

Connecticut Judicial Branch Civil Jury Instructions

This collection of jury instructions was compiled by the Civil Jury Instruction Committee and is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency.

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ABOUT THESE INSTRUCTIONS

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In addition to instructions covering the most commonly encountered civil issues, a new section has been added for Verdict Forms, which currently contains 2 forms for apportionment claims. The Committee plans to add more forms in the future.

Commentary

Footnotes appear in the body of the instruction to reference case law discussing specific language.

The Authority section cites to the primary authorities, including case law, statutes, and treatises, for the proposition(s) stated in the instructions.

Some instructions have a Notes section, which provides practice tips for using and adapting the instructions.

Revisions

The revision date indicates the date the Civil Jury Instructions Committee approved the adoption or substantive revision of an instruction. When a minor stylistic change or an update to the commentary is made, but the substantive body of the instruction remains the same, it will be indicated by a parenthetical date for modification. For example, “Revised to January 1, 2008 (modified June 15, 2008)” means that on June 15, 2008, the instruction or its commentary was modified in some minor way that did not affect the substance of the instruction.

Formatting Conventions

- Bold-faced titles and subheadings are included to make the instructions easier to read and are not part of the instruction.
- Angle brackets and italicized text are used to enclose directives to follow in customizing the charge. E.g., <*insert name of person injured*>. Angle brackets are also used to refer to other instructions that may contain some additional useful information. E.g., <*Insert Legal Cause, Instruction 3.1-1.*>
- Parentheses are used to indicate that a choice between words or phrases is necessary. This is most commonly used for gender-specific pronouns, e.g., (he/she) or (his/her). It is also used when an instruction offers several terms, not all of which may be applicable to

the case. If the choices are lengthy, such that stringing them together in a single parentheses would be cumbersome to read, they are separated into a bulleted list. For example,

These damages may consist of *<include as applicable:>*

- direct damages (expectation, reliance),
- liquidated damages,
- consequential damages,
- incidental damages,

all of which I will explain in a moment.

- Square brackets are used to indicate that a portion of the instruction is optional. It will be preceded by an italicized directive defining the circumstances under which the language would be appropriate, unless it is clear from the language itself. For example,

[*<If the plaintiff has plead in the alternative:>* For you to find for the plaintiff under this legal principle, you must first find that there was no written or oral contract expressed in words and no contract implied by conduct for *<insert precise issue>*. If you find that there was no contract for *<insert precise issue>* between the parties, you may consider whether the plaintiff is entitled to recover under promissory estoppel.]

Note that square brackets in commentary have their common meaning, i.e., the paraphrasing of small portions of quoted material.

RECENT CHANGES

The following instructions were revised by the committee:

2.9-8 Discharge/Release of Alternate Juror(s)

This revised charge combines the two prior charges so that the options of discharging alternates or releasing them subject to recall are together in one instruction.

3.1-1 Proximate Cause

The revised version of 3.1-1 replaces four prior charges (3.1-1 through 3.1-4) to include a complete basic instruction on proximate cause. The subsequent instructions in 3.1 were renumbered.

The following new instructions were approved by the committee:

2.9-13 Exercise of the Privilege against Self-Incrimination

3.9-35 Ski Operator Liability, General Statutes §§ 29-11 and 29-212

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1.1 BEFORE THE START OF EVIDENCE

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1.1-1 Obligation of Juror's Oath

Revised to October 11, 2013

A few moments ago you took an oath that will govern your conduct as jurors between the time you took that oath and the time that you are discharged by me after you have rendered a verdict in this case. That oath and the rules of court obligate you to do certain things and to avoid other things. These are called the Rules of Juror Conduct. You were given a copy when you were selected as a juror. Because they are so important, I want to review those with you again.

First, you must decide this case based only on the evidence presented here in court and on the law as I will explain it to you.

Second, do not make up your minds about what your verdict will be until after you have heard all the evidence, the closing arguments of the attorneys and my instructions on the law, and, after that, you and your fellow jurors have discussed the evidence. Keep an open mind until that time.

There are some rules that flow from these obligations, and I'll go over them now.

You may not perform any investigations or research or experiments of any kind on your own, either individually or as a group. Do not consult any dictionaries for the meaning of words or any encyclopedias for general information on the subjects of this trial. Do not look anything up on the Internet concerning information about the case or any of the people involved, including the parties, the witnesses, the lawyers, or the judge. Do not get copies of any statutes that may be referred to in court. Do not go to the scenes where any of the events that are the subject of this trial took place or use Internet maps or Google Earth or any other program or device to search for or view any place discussed during the case.

Why? Because the parties have a right to have the case decided only on evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we don't know about, then your verdict may be influenced by information that has not been tested by the oath to tell the truth and by cross-examination.

The same thing is true of any media reports you may come across about the case or anybody connected with the case. If you do come across any reports in the newspaper or a magazine, on TV, or any Internet site or "blog," you may not read or watch them because they may refer to information not introduced here in court or they may contain inaccurate information.

You may not discuss the case with anyone else, including anyone involved with this case until the trial is over, and you have been discharged as jurors. "Anyone else" includes members of your family, your friends, your coworkers; if you wish, you may tell them you are serving as a juror, but you may not tell them anything else about the case until it is over, and I have discharged you. You may not talk to any of the court personnel, such as marshals and clerks, about the case.

Why is that? Because they haven't heard the evidence you have heard, and in discussing the case with them, you may be influenced in your verdict by their opinions, and that would not be fair to the parties, and it may result in a verdict that is not based on the evidence and the law.

You may not communicate to anyone any information about the case. This includes communication by any means, such as text messages, email, Internet chat rooms, blogs, and social websites like Facebook, MySpace, YouTube, or Twitter.

The parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. When you have rendered a verdict and been dismissed by the court, you will be free to discuss the case with anyone you wish, though remember that you are not required to. Until then you must be focused solely on the evidence presented in the courtroom and your obligations to the fairness of the proceeding.

In addition, you may not talk to each other about the case until I tell you to do so, and that will not be until you have heard all the evidence, you have heard the closing arguments of the attorneys, and you have heard my instructions on the law that you are to apply to the facts you find to be true. Why is that? It may seem only natural that you would talk about the case as it is going on. The problem with that is, when people start discussing things, they take positions on them and express opinions which are often hard for them to change later on. So, if you were permitted to discuss the case while it's going on, you might reach conclusions or express opinions before you have heard all the evidence or heard the final arguments of counsel or heard the law that you must apply. Your verdict in the case might then be improperly influenced by the conclusions or opinions you or your fellow jurors have reached before you knew about all of the evidence or the law that will help you put that evidence in the proper context for your verdict.

What happens if these rules are violated by a juror? In some cases violations of the rules of juror conduct have resulted in hearings after trial at which the jurors have had to testify about their conduct. In some cases the verdict of the jury has been set aside and a new trial ordered because of jury misconduct. So, it is very important that you abide by these rules.

If someone should attempt to talk to you, please report it to the clerk immediately. If you see or hear anything of a prejudicial nature or that you think might compromise the proper conduct of this trial, please report it to the clerk immediately. I prefer that these communications be in writing. Do not discuss any such matters with your fellow jurors.

Authority

General Statutes § 1-25. See also *Kervick v. Silver Hill Hospital*, 309 Conn. 688, 710-11 (2013).

1.1-2 Description of the Order of the Trial

Revised to January 1, 2008

It is useful for you to know what the various parts of the trial are so that you may be aware throughout the trial what stage of the proceedings is in progress and what comes next.

The trial starts with opening statements by the lawyers. They will state the nature of their factual and legal claims. Opening statements are not proof or evidence; they are merely statements of the claims of the parties, so that you will be aware as you hear the evidence of what legal claims each party is trying to establish through the evidence.

After the opening statements, the plaintiff will present (his/her) evidence by calling witnesses. The lawyers for the defendant [and other parties] may cross examine each witness. After the plaintiff has presented all of (his/her) witnesses, the defendant [and other parties] will have an opportunity to present witnesses if (he/she) chooses to do so. Any witnesses presented by the defendant [and other parties] may be cross examined by the plaintiff's lawyer. I may vary the order of the trial if necessary to keep things running smoothly.

Once all of the witnesses and evidence have been presented, the lawyers will make closing arguments to you. These closing arguments, like the opening statements, are not evidence.

The final step is that I (the judge) will tell you what the legal principles are that apply to the claims that have been made and the evidence that has been presented. That instruction is known as the charge to the jury.

At the end of the charge, I will explain the process you should use for your deliberations and for delivering your verdict.

Authority

Practice Book § 15-6.

1.1-3 No Deliberations until Completion of Evidence and Charge

Revised to January 1, 2008

The evidence may take a number of days to present. You must wait until you have heard all of the evidence and have heard my charge to you on the law that applies before you make up your minds about any issue in this case.

You may not begin to discuss the case even with each other until after you have heard the charge on the law, because your duty is to wait until you have heard all of the evidence and the applicable law before making up your minds and discussing the claims and issues.

1.1-4 Note-Taking

Revised to January 1, 2008

You may, if you wish, take notes during the course of the trial. *<Have the clerk or marshal distribute note pads and pencils.>*

Some jurors find that taking notes is helpful in keeping track of the proceedings and some do not. You should remember that your main job as jurors is to listen to and observe the witnesses. If taking notes would distract you from that job, then don't take notes. There is no need to try to take down the testimony word for word. If, during your deliberations at the end of the case, you need to hear what a witness said, we have an official tape-recording or court stenographer's record that will give you an accurate record of all the testimony.

You should not allow note-taking to interfere with your attention to the testimony or your task of sizing up the witnesses as they testify, but you may take notes if doing so would aid your memory.

You should not make any notes outside of court and bring them here. Your notebooks will be collected at the end of each break and kept secure by the clerk. No one will look at them.

I take notes because I may be asked to rule on issues during the course of the evidence. Your decision whether to take notes at any point should not be influenced by my note-taking.

You should not disclose your notes to anybody during the trial. It will be up to you whether to disclose them to your fellow jurors during deliberations at the end of the trial.

Authority

Practice Book § 16-7; *Esaw v. Friedman*, 217 Conn. 553, 558-64 (1991).

Notes

It is within the discretion of the trial court judge to allow note-taking by the jurors. Practice Book § 16-7 is not explicit as to whether notes may be taken during the charge as well as during the evidence. It is advisable to get counsel to stipulate on the record on the procedure to be followed.

1.1-5 Questions by Jurors

Revised to January 1, 2008

In most trials, only the lawyers, and, at times, the judge, ask questions of the witnesses, and the jurors do not have any opportunity to ask questions. In this case I have decided that it may be useful to allow you that opportunity as well.

This is the procedure we will follow: *<describe procedure>*.

After the lawyers have each finished questioning a witness, I will have the (marshal / clerk) collect from you any questions that you have written down that you would like the witness to answer.

I will review those questions out of your presence. If they are questions that are permitted under the rules of evidence and under the rules that apply to trials such as this one, I will ask the question, or the substance of it, to the witness. You should not take it personally or make any adverse inference should your question not be asked. The lawyers will then have an opportunity to ask the witness any questions that follow from that question and answer.

Authority

Practice Book § 16-7; *Spitzer v. Haims & Co.*, 217 Conn. 532, 546-48 (1991).

Notes

It is within the discretion of the trial judge to allow questioning by jurors.

1.1-6 Limitation on Contact with Jurors

Revised to January 1, 2008

Under the rules of juror conduct, you must not speak to anyone about any aspect of this case while it is in progress. You will be instructed to use only certain routes to the courtroom to avoid contact with parties, witnesses, and lawyers.

While the court staff and I will greet you and give you any necessary instructions, we are not permitted to talk to jurors about a case while it is going on. Similarly, the lawyers are bound by a rule of professional conduct that forbids them from having any contact with jurors during a trial, so you should not hold it against any party or lawyer that they maintain their distance and do not converse with you if you see them in the building.

Jurors are supposed to decide cases strictly on the basis of the evidence and law presented in court, and these rules exist to keep away any outside influences of any kind.

Authority

General Statutes § 51-245; Rules of Professional Conduct 3.5; Practice Book §§ 16-14, 42-8.

1.1-7 Schedule of the Trial

Revised to January 1, 2008

On the day you were called in for jury duty you were probably required to be at the courthouse at 8:00 A.M. or so. During the trial, you will be requested to be here from 10:00 A.M. to 5:00 P.M. unless you are advised otherwise. There is a luncheon recess between 1:00 and 2:00 P.M. and a fifteen minute break mid-morning and mid-afternoon. If there is any change in that schedule, I will advise you.

It is expected that the trial will require ___ days. *<State which days of the week and any partial days.>*

1.1-8 Communications with the Court

Revised to January 1, 2008

During the course of the trial you cannot have any communication with the judge (me) except in open court on the record. If some issue, such as a sudden illness, occurs while the trial is in progress, you should write a note and give it to the court staff, who will give it to me to respond to on the record if need be.

If some emergency occurs at some time when court is not in session, you should call the jury administrator, whose phone number is in your jury notice *<or give them the number>*, and explain that you are a member of a jury in *<Judge's name>*'s courtroom and indicate what the problem is.

Obviously, since you have been chosen as a juror, it is your duty to be here every day that the case is on trial, and you can imagine the inconvenience to everyone else if a juror fails to be here punctually. In the unlikely event that there is some emergency or problem, I have just described the procedure to follow.

1.1-9 Deaf or Hearing Impaired Jurors: Interpreter

Revised to January 1, 2008

Before you began your service in this case, you took a solemn oath. In that oath, you swore that you would make a true interpretation to (Mr./Ms.) *<name of deaf or hearing impaired juror>* of all testimony and other proceedings that would take place in (his/her) presence in this case.

You also swore that if (Mr./Ms.) *<name of deaf or hearing impaired juror>* were chosen to serve on this jury, you would assist (him/her) as an interpreter throughout the trial, including the jury deliberations, but that apart from making true interpretations of (his/her) remarks to the other jurors and of the remarks of the other jurors to (him/her), or in (his/her) presence, you would refrain from participating in any manner in the jury deliberations, and would refrain from having communications with anyone outside the jury concerning the business or matters in the jurors' hands. Now, as the trial of this case begins, I wish to remind you of your oath, in the presence of the entire jury, for two important reasons.

First, I want to be certain that you remember your oath and are faithful to it throughout the trial. Remember, importantly, that you are not a juror in this case. (Mr./Ms.) *<name of deaf or hearing impaired juror>* is a juror, and you are here solely as (his/her) sworn interpreter.

Second, I want to be sure that the jurors fully understand and appreciate the legal limits under which you must do your work. Respecting those limits, the jurors must make no attempt whatsoever to otherwise involve you in this trial.

Authority

General Statutes §§ 51-245a; 51-245 (d), Practice Book §§ 16-1, 16-8.

Notes

This instruction is only applicable where sign language, as opposed to Computer-Assisted Real-Time Transcription (CART) service, is used.

1.1-10 Replacement of Regular Juror with Alternate Juror

Revised to January 1, 2008

When the jury in this case was selected, six regular jurors and two alternates were chosen. The reason alternates were chosen was to enable us to proceed all the way through trial even if one or more of the regular jurors became sick or otherwise incapable of serving on the case. Under our law, when a regular juror becomes unable to continue serving as a juror, the clerk selects one of the alternates by lot to replace that juror, and the alternate is promptly sworn in as the sixth regular juror.

In this case, unfortunately, one of our regular jurors can no longer serve on this case, and thus has been dismissed. Accordingly, in a lottery held earlier today, our clerk selected one of our remaining alternates, (Mr./Ms.) <alternate's name>, to become the sixth regular juror.

[<If the jury has not yet been sworn in:> Therefore, when the clerk calls the roll before administering the oath to regular jurors, (Mr./Ms.) <alternate's name> will be called, and (he/she) will be sworn in as a regular juror.]

[<If the jury has already been sworn in:> (Mr./Ms.) <alternate's name>, now please rise to take your oath as a regular juror.]

Authority

General Statutes § 51-243 (d).

1.1-11 Use of an Interpreter at Trial

New October 8, 2010

[You will recall that <insert names of all such witnesses> testified through an interpreter.] [In this case, <insert names of all such witnesses> will testify through an interpreter.] Our courts are open to everyone, regardless of their ability to understand and speak English. You are to draw no inference for or against any witness who (has offered/offers) testimony through an interpreter.

Some of you may speak or understand the language used by the witness(es). Nevertheless, you must treat the interpreter's English translation of the witness' answers as evidence. Even if you think that the interpreter makes a mistake, you must base your deliberations only on the official translation. What the witness(es) may have said in the foreign language, prior to the interpreter's translation, is not evidence, and may not be considered by you in any way in your deliberations. This ensures that all jurors consider the same evidence.

Authority

United States v. Fuentes-Montijo, 68 F.3d 352, 355 (9th Cir. 1995); *Diaz v. State*, 743 A.2d 1166, 1179 (Del. 1999); *People v. Colon*, 211 A.D.2d 575, 621 N.Y.S.2d 606, appeal denied, 85 N.Y.2d 971, 653 N.E.2d 627, 629 N.Y.S.2d 731 (1995).

Notes

This charge should be given before the foreign language witness testifies or at the beginning of trial. Judges should use their discretion in determining whether also to give this charge before the jury begins its deliberations.

1.1-12 Self-Representation

New December 10, 2010

The (plaintiff/defendant) is represented in this case by Attorney *<name>*. The (plaintiff/defendant), *<name>* has decided to represent (himself/herself). You should understand that the (plaintiff/defendant) is not required to have an attorney represent (him/her). You should not draw any inferences or conclusions because (he/she) has made this decision. Nor should you guess or speculate as to why (he/she) made this choice. You should neither favor nor disfavor a party because they have an attorney or have chosen to represent themselves.

1.2 DURING EVIDENCE

1.2-1 Instructions Before Recesses

**1.2-2 Instructions Before Adjournment for the
Day**

1.2-3 Effect of Side Bars/Argument Without Jury

1.2-4 Exhibits Marked for Identification Only

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1.2-9 Jury View

1.2-1 Instructions Before Recesses

Revised to January 1, 2008

Morning/Afternoon recess:

We will now take the (morning/afternoon) recess. We will be back in session at _____.

1. Remember all of the rules of juror conduct I told you about at the beginning of this case.
2. *<Describe any geographical limitations on where jurors can go during the break.>*

Luncheon recess:

We will now take the luncheon recess. We will be back in session at 2:00 P.M. and you should all report back to the jury deliberation room then so we can start promptly.

1. Remember all of the rules of juror conduct I told you about at the beginning of this case.
2. *<Describe any geographical limitations on where jurors can go during the luncheon recess.>*
3. *<If the accident scene is nearby, remind them not to visit it.>*
4. As you come back into the building after lunch, if you have to wait in line for a security check, be careful not to be near anyone you have observed to be involved in this case. They are instructed that they should not speak to you or make any comment about the case in your hearing.

1.2-2 Instructions Before Adjournment for the Day

Revised to January 1, 2008

First day:

We will now adjourn the trial for the day. Remember that you must obey the rules of juror conduct. You will be going home to people who will be curious about the case and about the trial. Remember that you have taken an oath that obligates you not to talk to anyone about the trial or its issues until after you have rendered a verdict. That means that you cannot talk to members of your family about it. There are no exceptions.

Though your oath should be reason enough to obey this instruction, let me suggest to you a further, practical reason. If you were to violate your oath and discuss the case at home or with others, they might give you ideas or details from some similar circumstances, and then you would have the problem, when you start your deliberations, of trying to sort out which information you heard in the courtroom and which you heard somewhere else. Jurors often find deciding issues to be difficult enough without having the added problem of trying to filter out information that they obtained improperly and that was not part of the trial.

Do not talk to anyone about the case nor let anyone talk to you about it. Honor the oath you have taken.

Likewise, you should not seek any information outside of the evidence being presented at trial. Do not visit any location that has been mentioned. Do not look anything up, do any research or perform any investigation. Remember that your obligation will be to decide the case on the basis of the evidence that is presented in this courtroom and only on that evidence.

If there is any media coverage of this case, likewise you are not to read it or watch it or listen to it.

Subsequent days:

Remember that you must abide by the rule of juror conduct that I described to you at the beginning of this trial, and the instructions I gave you at the end of the first day of trial.

1.2-3 Effect of Side Bars/Argument Without Jury

Revised to January 1, 2008

At various times throughout the course of this trial it's been necessary, at the suggestion of the lawyers or my own judgment, to discuss certain matters outside the hearing of the jury. It is within my role as a judge to determine which evidence may be presented to you and it is counsels' job to present those issues to me in a way that will not prejudice the fairness of the trial. You should not hold it against either counsel if (he/she) suggested that matters be discussed outside your hearing nor should you speculate as to the matters discussed. The rules of the court simply require that some issues be resolved outside your hearing.

1.2-4 Exhibits Marked for Identification Only

Revised to January 1, 2008

The clerk has just marked an exhibit for identification only. Counsel has a right to have the exhibit marked in this manner in order to preserve the record. Only exhibits that have been admitted as full exhibits are a part of the evidence for you to consider in deciding this case, however, and unless, for example, the marking on this exhibit is changed by the court, you will not consider it as evidence in this case and should not speculate as to its contents.

1.2-5 Stricken Evidence

Revised to January 1, 2008

I have just stricken <identify evidence> from the evidence in this case. That evidence is not a part of this case, and you should banish it completely from your minds. You may not consider it in deciding the issues in this case.

Notes

Many lawyers and judges believe that reference to stricken evidence during the final charge to the jury is more prejudicial than it is helpful. A trial court judge may decide that a sufficiently forceful charge given at the time the evidence is stricken may obviate the need or desire for a further charge at the end of the case.

1.2-6 Evidence Admitted for Limited Purpose

Revised to January 1, 2008

Ladies and gentlemen, I am admitting <identify evidence> as evidence solely as it relates to the issue of <identify issue>. You must consider this evidence only with respect to that issue and it would be wrong for you to use the evidence for any purpose other than your consideration of the one issue I have indicated.

Authority

Smith v. Greenwich, 278 Conn. 428, 451-52 (2006).

Notes

Many lawyers and judges believe that reference to limited evidence during the final charge to the jury is more prejudicial than it is helpful. A trial court judge may decide that a sufficiently forceful charge given at the time the evidence is limited may obviate the need or desire for a further charge at the end of the case.

1.2-7 Ruling on Objections

Revised to January 1, 2008

Attorney _____ has just objected to the admission of certain evidence and I have (sustained/overruled) the objection. When I sustain an objection, that means that the evidence will not be allowed to be presented to you for use in deciding this case. When I overrule an objection, that means that the evidence will be allowed. My decision whether to sustain or overrule an objection is based on the rules of evidence that govern this trial.

When evidence is offered, a lawyer has the right and sometimes the obligation to object and seek a ruling as to the admissibility of proposed evidence under the rules, or whether evidence already admitted should be stricken. You should not hold it against a lawyer, or the party that lawyer represents, if the lawyer objects to evidence, regardless of whether the objection is sustained or overruled. Just because evidence is admitted after an objection, you are not required to treat that evidence as true, but you should weigh and consider it in the same way as other evidence. You should not infer from my rulings on evidence that I favor or disfavor any party or lawyer; the court is neutral and is merely enforcing the rules of evidence so as to assure a fair trial. Do not speculate as to what the answer would have been had I not sustained an objection to the question and do not place any emphasis on a piece of evidence merely because I overruled an objection as to it.

Notes

Many trial court judges find this instruction to be most useful if given together with its ruling on the first objection as to the evidence. If given at that time, or otherwise during the trial, the trial court judge may decide that the final charge to the jury may not require its repetition.

1.2-8 Prerecorded Testimony

Revised to January 1, 2008

Where a witness is unavailable at the time of trial (or the parties otherwise agree), the testimony of that witness as recorded under oath at an earlier time may be presented for your consideration. Your role as jurors in assessing testimony presented in this manner is no different than if the witness were here in court to testify and you should pay careful attention as the (transcribed testimony is read / the videotaped testimony is played). You should not make any adverse inference from the fact that the witness was not present in person to testify, but rather you should consider this testimony in the same way that you consider all of the other evidence in this trial.

Authority

Practice Book § 13-31 (a) (2) and (4).

Notes

Many trial court judges find this instruction to be most useful if given when the transcribed evidence is admitted. If given at that time, or otherwise during the trial, the trial court judge may decide that the final charge to the jury may not require its repetition.

1.2-9 Jury View

Revised to January 1, 2008

I will shortly be permitting you to take a view of certain evidence relating to this case outside of the courtroom. This will give you the opportunity to see for yourselves a particular (location / item) so that the testimony and other evidence may be more easily understood and put into proper perspective.

Keep in mind that the proceedings outside of the courthouse are a part of the trial and are governed by the same rules. What you observe during the view is as much evidence as the testimony of the witnesses and the exhibits that are admitted. So, it is important that you pay close attention to what it is that can be seen on the view. Observe and observe well.

Please try to keep together as much as possible so that if the lawyers or I address you, you will be able to hear what is said. Any time we leave the courtroom the opportunity for mischief arises. Do not talk to anyone about the case while we are outside the courtroom and keep in mind the other rules that govern your conduct as jurors in this case.

Notes

Jury views can present challenges to the trial court judge somewhat different than issues that arise in the courtroom. To the extent possible, the trial court judge should resolve with counsel ahead of time, by agreement or otherwise, issues relating to the terms of the view, such as whether the jury's attention should be confined or directed to certain things, whether there will be testimony, questions or note-taking on the view, whether any of the counsel will address the jury during the view, and whether jurors should be given further instruction or restricted in their observations in any way. Any view should be arranged so as to limit to the extent possible distractions from the subject of the view. The burden of making any necessary arrangements, as approved by the court, should be borne by the party requesting the view.

PART 2: GENERAL INSTRUCTIONS

2.1 OPENING

2.2 PARTIES

2.3 EVIDENCE - PROCEDURES

2.4 TYPES OF EVIDENCE

2.5 WITNESSES

2.6 BURDEN OF PROOF

2.7 LIABILITY AND DAMAGES

2.8 DIRECTED VERDICT

2.9 DELIBERATIONS

2.1 OPENING

2.1-1 Role of Judge/Role of Jury

2.1-2 Duty to Follow the Law

2.1-3 Duty to Decide on the Evidence

2.1-1 Role of Judge/Role of Jury

Revised to January 1, 2008

Ladies and gentlemen of the jury, you have listened to the evidence and to the arguments of counsel, and it is now time to listen to me as I charge you on the law that applies to this dispute.

You as the jury and I as the judge have two separate functions. It is your function to find what the facts are in this case; with respect to the facts, you and you alone are charged with that responsibility. My function is to instruct you as to the law to be applied to the facts that you find in order to decide this case. With respect to the law, what I say to you is binding upon you and you must follow my instructions.

I do not have any preference as to the outcome of this case. I have not meant to convey by facial expression or tone of voice or in any other way at any time during the trial any preference or inclination as to how you should decide the facts, and you should not make any such interpretations. If, in my instructions to you, I refer to one party more than the other, or do anything that in your mind suggests a preference for one side or the other, it is not done on purpose. My task has been to apply the rules of evidence and to instruct you as to the law. It is for you alone to decide on the outcome of this case.

2.1-2 Duty to Follow the Law

Revised to January 1, 2008

It is your duty to follow my instructions and conscientiously apply the law as I give it to you to the facts as you find them in order to arrive at your ultimate verdict. If you should have a different idea of what the law is or even what you feel it ought to be, you must disregard your own notions and apply the law as I give it to you. The parties are counting on having their claims decided according to particular legal standards that are the same for everyone, and those are the standards I will give you and that you must follow. If what counsel said about the law differs from what I tell you, you will dismiss from your minds what they may have said to you. You must decide this case based only on the law that I furnish to you and on the basis of all of the law as I give it to you regardless of the order of my instructions. You must not single out any particular instruction or give it more or less emphasis than any other, but rather must apply all of my instructions on the law that apply to the facts as you find them.

2.1-3 Duty to Decide on the Evidence

Revised to January 1, 2008

You are to determine what the facts are by careful consideration of all the evidence presented and based solely upon the evidence, giving to each part of the evidence the weight you consider it deserves in reaching your ultimate conclusion. When I say evidence, I include the following:

<List those applicable>

- testimony by witnesses in court, including what you may have observed in any demonstrations they presented during their testimony;
- testimony by witnesses by way of the reading of transcripts or the showing of videotapes;
- exhibits that have been received into evidence as full exhibits, including any pictures or documents that are full exhibits;
- your observations at the viewing of the scene;
- facts that the parties have stipulated to;
- facts that I have told you are to be taken as true by judicial notice;
- facts admitted as true in pleadings;
- facts admitted in response to requests to admit.

The testimonial evidence includes both what was said on direct examination and what was said on cross examination, without regard to which party called the witness.

There are a number of things that may have been seen or heard during the trial which are not evidence and which you cannot rely on as evidence in deciding whether a party has proven a claim or a defense. For example, <use as applicable:>

- the statements made by lawyers, including statements made both in their opening statements and in their closing arguments are not evidence;
- a question is not evidence; it is the answer, not the question or the assumption made in the question, that is evidence;
- the fact that a party has filed a claim or a defense in the court is not evidence that proves the claim or the defense is true;
- testimony or exhibits that were offered but refused or stricken by me or that I told you to disregard must not be relied upon as evidence in resolving the case;
- testimony or exhibits that I told you were to be used only for a particular purpose are not evidence for any other issue;
- exhibits marked for identification that were not received in evidence as full exhibits are not evidence.

Your duty is to decide the case based on what has been admitted into evidence in this courtroom only, and not on any information about the issues that was not presented into evidence in this courtroom.

It's my right to make comments to you on the evidence, but where I do that, such comments are merely to suggest to you what point of law or what controversy I am speaking about. If I refer to certain facts or certain evidence in the case, do not assume that I mean to emphasize those facts or that evidence and do not limit your consideration to the things that I may have mentioned. Likewise, you should attach no importance to it if I should mention one party more than the other. If I should overlook any evidence in the case, you'll supply it from your own recollection; if I incorrectly state anything about the evidence in relation to what you remember, you should apply your own recollection and correct my error. In the same way, what any of the lawyers may have said in their respective summaries to you as to the facts or evidence in the case should have weight with you only if their recollection agrees with your own; otherwise, it's your own recollection of the facts and evidence which should have weight in your deliberations.

2.2 PARTIES

2.2-1 Corporation or Other Entity as a Party

2.2-1 Corporation or Other Entity as a Party

Revised to January 1, 2008

You have heard that one of the parties in this lawsuit is a person and the other is a corporation [or other entity]. A corporation is an entity created by the law. All parties are equal before the law.

The mere fact that one of the parties is a natural person and one is a creation of the law should not play any part in your deliberations. Rather, you must assess the claims and defenses of all parties without regard to their status and treat all parties in an equal and unbiased fashion.

Notes

This charge may be adapted to accommodate particular entities, such as state agencies, government subdivisions (e.g. municipality), partnerships or the like.

2.3 EVIDENCE - PROCEDURES

2.3-1 Ruling on Objections

2.3-2 Limiting Instructions on Evidence

2.3-3 Stricken Evidence

2.3-4 Spoliation of Evidence

2.3-1 Ruling on Objections

Revised to January 1, 2008

A trial is governed by rules of evidence. It is my duty to apply these rules to the testimony and exhibits offered by the parties to determine if that evidence should be admitted for you to consider. Lawyers have the right and sometimes the obligation to object to evidence that is offered and seek a ruling as to the admissibility of that evidence under the rules. You should not hold it against a lawyer, or the party (he/she) represents, if the lawyer objects to evidence or moves to strike evidence, regardless of the judge's ruling. Just because evidence is admitted after an objection, you are not required to treat that evidence as true, but you should weigh and consider it in the same way as other evidence. You should not infer from my rulings on evidence that I favor or disfavor any party or lawyer; the court is neutral and is merely enforcing the rules of evidence so as to assure a fair trial. Do not speculate as to what the answer would have been had I not sustained an objection and do not place any emphasis on a piece of evidence merely because I overruled an objection to it.

2.3-2 Limiting Instructions on Evidence

Revised to January 1, 2008

You will recall that I have ruled that some testimony and evidence have been allowed for a limited purpose only. Any testimony or evidence which I identified as being received for a limited purpose, you will consider only as it relates to the limited issue for which it was allowed, and you shall not consider such testimony and evidence in finding any other facts as to any other issue.

Optional:

You will recall that during the testimony of *<name of witness>* I permitted the introduction of *<exhibit/evidence>* as to *<issue>* and instructed you that you could use that evidence, to the extent that you find it should be given weight, only as to that issue. Any other use of that testimony would be improper.

Authority

Smith v. Greenwich, 278 Conn. 428, 451-52 (2006).

2.3-3 Stricken Evidence

Revised to January 1, 2008

Some evidence may have come before you in error, and at the time that occurred, I ordered that evidence stricken and told you that you must disregard it. That evidence is not a part of this case and you may not consider that evidence in reaching your verdict.

Notes

Many lawyers and judges believe that this instruction should be given at and only at the time the evidence is stricken, to avoid emphasis on it.

2.3-4 Spoliation of Evidence

New March 23, 2012

The *<name of party claiming spoliation>* claims that *<name of party>* intentionally (damaged/lost/destroyed) the following relevant evidence: *<describe evidence>*. Our law allows you to draw an adverse inference, that is, that the evidence would have been unfavorable to *<name of party>*, *<name of party claiming spoliation>* must prove that:

1. the evidence was (damaged/lost/destroyed) at a time when *<name of party>* was on notice of a duty to preserve it;
2. the (loss/damage/destruction) was intentional. This does not mean that there must have been an intent to perpetrate a fraud, but rather, that the evidence had been disposed of intentionally and not merely destroyed inadvertently; and
3. *<Name of party claiming spoliation>* used due diligence to have the evidence preserved or produced.

You are not required to draw the inference that the (damaged/lost/destroyed) evidence would be unfavorable to *<name of party>*, but you may do so if you are satisfied that these conditions have been met.

Authority

Beers v. Bayliner Marine Corp., 236 Conn. 769, 778-80 (1996); *Paylan v. St. Mary's Hospital Corp.*, 118 Conn. App. 258, 262-66 (2009).

2.4 TYPES OF EVIDENCE

2.4-1 Direct and Circumstantial Evidence

2.4-2 Use of Medical Records

2.4-3 Stipulations/Undisputed Facts

2.4-4 Admissions from Pleadings

2.4-5 Admissions from Requests to Admit

2.4-6 Admissions from Superseded Pleadings

2.4-7 Judicial Notice

2.4-8 Learned Treatises

2.4-9 Use of Deposition

2.4-1 Direct and Circumstantial Evidence

Revised to January 1, 2008

There are, generally speaking, two types of evidence from which a jury can properly find the truth as to the facts of the case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the inferences which may be drawn reasonably and logically from the proven facts. Let me give you an example of what I mean by direct evidence and circumstantial evidence. If you're looking out a third floor window and you see smoke rising outside the window, that's direct evidence that there is smoke outside. It is also circumstantial evidence that there is a fire of some sort below the window.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with a preponderance of all the evidence in the case, both direct and circumstantial. Thus, both direct and circumstantial evidence are permissible evidence and each type should be treated equally. In your consideration of the evidence, you are not limited to the bald statements of the witness, that is, the exact words that they use. On the contrary, you are permitted to draw from facts which you find to have been proven such reasonable inferences as seem justified in the light of your experience.

While you may make inferences and rely on circumstantial evidence, you should be careful not to resort to guesswork or speculation or conjecture to determine the facts in the case.

2.4-2 Use of Medical Records

Revised to January 1, 2008

In this case, some of the medical evidence has been presented by doctors who testified, and some has been presented in the form of written reports by doctors who treated the plaintiff. There is a statute that provides that such written reports may be used in court. That statute was enacted so that persons claiming injury would not have to take doctors away from their medical duties in order to testify in court. Since the use of reports rather than testimony in court is permitted by this statute, you should not draw any unfavorable inference from the plaintiff's use of reports rather than live testimony of some medical practitioners.

Authority

General Statutes § 52-174; *Richmond v. Ebinger*, 65 Conn. App. 776 (2001).

2.4-3 Stipulations/Undisputed Facts

Revised to January 1, 2008

Any facts to which the parties have stipulated, either in writing or orally during the course of the trial, you will treat as proven. Similarly, if you have been told in open court that a party has agreed not to dispute certain evidence presented by the other, you will treat that evidence as proven as well. It is still up to you to decide what weight or importance those facts or evidence have, if any, in deciding the issues in the case.

Authority

Rudder v. Mamasco Lake Park Assn., Inc., 93 Conn. App. 759, 769 (2006) (judicial admission dispenses with production of evidence by opposing party as to fact admitted, and is conclusive upon party making it); *Kelley v. Tomas*, 66 Conn. App. 146, 156 (2001) (formal stipulation of facts constitutes judicial admission); *Speed v. DeLiberio*, 23 Conn. App. 437, 440 (jury determines weight and effect to be given evidence), cert. denied, 216 Conn. 832 (1990).

2.4-4 Admissions from Pleadings

Revised to January 1, 2008

You have been presented with some statements that the <identify the party> made in the <identify the pleading> and some responses by <identify the party> admitting that those statements are true. As to <identify the party>, you should therefore consider that those facts are proven without the need for evidence. It is still up to you to decide what weight or importance those facts have, if any, in deciding the issues in the case.

Authority

Rudder v. Mamasco Lake Park Assn., Inc., 93 Conn. App. 759, 769 (2006) (judicial admission dispenses with production of evidence by opposing party as to fact admitted, and is conclusive upon party making it); *Jones Destruction, Inc. v. Upjohn*, 161 Conn. 191, 199 (1971) (admission in defendant's answer is judicial admission conclusive on defendant, and matter admitted is not in issue); *Speed v. DeLibero*, 23 Conn. App. 437, 440 (jury determines weight and effect to be given evidence), cert. denied, 216 Conn. 832 (1990); see also *Ferreira v. Pringle*, 255 Conn. 330, 345 (2001) (factual allegations contained in pleadings upon which case is tried are judicial admissions and are irrefutable as long as they remain in case).

2.4-5 Admissions from Requests to Admit

Revised to January 1, 2008

You have heard that <identify the party> filed a motion asking <identify the party> to admit certain facts and that those facts are admitted as true. You should therefore consider those facts as proven without the need for evidence. It is still up to you to decide what weight or importance those facts have, if any, in deciding the issues in this case.

Authority

Rudder v. Mamasasco Lake Park Assn., Inc., 93 Conn. App. 759, 769 (2006) (judicial admission dispenses with production of evidence by opposing party as to fact admitted, and is conclusive upon party making it); *East Haven Builders Supply, Inc. v. Fanton*, 80 Conn. App. 734, 744 (2004) (party's response to request for admissions is binding as judicial admission unless judicial authority permits withdrawal or amendment); *Speed v. DeLibero*, 23 Conn. App. 437, 440 (jury determines weight and effect to be given evidence), cert. denied, 216 Conn. 832 (1990).

2.4-6 Admissions from Superseded Pleadings

Revised to January 1, 2008

You have heard that <identify the party> at one time while this case was pending made certain statements in <identify the pleading> but amended in later pleadings. In making statements in pleadings, parties are supposed to make only those statements they believe are true at the time they make them. You may consider as evidence the fact that the statement was made, but in deciding what weight or effect to give the making of the statement in the pleading, you may also consider any explanations given as to the circumstances for making it or the circumstances that led to amending it.

Authority

Danko v. Redway Enterprises, Inc., 254 Conn. 369, 374-76 (2000); *Nationwide Mutual Ins. Co. v. Allen*, 83 Conn. App. 526, 542, cert. denied, 271 Conn. 907 (2004).

2.4-7 Judicial Notice

Revised to January 1, 2008

You may have observed that (an exhibit / a fact), namely, <identify exhibit / fact>, was received as part of the evidence after the court was asked to take what is called "judicial notice" of it. The effect of my having taken judicial notice of <identify exhibit / fact> is that you are to treat <identify exhibit / fact> as established without proof of that fact being presented to you.

Authority

State v. Zayas, 195 Conn. 611, 613-15 (1985).

2.4-8 Learned Treatises

Revised to January 1, 2008

Among the items placed in evidence is <*title of treatise*> that was introduced during the testimony of an expert witness. That exhibit can be used by you only for the limited purpose of determining what weight to give that witness' testimony concerning the subject the treatise covers.

You should not use that exhibit as independent evidence of the matters stated in the treatise, but only for the purpose of assessing the credibility and reliability of the expert witness.

Authority

Cross v. Huttenlocher, 185 Conn. 390, 395-97 (1981); *Kaplan v. Mashkin Freight Lines, Inc.*, 146 Conn. 327, 331 (1959); *State v. Wade*, 96 Conn. 238, 250-51 (1921); C. Tait, Connecticut Evidence (3d Ed. 2001) §§ 7.11.2, 8.23.2, pp. 539, 654-55.

2.4-9 Use of Deposition

Revised to January 1, 2008

While most of the witnesses whose testimony has been presented to you were here to testify in person, the testimony of one witness, *<name of witness>*, was presented to you by (having a transcript read to you / the showing of a videotape) of questions asked and answers given by that witness under oath at an earlier time. Testimony that is presented in this manner may be accepted or rejected by you in the same way as the testimony of witnesses who have been physically present in court.

Authority

Practice Book § 13-31 (a) (2) and (4).

2.5 WITNESSES

2.5-1 Credibility of Witnesses

2.5-2 False Testimony

2.5-3 Expert Witnesses

2.5-4 Hypothetical Questions

2.5-5 Testimony of Police Officials

2.5-1 Credibility of Witnesses

Revised to January 1, 2008

The credibility of witnesses and the weight to be given to their testimony are matters for you as jurors to determine. However, there are some principles that you should keep in mind. No fact is, of course, to be determined merely by the number of witnesses who testify for or against it; it is the quality and not the quantity of testimony that controls. In weighing the testimony of each witness you should consider the witness's appearance on the stand and whether the witness has an interest of whatever sort in the outcome of the trial. You should consider a witness's opportunity and ability to observe facts correctly and to remember them truly and accurately, and you should test the evidence each witness gives you by your own knowledge of human nature and the motives that influence and control human actions. You may consider the reasonableness of what the witness says and the consistency or inconsistency of (his/her) testimony. You may consider (his/her) testimony in relation to facts that you find to have been otherwise proven. You may believe all of what a witness tells you, some of what a witness tells you, or none of what a particular witness tells you. You need not believe any particular number of witnesses and you may reject uncontradicted testimony if you find it reasonable to do so. In short, you are to apply the same considerations and use the same sound judgment and common sense that you use for questions of truth and veracity in your daily life.

Notes

A complete and accurate charge on credibility may require only the first and last sentences of this instruction. The remaining principles are recommended to provide additional guidance to the jury as warranted in any given case.

2.5-2 False Testimony

Revised to January 1, 2008

If you believe that a witness testified falsely as to a part of (his/her) testimony, you may choose to disbelieve other parts of (his/her) testimony, or the whole of it, but you are not required to do so. You should bear in mind that inconsistencies and contradictions within a witness's testimony or between that testimony and other evidence do not necessarily mean that the witness is lying. Failures of memory may be the reason for some inconsistencies and contradictions; also, it is not uncommon for two honest people to witness the same event, yet perceive or recall things differently. Yet, if you find that a witness has testified falsely as to an issue, you should of course take that into account in assessing the credibility of the remainder of (his/her) testimony.

Notes

This additional instruction is within the discretion of the trial court judge as the circumstances may warrant in any given case. Instruction 2.5-1 is sufficient.

2.5-3 Expert Witnesses

Revised to January 1, 2008

We have had in this case the testimony of expert witnesses. Expert witnesses, such as engineers or doctors, are people who, because of their training, education, and experience, have knowledge beyond that of the ordinary person. Because of that expertise in whatever field they happen to be in, expert witnesses are allowed to give their opinions. Ordinarily, a witness cannot give an opinion about anything, but rather is limited to testimony as to the facts in that witness's personal knowledge. The experts in this case have given opinions. However, the fact that these witnesses may qualify as experts does not mean that you have to accept their opinions. You can accept their opinions or reject them.

In making your decision whether to believe an expert's opinion, you should consider the expert's education, training and experience in the particular field; the information available to the expert, including the facts the expert had and the documents or other physical evidence available to the expert; the expert's opportunity and ability to examine those things; the expert's ability to recollect the activity and facts that form the basis for the opinion; and the expert's ability to tell you accurately about the facts, activity and the basis for the opinion.

You should ask yourselves about the methods employed by the expert and the reliability of the result. You should further consider whether the opinions stated by the expert have a rational and reasonable basis in the evidence. Based on all of those things, together with your general observation and assessment of the witness, it is then up to you to decide whether or not to accept the opinion. You may believe all, some or none of the testimony of an expert witness. In other words, an expert's testimony is subject to your review like that of any other witness.

2.5-4 Hypothetical Questions

Revised to January 1, 2008

An expert witness may state an opinion in response to a hypothetical question, and the experts have done so in this case. A hypothetical question is one in which the witness is asked to assume that certain facts are true and to give an opinion based on those assumptions. The value of the opinion given by an expert in response to a hypothetical question depends upon the relevance, validity and completeness of the facts (he/she) was asked to assume. The weight that you give to the opinion of an expert will depend on whether you find that the facts assumed were proven and whether the facts relied on in reaching the opinion were complete or whether material facts were omitted or not considered. Like all other evidence, an expert's answer to a hypothetical question may be accepted or rejected, in whole or in part, according to your best judgment.

2.5-5 Testimony of Police Officials

New September 30, 2011

Police officials have testified. You should neither believe nor disbelieve the testimony of a police official just because (he/she) is a police official. You must determine the credibility of police officials in the same way and by the same standards as you would evaluate the testimony of any other witness. You should recall (his/her) demeanor on the stand, (his/her) manner of testifying, and evaluate it just as carefully as you would the testimony of any other witness.

Authority

It is preferable to give appropriate emphasis to the instruction on police testimony by devoting a separate instruction to that subject. *State v. Banks*, 59 Conn. App. 112, 132-35, cert. denied, 254 Conn. 950 (2000); *State v. Nieves*, 36 Conn. App. 546, 550, cert. denied, 232 Conn. 916 (1995).

2.6 BURDEN OF PROOF

2.6-1 Burden of Proof - Claims

2.6-2 Burden of Proof - Affirmative Defenses

2.6-1 Burden of Proof - Claims

Revised to January 1, 2008

The party making a claim has the burden of proof with respect to that claim. Thus, the plaintiff has the burden of proving each essential element of the cause of action upon which the plaintiff relies. I will review those elements with you in a moment. The defendant does not have to present evidence to disprove the plaintiff's claim.

Authority

Mankert v. Elmatco Products, Inc., 84 Conn. App. 456, 463-64, cert. denied, 271 Conn. 925 (2004); *Gulycz v. Stop & Shop Cos.*, 29 Conn. App. 519, 523, cert. denied, 224 Conn. 923 (1992).

Notes

This instruction should be adapted to address the existence of any counterclaims, cross claims or third party claims.

2.6-2 Burden of Proof - Affirmative Defenses

Revised to January 1, 2008

The defendant in this case, (in addition to / instead of) denying the claims made by the plaintiff, has affirmatively asserted certain special defenses to the plaintiff's claims. I will review these special defenses with you in a moment. The defendant has the burden of proof as to the allegations of any special defenses upon which the defendant relies. The plaintiff does not have the burden to disprove the allegations of the defendant's special defenses. Rather, each party has the burden of proving that party's own claims and no burden to disprove the claims of that party's adversary.

Authority

Perley v. Glastonbury Bank & Trust Co., 170 Conn. 691, 698 (1976).

Notes

This instruction should be adapted to address the existence of any counterclaims, cross claims or third party claims.

2.7 LIABILITY AND DAMAGES

2.7-1 Separation of Liability and Damages

2.7-2 Bifurcation of Liability and Damages

2.7-3 Suggested Amount of Damages

2.7-1 Separation of Liability and Damages

Revised to January 1, 2008

In a general sense, a civil trial such as this has two issues: liability and damages. You will reach the issue of damages only if you find liability in favor of the plaintiff. If you find that liability is established, you will have occasion to apply my instructions concerning damages. If you find that liability has not been established, then you will not consider damages. The fact that I am instructing you on both liability and damages should not be taken by you as any indication as to how the court would decide liability. Rather, my charge includes both liability and damages because I must give you instructions on all the issues in the case.

2.7-2 Bifurcation of Liability and Damages

Revised to January 1, 2008

In a general sense, a civil trial such as this has two issues: liability and damages. I have previously told you that I have bifurcated this trial, that is, cut this trial into two parts, such that you have heard only the evidence that relates to liability and you will decide that issue first. I will be instructing you only on the law that applies to the issue of liability at this time. You must not let speculation as to the plaintiff's claims of damages enter your deliberations on the issue of liability. If you find that the plaintiff has proven one or more of the liability claims, then we will proceed to trial on the issue of damages. If you find that the plaintiff has not proven any of the claims of liability, then this case is over because the issue of damages arises only if a defendant has been proven to be liable.

Notes

The trial court judge may order a trial bifurcated at his or her discretion, and bifurcation will affect the instructions that should be given to the jury at each step of the proceedings.

2.7-3 Suggested Amount of Damages

Revised to January 1, 2008

In closing argument, counsel mentioned some formulas or amounts that might figure in your verdict. I caution you that figures suggested by counsel do not constitute evidence. It is up to you to decide what fair, just and reasonable compensation is, whatever you find that figure might be, without regard to amounts that may have been suggested by counsel in argument.

Authority

General Statutes § 52-216b.

Notes

This charge is required when counsel have advocated a particular dollar amount or a formula. It is probably not required when counsel have argued the total of economic damages but not a dollar amount as to other types of damages nor as to the whole verdict.

2.8 DIRECTED VERDICT

2.8-1 Directed Verdict

2.8-1 Directed Verdict

Revised to January 1, 2008

After hearing a motion at the close of the evidence, I have determined that the plaintiff has failed to present the proof that the law requires to prevail on ((his/her) claim / some of (his/her) claims, namely, _____). Since I have made this legal determination, I am directing you that the law requires that you render a verdict in favor of the defendant [on count[s] ____].

The verdict form which you will use for this purpose is headed "Defendant's Verdict."
<Describe finding for defendant on particular counts on the verdict form>. You should elect a foreperson, who should sign this verdict form on behalf of the jury at the direction of the court.

2.9 DELIBERATIONS

2.9-1 Sympathy/Prejudice

2.9-2 Mention of Insurance

2.9-3 Process for Jury's Deliberations

2.9-4 Use of Notes During Deliberations

2.9-5 Duty to Deliberate

2.9-6 Restrictions on Deliberations

2.9-7 Procedures for Reporting Verdict

2.9-8 Discharge/Release of Alternate Juror(s)

**2.9-9 Instruction When Jury Fails To Agree
("Chip Smith")**

2.9-10 Reconsider Verdict

2.9-11 Discharge Jury

**2.9-12 When Alternate Juror Empaneled after
Deliberations Have Begun**

**2.9-13 Exercise of Privilege against
Self-Incrimination**

2.9-1 Sympathy/Prejudice

Revised to January 27, 2012

People may have biases for or prejudices against certain other people or certain perceptions or stereotypes of other people. Please understand that your decision must not be reached on the basis of sympathy or bias for or prejudice against any party. The parties come to court asking simply for a cool, impartial determination of the disputed issues based on the facts and the law. That is what they are entitled to and that is how you should approach the decision of this case.

Notes

The committee recommends giving this charge both at the beginning and the end of the trial.

2.9-2 Mention of Insurance

Revised to January 1, 2008

In the course of the trial there has been a passing reference to insurance. There is no issue pertaining to insurance before you, and that reference to insurance should play no part in your deliberations.

Authority

Bryar v. Wilson, 152 Conn. 162, 164-65 (1964); *Gigliotti v. United Illuminating Co.*, 151 Conn. 114, 122-23 (1963).

2.9-3 Process for Jury's Deliberations

Revised to January 1, 2008

At this time, ladies and gentlemen, I will explain the verdict form[s] to you and then you will be escorted to the jury deliberation room. You should not begin your deliberations until the exhibits and the verdict form[s] are delivered to you by the clerk. This will occur after the lawyers have had an opportunity to check that all the exhibits are present and to tell me if they think that any different or additional instructions to you are necessary. I will recall you to the courtroom if I conclude that further instructions are needed.

When the exhibits are delivered to you, your first task will be to elect a foreperson who will serve as your clerk. After you have received the exhibits and then elected the foreperson, you will begin deliberating. If you have questions during your deliberations, the foreperson should write the jury's question on a sheet of paper, sign and date it, and knock on the door. The marshal will then bring the question to me, and I will respond in open court. It may take a few minutes to assemble the staff before you are brought to the courtroom to hear the response. Please try to make any questions very precise. We cannot engage in an informal dialogue, and I will respond only to the question on the paper.

If you need to have any testimony or any part of my instructions (played / read back), follow the same procedure: on a sheet of paper specify what it is that you want to hear as precisely as you can. For example, if you know that you want to hear only the direct examination or only the cross examination of a particular witness, specify that. Otherwise, we will have to repeat the whole testimony.

We will now go over the verdict form[s]. *<Pass out verdict forms to each juror and explain the circumstances for the use of each form.>*

Your verdict must be unanimous. There is no such thing as a majority vote of a jury in Connecticut. Rather, you must all agree on the verdict.

No one will hurry you. If you are not able to reach a verdict today, you will resume your deliberations tomorrow. You may have as much time as you need to reach a verdict.

Marshal, please escort the jury to the jury deliberation room.

Notes

This instruction may be adapted to be given prior to or after discharge of alternates.

2.9-4 Use of Notes During Deliberations

Revised to January 1, 2008

As I told you at the beginning of the trial, the notes you may have taken are simply aids to your individual memory.

When you deliberate, you should rely on your independent recollection of the evidence you have seen and heard during the trial. You should not give precedence to your own notes or to any other juror's notes over your independent recollection of the evidence, because, as we all know, notes are not necessarily accurate or complete.

Jurors who have not taken notes should rely on their own recollection of the evidence and should not be influenced in any way by the fact that other jurors have taken notes. Your deliberations should be determined not by what is or is not in your notes but by your independent recollection of the evidence. If you have a question about any particular testimony, you may ask that it be read or played back to you from the official record, so there is no need to rely on notes.

Authority

Practice Book § 16-7; *Esaw v. Friedman*, 217 Conn. 553, 561 (1991).

2.9-5 Duty to Deliberate

Revised to January 1, 2008

Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but also collectively to express your views to the other jurors and to listen to theirs. That is the strength of the jury system. Each of you takes with you into the jury deliberation room your individual experience and wisdom. Your task is to pool that experience and wisdom in considering the evidence. You do that by giving your views and listening to the views of others. There must necessarily be discussion and give and take within the scope of your oath. That is the way in which agreement is reached.

2.9-6 Restrictions on Deliberations

Revised to January 1, 2008

You must not discuss the case unless all members of the jury are present.

You will take the usual breaks and luncheon recess, but you must not discuss the case in twos or threes during those breaks. You can deliberate only when all six of you are together in the jury deliberation room. This is important. We have had cases that had to be tried all over again because this rule was violated, so please be very careful not to discuss the case with your fellow jurors except when all of you are together deliberating.

2.9-7 Procedures for Reporting Verdict

Revised to January 1, 2008

When you have reached a verdict, knock on the door and the marshal will alert me. When you are told to enter the courtroom, the foreperson should sit in the first seat in the first row. When the jury is asked if it has reached a verdict, the foreperson should respond. The marshal will then hand the verdict to me and the verdict will be read twice to you. You will each be asked to respond whether it is your verdict, as a check that the verdict is, in fact, unanimous.

You should not at that point expect me to make any comment about your verdict. It has been my task to rule on issues of evidence and to instruct you on the law. It is your task to decide the case, and I will leave that strictly up to you and make no comment on what you decide. It is, of course, merely the division of duties, and not any lack of appreciation of your efforts, that keeps me from commenting on your decision.

2.9-8 Discharge/Release of Alternate Juror(s)

Revised to December 7, 2015

Note: General Statutes § 51-243 (e) provides that the court has the discretion to either discharge the alternates or retain them subject to recall if a regular juror cannot continue deliberations.

A. DISCHARGE

At this time I will discharge the alternate juror[s]. You should not have any contact with the other jurors during their deliberations, and you should not discuss the case with anyone until after a verdict has been rendered. You may call the clerk to determine when and if this has occurred.

You have listened with great attention to the evidence and the charge, and you have been ready, willing and able to step in and serve in the event that one of the first six jurors was no longer able to serve. Because all of them are here and ready to deliberate, we will not have to ask you to help decide the case. Your presence was nevertheless very important and the parties, the lawyers and the court all thank you for your service.

You are discharged. You should report to the jury administration room now and tell them you have been discharged.

B. RELEASE

At this time I will release but not discharge the alternate jurors.

You have listened with great attention to the evidence and the charge, and you have been ready, willing and able to step in and serve in the event that one of the first six jurors was no longer able to serve. Because all of them are here and ready to deliberate, we will not have to ask you to help decide the case, at this time.

However, our law allows you to be made part of the jury in the event that one of the jurors becomes unable to see the deliberation process through to conclusion. So although you are not deliberating right now, there is a possibility that unforeseen circumstances might require one or more of you to step in. If so, the clerk will notify you.

Accordingly, although I am releasing you from the courtroom, you should continue to follow the rules of juror conduct, such as not talking to anyone, including any other jurors, or doing any research, and avoiding any and all media reports about the case, until a verdict is reached.

When a verdict is rendered, the clerk will call you and advise you what the verdict is and that you have been dismissed and discharged from your oath.

Regardless of whether we have to call you back, your presence was nevertheless very important and the parties, the lawyers and the court all thank you for your service.

2.9-9 Instruction When Jury Fails To Agree ("Chip Smith")

Revised to January 1, 2008

The instructions that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict.

Along these lines, I would like to state the following to you. The verdict to which each of you agrees must express your own conclusion and not merely the acquiescence in the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result, you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other.

In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath.

But please remember this. Do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that - your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss the matter. There is no need to hurry.

Authority

This charge was adopted by the Supreme Court in *State v. O'Neil*, 261 Conn. 49, 74 (2002).

2.9-10 Reconsider Verdict

Revised to January 1, 2008

It is apparent to me from a review of your (verdict form / jury interrogatories) that you have made a mistake. Specifically, I am returning you to the jury deliberation room to reconsider your verdict and to correct the mistake I have identified. If you need portions of the evidence or charge re-read to assist you, please provide me with a note in accordance with the procedure I previously described.

Authority

General Statutes § 52-223; *Van Nesse v. Tomaszewski*, 265 Conn. 627, 634 (2003).

2.9-11 Discharge Jury

Revised to January 1, 2008

Your verdict in this case has now been accepted, and it is time to discharge you from your oath. The time and energy you have spent listening to the evidence and to the charge and in deliberating to a verdict is greatly appreciated by the parties and by the court. Jury service is both a burden and a privilege of our legal system, which could not function without your participation. We thank you for your efforts.

The oath that you took at the beginning of this case obligated you to keep silence about your work as jurors during the trial. Having rendered your verdict, you are released from that oath. It is, of course, up to you to decide whether or not to talk about your work as jurors. You certainly have no obligation to do so [and you should be aware that any comment you make might become the cause of further proceedings in this court concerning your verdict].

You are now discharged. You should report to the jury administration room and tell them you have been discharged.

Authority

General Statutes §1-25 (civil juror's oath).

Notes

A task force on post-verdict questioning of jurors has issued this recommended charge. The portion in brackets may be given at the discretion of the judge.

2.9-12 When Alternate Juror Empaneled after Deliberations Have Begun

New February 1, 2013

As you know, juror <insert juror number> was excused from the jury, and an alternate juror has been selected to take (his/her) place. Please do not speculate on the reason why the juror was excused.¹

Therefore, as of this moment, you are a new jury, and you must start your deliberations over again. The parties have the right to a verdict reached by six jurors who have had the full opportunity to deliberate from start to finish. The alternate juror has no knowledge of any earlier deliberations. Consequently, you must start over at the very beginning of deliberations. Together, as a new jury, you must consider anew all of the evidence and issues presented at trial in reaching your verdict.

¹ If the reason for the juror's dismissal is neutral, it is usually best to explain it to the remaining jurors.

Authority

General Statutes § 51-243 (d).

2-9.13 Exercise of Privilege against Self-Incrimination

New, December 7, 2015

You will recall that *<insert name of witness/deponent>* was called to testify as a (witness/deponent) in this case, but *<insert name of witness>* declined to respond to questions concerning *<insert putative conduct>*. As you probably know, under our laws, no person can be compelled to testify about matters that tend to demonstrate that the person engaged in criminal behavior.

In a civil case such as this, however, the refusal of a (witness/deponent) to testify based on this privilege allows jurors to draw an adverse inference. That is, you may infer that the (witness/deponent) did, indeed, engage in the criminal conduct about which the (witness/deponent) chooses to remain silent. In other words, that silence can be regarded as a tacit admission that the (witness/deponent) engaged in *<insert putative conduct>*.

Now, you are not required to draw this adverse inference, but you may do so if you find the inference to be logical and reasonable in light of all the evidence in the case. It is solely within your province to determine whether to draw the inference of guilt and what role that evidence plays in your ultimate decisions in this case.

Authority

Olin Corp. v. Castells, 180 Conn. 49, 53-54 (1980); *Secondino v. New Haven Gas Co.*, 147 Conn. 672, 675 (1960).

Note

The admissibility of evidence of refusal to testify based on the privilege against self-incrimination depends on the probative value/prejudice analysis described in *Rhode v. Milla*, 287 Conn. 731, 739-740 (2008).

PART 3: TORTS

3.1 CAUSATION

3.2 STANDARD OF PROOF

3.3 DEFENSES

3.4 DAMAGES

3.5 COMPARATIVE NEGLIGENCE

3.6 GENERAL NEGLIGENCE

3.7 AUTOMOBILE

3.8 PROFESSIONAL MALPRACTICE

3.9 PREMISES LIABILITY

3.10 PRODUCT LIABILITY

3.11 DEFAMATION

3.12 EMOTIONAL DISTRESS

3.13 INTENTIONAL TORTS

3.14 EMPLOYMENT ACTIONS

3.15 TORTIOUS INTERFERENCE

3.16 MISREPRESENTATION

3.17 DRAM SHOP

3.18 RECKLESSNESS

3.1 CAUSATION

3.1-1 Proximate Cause

3.1-2 Proximate Cause - Multiple Causes

3.1-3 Proximate Cause - Intervening Cause

3.1-4 Proximate Cause - Foreseeable Risk

3.1-5 Proximate Cause - Superseding Cause

3.1-1 Proximate Cause

Revised to December 7, 2015

The plaintiff must prove that any (injury/harm) for which (he/she/it) seeks compensation from the defendant was caused by the defendant.

The first issue for your consideration is, "Was the plaintiff (injured/harmed)?" If the answer is no, you will render a verdict for the defendant. If the answer is yes, you will proceed to the second issue, which is "Were such (injuries/harm) caused by the negligence of the defendant?" This is called "proximate cause."

Negligence is a proximate cause of an injury if it was a substantial factor in bringing the (injury/harm) about. In other words, if the defendant's negligence contributed materially and not just in a trivial or inconsequential manner to the production of the (injury/harm), then (his/her/its) negligence was a substantial factor. If you find that the defendant's negligence was not a substantial factor in bringing about the (injury/harm) suffered by the plaintiff, you will render a verdict in favor of the defendant. However, if you find that the defendant's negligence was a substantial factor in causing (injury/harm) to the plaintiff, you will consider the (allocation of liability, assessment of damages, etc.).

Authority

Winn v. Posades, 281 Conn. 50, 56 (2007) ("[t]he test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct"); *Shaughnessy v. Morrison*, 116 Conn. 661, 666 (1933) ("[a]n act or omission can hardly be regarded as the cause of an event which would have happened if the act or omission had not occurred"); see also *Pilon v. Alderman*, 112 Conn. 300, 301-302 (1930) ("The meaning of the term 'substantial factor' is so clear as to need no expository definition Indeed, it is doubtful if the expression is susceptible of definition more understandable than the simple and familiar words it employs."); *Phelps v. Lankes*, 74 Conn. App. 597, 606-607 (2003) (same).

3.1-2 Proximate Cause - Multiple Causes

Revised to January 1, 2008

Under the definitions I have given you, negligent conduct can be a proximate cause of an injury if it is not the only cause, or even the most significant cause of the injury, provided it contributes materially to the production of the injury, and thus is a substantial factor in bringing it about. Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all other causes, is material or substantial.

When, however, some other (cause / causes) contribute[s] so powerfully to the production of an injury as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, the defendant's negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing the injury about.

<Instruct jurors as to how the foregoing principles apply to the facts and issues of the case on trial.>

Authority

Boileau v. Williams, 121 Conn. 432, 440 (1936) ("[A] defendant's negligence, to impose liability, must have been a proximate and substantial cause of the injury. . . . [I]f the negligence of one only of the defendants caused the collision [which produced the injury,] that defendant only would be liable, but if the negligence of both contributed in a proximate and material way to cause it, both should be held liable. . . . When . . . injuries are claimed to have been caused by the concurring negligence of two defendants, and it is claimed that the active operation of the negligence of one is such a supervening cause as to prevent the antecedent negligence of the other from being a substantial factor in producing the injury, a statement to the jury of the general rule without any direction as to its application to the particular facts of the case will not ordinarily be sufficient to enable a jury of laymen to understand and correctly apply rules which eminent jurists and text-writers have found no little difficulty in expounding."); *Mahoney v. Beatman*, 110 Conn. 184, 197 (1929) ("Whether an injury following a negligent act is caused by this act depends upon whether it is traceable in causal relation to the tortious act. Or, expressed in another form, was this act a substantial factor in causing this later injury?").

See also 2 Restatement (Second), Torts § 439 ("If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability").

Notes

The term "supervening cause" is not used in this instruction because it appears rarely in our case law and risks confusing the jury on the related but quite different subject of "superseding cause." A "supervening cause" is one whose contribution to the production of an injury is so

powerful as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, and thus not a substantial factor in producing the injury.

A superseding cause, by contrast, is any force which, by its intervention in the sequence of events leading from the defendant's negligence to the plaintiff's injury, prevents the defendant from being held liable for the injury even though (his/her) negligence has been a substantial factor in bringing the injury about.

3.1-3 Proximate Cause - Intervening Cause

Revised to January 1, 2008

In this case, the defendant asserts that (he/she/it) did not legally cause the plaintiff's injury because another cause, proceeding entirely from an independent source, intervened to produce that injury after the defendant's own alleged act[s] of negligence had already occurred. In particular, the defendant claims that the plaintiff's injury was legally caused by *<describe the alleged conduct which the defendant claims to have been an intervening cause of the plaintiff's injury>*.

Negligent conduct can be a proximate cause of an injury, even if it is not the nearest or the most immediate cause of the injury. Thus, when the act of a third person or some other intervening cause operates actively to produce the injury after the defendant's negligent act or omission has been committed, the defendant's negligence is a proximate cause of the injury if the following (two / three) part test is satisfied:

First, the defendant's negligence must have been a substantial factor in bringing about the plaintiff's injury. *<See Proximate Cause - Substantial Factor, Instruction 3.1-4.>*

Second, the plaintiff's injury must have been harm of the same general nature as that which a reasonably prudent person in the defendant's position should have anticipated. *<See Proximate Cause - Foreseeable Risk, Instruction 3.1-7.>*

<Read the next section only in cases where evidence of superseding cause has been introduced.>

Third, the intervening cause which actively operated to produce the injury after the defendant's negligent act or omission was committed must not have been a superseding cause of the plaintiff's injury. *<See Proximate Cause - Superseding Cause, Instruction 3.1-8.>*

Authority

Fleming v. Garnett, 231 Conn. 77, 86 (1994), citing *Doe v. Manheimer*, 212 Conn. 748, 758 (1989).

Notes

An intervening cause is any cause proceeding entirely from an independent source that "breaks the line of causation" from the defendant's allegedly wrongful act to the plaintiff's complained-of injury. See generally *Edwards v. Tardif*, 240 Conn. 610, 615 (1997). A superseding cause, by contrast, relieves a negligent defendant of legal responsibility for the plaintiff's complained-of harm without breaking the line of causation between the negligence and the harm.

3.1-4 Proximate Cause - Foreseeable Risk

Revised to January 1, 2008

To prove that an injury is a reasonably foreseeable consequence of negligent conduct, a plaintiff need not prove that the defendant actually foresaw or should have foreseen the extent of the harm suffered or the manner in which it occurred. Instead, the plaintiff must prove that it is a harm of the same general nature as that which a reasonably prudent person in the defendant's position should have anticipated, in view of what the defendant knew or should have known at the time of the negligent conduct.

Authority

Merhi v. Becker, 164 Conn. 516, 521 (1973) ("If the . . . [defendant's] conduct is a substantial factor in bringing about harm to another, the fact that the . . . [defendant] neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.' Restatement (Second), 2 Torts § 435 (1). Neither foreseeability of the extent nor the manner of the injury constitute the criteria for deciding questions of proximate cause. The test is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence").

3.1-5 Proximate Cause - Superseding Cause

Revised to January 1, 2008

NOTE: The doctrine of superseding cause was partially abandoned in *Barry v. Quality Steel Products, Inc.*, 263 Conn. 424 (2003). See discussion below.

The defendant claims that he did not legally cause the plaintiff's alleged injury because that injury was produced, in material part, by a superseding cause. A superseding cause is any intentionally harmful act, force of nature, or criminal event, unforeseeable by the defendant, which intervenes in the sequence of events leading from the defendant's alleged negligence to the plaintiff's alleged injury and proximately causes that injury. Under our law, the intervention of such a superseding cause prevents the defendant from being held liable for the plaintiff's injury on the theory that, due to such superseding cause, the defendant did not legally cause the injury even though (his/her) negligence was a substantial factor in bringing the injury about. Therefore, when a claim of superseding cause is made at trial, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove, by that standard, its own conflicting claim of legal causation.

In this case, the defendant claims, more particularly, that *<describe alleged intervening conduct or event claimed to constitute a superseding cause>* was a superseding cause of the plaintiff's alleged injury, and thus that (his/her) own negligence did not legally cause that injury. Because such intentionally harmful (conduct / force of nature / criminal event), if unforeseeable by the defendant, would constitute a superseding cause of the plaintiff's alleged injury if it occurred as claimed by the defendant and if it proximately caused the plaintiff's injury, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove that the defendant legally caused that injury. The plaintiff can meet this burden by proving either 1) that the conduct claimed to constitute a superseding cause did not occur as claimed by the defendant, either because it did not occur at all or because it was not engaged in with the intent to cause harm; or 2) that such conduct was foreseeable by the defendant, in that the injury in question was within the scope of the risk created by the defendant's conduct; or 3) that such conduct was not a substantial factor in bringing about the plaintiff's alleged injury. These, of course, are questions of fact for you to determine based on the evidence. Keep in mind, however, that the defendant does not have any burden to prove the existence of a superseding cause. The burden at all times rests upon the plaintiff to disprove the defendant's claim of superseding cause as a necessary part of (his/her) proof that the defendant legally caused the plaintiff's injury.

Authority

See 2 Restatement (Second), Torts § 442B (1965); 2 Restatement (Second), supra, § 448 ("The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of (his/her) negligent conduct realized or should have realized that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a

tort or crime"); 2 Restatement (Second), supra, § 449 ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby").

Doe v. Manheimer, 212 Conn. 748, 759 (1989) (following Restatement (Second), Torts § 442B, by holding that "a negligent defendant, whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, except where the harm is intentionally caused by a third person and is not within the scope of the risk of created by the defendant's conduct. . . . 'The reason [for the general rule precluding liability where the intervening act is intentional or criminal] is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of (his/her) act is shifted to him.' 2 Restatement (Second), Torts § 442B, comment c. 'Such tortious or criminal acts may in themselves be foreseeable, [however,] and so within the scope of the created risk. . . .").

Notes

Prior to 2003, Connecticut courts used the term "superseding cause" to describe intervening causes of two types, which operated to defeat claims of liability against defendant tortfeasors in different ways. First, the term was used to describe any cause intervening between the time of the defendant's allegedly tortious conduct and that of the plaintiff's claimed injury which contributed so substantially to the production of the injury as to make the defendant's contribution to the injury merely trivial or inconsequential, and thus to establish that the defendant's conduct was not a proximate cause of the injury. See, e.g., *Corey v. Phillips*, 126 Conn. 246, 254-55 (1939) ("[t]he injury resulting from [negligent conduct] need not be the direct or immediate result of the wrongful act; if it is probable and a natural result, that is according to the operations of natural laws, it is enough,' nevertheless, 'the connection between negligence and injury may be broken by what the law terms an intervening cause, if the intervening cause in fact break the connection; . . . the intervening cause . . . must be a cause, whether intelligent or not, which so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in any degree, produces the injury . . ."); *Boileau v. Williams*, 121 Conn. 432, 439-41 (1936). This usage was formally abandoned by our Supreme Court in *Barry v. Quality Steel Products, Inc.*, 263 Conn. 424 (2003), because it erroneously suggested to jurors that the plaintiff did not bear the entire burden of proof on the issue of proximate causation. The interplay between the defendant's tortious conduct and other alleged causes of the plaintiff's claimed injury is covered by Instruction 3.1-5, Proximate Cause - Multiple Causes.

Second, the term was used, as in 2 Restatement (Second), Torts § 440 (1965) and *Doe v. Manheimer*, supra, 212 Conn. 759, to describe any cause intervening between the time of the defendant's allegedly tortious conduct and that of the plaintiff's claimed injury which, although not disproving that the defendant's conduct proximately caused the plaintiff's claimed injury, prevented the defendant's conduct from being considered a legal cause of that injury. Such superseding causes, as described in the foregoing instruction and explained above, are limited to intentionally harmful acts, forces of nature, or criminal events, unforeseeable by the defendant, which intervene in the sequence of events leading from the defendant's alleged negligence to the plaintiff's alleged injury and proximately cause that injury. See *Barry v. Quality Steel Products, Inc.*, supra, 263 Conn. 439 n.16 (confirming the continuing viability of the superseding cause

doctrine in "cases where the defendant claims that an unforeseeable intentional tort, force of nature, or criminal event supersedes its tortious conduct").

Our courts have not decided which party bears the burden of proof with respect to claims of superseding causes except in cases where that term has been used in the manner disapproved of in *Barry v. Quality Steel Products, Inc.*, supra. See, e.g., *Coburn v. Lenox Homes, Inc.*, 186 Conn. 370, 383 (1982) ("[p]roximate cause results from a sequence of events unbroken by a superseding cause, so that its causal viability continued until the moment of injury or at least until the advent of the immediate injurious force"). Hence, although it might reasonably be suggested that the burden of pleading and proving superseding cause, as defined in the Restatement, should rest on the defendant, because its existence depends upon proof of extrinsic facts not logically inconsistent with the basic elements of probable cause, the above-quoted passage from *Coburn v. Lenox Homes, Inc.* suggests to the contrary, for it does not distinguish, for this purpose, between the two then-existing types of superseding cause. Therefore, this instruction treats superseding cause as a claim inconsistent with legal causation that the plaintiff must disprove by a fair preponderance of the evidence whenever it is raised by the defendant at trial as a basis for defeating the plaintiff's claim of legal causation.

3.2 STANDARD OF PROOF

3.2-1 Standard of Proof

3.2-2 Clear and Convincing Evidence

3.2-1 Standard of Proof

Revised to January 1, 2008

In order to meet (his/her) burden of proof, a party must satisfy you that (his/her) claims on an issue are more probable than not. You may have heard in criminal cases that proof must be beyond a reasonable doubt, but I must emphasize to you that this is not a criminal case, and you are not deciding criminal guilt or innocence. In civil cases such as this one, a different standard of proof applies. The party who asserts a claim has the burden of proving it by a fair preponderance of the evidence, that is, the better or weightier evidence must establish that, more probably than not, the assertion is true. In weighing the evidence, keep in mind that it is the quality and not the quantity of evidence that is important; one piece of believable evidence may weigh so heavily in your mind as to overcome a multitude of less credible evidence. The weight to be accorded each piece of evidence is for you to decide.

As an example of what I mean, imagine in your mind the scales of justice. Put all the credible evidence on the scales regardless of which party offered it, separating the evidence favoring each side. If the scales remain even, or if they tip against the party making the claim, then that party has failed to establish that assertion. Only if the scales incline, even slightly, in favor of the assertion may you find the assertion has been proved by a fair preponderance of the evidence.

Authority

Tianti v. William Raveis Real Estate, Inc., 231 Conn. 690, 702 (1995); *Holmes v. Holmes*, 32 Conn. App. 317, 318, cert. denied, 228 Conn. 902 (1993).

3.2-2 Clear and Convincing Evidence

Revised to January 1, 2008

Now an accusation of *<state cause of action>* is serious, and, therefore, the law applies a higher standard of proof than is employed ordinarily in civil cases. The party making such a claim has the burden of proving it by clear and convincing evidence which is a more exacting standard than proof by a preponderance of the evidence as I have previously defined that standard to you in regard to other claims in this case.

Thus, a party cannot meet the burden of establishing *<state cause of action>* by simply producing evidence which is slightly more persuasive than that opposed to it, which would meet the burden of proof under the preponderance of evidence standard. Instead, the party must produce clear and convincing evidence which is evidence that is substantial and that unequivocally establishes the elements of *<state cause of action>*, which I shall shortly explain to you. Clear and convincing evidence is evidence that establishes for you a very high probability that the facts asserted are true or exist.

Authority

Cadle Co. v. D'Addario, 268 Conn. 441, 455 (2004); *Correia v. Rowland*, 263 Conn. 453, 475 n.22 (2003); *Holbrook v. Casazza*, 204 Conn. 336, 358 (1987), cert. denied, 484 U.S. 1006, 108 S. Ct. 699, 98 L. Ed. 2d 651 (1988); *Lopinto v. Haines*, 185 Conn. 527, 534 (1981); *Clark v. Drska*, 1 Conn. App. 481, 485-87 (1984).

3.3 DEFENSES

3.3-1 Statute of Limitation Defense - General

**3.3-2 Statute of Limitation Defense - Occurrence
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**3.3-4 Governmental Immunity - Municipal
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**3.3-5 Governmental Immunity - Imminent Harm
exception**

3.3-1 Statute of Limitation Defense - General

Revised to January 1, 2008

Note: Defenses based on statutes of limitation are usually adjudicated on motion. Disputes over the date of an occurrence or application of tolling doctrines may, however, require factual findings by the jury. The following sample charges, with appropriate adaptations, may be used to explain the tolling doctrines of continuing course of conduct, continuing duty based on a special relationship between the parties, and fraudulent concealment. There are some statutory causes of action, e.g., CUTPA, to which some tolling doctrines do not apply. See *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 45-47 (1998); *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 216-17 (1998).

The defendant has raised as a defense to the plaintiff's claim of <describe the claim to which the defense is directed> that the plaintiff cannot prevail on that claim because (he/she) did not bring suit on that claim within the time allowed by the law. There are state statutes that specify how much time a person has to bring certain kinds of claims. These are called statutes of limitation. A person cannot recover on a claim that is brought after the time period that applies to a particular claim, even if it is only one day late. The statute of limitation that applies to <describe the claim to which the defense is directed> provides that the claim must be brought within ____ years of the date the incident occurred. The plaintiff brought (his/her) suit against the defendant on <date>. A claim for <describe claim> based on acts or occurrences that took place more than ____ years before that date is barred by the statute of limitation. You must decide when each act or occurrence on which the plaintiff bases (his/her) claim occurred. If any of these acts or occurrences took place more than ____ years before the plaintiff brought suit, then a claim based on that act or occurrence is barred by the statute of limitation [unless an exception to this rule applies].

Note: Omit the phrase in brackets if no tolling doctrine is pleaded. If one is pleaded, state that the plaintiff claims that an exception applies in this case and go on to explain the doctrine invoked. Tell the jury the date the complaint was brought and remind them of the date of the occurrence, or, if the date is in dispute, the claims as to relevant dates. This charge will also have to be modified if there is a dispute concerning the date when a plaintiff discovered or ought to have discovered the injury; see General Statutes § 52-584.

3.3-2 Statute of Limitation Defense - Occurrence not Discovery

Revised to January 1, 2008

Note: Use if plaintiff asserts lack of knowledge of cause of action, except if fraudulent concealment is alleged in pleadings, but note that some statutes of limitation, notably, § 52-584, provide that suit must be brought within a period from the acts on which liability is based but within a shorter period from discovery.

The time limit for bringing an action applies even if a plaintiff does not discover that (he/she) has been harmed or does not discover that (he/she) has a claim until the period for bringing a suit has expired. Under Connecticut law, the time period for bringing suit begins to run from the time of the act or occurrence, not from the time the party discovers it.

Note: Adapt or omit this paragraph if a tolling doctrine is invoked.

Authority

Grey v. Stamford Health System, Inc., 282 Conn. 745, 750-51 (2007); *Witt v. St. Vincent's Medical Center*, 252 Conn. 363, 369 (2000); *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 212 (1988); *S.M.S. Textile Mills, Inc. v. Brown, Jacobson, Tillinghast, Lahan & King, P.C.*, 32 Conn. App. 786, 791, cert. denied, 228 Conn. 903 (1993).

3.3-3 Statute of Limitation Defense - Tolling Doctrines

Revised to January 1, 2008

Connecticut law recognizes that there are some situations in which the period set in a statute of limitation does not apply, or in which the date when the period begins to run is suspended or delayed. These situations are referred to as “tolling” the statute of limitations. The time specified for bringing suit does not run during a time when the statute of limitations is tolled.

The plaintiff has alleged that one [or more] of these situations is present, and that the statute of limitation therefore does not apply in the way the defendant asserts. The plaintiff has the burden of proving that the statute of limitation is tolled for the reason that (he/she) asserts.

A. Continuing course of conduct

The statute of limitation is applied differently if the incident on which the claim is based is part of a continuing course of conduct between the parties. The plaintiff has alleged that *<describe claim>* was not an isolated transaction but was part of a continuing course of conduct in which the defendant engaged over a period of time. To establish a continuing course of conduct, the plaintiff must present evidence that the defendant assumed a duty that remained in existence after commission of what is alleged to be the original wrong committed against the plaintiff. If the incident at issue in the suit was part of a continuing course of conduct, then the plaintiff may prevail on claims resulting from any act that was part of that continuing course of conduct, even if the particular act was outside the ___ year limitation period. If the incident was not part of a continuing course of conduct, but a separate instance of the defendant undertaking a duty that ended with the completion of the transaction, the plaintiff cannot prevail on claims based on those incidents that were not brought within ___ years of bringing suit.

In deciding whether there was a continuing course of conduct, you must determine what duty the defendant assumed, and when that duty terminated. The fact that parties may in fact have engaged in additional transactions at a later date may be evidence of a continuing course of conduct, or it may be evidence only of a series of separate transactions, depending on what duty you find the defendant assumed in each transaction. You must decide whether the plaintiff has proved that the conduct that occurred outside the time limit for bringing suit was or was not part of a continuing course of conduct.

Even where there is a continuing course of conduct, the plaintiff’s claim is barred if (he/she) failed to bring (his/her) claim within ___ years of the most recent part of that course of conduct.

Authority

Grey v. Stamford Health System, Inc., 282 Conn. 745, 751-56 (2007); *Blanchette v. Barrett*, 229 Conn. 256, 275-77 (1994); *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 209 (1988).

B. Special relationship

The plaintiff has alleged that even though some of the acts on which (his/her) claims are based happened more than ___ years before (he/she) brought suit, they are not barred by the statute of limitation because the acts arose from a special relationship between the parties that required the defendant to act in accordance with a continuing duty of care toward the plaintiff. The existence of a special relationship must be proved on the basis of the facts. You must determine from the facts whether the defendant had assumed a relationship of trust and continuing duty toward the plaintiff that continued past the date of the incident on which the claim is based. The fact that a plaintiff may have had a special relationship with the defendant (as _____) at one point in time does not necessarily establish that there was an ongoing relationship. It may be that the parties had a special relationship that ended, or a series of times or transactions when the defendant had a special relationship with the plaintiff that was not continuous but ended with the completion of each transaction. If the defendant had a special relationship with the plaintiff that required (him/her) to <describe>, then a claim is not barred by the statute of limitations if the plaintiff brought suit within ___ years of the last date on which that special relationship existed. You must consider all the facts to determine whether the plaintiff has proved that the defendant assumed a special relationship with the plaintiff that subjected (him/her) to a continuing duty to act in the plaintiff's best interest.

Authority

Zielinski v. Kotsoris, 279 Conn. 312, 322, 330 (2006); *Blanchette v. Barrett*, 229 Conn. 256, 275-76 (1994); *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 210 (1988).

C. Fraudulent concealment

The statute of limitation period is tolled and does not bar a claim if the plaintiff proves that for all or part of the period the defendant fraudulently concealed the cause of action from the plaintiff. To establish fraudulent concealment, the plaintiff must prove all three of the following things: 1) that the defendant was actually aware of facts necessary to establish the plaintiff's claim; 2) that the defendant intentionally concealed those facts from the plaintiff; and 3) that the defendant's purpose in concealing the facts was to obtain delay on the plaintiff's part in filing a lawsuit based on the incident. If the plaintiff has failed to prove any of those things, then (he/she) has failed to prove the elements necessary to suspend the application of the statute of limitation.

The proof required on this issue is greater than for most issues in a civil case. The standard of proof for fraudulent concealment is not simply "more likely so than not so"; rather, the plaintiff must prove fraudulent concealment by clear, precise and unequivocal evidence.

A party from whom a claim has been fraudulently concealed must bring the claim within ___ years of the date when (he/she) discovered the facts that give rise to the claim, even if (he/she) proves that the defendant intentionally concealed those facts.

Authority

General Statutes § 52-595; *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 105 (2007); *Bartone v. Robert L. Day Co.*, 232 Conn. 527, 533 (1995); *Connell v. Colwell*, 214 Conn. 242, 250-51 (1990).

3.3-4 Governmental Immunity - Municipal Employee

New October 8, 2010

In this case, the <defendant> claims that (he/she/it) cannot be held liable to the plaintiff for any damages the plaintiff may have suffered because (he/she/it) is protected from such liability by governmental immunity. The defendant has the burden of proving this special defense of immunity by a preponderance of the evidence.

Under our law, a municipal employee, while working on behalf of the public, cannot be found liable for negligent acts or omissions if those acts or omissions were the result of an exercise of the employee's judgment and discretion rather than the mere execution of a mandatory course of conduct. This immunity, if it applies, protects both the innocent employee and the negligent employee. That is, whether the employee was careless or careful is immaterial to the question of whether the defendant is immune from liability. Every municipal employee, who is required to use discretion in the performance of (his/her/its) job, is covered by this cloak of immunity, unless some exception applies, which exception[s] I will discuss with you shortly.

The rationale for shielding municipal employees from legal responsibility for injuries they may have caused through negligence, which resulted from the necessary exercise of their discretion, arises because exposure to such liability may have the effect of cramping the exercise of that discretion to the detriment of the public. This immunization reflects a value judgment by society that, despite injury to an individual member of the public, the broader interest in having governmental officers and employees unhampered by the fear of being second-guessed and subjected to lawsuits outweighs the benefits to permitting such liability.

However, this rationale is inapplicable, of course, in the situation where the municipal employee has no leeway as to how to act. If the employee performs a task which requires no exercise of discretion, then no immunity exists. Such mandatory activities are known as ministerial acts, as opposed to discretionary acts. Ministerial acts are those duties which the public employee must perform in a prescribed manner without the exercise of judgment or discretion. There is no immunity for the employee who negligently deviates from that prescribed path and causes injury.

In this case, (the parties agree/the court instructs you) that the defendant was a municipal employee engaged in a governmental function at the time of the plaintiff's alleged injury. The parties disagree, however, as to whether the defendant was free to exercise discretion when acting or failing to act as (he/she/it) did.

<Discuss specifics of parties' contentions>

The question for you to decide, then, is whether the defendant was performing a discretionary or ministerial act when the plaintiff was allegedly injured by the defendant's conduct. As I stated earlier, the burden is on the defendant, who desires the benefit of governmental immunity, to persuade you, by a preponderance of the evidence, that (his/her/its) actions or inactions were the

result of the exercise of discretion rather than the failure to comport with a mandatory course of conduct.

If you find that the defendant has failed to meet the burden of establishing this special defense, then no immunity would protect the defendant from liability if you determine that the defendant was negligent and that negligence proximately caused the injuries claimed by the plaintiff. If, however, you find that the defendant has satisfied this burden, then you would (render a verdict for the defendant on the negligence count/proceed to consider whether the plaintiff has proved that an exception to this governmental immunity applies in this case).

Authority

Doe v. Petersen, 279 Conn. 607 (2006); General Statutes § 52-557n.

Notes

In most cases, the existence of governmental immunity and any exceptions will be resolved by summary judgment. *Doe v. Petersen*, supra, 279 Conn 613. Whether the victim is identifiable or a member of an identifiable class is a question of law for the court to decide, *Prescott v. Meriden*, 273 Conn. 759, 763-64 (2005).

3.3-5 Governmental Immunity - Imminent Harm Exception

This jury instruction has been removed. Please refer to the Connecticut Supreme Court decision in *Haynes v. Middletown*, 314 Conn. 303 (2014).

3.4 DAMAGES

3.4-1 Damages - General

3.4-2 Damages - Double or Treble

3.4-3 Damages - Loss of Consortium

3.4-4 Damages - Punitive

3.4-5 Damages - Fear Resulting from an Increased Risk of Future Medical Treatment and Disability

3.4-6 Damages - Compensation for Increased Risk of Injury

3.4-7 Damages - Wrongful Death

3.4-8 Damages - Duty to Mitigate (or Minimize)

3.4-9 Damages - Economic without non-Economic

3.4-1 Damages - General

Revised to March 23, 2012 (modified April 5, 2012)

The rule of damages is as follows. Insofar as money can do it, the plaintiff is to receive fair, just and reasonable compensation for all injuries and losses, past and future, which are proximately caused by the defendant's proven negligence. Under this rule, the purpose of an award of damages is not to punish or penalize the defendant for (his/her) negligence, but to compensate the plaintiff for (his/her) resulting injuries and losses. You must attempt to put the plaintiff in the same position, as far as money can do it, that (he/she) would have been in had the defendant not been negligent.

Our laws impose certain rules to govern the award of damages in any case where liability is proven. Just as the plaintiff has the burden of proving liability by a fair preponderance of the evidence, (he/she) has the burden of proving (his/her) entitlement to recover damages by a fair preponderance of the evidence. To that end, the plaintiff must prove both the nature and extent of each particular loss or injury for which (he/she) seeks to recover damages and that the loss or injury in question was proximately caused by the defendant's negligence. You may not guess or speculate as to the nature or extent of the plaintiff's losses or injuries. Your decision must be based on reasonable probabilities in light of the evidence presented at trial. Injuries and losses for which the plaintiff should be compensated include those (he/she) has suffered up to and including the present time and those (he/she) is reasonably likely to suffer in the future as a proximate result of the defendant's negligence. Negligence, as I previously instructed you, is a proximate cause of a loss or injury if it is a substantial factor in bringing that loss or injury about.

Once the plaintiff has proved the nature and extent of (his/her) compensable injuries and losses, it becomes your job to determine what is fair, just and reasonable compensation for those injuries and losses. There is often no mathematical formula in making this determination. Instead, you must use human experience and apply sound common sense in determining the amount of your verdict.

In a personal injury action, there are two general types of damages with which you must be concerned: economic and noneconomic damages. Economic damages are monies awarded as compensation for monetary losses and expenses which the plaintiff has incurred, or is reasonably likely to incur in the future, as a result of the defendant's negligence. They are awarded for such things as the cost of reasonable and necessary medical care and lost earnings. Noneconomic damages are monies awarded as compensation for non-monetary losses and injuries which the plaintiff has suffered, or is reasonably likely to suffer in the future, as a result of the defendant's negligence. They are awarded for such things as physical pain and suffering, mental and emotional pain and suffering, and loss or diminution of the ability to enjoy life's pleasures.

I will now instruct you more particularly on economic damages. In this case, the plaintiff seeks to recover economic damages for each of the following types of monetary losses or expenses:
<Here list each type of monetary loss or expense for which the plaintiff seeks, and the evidence

potentially supports, an award of economic damages. Then, proceed to instruct on each such claim under the appropriate paragraph(s) below.>

The plaintiff is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of injuries sustained as a result of the defendant's negligence. The plaintiff must prove that the expenses (he/she) claims were reasonably necessary and proximately caused by the defendant's negligence.

The plaintiff is also entitled to recover any loss of earnings or earning capacity that (he/she) proves to have been proximately caused by the defendant's negligence. With respect to lost earnings up to the present time, the plaintiff must prove that the defendant's negligence has prevented (him/her) from receiving the earnings for which (he/she) seeks compensation. (He/She) must do so by establishing a reasonable probability that (his/her) injury brought about a loss of earnings. The evidence must establish a basis for a reasonable estimate of that loss.

The plaintiff is also entitled to damages for the loss of future earnings based upon the evidence as to what (he/she) probably could have earned but for the harm caused by the defendant's negligence and as to what the plaintiff can now earn through the earning period of (his/her) life.

Let me now turn to noneconomic damages. In this case, the plaintiff seeks to recover noneconomic damages for each of the following types of non-monetary losses or injuries: *<Here list each type of non-monetary loss or injury for which the plaintiff seeks, and the evidence potentially supports, an award of noneconomic damages. Then, proceed to instruct on each such claim under the appropriate paragraph(s) below.>*

A plaintiff who is injured by the negligence of another is entitled to be compensated for all physical pain and suffering, mental and emotional suffering, loss of the ability to enjoy life's pleasures, and permanent impairment or loss of function that (he/she) proves by a fair preponderance of the evidence to have been proximately caused by the defendant's negligence. As far as money can compensate the plaintiff for such injuries and their consequences, you must award a fair, just, and reasonable sum. You simply have to use your own good judgment in awarding damages in this category. You should consider the nature and duration of any pain and suffering that you find.

A plaintiff who is injured by the negligence of another is entitled to be compensated for mental suffering caused by the defendant's negligence for the results which proximately flow from it in the same manner as (he/she) is for physical suffering.

You should consider, as a separate category for awarding damages in this case, the length of time the plaintiff was, or will probably be, disabled from engaging in activities which (he/she) enjoys.

If you find that it is reasonably probable that (he/she) has suffered permanent physical harm, loss of function or disfigurement, the plaintiff is entitled to be compensated for that category of injury. Your award should be in accordance with the nature and extent of such physical impairment, loss of function or disfigurement and the length of time (he/she) is reasonably

expected to endure its negative consequences. *<Here it may be appropriate to instruct the jury as to the use of any evidence of life expectancy that has been introduced.>*

The plaintiff is entitled to full compensation for all injuries and losses proximately caused by the defendant's negligence even though those injuries and losses are more serious than they otherwise would have been because of a pre-existing condition. You may not compensate the plaintiff for the pre-existing injury itself. However, the aggravation of such an injury, proximately caused by the defendant's negligence, is a proper item of noneconomic damages.

The plaintiff alleges that, before the accident occurred, (he/she) had a preexisting medical condition but that condition was not causing the plaintiff to suffer any symptoms. If you find that the plaintiff had a preexisting condition from which (he/she) was suffering no symptoms and that the condition was aggravated by an injury caused by the defendant's negligence, the plaintiff is entitled to recover full compensation for those symptoms, even though the symptoms are greater than if the plaintiff had not suffered from this preexisting condition.

Authority

Tuite v. Stop & Shop Cos., 45 Conn. App. 305, 310-11 n.2 (1997).

Notes

Only the portions of the charge pertinent to damages sought by the plaintiff and supported by the evidence should be given. In cases involving numerous categories of claimed economic damages, it is a good practice to provide the jury with an overview of the particular types of damages that (if appropriate) are not being sought.

If relevant, a life expectancy charge should be given at this time if it wasn't given at the time that the evidence was introduced.

Cases involving claims of fear of the possibility of future medical treatment and disability will require specialized instruction. See *Goodmaster v. Houser*, 225 Conn. 637, 645-47 (1993); *Petriello v. Kalman*, 215 Conn. 377, 395-98 (1990).

3.4-2 Damages - Double or Treble

Revised to January 1, 2008

Note: This would be added to the end of Damages - General, **Instruction 3.4-1.**

In any civil action to recover damages resulting from (personal injury / wrongful death / damages to property) – as in this case – the jury, as the trier of fact, may award double or treble (triple) damages if the plaintiff has proved that the defendant has:

- 1) deliberately or with reckless disregard, operated a motor vehicle in violation of statute <insert appropriate statute¹ and describe elements, definitions, and specific facts where appropriate>, and
- 2) that the violation was a substantial factor in causing such (injury / death / damage to personal property).

You should understand that the phrase deliberately or with reckless disregard involves conduct that is more than negligence. It is conduct that indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. It is conduct that tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.

If you find that has been proven, you are allowed to multiply any fair, just and reasonable damages that you award by either two or three. You are not obliged to do so but you may do so. That is solely within your discretion.

¹ General Statutes §§ 14-218a (traveling unreasonably fast), 14-219 (speeding), 14-222 (reckless driving), 14-227a (driving under the influence), 14-230 (failure to drive in right-hand lane), 14-234 (no passing zones), 14-237 (driving on divided highways), 14-239 (one-way streets), or 14-240a (driving a reasonable distance apart).

Authority

General Statutes § 14-295; *Matthiessen v. Vanech*, 266 Conn. 822, 827 n.6 (2003); *Gionfriddo v. Avis Rent A Car Systems, Inc.*, 192 Conn. 280, 292 (1984); *Manifold v. Ragaglia*, 94 Conn. App. 103, 115-16 (2006).

Notes

Statutory multiple damages awarded pursuant to General Statutes § 14-295, while serving a punitive purpose, are separate and distinct from common-law punitive damages and are awarded in addition thereto in appropriate cases. *Caulfield v. Amica Mutual Ins. Co.*, 31 Conn. App. 781, 786 n.3, cert. denied, 227 Conn. 913 (1993).

Section 14-295 requires the plaintiff to specifically plead that "another party has deliberately or with reckless disregard" This charge will obviously only be given where that requirement has been met.

3.4-3 Damages - Loss of Consortium

Revised to January 1, 2008

(Mr./Ms.) _____ has made a claim for loss of consortium.

Loss of consortium is a suit by a spouse for the loss of the affection, dependence and companionship that (he/she) has suffered through the loss of (his/her) spouse. Damages awarded for loss of consortium include both past and future loss and are measured by the extent of the loss incurred, to the extent that money can measure it.

The term "consortium" encompasses the services of the spouse and the variety of intangible relations which exist between spouses including affection, society, companionship and physical intimacies of the spousal relationship.

(Mr./Ms.) _____'s recovery must be causally connected to the accident, and, once again, (he/she) can recover only if ((his/her) spouse / the estate of _____) recovers, because (his/her) action for loss of consortium is derivative from (his/her) spouse's case. Finally, in awarding damages for loss of consortium, you must take into account the life expectancies of both spouses and base your award on the shorter life expectancy.

Authority

Musorofiti v. Vlcek, 65 Conn. App. 365, 372, cert. denied, 258 Conn. 938 (2001); *Blake v. Neurological Specialties, P.C.*, Superior Court, complex litigation docket at Waterbury, Docket No. X02 CV 94 0155265 (May 9, 2003).

Notes

This charge applies to civil unions, General Statutes § 46b-3800; see also *Kerrigan v. State*, 49 Conn. Sup. 644 (2006), on appeal, Supreme Court, Docket No. 17716.

3.4-4 Damages - Punitive

Revised to January 1, 2008

In addition to seeking compensatory damages, the plaintiff seeks an award of punitive damages. Punitive damages are damages awarded not to compensate the plaintiff for any injury or losses but to punish the defendant for outrageous conduct and to deter (him/her) and others like (him/her) from similar conduct in the future. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's reckless indifference to the rights of others or an intentional and wanton violation of those rights. You may award punitive damages only if you unanimously find, from facts established by a preponderance of the evidence, that the conduct of the defendant was, in fact, outrageous.

The law does not require you to award punitive damages. It is, instead, a matter for your sound discretion. An award of punitive damages must not reflect bias, prejudice or sympathy with respect to any party. It must instead be fairly based on the evidence in the case.

There is no exact standard for fixing the amount of punitive damages. The amount awarded, if any, should be the amount you unanimously find necessary for achieving the objectives of punitive damages that I have described. You should consider the degree of reprehensibility of the defendant's misconduct and the actual or potential harm suffered by the plaintiff.

Authority

Votto v. American Car Rental, Inc., 273 Conn. 478, 485-86 (2005); *Gaudio v. Griffin Health Services Corp.*, 249 Conn. 523, 551 (1999); *Ames v. Sears, Roebuck & Co.*, 8 Conn. App. 642, 655, cert. denied, 201 Conn. 809 (1986); *Wedig v. Brinster*, 1 Conn. App. 123, 134 (1983), cert. denied, 192 Conn. 803 (1984).

Punitive damage awards are subject to constitutional limitation. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Appropriate instructional language, from the standpoint of federal constitutional law, is discussed in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). See *Smith v. Wade*, 461 U.S. 30, 54-55, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983); *Hilao v. Estate of Marcos*, 103 F.3d 767, 781 n.7 (9th Cir. 1996). Connecticut law concerning punitive damages in a statutory context is summarized in *Votto v. American Car Rental, Inc.*, supra, 273 Conn. 486. Helpful language is contained in 4 Restatement (Second), Torts § 908 (1979).

Notes

The charge above is appropriate for use in the trial of some statutory causes of action, such as 42 U.S.C. § 1983.

Please note that the state legislature's authorization of punitive damage awards "fall into three categories: (1) those that limit the amount of the award to no more than two times the actual damages incurred; (2) those that designate a specific, albeit modest, dollar limit for such awards; and (3) those that authorize punitive damages, but leave the amount of the award to the discretion of the court [such as CUTPA]." *MedValUSA Health Programs, Inc. v.*

MemberWorks, Inc., 273 Conn. 634, 672, cert. denied sub nom. *Vertrue, Inc. v. MedValUSA Health Programs, Inc.*, 546 U.S. 960, 126 S. Ct. 479, 163 L. Ed. 2d 363 (2005).

With respect to common-law causes of action, the final paragraph of the suggested charge should be replaced by the following language: "Punitive damages are limited to the costs of litigation, including attorney's fees, less taxable costs. Within that limitation, the extent to which they are awarded is within your sole discretion."

Label Systems Corp. v. Aghamohammadi, 270 Conn. 291, 335 (2004). Under *Smith v. Snyder*, 267 Conn. 456, 471 (2004), "there is an undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an *appropriate evidentiary showing*." (Emphasis in original; internal quotation marks omitted.)

With respect to common-law causes of action, it may be prudent to have the jury find whether an award of punitive damages is appropriate and to have the court subsequently determine the amount of such award.

In cases involving multiple causes of action, the court should specifically refer to the count providing the basis for the punitive damages claim in question. The jury should be directed to consider only the conduct alleged and proved with respect to that count as the basis for the requisite finding of outrageousness and any resulting award of punitive damages. The Second Restatement of Torts permits the trier of fact to consider, inter alia, "the wealth of the defendant" in assessing the amount of punitive damages. 4 Restatement (Second), Torts § 908 (2) (1979). The "wealth" factor has no discovered basis in Connecticut common law, although it may be relevant to the assessment of certain statutory penalties. See *Ventres v. Goodpeed Airport, LLC*, 275 Conn. 105, 149 n.39 (2005), cert. denied, 126 S. Ct. 1913 (2006); *Carothers v. Capozziello*, 215 Conn. 82, 103-104 (1990) (listing factors to be considered in imposing civil penalty pursuant to General Statutes § 22a-226a). *State Farm Mutual Automobile Ins. Co. v. Campbell*, supra, 538 U.S. 427-28, permits the use of the "wealth" factor but views it with some skepticism. The use of this factor in Connecticut common-law charges is not recommended.

3.4-5 Damages - Fear Resulting from an Increased Risk of Future Medical Treatment and Disability

Revised to January 1, 2008

The plaintiff may recover damages for fear of an increased risk of future medical treatment and disability proximately caused by the defendant's negligence. The fear must be rational in that the consequence feared has a reasonable basis in the evidence. Fear of a completely fictitious or imagined consequence, having no reasonable basis, is not a recoverable element.

Authority

Barrett v. Danbury Hospital, 232 Conn. 242, 256 n.6 (1995); *Goodmaster v. Houser*, 225 Conn. 637, 645-46 (1993); *Petriello v. Kalman*, 215 Conn. 377, 389-90 (1990).

Notes

Although no expert testimony is needed on the existence of the plaintiff's fear, the reasonable basis for that fear must be established by expert testimony. The underlying theory of the case law can apply to increased risks of harm other than that of increased risk of future medical treatment and disability. The charge can thus be modified in an appropriate case.

3.4-6 Damages - Compensation for Increased Risk of Injury

Revised to January 1, 2008

The plaintiff claims that (he/she) has suffered an increased risk of <*alleged future complication*> as a result of the defendant's negligence. The plaintiff is entitled to recover damages for physical harm resulting from a failure to exercise reasonable care. If the failure to exercise reasonable care increases the risk that such harm will occur in the future, the plaintiff is entitled to compensation for the increased risk. In order to award this element of damages, you must find a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm. The increased risk must have a basis in the evidence. Your verdict may not be based on speculation. The plaintiff is entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur.

Authority

Marchetti v. Ramirez, 240 Conn. 49, 55 (1997); *Seymour v. Carcia*, 221 Conn. 473, 481 n.7 (1992); *Petriello v. Kalman*, 215 Conn. 377, 392 n.7, 397-98 (1990).

Notes

This issue should not be submitted to the jury absent a reasonable basis in the evidence for the estimation of such damages. *Seymour v. Carcia*, supra, 221 Conn. 481 n.7.

3.4-7 Damages - Wrongful Death

Revised to January 1, 2008

I want to discuss the laws pertaining to damages. I will address our general rules and then I will discuss the specific laws relating to a wrongful death case.

As you know, this case is captioned <name> v. <name>. (Mr./Ms.) <name of plaintiff>, while labeled the plaintiff, is the (executor / administrator) of the decedent <name of decedent>'s estate; the estate is the actual plaintiff in this case. Any damages awarded in this case would go to the estate and not simply to (Mr./Ms.) <name of plaintiff>.

The General Rules of Damages

Insofar as money can do it, a plaintiff is to receive fair, just and reasonable compensation for all injuries and losses, past and future, which are legally caused by the defendant's proven negligence. Under this rule, the purpose of an award of damages is not to punish or penalize the defendant for (his/her) negligence but to compensate the plaintiff, and in this case the estate, for the decedent's resulting injuries and losses.

Our laws impose certain rules to govern the award of damages. The plaintiff has the burden of proving (his/her) entitlement to recover damages by a fair preponderance of the evidence. The plaintiff must prove both the nature and extent of each particular loss or injury for which (he/she) seeks to recover damages and that the loss or injury in question was legally caused by the defendant's negligence. You may not guess or speculate as to the nature or extent of the plaintiff's decedent's losses or injuries. Your decision must be based on reasonable probabilities in light of the evidence presented at trial.

Once the plaintiff has proved the nature and extent of the decedent's compensable injuries and losses, it becomes your job to determine what is fair, just and reasonable compensation for those injuries and losses. Some determinations require a mathematical calculation; others involve the use of human experience and the application of sound common sense.

In a personal injury action, which includes a wrongful death action, there are two general types of damages with which you must be concerned: economic and noneconomic damages. Economic damages are monies awarded as compensation for monetary losses and expenses which have been incurred as a result of the defendant's negligence. They are awarded for such things as the cost of reasonable and necessary medical care and lost earnings. Noneconomic damages are monies awarded as compensation for non-monetary losses and injuries which the plaintiff's decedent has suffered as a result of the defendant's negligence. They are awarded for such things as physical pain and suffering and the destruction of the ability to enjoy life's pleasures.

Wrongful Death Damages

We have a statute that governs damages in cases such as this where there is a death. It allows for just damages which includes:

Economic damages of :

- 1) the reasonable and necessary medical and funeral expenses and
- 2) the value of the decedent's lost earning capacity less deductions for (his/her) necessary living expenses taking into consideration that a present cash payment will be made and

Noneconomic damages of:

- 3) compensation for the destruction of the decedent's capacity to carry on and enjoy life's activities in a way that (he/she) would have done had (he/she) lived and,
- 4) compensation for the death itself, or
- 5) pain and suffering.

[The statute also allows damages for pain and suffering; however, due to the instantaneous death of (Mr./Ms.) <name of decedent> there is no claim made for pain and suffering.]

I will now instruct you on economic damages.

1. Reasonable and Necessary Medical and Funeral Expenses

You may award damages for the reasonable and necessary medical, funeral and burial expenses. The plaintiff is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of injuries sustained by the decedent as a result of the defendant's negligence. The plaintiff must prove that the expenses (he/she) claims were reasonably necessary and legally caused by the defendant's negligence.

2. Destruction of Earning Capacity

The destruction of earning capacity, that is, the capacity to carry on the particular activity of earning money, may be compensated. First, we address the probable net earnings, in the ordinary sense of that phrase, during the decedent's probable lifetime.

In measuring the compensation for the destruction of (Mr./Ms.) <name of decedent>'s earning capacity over (his/her) probable lifetime, it is proper for you to consider the salary or wages (Mr./Ms.) <name of decedent> had been earning before the injury which caused (his/her) death. This is not conclusive evidence; yet, it is evidence of the value of (his/her) earning capacity. It is likewise proper for you to consider (his/her) general experience as a wage earner and (his/her) qualifications for conducting a gainful occupation. Necessarily, the damages would be limited to that period of time which you find would have been (Mr./Ms.) <name of decedent>'s length of life had (he/she) not died.

Next, you should understand that the probable income taxes must be deducted from (his/her) probable lifetime earnings to get any fair or proper basis for assessing reasonable compensation for the loss caused by the destruction of (his/her) earning capacity. For all practical purposes, the only usable earnings are net earnings after payment of such taxes.

[<If expert testimony was offered on economic loss:> You may recall the testimony of <name of expert> who described (his/her) formula in reducing to present value lost earnings over the decedent's working lifetime. (He/She) estimated what the wages would have been had the decedent lived to work from age___ through age ____.]

Next, the probable cost of future personal living expenses must also be deducted from an award of reasonable compensation for the total destruction of (his/her) earning capacity. The phrase "personal living expenses" refers to those personal expenses that would have been reasonably necessary for (him/her) to spend to maintain (his/her) lifestyle in order to keep (himself/herself) in such a condition of health and well-being that (he/she) could enjoy life's activities before (his/her) death.

Accordingly, in determining the loss to the plaintiff, you must subtract probable income taxes and necessary personal living expenses.

Now I will instruct you on noneconomic damages.

3. Destruction of Capacity to Enjoy Life's Activities

Damages are also allowed for the destruction of (Mr./Ms.) <name of decedent>'s capacity to enjoy life's activities.

Evidence has been presented as to those incidents of life that (Mr./Ms.) <name of decedent> enjoyed, including family, work, sports, recreation and other aspects of life. You may consider those areas in connection with this claim and award damages for this loss.

4. Compensation for the Death Itself

The rule is that insofar as money can do it, the plaintiff may be awarded fair, just and reasonable compensation for the loss of life. As in the other categories of damages, there is no precise mathematical formula for a jury to apply.

5. Pain and Suffering

<In the event the death was not instantaneous, see relevant portions of Damages - General, Instruction 3.4-1>

Loss of Consortium

<See Damages - Loss of Consortium, Instruction 3.4-3 where applicable.>

Double or Treble Damages, General Statutes § 14-295

<See Damages - Double or Treble, Instruction 3.4-2 where applicable.>

Authority

General Statutes § 52-555; General Statutes § 52-555a; General Statutes § 52-572 (a) and (f); *Carrano v. Yale-New Haven Hospital*, 279 Conn. 622, 650-51 (2006); *Katsetos v. Nolan*, 170 Conn. 637, 657, 659 (1976); *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 669-76 (1957); *Tesler v. Johnson*, 23 Conn. App. 536, 541-42 (1990), cert. denied, 217 Conn. 806 (1991).

Notes

"Personal living expenses" do not include recreational expenses, nor that proportion of living expenses properly allocable to the furnishing of food and shelter to members of the decedent's family other than himself. *Carrano v. Yale-New Haven Hospital*, 279 Conn. 622, 651 (2006).

3.4-8 Damages - Duty to Mitigate (or Minimize)

New March 25, 2011

You should also consider what efforts the plaintiff took to minimize the effects of (his/her) injury. One who has been injured by the negligence of another must use reasonable care, such as following doctor's instructions regarding the treatment of (his/her) injuries, to promote recovery and prevent any aggravation or increase of the injury. The plaintiff is not entitled to be compensated for any injury or aggravation of injury caused by (his/her) failure to minimize damages. Thus, you should reduce the damages awarded to the plaintiff to the extent you find that the plaintiff made (his/her) condition worse by not taking reasonable care to promote (his/her) recovery or prevent any aggravation or increase of the injury. It is the defendant's burden to prove by a preponderance of the evidence that the plaintiff has failed to minimize (his/her) damages.

Authority

Hallas v. Boehmke & Dobosz, Inc., 239 Conn. 658, 668-69 (1997); *Preston v. Keith*, 217 Conn. 12, 15-19 (1991).

Notes

The defendants have the burden of production and the burden of proof, but they do not have to plead the failure to mitigate damages as a special defense or a cause of action for negligence. *Keans v. Bocciarelli*, 35 Conn. App. 239, 243, cert. denied, 231 Conn. 934 (1994).

3.4-9 Damages - Economic without Non-Economic

New March 25, 2011

Ladies and Gentlemen, I have reviewed your verdict and see that you have found in favor of the plaintiff and awarded economic damages, but have awarded zero non-economic damages. While that is a possible verdict, some might argue that it is inconsistent to say that a person was injured enough to incur (medical expenses/lost wages), but experienced no pain and suffering or other non-economic damages. On the other hand, you may have concluded that while the plaintiff proved (his/her) economic damages, (he/she) failed to prove the claimed non-economic damages.

To help eliminate any concerns either party might have, I am going to ask you to go back and review your verdict. In addition to my instructions regarding the plaintiff's burden of proving damages you should also remember my instruction that even momentary pain and suffering is compensable.

Now, in sending you back for further deliberations, I am in no way suggesting that you should change your verdict. I am simply asking you to review your thought processes once more to make sure you have considered all relevant factors. I am giving you a new verdict form, which you should use if you decide to change your verdict.

Authority

General Statutes § 52-223; *Monti v. Wenkert*, 287 Conn. 101, 117-19 (2008); *Wichers v. Hatch*, 252 Conn. 174 (2000).

Notes

Judges are not required to give this charge, but they have the discretion to do so pursuant to General Statutes § 52-223. *Monti v. Wenkert*, supra, 287 Conn. 117-19.

3.5 COMPARATIVE NEGLIGENCE

3.5-1 Comparative Negligence - General

3.5-2 Defendant's Specification of Negligence

3.5-3 Plaintiff's Duty of Care

3.5-4 Rules of Comparative Negligence

**3.5-5 Allocation of Negligence - Two Defendants
with a Special Defense of Comparative
Negligence**

**3.5-6 Apportionment Claim - One Defendant (No
Special Defense) and One Apportionment
Respondent Only**

**3.5-7 Apportionment - One Defendant (With
Special Defense of Comparative Negligence)
and One Non-Defendant Apportionment
Respondent**

3.5-1 Comparative Negligence - General

Revised to January 1, 2008

In this case, the defendant has filed a special defense alleging that the plaintiff's injuries were legally caused by the plaintiff's own negligence. The defendant must prove the elements of this special defense by a preponderance of the evidence. Specifically, the defendant must prove that the plaintiff was negligent in one or more of the ways specified in the special defense and that such negligence was a legal cause of any of the plaintiff's injuries.

3.5-2 Defendant's Specification of Negligence

Revised to January 1, 2008

The special defense filed by the defendant alleges a number of specific ways in which the plaintiff was negligent. I will read these specific allegations to you shortly. To establish that the plaintiff was negligent, it is not necessary for the defendant to prove all of these specific allegations. The proof of any one of these specific allegations is sufficient to prove negligence.

Notes

No specific authority for this instruction has been found, although it is commonly given. This charge presumes that specific allegations that are not sufficient to prove negligence will not be given to the jury.

3.5-3 Plaintiff's Duty of Care

Revised to January 1, 2008

I have previously instructed you that the defendant is under the obligation to exercise the care which a reasonably prudent person would use under the circumstances. The plaintiff is also under the same obligation. A plaintiff is negligent if the plaintiff does something which a reasonably prudent person would not have done under similar circumstances or fails to do that which a reasonably prudent person would have done under similar circumstances.

Notes

This instruction is given only if the special defense of comparative negligence is pleaded by the defendant and evidence is introduced to support such defense.

3.5-4 Rules of Comparative Negligence

Revised to January 1, 2008

As I have explained, the plaintiff has claimed that the (collision / incident) was caused by the defendant's negligence, and the defendant has claimed that it was caused by the plaintiff's own negligence. If you find that negligence on the part of BOTH parties was a substantial factor in causing the (collision / incident), then the law is that the plaintiff can recover damages from the defendant only to the extent of the defendant's fault and may not recover damages to the extent that (he/she) (himself/herself) was at fault.

If the plaintiff was more at fault than the defendant, then the plaintiff cannot recover any damages.

Here is an example to make this rule clear: If the plaintiff was 20% at fault and the defendant was 80% at fault, the plaintiff recovers 80% of (his/her) damages. If the plaintiff was 50% at fault and the defendant was 50% at fault, the plaintiff recovers 50% of (his/her) damages. However, if the plaintiff was more than 50% at fault, (he/she) was more at fault than the party (he/she) has sued, and (he/she) recovers no damages.

Just as an example, suppose the plaintiff's total damages were \$100. If the plaintiff was 30% at fault and the defendant was 70% at fault, the plaintiff would recover 70% of the \$100, or \$70. The plaintiff would thus not receive payment for the part of (his/her) damages caused by (his/her) own negligence. Obviously, the numbers used are just for the sake of an example. I could have used \$10,000 or \$10 million.

3.5-5 Allocation of Negligence – Two Defendants with a Special Defense of Comparative Negligence

Revised to January 1, 2008

Note: This charge is designed to be used in a case in which the plaintiff has brought an action against two defendants between whom an award of damages may be allocated, and one or both defendants have filed a special defense of comparative negligence against the plaintiff. It is designed to be given immediately following Comparative Negligence - General, Instruction 3.5-1.

Practice Tip: It is useful to the jurors at this stage if you distribute copies of the verdict forms and any special interrogatories and invite them to follow along with this portion of the charge using the forms as a guide.

In the event that you determine that the plaintiff will be entitled to some award of money damages – in other words, the plaintiff has proved all the elements of (his/her) claim, and neither defendant has proved that the plaintiff was more than 50% negligent in causing (himself/herself) injury – there is another determination that you must make.

As with the comparative negligence analysis, the total amount of the negligence that causes the injury must equal 100%; but you must allocate that negligence among all of the parties, depending on what your findings are. Our law requires that you do this because a defendant is only required to pay damages to an injured plaintiff based on the percentage of that defendant's negligence and no more.

Let me give you four illustrations of how this would work depending on your findings:

- 1) You may find that the plaintiff has proved that the negligence of both defendants caused (him/her) injury and that neither defendant has proved that the plaintiff (himself/herself) was negligent in any degree. You would assign 0% of negligence to the plaintiff, and since the plaintiff has proved (his/her) claims against both defendants, you would have to determine how the remaining 100% of the negligence is to be allocated between the two defendants.
- 2) You may find that the plaintiff has proved (his/her) claims against only one defendant but that one or both defendants have proved that the plaintiff's injury was caused by the plaintiff's own negligence amounting to 50% or less of the total negligence. Then there are two parties – the plaintiff and one defendant – between whom you must allocate this 100%.
- 3) You may find that the plaintiff has proved (his/her) claims against both defendants, and that the defendants have proved that the plaintiff's injury was caused by the plaintiff's own negligence amounting to 50% or less of the total negligence. Under the comparative negligence rule, the plaintiff is entitled to a verdict in (his/her) favor, but the effect of that finding by you would leave three parties among whom to allocate the negligence: the plaintiff at 50% or less and the two defendants at the remaining percentage.

4) Finally, there are two situations in which there would be no allocation among any of the parties. One is if the plaintiff has not proved that either defendant was negligent or that none of the negligence of either defendant caused (him/her) to suffer injury; and the other is if you find that the plaintiff proved (his/her) claims, but you also find that one or both defendants have proved that the plaintiff was more than 50% negligent in causing the injury, so that the plaintiff's negligence is a complete bar to (his/her) prevailing in this case. In either of those situations, you will return a verdict for the defendants.

Notes

See Sample Apportionment Verdict Form (Plaintiff), Instruction 6.1. The judge should consider distributing copies of the verdict forms to the jury in conjunction with the delivery of this charge, so that the jury can see the practical effect of the charge before they begin their deliberations. General Statutes §§ 52-102b, 52-572h; *Carlson v. Waterbury Hospital*, 280 Conn. 125 (2006).

3.5-6 Apportionment Claim - One Defendant (No Special Defense) and One Apportionment Respondent Only

Revised to January 1, 2008

Note: This charge is designed to be used when the plaintiff has sued one defendant who has filed a notice of apportionment against another potential tortfeasor – called here the apportionment respondent – and the apportionment respondent is not a party to the case at the time of trial.

The defendant has made a claim in this case regarding the negligence of another (person / driver), <insert name of apportionment respondent, hereafter "AR"> who has not been sued in this case. Because the plaintiff has not sued AR, AR is not liable to pay money damages to the plaintiff; but the conduct of AR must be considered by you in determining whether the defendant is liable to pay damages to the plaintiff and in determining whether any damages assessed against the defendant should be reduced because of AR's conduct.

The defendant claims that AR was negligent and that, if the plaintiff suffered injury, it was AR's negligence that legally caused injury to the plaintiff. Here are the defendant's claims concerning AR's conduct:

<Charge on the specifications of negligence against AR.>

I have previously explained to you how to analyze claims of negligence and causation. The same analysis applies with respect to the defendant's claim against AR. What is different is the burden of proof. As to this claim of the defendant, it is the defendant's burden to prove the allegations concerning AR by a preponderance of the evidence. I also remind you that unless you first determine that the plaintiff has carried (his/her) burden of proof, that is, that the plaintiff has proved that the negligence of the defendant legally caused injury to the plaintiff, you need not evaluate the claim of the defendant about the negligence of AR. That is because a finding about AR's responsibility serves only to reduce any damages owed by the defendant to the plaintiff and not to relieve the defendant of liability.

If you find that plaintiff has proved (his/her) claim against the defendant and that the defendant has proved (his/her) claim regarding AR, you will have to allocate the percentage of negligence attributable to the defendant and the negligence attributable to AR, with the total amount of negligence equaling 100%. You must then reduce the amount of damages to be awarded to the plaintiff from the defendant by any percentage of negligence which the defendant proves to be attributable to AR.

Assume, for example, that the defendant has proved that AR was negligent, that AR's negligence caused injury to the plaintiff, and that AR's negligence constituted 25% of all proven negligence that caused the plaintiff's injury. [That would logically mean that you have found that the

remaining 75% was attributable to the defendant, because the total amount of the negligence must always equal 100%.] Let us also assume you determine damages to be \$100. You would then reduce your award to the plaintiff by the 25% that was attributable to AR, and your award to the plaintiff from the defendant would be \$75.

In another example, if you were to find that all of the plaintiff's injuries – 100% – were caused by the negligence of AR and none at all were attributable to the defendant, then that would mean you have found that the defendant is not liable to the plaintiff at all and your verdict must be for the defendant.

Notes

See Sample Apportionment Verdict Form (Plaintiff), Instruction 6.2. The judge should consider distributing copies of the verdict forms to the jury in conjunction with the delivery of this charge so that the jury can see the practical effect of the charge before they begin their deliberations. General Statutes § 52-102b; *Carlson v. Waterbury Hospital*, 280 Conn.125 (2006).

3.5-7 Apportionment – One Defendant (With Special Defense of Comparative Negligence) and One Non-Defendant Apportionment Respondent

Revised to January 1, 2008

Note: This charge is designed to be used when there is one plaintiff and one defendant who has filed both a special defense of comparative negligence and a notice of apportionment concerning a respondent who is not a party in the case. It is designed to be given immediately following Comparative Negligence - General, Instruction 3.5-1.

In addition to the defendant's claim that the plaintiff contributed to (her/his) own injuries through (her/his) own negligence, the defendant makes a claim regarding the negligence of another person/driver, <insert name of apportionment respondent, hereafter "AR">, who has not been sued in this case. Because the plaintiff has not sued AR, AR is not liable to pay money damages to the plaintiff, but the conduct of AR has been put in issue by the defendant. The defendant claims that AR was also negligent and that, if the plaintiff suffered injury, it was AR's negligence that legally caused injury to the plaintiff. Here are the defendant's claims concerning AR's conduct:

<Charge on the specifications of negligence against AR.>

I have previously explained to you how to analyze claims of negligence and causation. The same analysis applies with respect to the defendant's claim against AR; and, as with the defendant's claim of comparative negligence against the plaintiff, the defendant bears the burden of proof.

As to this claim that AR's negligence was a cause of injury to the plaintiff, unless you first determine that there will be a verdict in favor of the plaintiff, you need not evaluate the claim of the defendant about AR's conduct. That is because a finding that AR was negligent and that AR's negligence caused injury to the plaintiff serves only to reduce any damages to the plaintiff from the defendant and not to relieve the defendant of liability.

If you find that the plaintiff has proved the claims against the defendant so that there will be a verdict in plaintiff's favor and that the defendant has proved one or more of (his/her) claims against the plaintiff or AR, or as to both the plaintiff and AR, you will have to apportion the percentage of negligence attributable to the defendant and that attributable to the plaintiff or to AR, or to both the plaintiff and AR, with the total amount of negligence equaling 100%.

As I explained in my comparative negligence instruction, you must then reduce the amount of damages to be awarded to the plaintiff from the defendant by any percentage not attributable to the defendant but rather attributable to the plaintiff or to AR or both. I will give you two examples to illustrate these concepts.

EXAMPLE #1 – A finding that both the defendant and AR were at fault

For example, assume you find that the plaintiff has proved negligence and causation against the defendant and that the defendant has proved NO negligence and causation against the plaintiff – that is, no comparative fault on the plaintiff. You must still determine if the defendant has proved negligence and causation against AR. If so, you determine what percentage of negligence is attributable to the defendant and what percentage is attributable to AR. If the defendant has proved that AR's negligence caused injury to the plaintiff and that AR's negligence constituted 25% of all proven negligence that caused plaintiff's injury, you would then reduce your award to the plaintiff by that percentage – 25% – that was attributable to AR. If you determined that the plaintiff was entitled to damages in the amount of \$100, then you would reduce the damages by 25% and your award to the plaintiff against the defendant would be \$75. If you were to find that all of the plaintiff's injuries – 100% – were the fault of AR, then that would mean you have found that the defendant is not liable at all and your verdict must be in favor of the defendant.

EXAMPLE #2 – A finding that the defendant and AR and the plaintiff were all at fault

Assume that you find another set of facts. Assume you find that the defendant and AR and the plaintiff were all negligent to some degree in causing the plaintiff's injury. The rule still remains that if the plaintiff is more than 50% negligent, the plaintiff cannot recover any damages from the defendant regardless of the relative fault of AR. Therefore, the analysis I am now describing only comes into play if you determine that the plaintiff is 50% or less at fault and that AR's negligence also caused injury to the plaintiff. You determine what the percentage of negligence is for each, and you "apportion" damages against the defendant by reducing the damages to which the plaintiff is entitled by the percentages that are not attributable to the defendant.

Assume, for example, that the defendant has proved that the plaintiff's negligence was 25% and that AR's negligence was 50% of the negligence that caused injury to the plaintiff. If your finding of damages were \$100, you subtract \$25 for the plaintiff's own negligence and subtract \$50 for AR's negligence, and the plaintiff is entitled to an award of damages of \$25 from the defendant. The verdict form I give to you will provide a guide for you with spaces to fill in the blanks so that you can report your findings.

Notes

See Sample Apportionment Verdict Form (Plaintiff), Instruction 6.1. The judge should consider distributing copies of the verdict forms to the jury in conjunction with the delivery of this charge so that the jury can see the practical effect of the charge before they begin their deliberations. General Statutes §§ 52-102b, 52-572h; *Carlson v. Waterbury Hospital*, 280 Conn.125 (2006).

3.6 GENERAL NEGLIGENCE

3.6-1 Negligence - Definition

**3.6-2 Distinction between Statutory and
Common-Law Negligence**

3.6-3 Common-Law Negligence Defined

3.6-4 Reasonable Care

3.6-5 Standard of Care Applicable to Children

**3.6-6 Standard of Care of Others in Relation to
Children**

3.6-7 Duty - Foreseeability

**3.6-8 Standard of Care of Volunteer (Common
Law)**

**3.6-9 Standard of Care of Person Suffering from
an Infirmary**

3.6-10 Specifications of Negligence - Complaint

**3.6-11 Specifications of Negligence - Special
Defense**

3.6-12 Need for Actual Injury

3.6-13 Negligence Per Se - Statutory Negligence

3.6-14 Excused or Justified Violation of Statute

3.6-15 Rescue Doctrine

3.6-16 Unavoidable Accident

3.6-1 Negligence - Definition

Revised to February 1, 2013

Negligence is the violation of a legal duty which one person owes to another.

Authority

Phaneuf v. Berselli, 119 Conn. App. 330, 336, 988 A.2d 344 (2010).

3.6-2 Distinction between Statutory and Common-Law Negligence

Revised to January 1, 2008

There are, for purposes of this case, two kinds of negligence: statutory negligence and common-law negligence. Statutory negligence is the failure to conform one's conduct to a duty imposed by the legislature through the enactment of a statute. Common-law negligence is a violation of the duty to use reasonable care under the circumstances. A violation of either of these duties is negligence.

Authority

Guglielmo v. Klausner Supply Co., 158 Conn. 308, 318 (1969).

3.6-3 Common-Law Negligence Defined

Revised to January 1, 2008

Common-law negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would use in the same circumstances.

Authority

Hoelter v. Mohawk Services, Inc., 170 Conn. 495, 501 (1976).

3.6-4 Reasonable Care

Revised to January 1, 2008

In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendant at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

Authority

Galligan v. Blais, 170 Conn. 73, 77 (1976); *Pleasure Beach Park Co. v. Bridgeport Dredge & Dock Co.*, 116 Conn. 496, 503 (1933); *Geoghegan v. G. Fox & Co.*, 104 Conn. 129, 134 (1926).

3.6-5 Standard of Care Applicable to Children

Revised to January 1, 2008

In considering whether or not a child has been negligent, you are not to judge the child by the standard of care that you would apply to an adult. The reasonable care required of a child is the care that may be reasonably expected of children of similar age, judgment and experience under similar circumstances.

Authority

Neal v. Shiels, Inc., 166 Conn. 3, 11 (1974); *Rohloff v. Fair Haven & Westville Railroad Co.*, 76 Conn. 689, 693 (1904).

3.6-6 Standard of Care of Others in Relation to Children

Revised to January 1, 2008

A person is required to use greater care where the presence of children may be reasonably expected. The question is whether a reasonably prudent person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the same general nature as that which occurred here was likely to result. In answering this question, you may take into account the tendency of children to disregard dangerous conditions.

Authority

Neal v. Shiels Inc., 166 Conn. 3, 11 (1974); *Scorpion v. American-Republican, Inc.*, 131 Conn. 42, 46 (1944).

3.6-7 Duty - Foreseeability

Revised to January 1, 2008

A duty to use care exists when a reasonable person, knowing what the defendant here either knew or should have known at the time of the challenged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable.

Authority

Coburn v. Lenox Homes, Inc., 186 Conn. 370, 375 (1982); *Pisel v. Stamford Hospital*, 180 Conn. 314, 332-33 (1980); *Orlo v. Connecticut Co.*, 128 Conn. 231, 237 (1941).

3.6-8 Standard of Care of Volunteer (Common Law)

Revised to January 1, 2008

A person who voluntarily performs an act, without legal obligation to do so, has the same duty of care in performing that act that any other person would have under the same circumstances. That duty is the duty to use reasonable care under the circumstances.

Notes

This charge pertains to volunteers who are defendants. The rescue doctrine charge, separately given, pertains to volunteers who are plaintiffs. No Connecticut authority has been discovered. The proposed instruction is taken from 2 Restatement (Second), Torts § 323 (1965). The rule is considered "hornbook law." *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 76 S.Ct. 122, 100 L.Ed.2d 48 (1955).

A volunteer is subject to liability for physical harm resulting from a failure to use reasonable care if either 1) the failure to use reasonable care has increased the risk of such harm or 2) the harm is suffered because the person who was harmed relied on the act being performed.

There are numerous statutory exceptions to this common-law rule codified in Connecticut's "good Samaritan law." General Statutes § 52-557b. In appropriate cases, the jury must be instructed on the statute rather than the common law.

3.6-9 Standard of Care of Person Suffering from an Infirmary

Revised to January 1, 2008

A person suffering from an infirmity is under a duty to use the same degree of care that a reasonably prudent person with the same infirmity would use in the same circumstances.

Authority

Muse v. Pate, 135 Conn. 219, 223 (1939) (visual impairment); *Kerr v. Connecticut Co.*, 107 Conn. 304, 308 (1928) (hearing impairment).

Notes

Advanced age is not, in and of itself, an infirmity. *LeCourt v. Farrand*, 118 Conn. 210, 213 (1934).

This standard pertains to common-law negligence only. Questions of statutory negligence must be resolved by construction of the statute in question.

3.6-10 Specifications of Negligence - Complaint

Revised to January 1, 2008

The complaint filed by the plaintiff alleges a number of specific ways in which the defendant was negligent. To prove negligence, it is not necessary for the plaintiff to prove that the defendant was negligent in all of the ways claimed. Proof that the defendant was negligent in just one of the ways claimed is sufficient to prove negligence.

Notes

No specific authority for this instruction has been found, although it is commonly given. A separate instruction is given for special defenses. This charge presumes that specific allegations that are not sufficient to prove negligence will not be given to the jury. The allegations that "survive the cut" should be read to the jury.

3.6-11 Specifications of Negligence - Special Defense

Revised to January 1, 2008

The special defense filed by the defendant alleges a number of specific ways in which the plaintiff was negligent. To prove negligence, it is not necessary for the defendant to prove that the plaintiff was negligent in all of the ways claimed. Proof that the plaintiff was negligent in just one of the ways claimed is sufficient to prove negligence.

Notes

This charge, like its counterpart pertaining to the complaint, presumes that specific allegations that are not sufficient to prove negligence will not be given to the jury. The allegations that "survive the cut" should be read to the jury.

3.6-12 Need for Actual Injury

Revised to January 1, 2008

Note: This charge may be used when there is a contest over whether the plaintiff suffered any injury. It may be given during the explanation of the negligence cause of action or during the explanation of damages.

In order to recover money damages, the plaintiff must prove that (he/she) suffered an actual injury. That injury can be any one or more of the types about which I will instruct you in the damages portion of my charge. Unless the plaintiff proves an actual injury caused by the defendant's negligence, you cannot find for the plaintiff and award damages.

Authority

Right v. Breen, 277 Conn. 364, 377 (2006).

3.6-13 Negligence Per Se - Statutory Negligence

Revised to January 1, 2008

Negligence can arise from a violation of a statute that creates a duty by declaring that certain requirements must be followed or that certain acts must not be done. By enacting such a law, the legislature has determined the appropriate standard of care to which an individual's conduct must conform. Conduct that violates the requirements of such a statute constitutes negligence. The plaintiff has alleged that the defendant has violated the following statutory (duty / duties): *<insert allegations of the complaint and text of relevant statutes>*.

A violation by the defendant of a duty imposed by one or more of these statutes constitutes negligence. If you find that the defendant has violated one or more of these statutes then the defendant's conduct is negligent as a matter of law.

Authority

Considine v. Waterbury, 279 Conn. 830, 860-61 n.16 (2006); *Staudinger v. Barrett*, 208 Conn. 94, 101 (1988); *Pickering v. Aspen Dental Management, Inc.*, 100 Conn. App. 793, 802 (2007).

Notes

An instruction for negligence per se should not be given when the alleged negligent party is a minor under the age of sixteen. General Statutes § 52-217.

The instruction for negligence per se applies only when the statute alleged is designed to protect persons against injury and the plaintiff has suffered an injury for which the statute was intended to guard against. The plaintiff must be within the class of persons for whose benefit and protection the statute in question was enacted; the violation of the statute must constitute a breach of duty owed to the plaintiff; and the violation of the statute must be the proximate cause of the injuries claimed. See *Gore v. People's Savings Bank*, supra, 235 Conn. 375-76; *Berchtold v. Maggi*, 191 Conn. 266, 274-75 (1983); *Couplin v. Peters*, 153 Conn. 99, 101-102 (1965).

This charge should be given in conjunction with the charge on causation. If the defendant is found to be negligent due to violation of a statutory duty, then the defendant will be liable to the plaintiff if such violation is a substantial factor in causing the claimed injury. See *Gore v. People's Savings Bank*, supra, 235 Conn. 376 n.15, citing *Busko v. DeFilippo*, 162 Conn. 462, 466 (1972).

Negligence per se is applicable to a violation of a valid regulation or ordinance. See *Citerella v. United Illuminating Co.*, 158 Conn. 600, 608 (1969); *Heritage Village Master Assn., Inc., v. Heritage Village Water Co.*, 30 Conn. App. 693, 705 (1993). An exception to this general rule applies to OSHA regulations which cannot furnish the basis of a negligence per se instruction due to applicable limiting state and federal statutes. OSHA regulations can be the basis for an instruction that they are evidence of the standard of care to which the defendant must be held. A violation of the regulations, while not negligence per se, can be considered evidence of negligence. *Wendland v. Ridgefield Construction Services, Inc.*, supra, 184 Conn. 178. See also *Staudinger v. Barrett*, supra, 208 Conn. 100-03 (a violation of a police pursuit policy which does not have the force of a regulation may still be evidence of negligence).

3.6-14 Excused or Justified Violation of Statute

Revised to January 1, 2008

A defendant who has violated a statutory duty is negligent as a matter of law, unless there is a valid excuse or justification for the violation. If you find that a valid excuse or justification exists, then the defendant's conduct is not negligent as a matter of law. All persons are required to make reasonable efforts to comply with the laws governing their conduct. The defendant has the burden of proving by a preponderance of the evidence that a valid excuse or justification exists. A valid excuse or justification exists if you find, from the evidence presented: <list those applicable:>

- that the defendant made reasonable efforts to comply with the statutory requirements, but a violation occurred of which the defendant was unaware; OR
- that the defendant made reasonable efforts to comply with the statutory requirements, but after making such efforts, the defendant was unable to comply; OR
- that the defendant was confronted by an emergency not due to (his/her) own misconduct; <see *Sudden Emergency, Instruction 3.7-18*>; OR
- that compliance with the statute would involve a greater risk of harm to the defendant or others.

Authority

Gore v. People's Savings Bank, 235 Conn. 360, 376 n.16, 377 (1995); 2 Restatement (Second), Torts § 288A (1965).

Notes

This charge, applicable in general negligence cases, is to be given in conjunction with Negligence Per Se - Statutory Negligence, Instruction 3.6-13. It should be given when the defendant has attempted to avoid liability by offering proof of a valid excuse or justification. Only the pertinent excuses should be read to the jury. This charge should not be given when the specific statutory provision provides that no excuses or justifications are permitted to avoid liability. Such statutes result in strict liability on the part of the violator. *Gore v. People's Savings Bank*, supra, 235 Conn. 377-78, 382-83.

3.6-15 Rescue Doctrine

Revised to January 1, 2008

The defendant in this case has asserted the defense of comparative negligence. This defense asserts that the plaintiff's injuries were caused, either in part or in whole, by the plaintiff's own negligent conduct. When viewing the plaintiff's conduct, you may consider a doctrine of law known as the rescue doctrine. The rescue doctrine states that it is not negligence to expose oneself to danger in a reasonable effort to save another person from harm.

To determine whether the conduct of the plaintiff falls within the rescue doctrine, you must consider the evidence and decide whether the plaintiff made a reasonable effort to save *<insert the name of the appropriate person>*. In determining whether the actions of the plaintiff were reasonable, you should judge the conduct in light of the existing circumstances. The question is not whether the conduct was that of a prudent person under ordinary circumstances but whether the conduct was that of an ordinarily prudent person in an emergency. In an emergency, the conduct of a person attempting a rescue is not to be judged by what one would do when there was time for cool deliberation but by what a reasonable person would do in that emergency.

If you find that the plaintiff was reasonably faced with an emergency in which there was fear for the safety of another, and that the plaintiff made a reasonable effort to save *<insert the name of the appropriate person>* from harm, then the plaintiff would not be negligent.

If you find that the plaintiff's efforts to rescue were not reasonable under the circumstances, then the plaintiff was negligent and the principles of comparative negligence, as I will explain them to you, will apply.

Authority

Zimny v. Cooper-Jarrett, Inc., 8 Conn. App. 407, 411-22, cert. denied, 201 Conn. 811 (1986); *Cote v. Palmer*, 127 Conn. 321 (1940). See also 2 Restatement (Second), Torts § 472 (1965).

Notes

The rescue doctrine applies under Connecticut's comparative negligence statute. This is true even if the plaintiff-rescuer contributed to the victim's peril. In such cases, "the rescuer's negligence in contributing to the peril is to be considered along with all of the other negligence of the rescuer and the defendant." *Zimny v. Cooper-Jarrett, Inc.*, supra, 8 Conn. App. 421-22.

3.6-16 Unavoidable Accident

Revised to January 1, 2008

The defendant claims that any injury suffered by the plaintiff was the result of an unusual or unexpected event and was not the result of either party's negligence. If you find that the alleged injuries and/or losses in question did not result from either the defendant's or the plaintiff's negligence but were caused solely by some other happening, then the defendant is not liable to the plaintiff.

Authority

Tomczuk v. Alvarez, 184 Conn. 182, 190-91 (1981); *Dinda v. Sirois*, 166 Conn. 68, 69-74 (1974); *Robinson v. Faulkner*, 163 Conn. 365, 370 (1972). See also *Barrese v. DeFillippo*, 45 Conn. App. 102 (1997); Annot., 21 A.L.R. 5th 82 (1993); 65 A.L.R. 2d 12 (1959).

Notes

This charge should rarely be given. The Connecticut Supreme Court consistently has disapproved of the use of the unavoidable accident charge. The charge has been viewed as serving no useful purpose, instead functioning to confuse and mislead the jury. It has been characterized as nothing more than a denial of negligence by the defendant. The court has indicated that the instruction is warranted only when the record in the case supports a finding that the negligence of neither party is involved. Even in such cases, the decision to give the unavoidable accident charge is discretionary, and it is not error to refuse to give such an instruction as long as the jury is charged on the principles of negligence, proximate cause and burden of proof. See *Tomczuk v. Alvarez*, supra, 184 Conn. 190-91; *Barrese v. DeFillippo*, supra, 45 Conn. App. 108-09.

It is noted that numerous other state commissions have recommended against giving an unavoidable accident charge. See, e.g., Ark. Supreme Court Comm., Arkansas Model Jury Instructions AMI 604 (3rd ed. 1989); Colo. Supreme Court Comm., Colorado Jury Instructions-Civil 9:11 (3rd ed. 1990); Fla. Supreme Court Comm., Florida Standard Jury Instructions in Civil Cases 4.1 (1983); Idaho Pattern Jury Instructions Comm., Idaho Jury Instructions 217 (1982); Ill. Supreme Court Comm., Illinois Pattern Jury Instructions: Civil IPI 12.03 (3rd ed. 1990); Ind. Judges Ass'n, Indiana Pattern Jury Instructions §5.47 (1966); Kan. Judicial Council, Pattern Instructions for Kansas 2d PIK 8.82 (1977); Mich. Supreme Court Comm., Michigan Standard Jury Instructions-Civil SJI2d 13.05 (2d ed. & Supp. 1991); Mo. Supreme Court Comm., Missouri Approved Jury Instructions 1.01 (4th ed. 1991); State Bar Comm., South Dakota Pattern Jury Instructions-Civil 12.01 (1968 & Supp. 1980); Wis. Judicial Conference, Wisconsin Jury Instructions-Civil 1000 (1991).

3.7 AUTOMOBILE

- 3.7-1 Statutory Negligence - Reckless Driving**
- 3.7-2 Statutory Negligence - Speeding**
- 3.7-3 Statutory Negligence - Traveling Unreasonably Fast**
- 3.7-4 Statutory Negligence - Slow Speed**
- 3.7-5 Statutory Negligence - Passing**
- 3.7-6 Statutory Negligence - Left Turn**
- 3.7-7 Statutory Negligence - Right of Way at Intersections**
- 3.7-8 Statutory Negligence - Lights**
- 3.7-9 Statutory Negligence - Unsafe Tires**
- 3.7-10 Statutory Negligence - Brakes**
- 3.7-11 Statutory Negligence- Failing to Drive a Reasonable Distance Apart**
- 3.7-12 Statutory Negligence - Driving in Right-Hand Lane**
- 3.7-13 Statutory Negligence - Falling Asleep While Driving**
- 3.7-14 Negligence - Un/Under-Insured Motorist**
- 3.7-15 Right to Assume that Others Will Obey the Law**
- 3.7-16 Lookout**
- 3.7-17 Failure to Sound Horn**
- 3.7-18 Sudden Emergency**

**3.7-19 Family Car Doctrine - General Statutes §
52-182**

**3.7-20 Presumption of Agency - General Statutes §
52-183**

3.7-1 Statutory Negligence - Reckless Driving

Revised to January 1, 2008

We have a statute that provides that no person shall operate any motor vehicle upon any public highway of the state recklessly, having regard to the width, traffic and use of such highway, the intersection of streets and the weather conditions. A person operates a motor vehicle recklessly when that person does so knowing or having reason to know of facts that create a high degree of risk of physical harm to another and deliberately proceeds to act in conscious disregard of, or with indifference to, that risk. A person may also operate a motor vehicle recklessly when that person does so knowing or having reason to know of facts that create a high degree of risk, although a reasonable person in the same circumstances would realize or appreciate that risk.

In addition to this general definition of reckless driving, the statute further describes two specific forms of reckless operation of a motor vehicle that constitute reckless driving as a matter of law. The first is the operation of a motor vehicle upon any public highway at such a rate of speed as to endanger the life of any person other than the operator of the motor vehicle. The second is the operation of a motor vehicle upon any public highway at a rate of speed greater than eighty-five miles per hour.

If you find that the defendant violated the reckless driving statute in any of the ways I have defined for you, then the defendant was negligent.

Authority

General Statutes § 14-222 (a); *Matthiessen v. Vanech*, 266 Conn. 822, 832-33 (2003); 2 Restatement (Second), Torts § 500 comment (a) (1965). Recklessness may be inferred from the act of operating a motor vehicle while intoxicated. *Seymour v. Carcia*, 24 Conn. App. 446, 452 (1991), *aff'd*, 221 Conn. 473 (1992). Public highways are used for illustrative purposes.

Notes

The statute applies to a number of other areas as well. The instruction need not necessarily be given in its entirety. The portion that is to be read will depend upon the evidence.

3.7-2 Statutory Negligence - Speeding

Revised to January 1, 2008

We have a statute that provides that no person shall operate any motor vehicle upon any highway at such a rate of speed as to endanger the life of any occupant of that motor vehicle or at a rate of speed greater than fifty-five miles per hour. If you find that the defendant operated a motor vehicle upon a highway either at such a speed as to endanger the life of any occupant of that motor vehicle or at a rate of speed greater than fifty-five miles per hour, then the defendant has failed to conform to the duty imposed by the legislature through the enactment of the statute that I have just described.

Authority

General Statutes § 14-219 (a).

Notes

The statute does not apply to rates of speed that endanger the life of a person other than an occupant. That circumstance is addressed by the reckless driving statute, General Statutes § 14-222 (a), and Statutory Negligence - Reckless Driving, Instruction 3.7-1. The offense of traveling unreasonably fast in violation of General Statutes § 14-218a (a) is addressed in Statutory Negligence - Traveling Unreasonably Fast, Instruction 3.7-3.

3.7-3 Statutory Negligence - Traveling Unreasonably Fast

Revised to January 1, 2008

We have a statute that provides that no person shall operate a motor vehicle upon any public highway of the state at a rate of speed greater than is reasonable, having regard to the width, traffic and use of the highway, the intersection of streets and weather conditions. A reasonable speed is the speed at which a reasonably prudent person would travel under all of the circumstances.

One fact that you may consider is the posted speed. There is evidence that the public highway in question had a posted speed limit.

If you find that the defendant was driving in excess of the posted speed limit at the time in question, that fact standing alone permits but does not require you to find that the defendant's speed was unreasonable.

If you find that the defendant was not driving in excess of the posted speed limit at the time in question, this does not necessarily relieve the defendant of liability. The statute provides that the fact that the speed of a vehicle is lower than the posted speed limit shall not relieve the operator from the duty to decrease speed when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Authority

General Statutes § 14-218a (a); *Rapuano v. Oder*, 181 Conn. 515 (1980).

Notes

The terms "plaintiff" and "defendant" must be switched when unreasonable speed is asserted in a special defense. The paragraphs given will, of course, depend on the evidence in the case. The statute applies to a number of roads and areas other than public highways. Public highways are used here for illustrative purposes. Speeding in violation of General Statutes § 14-219 is addressed in Statutory Negligence - Speeding, Instruction 3.7-2.

3.7-4 Statutory Negligence - Slow Speed

Revised to January 1, 2008

We have a statute that provides that no person shall operate a motor vehicle at a speed lower than forty miles per hour on any limited access divided highway. No person shall operate a motor vehicle on any other highway at such a slow speed as to impede or block the normal and reasonable movement of traffic. This statute is not violated when 1) reduced speed is necessary for safe operation of a motor vehicle, 2) in the event of an emergency, 3) when the speed of the motor vehicle is in compliance with the law, or 4) when the motor vehicle is operated in compliance with the direction of an officer. The plaintiff has the burden of proving, by a fair preponderance of the evidence, that the defendant has violated this statute.

Authority

General Statutes § 14-220 (a).

Notes

Only the portions of this charge raised by the evidence in the case should be given. The Supreme Court has stated that the meaning of the statute, "in many not unlikely applications, is obscure." *Mancaniello v. Guile*, 154 Conn. 381, 387 (1966). The question of whether the four enumerated exceptions (for safe operation, emergency, compliance with the law, and direction of an officer) are affirmative defenses has not been definitively answered. *Mancaniello* suggests that they are not. The defendant in that case did not file an affirmative defense, and the court did not criticize that fact. The court instead held that the plaintiff's request to charge was deficient because it did not mention the applicable statutory exceptions supported by the evidence. *Id.*, 386. "[T]he mere fact that a party is required to prove a negative does not mandate that the burden of proof regarding that issue shifts to the opposing party." *Northeast Enterprises v. Water Pollution Control Authority*, 26 Conn. App. 540, 544-45 n.4 (1992).

3.7-5 Statutory Negligence - Passing

Revised to January 1, 2008

Duty of overtaking driver:

We have a statute that provides that the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left of the vehicle being overtaken at a safe distance and shall not again drive to the right side of the highway until safely clear of the overtaken vehicle.

The driver of the overtaking vehicle shall not drive to the left side of the center of the highway unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit the passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or interfering with the safe operation of any vehicle being overtaken.

The plaintiff has the burden of proving, by a fair preponderance of the evidence, that the defendant has violated this statute.

Duty of overtaken driver:

We have a statute that provides that the driver of a vehicle that is being overtaken shall give way to the right in favor of the overtaking vehicle. The driver of the vehicle that is being overtaken shall not increase the speed of this vehicle until (he/she) has been completely passed by the overtaking vehicle.

Authority

General Statutes § 14-232.

3.7-6 Statutory Negligence - Left Turn

Revised to January 1, 2008

The plaintiff alleges that the defendant made an improper left turn in violation of General Statutes § 14-242 (e). This statute states that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the-right-of-way to any vehicle approaching from the opposite direction which is within the intersection . . . or so close to such intersection . . . as to constitute an immediate hazard."

The statute is violated if the driver fails to yield the right of way to a vehicle approaching from the opposite direction and the approaching vehicle is either: 1) within the intersection; or 2) is so close to the intersection to constitute an immediate hazard.

A vehicle is so close to an intersection to constitute an immediate hazard if a reasonably prudent person in the driver's situation who is intending to make a left turn would believe that if (he/she) did make the left turn there would be an immediate danger or risk of a collision even though it might not be a certainty.

Therefore, if the plaintiff proves by a preponderance of the evidence that the defendant failed to yield the right of way when the plaintiff's vehicle was either: 1) within the intersection; or 2) so close to the intersection to constitute an immediate hazard, then you shall find that the defendant violated General Statutes § 14-242 (e).

Authority

Affinito v. Daniels, 179 Conn. 388, 389-90 (1979); *Randazzo v. Pitcher*, 17 Conn. App. 471, 473-74 (1989).

3.7-7 Statutory Negligence - Right of Way at Intersections

Revised to January 1, 2008

The plaintiff alleges that the defendant failed to grant the right of way to the plaintiff in violation of General Statutes § 14-245.¹ This statute states that "[e]ach driver of a vehicle approaching an intersection shall grant the right-of-way at such intersection to any vehicle approaching from his right when such vehicles are arriving at such intersection at approximately the same time, unless otherwise directed by a traffic officer."

Vehicles are considered to be arriving at the intersection at approximately the same time if a person of ordinary prudence, in the exercise of due care, would reasonably believe that if the two vehicles continued to run at the rate of speed at which they are then operating, there would be a risk of collision. If there is such a risk, then the driver on the left must grant the right of way to the other.

¹ General Statutes § 14-245 and this instruction do not apply to intersections controlled by a yield sign, a stop sign or a traffic control signal. In a case involving the failure to obey a "yield" sign, the instruction is governed by § 14-302. If the intersection is controlled by a stop sign, refer to General Statutes § 14-301 and *Velardi v. Selwitz*, 165 Conn. 635 (1974). If the intersection is controlled by a traffic control signal, refer to General Statutes § 14-299 and *Rose v. Campitello*, 114 Conn. 637 (1932).

Authority

This instruction was approved in *Peckham v. Knofla*, 130 Conn. 646, 648-49 (1944), and has been cited with approval in subsequent cases. If supported by the evidence, the court should also instruct that arriving at an intersection first is not a test of the right of way, but a factor to be considered by the trier in deciding whether the cars arrived at approximately the same time. *Efland v. Guyott Construction Company*, 138 Conn. 183 (1951).

3.7-8 Statutory Negligence - Lights

Revised to January 1, 2008

The plaintiff alleges that the defendant failed to display headlights [or illuminating devices] as required by General Statutes § 14-96a. This statute requires that headlights [or illuminating devices] be used: 1) at any time from a half-hour after sunset to a half-hour before sunrise; 2) at any time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of five hundred feet ahead; and 3) at any time during periods of precipitation, including, but not limited to, periods of rain, snow or fog.

In this case, the plaintiff alleges that the defendant violated subsection *<insert appropriate subsection(s) based on plaintiff's allegations and proof>* of General Statutes § 14-96a in that the defendant did not use (his/her) lights at a time . . . *<insert factual basis of plaintiff's claim as it relates to violation of the subsection>*.

Notes

Section 14-96a sets forth the general requirement that lights be displayed at certain times of the day or in response to weather conditions. General Statutes §§ 14-96b through 14-96aa sets forth the specific statutory requirements governing head lamps, tail lights, reflectors, commercial vehicles, location, visibility, etc. Specific reference should be made to the requirements of those provisions in accordance with the particular facts of the case. This statute refers to "lighted lamps." The court may alter the charge as necessary if lights referred to are other than headlights.

3.7-9 Statutory Negligence - Unsafe Tires

Revised to January 1, 2008

The plaintiff alleges that the defendant operated (his/her) vehicle with unsafe tires in violation of General Statutes § 14-98a. This statute provides that "[n]o person shall operate a motor vehicle or trailer upon the public highways unless such motor vehicle or trailer is equipped with tires in safe operating condition in accordance with requirements approved by the Commissioner of Motor Vehicles." In this case the plaintiff alleges that the defendant violated the standards established by the Commissioner of Motor Vehicles with respect to tire wear or tire tread. Specifically, the plaintiff alleges that the defendant violated *<specify the Motor Vehicle Department standard(s) the defendant is alleged to have violated and the factual basis for the claim>*.

Notes

General Statutes § 14-98a requires the Commissioner of Motor Vehicles to establish standards of safe operating conditions for tires including specifications governing tread wear and tread depth. Reference should be made to the applicable standards in accordance with the particular facts of the case.

3.7-10 Statutory Negligence - Brakes

Revised to January 1, 2008

The plaintiff alleges that the defendant's brakes were defective in violation of General Statutes § 14-80h. This statute states that "[e]ach motor vehicle, other than a motorcycle, shall be equipped, when operated on a highway, with at least two braking systems one of which shall be a service brake system and the other a parking brake system . . . Each braking system, including any power assist devices used to reduce operator braking effort, shall be maintained in good working order at all times."

Notes

General Statutes § 14-80h (a) through (h) sets forth particular safety requirements for parking and service brake systems. Reference should be made to § 14-80h (f) for standards governing vehicles, including tractor trailers, with a gross vehicle weight in excess of ten thousand pounds. Section 14-80i sets forth the braking requirements for motorcycles. Section 14-81 specifies the brake equipment required for trailers.

3.7-11 Statutory Negligence- Failing to Drive a Reasonable Distance Apart

Revised to January 1, 2008

The plaintiff has claimed that the defendant was negligent in not driving a reasonable distance from the plaintiff's vehicle in violation of Connecticut General Statutes § 14-240. This statute requires that "[n]o driver of a motor vehicle shall follow another vehicle more closely than is reasonable and prudent, having regard for the speed of such vehicles, the traffic upon and the condition of the highway and weather conditions."

If the plaintiff proves that the defendant's vehicle was traveling behind the plaintiff's vehicle in the same lane of traffic and that the distance between the vehicles was closer than was reasonable and prudent under the circumstances, then the defendant was negligent in violation of this section.

Authority

General Statutes § 14-240 (a); *Wrinn v. Connecticut*, 234 Conn. 401 (1995) (charge is warranted under this section when there is evidence that the vehicles were simultaneously in motion when the negligent conduct occurred; a rear end collision alone is not sufficient evidence of a violation and failure to charge in such circumstances is not error). In the case of multiple vehicle accidents, the language of the charge should be changed accordingly.

3.7-12 Statutory Negligence - Driving in Right-Hand Lane

Revised to January 1, 2008

The plaintiff alleges that the defendant failed to drive on the right side of the highway in violation of General Statutes § 14-230. Section 14-230 requires that vehicles be driven on the right side of a two-lane highway except in certain situations. Under the statute a driver may move from the right side of the highway:

- 1) when overtaking and passing another vehicle proceeding in the same direction;
- 2) when overtaking and passing pedestrians, parked vehicles, animals or obstructions on the right side of the highway;

OR

- 3) when the right side of a highway is closed to traffic while under construction or repair.

When considering whether the defendant violated this statutory section you should first determine if the defendant failed to drive on the right side of the highway. If the defendant failed to drive on the right side of the highway, you should then determine whether any of the statutory exceptions existed. If you find that the plaintiff has proven by a preponderance of the evidence that the defendant failed to comply with the statute's requirements and that none of the exceptions apply, then the defendant was negligent in violation of this statute.

Authority

General Statutes § 14-230 (a). This statute section does not apply to a highway divided into three or more marked lanes for travel or one which is designated and signposted for one-way traffic. See *Maciejewska v. Lombard Bros. Inc.*, 171 Conn. 35 (1976) (exception four of statute applied because highway in question had three or more marked lanes for traffic). Subsection (b) of the statute applies when a vehicle is proceeding at less than the normal speed of traffic and subsection (c) applies to vehicles which exceed the maximum width limitations. When these subsections apply, the charge should be modified accordingly.

3.7-13 Statutory Negligence - Falling Asleep While Driving

Revised to January 1, 2008

The plaintiff claims that the defendant was negligent in falling asleep while driving. As part of the duty to use reasonable care in the operation of a motor vehicle, a driver must take very great care to avoid falling asleep. Because sleep does not ordinarily come upon a driver of a car without some warning of its approach, a driver who knows, or should know, that (he/she) is becoming sleepy must either maintain a constant vigilance to stay awake or cease driving. Proof that a driver of a car fell asleep while driving is, alone, a sufficient basis for finding the driver negligent.

[<Give the following paragraphs if the defendant claims to have proven that there was an unforeseen falling asleep or loss of consciousness caused by a circumstance that tends to excuse or justify the conduct.> In this case, the defendant has claimed that (he/she) is not liable because the falling asleep or loss of consciousness while driving was caused by <state the facts claimed by the defendant to excuse or justify conduct>. A driver who falls asleep or loses consciousness while driving may be found not to be negligent if such conduct was due to unforeseen sleep or loss of consciousness resulting from a condition of which the driver was not and should not have been aware.

In evaluating circumstances presented in this case, you should keep in mind that ordinarily sleep does not come upon one without warning of its approach. Additionally, a driver who loses control of a car due to a sudden condition or loss of consciousness is not automatically excused from liability. Whether a driver is negligent or not under these circumstances depends upon whether (he/she) was or should have been aware of the claimed condition. A driver is not negligent when suffering a black-out, fainting spell, sudden attack or loss of consciousness when it occurs without premonition or warning. In determining whether the defendant was negligent under the circumstances of this case, you should consider the defendant's health history along with all of the other evidence presented.]

Authority

Shea v. Tousignant, 172 Conn. 54 (1976); *Bushnell v. Bushnell*, 103 Conn. 583 (1925); *Smith v. Czescel*, 12 Conn. App. 558 (1987).

In *Smith*, the Appellate Court outlined "several critical features of the law" required in a charge on falling asleep while driving as enunciated in *Bushnell*. The Court emphasized that "reasonable care to avoid such a danger requires *very* great care." (Internal quotation marks omitted.) *Smith v. Czescel*, supra, 12 Conn. App. 566. The court further stated that: "[t]he jury should also have been instructed, in accordance with these principles, that if a driver of a car falls asleep while driving, that alone will be a sufficient basis for a finding of negligence, because ordinarily the law requires that a driver maintain a vigilance either to stay awake or to cease driving. The jury should have been instructed that, if there are circumstances which excuse or justify his having fallen asleep, they may find that the driver was not negligent, but in

this connection they should have been further instructed that 'ordinarily sleep does not come upon one without warning of its approach.'" *Id.*

Additionally, in order for the jury to consider a defendant's claim of excuse or justification, there must be evidence presented that the defendant either suddenly lost consciousness from a cause other than sleep or suddenly fell asleep without having experienced the usual pre-sleep warnings. *Id.*, 568-69.

Notes

Falling asleep can constitute recklessness. See *Potz v. Williams*, 113 Conn. 278 (1931); *Smith v. Czescel*, 12 Conn. App. 558 (1987).

3.7-14 Negligence - Un/Under-Insured Motorist

Revised to January 1, 2008

The plaintiff has brought this action against the defendant, (his/her) own insurance company, under coverage known as uninsured / underinsured motorist coverage. The purpose of such insurance is to provide compensation to the plaintiff for the damages that would have been recoverable if the uninsured / underinsured motorist, *<defendant's name>*, [or the unknown driver of the other car] had maintained an insurance policy to adequately cover the plaintiff's losses from this collision. For this defendant to be liable to the plaintiff, the plaintiff must show that the other driver was negligent, that the negligence caused injury to the plaintiff and that the other driver did not have (any / adequate) insurance.

The defendant has stipulated that the plaintiff's insurance policy with the defendant provides this type of coverage and that the policy was in full force and effect, and thus you need not concern yourself with the specifics of the policy.

[<If there is no stipulation on negligence:> Rather, you must determine if the plaintiff has proved that the other driver was negligent, whether any such negligence caused injury to the plaintiff, and if so, what amount of money will fully and fairly compensate the plaintiff. <See Negligence - Definition, Instruction 3.6-1, Proximate Cause - Definition, Instruction 3.1-3, and Damages - General, Instruction, 3.4-1.>]

[<If there is a stipulation on negligence:> The defendant has agreed that the other driver was negligent and caused the accident, and thus you need not concern yourself with the question of who caused the accident. Rather, your only task is to determine whether the plaintiff suffered injury as a result of the accident and, if so, what amount of money will fully and fairly compensate the plaintiff. <See Damages - General, Instruction 3.4-1.>]

[<If there is evidence of underinsurance:>

<Select one of the following as appropriate:>

- You have heard testimony that the plaintiff has already received some compensation from the other driver.
- The fact that the plaintiff is suing *<name of insurance company>* for underinsured motorist benefits suggests that the other driver had some insurance which was paid out to the plaintiff.

If you determine that the plaintiff was injured as a result of the negligence of the other driver, and awarded damages from the defendant insurance company, the plaintiff will not receive compensation twice for the same injuries. Your task is to determine whether the plaintiff is entitled to an award of damages and, if so, in what amount. After you determine the full amount to which the plaintiff is entitled, I will make any necessary mathematical calculations after your verdict to adjust for any sums the plaintiff may already have received.]

Notes

If there is no contest over the terms of the defendant's insurance policy, the policy and the coverage limits are not admissible. Evidence of the amount of coverage in the insurance contract or the amount of recovery from the tortfeasor are deemed irrelevant to the jury's determination of damages. *Fahey v. Safeco Insurance Company*, 49 Conn. App. 306, 314-15 (1998).

3.7-15 Right to Assume that Others Will Obey the Law

Revised to January 1, 2008

In determining what is reasonable care under all of the circumstances, the conduct of the <*name of defendant*> should be judged from the viewpoint of the reasonably prudent person. A driver of an automobile is entitled to assume that other drivers will obey the law. The driver may thus assume that other drivers will obey all statutes governing the operation of motor vehicles in this state and that they will use the care that a reasonably prudent person would use in the same circumstances. The driver is allowed to make this assumption until (he/she) knows or in the exercise of reasonable care should know that the assumption has become unwarranted.

Authority

Turbert v. Mather Motors, Inc., 165 Conn. 422, 429 (1973); *Ramonas v. Zucker*, 163 Conn. 142, 147-48 (1972); *Tarzia v. Koopman*, 147 Conn. 540, 544 (1960); *Gross v. Boston, Worcester & New York State Railway Co.*, 117 Conn. 589, 596 (1933); *Strosnick v. Connecticut Co.*, 92 Conn. 594, 598 (1918).

3.7-16 Lookout

Revised to January 1, 2008

The plaintiff claims that the defendant failed to keep a proper lookout. A driver of an automobile has a duty to use reasonable care to discover dangers or conditions to which (he/she) may be exposed as well as to avoid those dangers and conditions that are actually known to (him/her). A driver is required to keep a reasonable lookout for any persons and traffic (he/she) is likely to encounter. (He/She) is chargeable with notice of dangers or conditions of which (he/she) could become aware through a reasonable exercise of (his/her) faculties.

Authority

McDonald v. Connecticut Co., 151 Conn. 14, 17 (1963); *Palombizio v. Murphy*, 146 Conn. 352, 357 (1959); *Plucherino v. Shey*, 108 Conn. 544, 546 (1928).

3.7-17 Failure to Sound Horn

Revised to January 1, 2008

The plaintiff claims that the defendant failed to sound (his/her) horn prior to the collision. The driver of an automobile has a duty to use reasonable care to avoid injury to other persons using the road. He has a duty to sound (his/her) horn prior to a collision to give warning of (his/her) approach to other persons if a reasonably prudent person in the same circumstances would do so.

Notes

General Statutes § 14-80 (e) requires motor vehicles to be equipped with horns in "good working order." The statute says nothing about when such horns should be sounded. Several Connecticut cases hint at the necessity of sounding a horn to give warning, but do not specify the circumstances in which such a warning should be given. See *Alderman v. Kelly*, 130 Conn. 98, 100 (1943); *Rosenberg v. Matulis*, 116 Conn. 675, 678 (1933); *Travis v. Balfour*, 115 Conn. 711, 712 (1932). The reasonably prudent person standard, however, is clear from the case law. See *McHaffie v. Bunch*, 891 S.W.2d 822, 828 (Mo. 1995), appeal dismissed after remand, 951 S.W. 2d. 340 (Mo. Ct. App. 1997); *Lowe v. Futrell*, 157 S.E.2d 92, 95 (N.C. 1967).

3.7-18 Sudden Emergency

Revised to January 1, 2008

As previously stated, negligence is the failure to exercise reasonable care under all of the circumstances presented. One of the circumstances for you to consider in this case is whether a sudden emergency situation existed. The existence of a sudden emergency is a factor to be considered in the evaluation of whether the defendant acted as a reasonable person under the circumstances. An individual, choosing a course of action in an emergency, is required to exercise the care of an ordinarily prudent person acting in such an emergency.

You are to consider the evidence in this case to determine whether an emergency situation existed. If you find that an emergency existed which was not caused by the conduct of the defendant and that, as a result of the emergency, the defendant chose a course of action which a reasonable person would have done under the circumstances, then the defendant's conduct would not be negligent. However, if you find that plaintiff's injuries resulted from the conduct of the defendant and that either an emergency did not exist, or the emergency situation was caused by the defendant's own conduct, or that the defendant, in the face of an emergency, failed to act as a reasonable person would have done under the circumstances, then the defendant would be negligent.

Authority

Mei v. Alterman Transport Lines, Inc., 159 Conn. 307, 310-12 (1970); *Miller v. Porter*, 156 Conn. 466, 469-70 (1968); *Puza v. Hamway*, 123 Conn. 205, 213 (1937); *Puchalsky v. Rappahahn*, 63 Conn. App. 72, 79-81, cert. denied, 256 Conn. 931 (2001).

Notes

Although drafted from the standpoint of the defendant, this charge is equally applicable to a claim asserted by a plaintiff. Whether a charge on the doctrine of sudden emergency is applicable depends upon the claims of proof advanced by the parties. To justify the instruction there must be an adequate basis in the claims of proof to satisfy each of the doctrine's elements: 1) that an emergency actually existed, 2) that the perilous situation was not created by the party requesting the charge, and 3) when confronted with the emergency, the party chose a course of action which would or might have been taken by a person of reasonable prudence in the same or similar situation. *Mei v. Alterman Transport Lines, Inc.*, supra, 159 Conn. 311-12; *Miller v. Porter*, supra, 156 Conn. 468-69. "The doctrine applies only in cases in which the operator is suddenly confronted by a situation not of his own making and has the opportunity of deciding rapidly between alternative courses of action." *Mei v. Alterman Transport Lines, Inc.*, supra, 159 Conn. 312, quoting *Vachon v. Ives*, 150 Conn. 452, 455 (1963).

The Connecticut Supreme Court has not considered the sudden emergency doctrine in recent years. The modern status of the doctrine in other jurisdictions is in flux. Criticism of the doctrine has centered mainly on the confusion of the doctrine with respect to the standard of care and its effect on the application of comparative negligence. See J. Ghent, *Modern Status of Sudden Emergency Doctrine*, 10 A.L.R.5th 680 (1993); W. Prosser & W. Keeton, *Torts* (5th Ed. 1986) § 33, pp. 196-97.

3.7-19 Family Car Doctrine - General Statutes § 52-182

New March 25, 2011 (modified September 28, 2012)

In Connecticut, we have a statute called the family car doctrine, which makes the owner of a car driven by the owner's (spouse/parent/child) liable to the same extent as the driver unless the owner proves that the driver was not authorized to drive the vehicle. In this case, <name of defendant owner> presented evidence through which (he/she) attempted to prove the driver was not authorized to drive the vehicle at the time of the accident. It is up to you to determine whether the evidence presented was sufficient to do so. If it was, then <name of defendant owner> cannot be held liable. If it was not, then you must find <name of defendant owner> liable to the same extent as the driver.

Authority

Jancura v. Szwed, 176 Conn. 285, 290 (1978).

3.7-20 Presumption of Agency - General Statutes § 52-183

New June 1, 2012

In Connecticut, we have a statute called the "presumption of agency" doctrine, which provides that if the driver of a motor vehicle is not the owner of the vehicle, the driver is presumed to be the agent and servant of the owner and driving the vehicle in the course of (his/her) employment, unless the defendant proves otherwise. This makes the owner of a car driven by the owner's agent liable to the same extent as the driver unless the owner proves that the driver was not authorized to drive the vehicle or was not driving the vehicle in the course of (his/her) employment. In this case, <name of defendant owner> presented evidence through which (he/she) attempted to prove the driver was <insert as applicable:>

- not authorized to drive the motor vehicle
- not driving the vehicle in the course of (his/her) employment.

It is up to you to determine whether the evidence presented was sufficient to do so. If it was, then <name of defendant owner> cannot be held liable. If it was not, then you must find <name of defendant owner> liable to the same extent as the driver.

Authority

General Statutes § 52-183; *Matthiessen v. Vanech*, 266 Conn. 822, 837-38 (2003).

3.8 PROFESSIONAL MALPRACTICE

3.8-1 Professional Malpractice - General

3.8-2 Fiduciary Duty

3.8-3 Medical Malpractice

3.8-4 Informed Consent

3.8-5 Legal Malpractice

3.8-6 Legal Malpractice - Settlement Advice

3.8-7 Insurance Agent Malpractice

3.8-1 Professional Malpractice - General

Revised to January 1, 2008

Here, the plaintiff claims that the defendant was negligent in that: *<list allegations of negligence>*.

The plaintiff further alleges that as a direct and proximate result of the acts and/or omissions of the defendant, the plaintiff was damaged.

The plaintiff need not prove that the defendant failed to use the required care, skill and diligence in all the ways alleged. It is enough if the plaintiff proves one or more of the allegations of negligence, provided the plaintiff also proves that such negligence was a legal cause of harm to the plaintiff.

The plaintiff's claims in this case are claims of professional malpractice, since the allegations of the complaint revolve around the conduct of defendant in the practice of (his/her) profession. Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by a reasonably prudent member of the profession with the result of injury, loss or damage to the recipient of those services.

In a malpractice case against a professional *<name of profession>*, it is incumbent upon the plaintiff to produce evidence as to what a skilled *<name of profession>* of ordinary prudence engaged in the same line of business would have exercised in the same or similar circumstances. This must be established through expert testimony.¹ When the question involved goes beyond the field of the ordinary knowledge and experience of judges or jurors, expert testimony is required.

Based on the evidence that has been presented, you must determine whether the defendant failed to exercise that degree of skill and learning commonly applied by a reasonably prudent *<name of profession>* under the circumstances here as you find them to be. If you find that the defendant failed to exercise such skill, you must then determine whether that lack of skill was a legal cause of the plaintiff's claimed injuries, and such legal cause must also be shown by expert testimony.

In every professional malpractice action, the plaintiff is required to prove that 1) the defendant was obligated to conform to the applicable standard of care, 2) the defendant departed from that standard, 3) the plaintiff suffered some injury, and 4) the defendant's departure from the standard of care caused the plaintiff harm.

¹ Expert testimony is not required where there is such an obvious and gross lack of care and skill that it is clear even to a layperson. *Davis v. Margolis*, 215 Conn. 408, 416 n.6 (1990). Some Superior Court opinions have held that whether the exception applies is a question of law. *Thompson v. Putnam Kitchens*, Superior Court, judicial district of Stamford-Norwalk at

Stamford, Docket No. CV 02 0188635 (December 7, 2004); *Faulise v. Eisenstein*, Superior Court, judicial district of New Britain, Docket No. CV 98 0490341 (October 30, 2000); *Digioia v. Greenberg*, Superior Court, judicial district of New Haven, Docket No. CV 0350406 (October 11, 1995).

Authority

Davis v. Margolis, 215 Conn. 408, 415-16 (1990); *Sherman v. Bristol Hospital, Inc.*, 79 Conn. App. 78, 88 n.6 (2003); *Ahern v. Fuss and O'Neill, Inc.*, 78 Conn. App. 202, 208-209 (2003); *Gordon v. Glass*, 66 Conn. App. 852, 855-56 (2001), cert. denied, 259 Conn. 909 (2002); *Matyas v. Minck*, 37 Conn. App. 321, 326-27 (1995).

3.8-2 Fiduciary Duty

Revised to January 1, 2008

A. Description of Fiduciary Relationship

In the __ count of the complaint, the plaintiff has alleged that the defendant acted as (his/her/its) fiduciary for the purpose of *<state specific purpose of fiduciary relationship>* and that the defendant breached the fiduciary duty created by that relationship. The plaintiff must prove, by a preponderance of the evidence, as I have defined that phrase for you, that a fiduciary relationship existed between the plaintiff and the defendant and that the defendant was acting as the plaintiff's fiduciary when the defendant engaged in *<summarize allegations of complaint>*.

A fiduciary relationship is one in which one party, known as the principal, has a unique degree of trust and confidence in the other party, known as the fiduciary, who has superior knowledge, skill, or expertise, and who has a duty to act on behalf of the interests of the principal. You may find that a fiduciary responsibility existed only where one party to such relationship is unable to protect its interests fully or where one party has a high degree of control over the property or subject matter of another and the unprotected party has placed its trust and confidence in the other. No fiduciary relationship or responsibility arises between the parties where the parties were acting at arm's length, lacking a relationship of dominance and dependency, or were not engaged in a relationship of special trust and confidence.

It is for you to determine, after a consideration of all the evidence bearing on this point, whether the plaintiff justifiably placed special trust and confidence in the defendant, who then exercised superiority, influence and/or control over the plaintiff's property or interests.

If the plaintiff has failed to prove that the defendant had a fiduciary relationship with the plaintiff, then you would return a defendant's verdict on this count. If the plaintiff has satisfied its burden of proving that the defendant owed the plaintiff a fiduciary duty with respect to the allegations of the __ count, then you will proceed to determine if the defendant breached that duty in any of the ways alleged by the plaintiff.

Authority

Sherwood v. Danbury Hospital, 278 Conn. 163, 195-96 (2006); *Biller Associates v. Peterken*, 269 Conn. 716, 723-24 (2004); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 41 (2000); *Dunham v. Dunham*, 204 Conn. 303, 320-23 (1987), overruled in part on other grounds, *Santopietro v. New Haven*, 239 Conn. 207, 213 n.8 (1996); *DeMorais v. Wisniewski*, 81 Conn. App. 595, 606-607, cert. denied, 268 Conn. 923 (2004).

B. Liability of Fiduciary (fraud, self-dealing, conflict of interest)

In this count, the plaintiff has alleged that the defendant, acting as the plaintiff's fiduciary, engaged in (fraud / self-dealing / conflict of interest) by *<recite pertinent allegations>*.

If the defendant owed the plaintiff a fiduciary duty, the defendant was obligated to treat the plaintiff's interests and property, which were the subject of the parties' relationship, with the

utmost sensitivity, honesty, candor, scrupulous good faith, and undivided loyalty. A fiduciary cannot act toward the principal as if the fiduciary had merely an ordinary business relationship with the principal. By principal, I mean the person to whom the fiduciary owed a duty. A fiduciary must act exclusively in the interests of those depending upon the fiduciary even if the resulting action is detrimental to the fiduciary's own interests. The fiduciary must act not merely reasonably, but also fairly, with regard to the principal.

Therefore, our law presumes that if the fiduciary gained any financial advantage or benefit at the expense of the plaintiff, that benefit or advantage was acquired in breach of the fiduciary duty owed to the principal. As a consequence, the law shifts the burden of proof of (fraud / self-dealing / conflict of interest) from the plaintiff to the fiduciary to prove that the transaction which resulted in benefit to the fiduciary was the product of fair dealing, good faith, and full disclosure. In addition, the fiduciary is required to prove fair dealing and proper conduct by the heightened standard of clear and convincing evidence.

<Instruct on Clear and Convincing Evidence, Instruction 3.2-2>

If the defendant satisfies you, by clear and convincing evidence, that any financial gain or benefit acquired was the result of fair dealing with respect to the plaintiff and not the product of (fraud, self-dealing, conflict of interest), then you would return a verdict for the defendant on this count.

If the defendant has failed to meet its burden of proof, then you would proceed to consider whether the plaintiff has proved, by a preponderance of the evidence, the amount of damages, if any, which resulted from the defendant's breach of fiduciary duty.

<Instruct on compensatory and punitive damages: see Damages - General, Instruction 3.4-1 and Damages - Punitive, Instruction 3.4-4.>

Authority

Sherwood v. Danbury Hospital, 278 Conn. 163, 195-196 (2006); *Cadel Co. v. D'Addario*, 268 Conn. 441, 455-57 (2004); *Murphy v. Wakelee*, 247 Conn. 396, 400-406 (1998); *Oakhill Associates v. D'Amato*, 228 Conn. 723, 726-27 (1994); *Konover Development Corp. v. Zeller*, 228 Conn. 206, 219-230 (1994).

C. Liability of Fiduciary (sophisticated, commercial parties)

In this count, the plaintiff has alleged that the defendant, acting as the plaintiff's fiduciary, engaged in (fraud / self-dealing / conflict of interest) by *<recite pertinent allegations>*.

If the defendant owed the plaintiff a fiduciary duty, the defendant was obligated to treat the plaintiff's interests and property, which were the subject of the parties' relationship, with the utmost sensitivity, honesty, candor, scrupulous good faith, and undivided loyalty. A fiduciary cannot act toward the principal as if the fiduciary had merely an ordinary business relationship with the principal. By principal, I mean the person to whom the fiduciary owed a duty. A fiduciary must act exclusively in the interests of the principal even if the resulting action is detrimental to the fiduciary's own interests. The fiduciary must act not merely reasonably, but also fairly, with regard to the principal.

Therefore, our law presumes that if the fiduciary gained any financial advantage or benefit at the expense of the plaintiff, that benefit or advantage was acquired in breach of the fiduciary duty owed to the principal. As a consequence, the law shifts the burden of proof of (fraud / self-dealing / conflict of interest) from the plaintiff to the fiduciary to prove that the transaction which resulted in benefit to the fiduciary was the product of fair dealing, good faith, and full disclosure. In addition, the fiduciary is required to prove fair dealing and proper conduct by the heightened standard of clear and convincing evidence.

<Instruct on Clear and Convincing Evidence, Instruction 3.2-2>

Among sophisticated, commercial parties, like the plaintiff and defendant in this case, the parties may contractually agree that the fiduciary will gain some advantage or benefit at the expense of the principal while still maintaining the fairness of the transaction in question. Such a beneficial transaction is permissible and does not breach the defendant's fiduciary duty as long as the transaction under scrutiny was explicitly part of the contract between the parties and consideration of the factors described below convince you that the defendant has dealt fairly with the plaintiff.

Important factors in determining whether a particular transaction is fair include a showing by the fiduciary: 1) that the fiduciary made a free and frank disclosure of all the relevant information which the fiduciary possessed surrounding the transaction; 2) that the compensation received by the principal was adequate; 3) that the principal had competent and independent advice before completing the transaction; and 4) the relative sophistication and bargaining power among the parties.

If the defendant satisfies you, by clear and convincing evidence, that any financial gain or benefit acquired was the result of fair dealing with respect to the plaintiff, and not the product of (fraud /self-dealing / conflict of interest), then you would return a verdict for the defendant on this count.

If the defendant has failed to meet its burden of proof, then you would proceed to consider whether the plaintiff has proved, by a preponderance of the evidence, the amount of damages, if any, which resulted from the defendant's breach of fiduciary duty.

<Instruct on compensatory and punitive damages: see Damages - General, Instruction 3.4-1 and Damages - Punitive, Instruction 3.4-4.>

Authority

Konover Development Corp. v. Zeller, 228 Conn. 206, 219-230 (1994); *Spector v. Konover*, 57 Conn. App. 121, 129, cert. denied, 254 Conn. 913 (2000).

D. Fiduciary Liability Where No Fraud, Self-Dealing, Conflict of Interest Alleged

Note: Under *Cadle Co. v. D'Addario*, 268 Conn. 441, 456-57 (2004), there is no burden shifting in the absence of allegations of fraud, self-dealing, or conflict of interest which benefit the fiduciary.

In this count, the plaintiff alleges that the defendant breached the fiduciary duty owed to the plaintiff in the following specific ways: *<recite allegations in complaint>*.

If you find that the plaintiff has failed to prove, by a preponderance of the evidence, any of the plaintiff's allegations of breach of fiduciary duty, then you will return a verdict for the defendant on this count.

However, if you find that the plaintiff has proven, by a preponderance of the evidence, that the defendant violated the fiduciary duty owed to the plaintiff in one or more of the ways alleged, then you will proceed to determine if the breach of fiduciary duty proven caused the damages which the plaintiff claims resulted from such violation.

In summary, in order to prevail the plaintiff must prove, by a preponderance of the evidence: 1) that the defendant was acting as a fiduciary of the plaintiff with respect to *<state specific purpose of fiduciary relationship>*, 2) that the defendant breached this fiduciary duty, and 3) that this breach of fiduciary duty caused the plaintiff's damages.

<Instruct on compensatory and punitive damages: see Damages - General, Instruction 3.4-1 and Damages - Punitive, Instruction 3.4-4.>

3.8-3 Medical Malpractice

Revised to February 1, 2013

The plaintiff in this case, *<name of plaintiff>*, claims that (he/she) has been injured through the negligence of the defendant, *<name of defendant>*. Negligence is the violation of a legal duty which one person owes to another.

The legal duty that a health care provider, such as Dr. *<name>*, owes to a patient, such as *<name of patient>*, has been established by our legislature.

We have a statute which provides that "[i]n any civil action to recover damages resulting from personal injury . . . in which it is alleged that such injury resulted from the negligence of a health care provider . . . the claimant shall have the burden of proving by a preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."¹

Because the health care provider in this case, Dr. *<name>*, has been certified by the appropriate American board as a specialist, a "similar health care provider" in this case is, according to our statute, "one who: 1) is trained and experienced in the same specialty; and 2) is certified by the appropriate American board in the same specialty."²

In this case, Dr. *<name>*'s specialty is *<insert defendant's specialty>*. The prevailing professional standard of care that applies to (him/her) is thus the level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent board certified *<insert type of specialists>*. This standard applies to both diagnosis and treatment. In order to establish liability, the plaintiff must prove by a fair preponderance of the evidence that Dr. *<name>*'s conduct represented a breach of the prevailing professional standard of care that I have just described.

The standard of care is the standard prevailing at the time of the treatment in question. The treatment in question occurred in *<year>*.

A *<specialist>* such as Dr. *<name>* is held to the same prevailing professional standard of care applicable to *<specialists>* across the nation. For this reason, the particular state in which an expert witness has practiced is unimportant. You should consider the testimony of all the experts who have testified in light of their familiarity or lack of familiarity with the standard of care to which I have referred.

A doctor does not guarantee a good medical result. A poor medical result is not, in itself, evidence of any wrongdoing by the health care provider. The question on which you must focus is whether the defendant has breached the prevailing professional standard of care.

As I have already mentioned, the plaintiff has the burden of proving by a fair preponderance of the evidence that Dr. <name>'s conduct represented a breach of the prevailing professional standard of care. Under our law, the plaintiff must prove this by expert testimony. More specifically, (he/she) must establish through expert testimony both what the standard of care is and (his/her) allegation that Dr. <name>'s conduct represented a breach of that standard. Finally, (he/she) must establish, through expert testimony, that the breach of that standard of care was the proximate cause of the injuries that (he/she) claims.

<Review the specifications of negligence in the complaint.>

[<Insert if a claim of lost chance of survival is made:> In this case, <name of plaintiff> claims [in part] that <name of patient> suffered a lost chance of survival which was proximately caused by the negligence of <name of defendant>, because if <name of defendant> was not negligent, <name of patient> would have had a greater than 50 percent chance of surviving. This is called a "loss of chance" claim. To prove (his/her) claim, <name of plaintiff> must prove, by a preponderance of the evidence:

1. that <name of patient> was in fact deprived of a chance of survival, and
2. that (his/her) decreased chance of survival more likely than not resulted from the negligence of <name of defendant>.

In order to establish this claim, <name of plaintiff> must prove that absent <name of defendant>'s professional negligence, <name of patient> had a greater than 50 percent chance of survival. It is not sufficient for <name of plaintiff> to prove that the negligent conduct deprived <name of patient> of some chance of survival. <Name of plaintiff> must prove that the negligent conduct more likely than not affected the actual outcome. In other words, if <name of patient> probably would not have survived, even if (he/she) was treated properly, (his/her) death was caused by (his/her) medical condition, and not <name of defendant>'s negligence.

However, if you find that if <name of patient> had been properly treated, more likely than not (he/she) would have survived, then (his/her) death would be the result of <name of defendant>'s negligence and not (his/her) underlying condition.]

¹ General Statutes § 52-184c (a).

² General Statutes § 52-184c (c).

Authority

General Statutes § 52-184c; *Jarmie v. Troncale*, 306 Conn. 578, 587-88 (2012); *Carrano v. Yale-New Haven Hospital*, 279 Conn. 622, 659 n.31 (2006); *Boone v. William W. Backus Hospital*, 272 Conn. 551, 573-75 (2005); *Peterson v. Ocean Radiology Associates, P.C.*, 109 Conn. App. 275, 277-79 (2008); *LaBieniec v. Baker*, 11 Conn. App. 199, 207-08 (1987).

Notes

The standard of care in negligence actions against health care providers is governed by statute. General Statutes § 52-184c. This instruction is an affirmative description of what medical malpractice is under the controlling statute. It intentionally avoids argumentative statements, sometimes found in pre-statutory common-law cases, of what malpractice is not. Instructional statements of the latter description are unnecessary under the controlling statute and should ordinarily be avoided.

The charge would, of course, be given in addition to Expert Witnesses, Instruction 2.5-3

The Committee regards a lost chance of survival claim as an issue of causation and not as a separate action for medical malpractice or as a separate element of damages. But see *Borkowski v. Sacheti*, 43 Conn. App. 294, 311, cert. denied, 239 Conn. 945 (1996).

3.8-4 Informed Consent

Revised to January 1, 2008

The theory of informed consent imposes a duty upon a physician that is completely separate and distinct from (his/her) responsibility to skillfully diagnose and treat the patient's ills. A physician has a duty to disclose all known material risks of the proposed procedure. A material risk is risk that a reasonably prudent person in the patient's position would have found significant in deciding whether or not to submit to the proposed procedure. The physician has a duty to give a patient whose situation permits it all information material to the decision to undergo the proposed procedure. This duty includes a responsibility to advise the patient of feasible alternatives. The duty to warn of alternatives exists only when there are feasible alternatives available.

The plaintiff must prove both that there was a failure to disclose a known material risk of a proposed procedure and that such failure was a proximate cause of (his/her) injury. In order to find proximate cause in this context, you must find that a disclosure of the material risks of the proposed procedure would have resulted in a decision by a reasonably prudent person in the patient's position not to submit to the proposed procedure. The particular patient's reaction, had (he/she) received the information as to the risks involved, is not the governing one with respect to the duty to inform. The standard is what a reasonably prudent person in the patient's position would have decided if suitably informed of all material risks.

Authority

Godwin v. Danbury Eye Physicians & Surgeons, P.C., 254 Conn. 131, 143 (2000); *Logan v. Greenwich Hospital Assn.*, 191 Conn. 282, 287-95 (1983); *Hammer v. Mount Sinai Hospital*, 25 Conn. App. 702, 711-12, cert. denied, 220 Conn. 933 (1991).

Notes

If the charge addresses other counts of medical malpractice, the jury should be informed that the count of informed consent is governed by the lay standard of disclosure and that, unlike the law governing medical malpractice, there is no requirement that the standard in question or its breach be established by expert testimony.

3.8-5 Legal Malpractice

Revised to January 1, 2008

In a legal malpractice action, the plaintiff must prove by a preponderance of the evidence three essential elements:

- 1) that the defendant, *<name of defendant>*, was the plaintiff's attorney in the matter of *<nature of representation>*;
- 2) that the attorney departed from the standard of professional care owed to protect the plaintiff's legal interests in that matter; and
- 3) that this departure was a legal cause of harm to the plaintiff. I shall explain the term "legal cause" to you in more detail shortly.

[In this case, the defendant has conceded that (he/she) represented the plaintiff for the purpose of *<nature of representation>*.]

[*<If the defendant has not conceded that (he/she) represented the plaintiff for such purpose:>*

As to the first element of legal malpractice, the defendant denies that (he/she) had an attorney-client relationship with the plaintiff regarding the transaction[s] which (is/are) the subject of the plaintiff's claim of professional negligence.

An attorney-client relationship is established when the advice and assistance of an attorney is sought and received in matters pertinent to the legal profession. It is the obligation of an attorney to provide the legal services for which (he/she) was hired. This duty extends only to those services within the legal profession which the attorney agreed, expressly or impliedly, to provide on behalf of the client and does not extend to the business of the plaintiff in general.

The burden is on the plaintiff to prove, by a preponderance of the evidence, that such an attorney-client relationship existed between the parties with respect to the malpractice alleged by the plaintiff.]

In an ordinary negligence action, for instance, one brought to recover damages for injuries arising out of an automobile accident, the jury does not need evidence as to the degree of care which the automobile operator should have used under the circumstances, as it is assumed that, from your own experience, you are aware of the necessary degree of care. In a malpractice action, however, the situation, as I am sure you understand, is quite different. Malpractice is really professional negligence. Because jurors are probably unfamiliar with legal procedures, methods, and strategies, you obviously cannot be expected to know the demands of proper legal representation. It is for this reason that expert testimony is required to define the standard of care or the duty owing from the lawyer to his client, whether that duty has been breached, and whether that breach of duty caused the damages the plaintiff claims, so that you can reasonably

and logically conclude what the proper standard of professional care was, whether or not it was violated, and whether that violation was a legal cause of harm to the plaintiff.¹

Although the standard of care is a matter of expert opinion, the determination of the facts and the measuring of the facts by the standard is for you, the jury.

The rule of law applicable in legal malpractice cases is as follows: An attorney, in representing a client, is obligated to exercise that degree of knowledge, skill, and diligence which lawyers in Connecticut and in the same general line of practice as the defendant ordinarily have and exercise in similar cases. You will recall that we are talking about a lawyer practicing in the field of *<area of law>*.

<Recite allegations.>

The plaintiff need not prove that the defendant failed to possess and use the required knowledge, skill, and diligence in all the ways alleged. It is enough if the plaintiff proves one or more of the allegations of professional negligence, provided the plaintiff also proves that such negligence, if proven, was a legal cause of the plaintiff's damages.

The test in this case for determining what constitutes sufficient knowledge, skill, and diligence on the part of the defendant is that which attorneys ordinarily have and exercise in similar cases. That means that the law does not expect from an attorney the utmost care and skill obtainable or known to the profession. Furthermore, the fact that the representation was unsuccessful or the result was not as favorable as hoped by the client or the attorney raises no presumption of lack of knowledge, skill, or diligence. Negligence and unskillfulness are not presumed. As previously stated, the plaintiff has the burden of proof in this regard.

In order, then, to obtain a verdict against the defendant, the plaintiff must prove, by a fair preponderance of the evidence, that the defendant was the plaintiff's attorney regarding *<nature of representation>*; that the defendant failed to possess or exercise the knowledge, skill, and diligence ordinarily exercised by such an attorney in one or more of the ways alleged, and that that lack of knowledge, skill, and diligence was a legal cause of the plaintiff's damages.

¹ Expert testimony is not required where there is such an obvious and gross lack of care and skill that it is clear even to a layperson. *Davis v. Margolis*, 215 Conn. 408, 416 n.6 (1990). Some Superior Court opinions have held that whether the exception applies is a question of law. *Thompson v. Putnam Kitchens*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 02 0188635 (December 7, 2004); *Faulise v. Eisenstein*, Superior Court, judicial district of New Britain, Docket No. CV 98 0490341 (October 30, 2000, *Kocay, J.*); *Digioia v. Greenberg*, Superior Court, judicial district of New Haven, Docket No. CV 0350406 (October 11, 1995).

Authority

DiStefano v. Milardo, 276 Conn. 416, 422 (2005); *Davis v. Margolis*, 215 Conn. 408, 415-416 (1990); *Kregos v. Stone*, 88 Conn. App. 459, 464-466, cert. denied, 275 Conn. 901 (2005); *Somma v. Gracey*, 15 Conn. App. 371, 379 (1988).

3.8-6 Legal Malpractice - Settlement Advice

Revised to January 1, 2008

With regard to the plaintiff's allegation that the defendant rendered faulty legal advice concerning accepting a settlement offer, it is worthwhile to remember that pretrial settlement of claims is encouraged because, in the vast majority of cases, an amicable resolution of disputes is in the best interest of all concerned. However, although such settlements are desirable, attorneys giving advice to clients as to whether to accept or reject offers of settlement are still required to employ that same skill, knowledge, and diligence with which they pursue all other legal tasks.

I point out to you that an attorney would not be liable simply because the attorney was unsuccessful in persuading an opposing party to accept certain terms. Also, I remind you that an attorney who pursues reasonable strategies and renders reasonable settlement advice to the client cannot be held liable merely because those strategies fail or because of an unprofitable outcome that results because the client followed that advice. While the law demands that lawyers handle their cases with knowledge, skill, and diligence, it does not require that attorneys be perfect or infallible nor that they always secure the most successful outcome for the client.

In advising a client concerning settlement, the attorney must exercise that degree of learning and skill which the average and ordinarily prudent attorney in that line of practice in Connecticut would apply under all the relevant circumstances. Consequently, the plaintiff must prove, by a preponderance of the evidence, not only that the defendant rendered certain settlement advice which the plaintiff followed to his financial detriment, but also that the advice given to (him/her) fell below the standard for lawyers in that field of practice in Connecticut.

Authority

Grayson v. Wofsey, Rosen, Kweskin, & Kuriansky, 231 Conn. 168, 173-177 (1994).

3.8-7 Insurance Agent Malpractice

Revised to January 1, 2008

Here the plaintiff claims that the defendant was negligent in that: *<list allegations of negligence>*.

The plaintiff further alleges that as a direct and proximate result of the acts and/or omissions of the defendant, the plaintiff was damaged.

The plaintiff need not prove that the defendant failed to use the required care, skill, and diligence in all the ways alleged. It is enough if the plaintiff proves one or more of the allegations of negligence, provided the plaintiff also proves that such negligence was a legal cause of (his/her) losses.

The plaintiff claims that in failing to obtain the insurance coverage requested by the plaintiff, the defendant insurance agent breached (his/her) obligation to perform under the reasonable standard of care of an insurance agent. The defendant held (himself/herself) out to be a skilled insurance agent. As such, the defendant was bound to exercise the same degree of care as a skilled insurance agent of ordinary prudence, engaged in the same line of business.

Negligence is the breach of a legal duty which one person owes to another to care for the safety of that person or that person's property. To the extent that the defendant was acting as the plaintiff's agent, the defendant owed the plaintiff a duty to exercise reasonable skill, care, and diligence in obtaining the insurance, and any negligence or other breach of duty on the defendant's part that defeats the insurance which (he/she) undertakes to secure renders (him/her) liable to the plaintiff for the resulting loss. Where an agent, like the defendant, undertakes to procure a policy affording protection against a designated risk, the law imposes upon (him/her) an obligation to perform with reasonable care the duty (he/she) has assumed, and the defendant may be held liable for loss properly attributable to (his/her) breach. An agent acts negligently if (he/she) fails to obtain the insurance requested or fails to notify the client of (his/her) inability to do so.

As I have already mentioned, the plaintiff has the burden of proving its negligence claim by a fair preponderance of the evidence, that is, that the defendant's conduct represented a breach of the prevailing professional standard of care. Under our law, the plaintiff must prove this by expert testimony.¹ More specifically, the plaintiff must establish, through expert testimony, both what the standard of care is and the allegations that the defendant's conduct represented a breach of that standard. Additionally, the plaintiff must establish through expert testimony that the breach of the standard of care was a legal cause of the injury that the plaintiff claims to have occurred.

Keeping in mind all the requirements I just discussed, if the plaintiff has failed to prove by a preponderance of the evidence that the defendant breached the prevailing professional standard

of care, or that said breach was a legal cause of the injuries claimed, or that no damages resulted therefrom, you must render a verdict for the defendant on this claim.

¹ Expert testimony is not required where there is such an obvious and gross lack of care and skill that it is clear even to a layperson. *Davis v. Margolis*, 215 Conn. 408, 416 n.6 (1990). Some Superior Court opinions have held that whether the exception applies is a question of law. *Thompson v. Putnam Kitchens*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 02 0188635 (December 7, 2004); *Faulise v. Eisenstein*, Superior Court, judicial district of New Britain, Docket No. CV 98 0490341 (October 30, 2000); *Digioia v. Greenberg*, Superior Court, judicial district of New Haven, Docket No. CV 0350406 (October 11, 1995).

Authority

Ursini v. Goldman, 118 Conn. 554, 559 (1934); *Dimeo v. Burns, Brooks & McNeil, Inc.*, 6 Conn. App. 241, 244-45, cert. denied, 199 Conn. 805 (1996); *Todd v. Malafronte*, 3 Conn. App. 16, 22 (1984).

3.9 PREMISES LIABILITY

Status of Parties

3.9-1 Status of Parties - General

3.9-2 Status of Parties - Trespasser

3.9-3 Status of Parties - Licensee

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3.9-5 Status of Parties - Children

**3.9-6 Status of Parties - Invitee of
Tenant/Common Areas**

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Control

3.9-9 Control

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Notice

3.9-12 Actual Notice of Condition

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3.9-20 Plaintiff's Duty to Use Faculties

Nuisance

3.9-21 Nuisance - Introductory Note

3.9-22 Private Nuisance - Injury to Property

3.9-23 Private Nuisance - Damages

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3.9-26 Public or Private Nuisance - Control

3.9-27 Public Nuisance - Intentional or Negligent

Other

**3.9-28 Duty to Protect from Wrongful Conduct of
Third Persons**

3.9-29 Negligence of Independent Contractor

3.9-30 State Highway Defect Case - § 13a-144

**3.9-31 Municipal Sidewalk (Road, Bridge) Defect -
§ 13a-149**

**3.9-32 Municipal Sidewalk (Road, Bridge) Snow
and Ice- § 13a-149**

3.9-33 Strict Liability of One Who Keeps a Dog

**3.9-34 Duty to Remove Snow and Ice - Ongoing
Storm**

**3.9-35 Ski Area Operator Liability, General
Statutes §§ 29-211 and 29-212**

3.9-1 Status of Parties - General

Revised to January 1, 2008

In determining whether the defendant is liable to the plaintiff, it is necessary for you, the jury, to decide what, if any, duty the defendant owed to the plaintiff. Under our law, this depends on what the status of the plaintiff was in entering and remaining on the premises. If the plaintiff was a trespasser, that may obligate the defendant to do or refrain from doing certain things about the premises. If the plaintiff was a licensee (I will explain this term in a moment), then another set of obligations is due from the defendant. If the plaintiff is an invitee, then a third set of legal duties is owed by the defendant.

[<If status is stipulated to or admitted:> The (parties agree / defendant admits the allegation) that the plaintiff had the status of (a/an) (trespasser / licensee / invitee). I will now explain what the law says about the duty of the defendant to one who has that status.]

[<If status of plaintiff is disputed:> The determination of the plaintiff's status is a question of fact for you to determine. Your decision about what the plaintiff's status was will then lead you to answer the question "what, if any, duty did the defendant owe to the plaintiff?" according to the instructions that follow. Your first question in this premises liability case, however, is what was the status of the plaintiff? The plaintiff claims (he/she) had the status of (a/an) (trespasser / licensee / invitee); the defendant claims the plaintiff had the status of (a/an) (trespasser / licensee / invitee). Since you must resolve this dispute, I will now explain the definition of [trespasser], [licensee], and [invitee]; and in each case what the law says about the duty of the defendant.]

Notes

In charging on premises liability, the status of the plaintiff determines the standard of care the defendant owes to the plaintiff. The following sections are arranged so that "Status of the Parties" includes the standard of care.

3.9-2 Status of Parties - Trespasser

Revised to January 1, 2008 (modified May 12, 2014)

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so.

A possessor of land owes no duty to safeguard from harm a person who comes upon the land as a trespasser. The possessor has a right to assume that no one will trespass upon the land. The possessor has no duty to keep the land reasonably safe for any adult trespasser. Rather, there is only a duty to refrain from intentional, willful, wanton or reckless conduct that causes injury to the trespasser.

If a possessor of land has knowledge that trespassers constantly intrude upon a limited area of the land, the possessor of land is liable for an artificial condition that caused injury to the trespasser on that part of the land if all of the following are met:

1. the condition is one that the possessor has created or maintains, and
2. the condition is one that, to the possessor's knowledge, is likely to cause death or serious bodily harm to such trespassers, and
3. the condition is of such a nature that the possessor has reason to believe that such trespassers will not discover it, and
4. the possessor has failed to use reasonable care to warn such trespassers of the artificial condition and the risk involved.

Authority

Maffucci v. Royal Park Ltd. Partnership, 243 Conn. 552, 558-60 (1998).

Notes

This charge is drafted in the context where the dangerous condition on the property is artificial and the trespasser is an adult. If the trespasser is a child, give the following charge instead: Status of Parties - Children, Instruction 3.9-5. Connecticut also recognizes liability to trespassers for dangerous activities on the property, as noted in *Morin v. Bell Court Condominium Association, Inc.*, 223 Conn. 323 (1992) and *Maffucci v. Royal Park Ltd. Partnership*, 243 Conn. 552, 559 n.8 (1998), both of which cite to *Carlson v. Connecticut Co.*, 95 Conn. 724 (1921) and Restatement (Second), Torts § 334. For dangerous activities, adjust this charge as necessary.

3.9-3 Status of Parties - Licensee

Revised to May 12, 2014

A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent, that is, with the possessor's permission or with the possessor's express or implied consent. A person who is a licensee has certain privileges that a trespasser does not have. A possessor of land owes no duty to a licensee to keep the premises in a safe condition, because the licensee must take the premises as (he/she) finds them and assumes the risk of any danger arising out of an obvious condition. When, then, is a possessor of land liable for injury sustained by a licensee?

A possessor of land is subject to liability for injury to a licensee caused by a condition on the land if, but only if:

1. the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensee, and should expect that (he/she) will not discover or realize the danger, and
2. the possessor fails to exercise reasonable care to make the condition safe, or to warn the licensee of the condition and the risk involved, and
3. the licensee does not know or have reason to know of the condition and the risk involved. [Caveat: see the concerns in the notes regarding the compatibility of the third prong with the abolition of the assumption of the risk doctrine and the adoption of comparative negligence.]

[<Insert if "reason to know" is at issue:> A possessor of land has reason to know of a dangerous condition if (he/she/it) had factual information that would have led a person of reasonable intelligence to conclude that the condition was dangerous. The possessor of land must already know this factual information; (he/she/it) does not owe a duty to a licensee to inspect the property to discover such factual information.]

[<Insert if the condition is the result of active operations on the property:> If the possessor engages in active operations on the land, such as <insert alleged active operations>, there is a duty to exercise reasonable care for the protection of the licensee, that is, to act with due regard for the possibility that the licensee may be present.]

Authority

See *Salaman v. Waterbury*, 246 Conn. 298, 305-308 (1998) (absent hidden hazards, no duty to warn adult swimmer about the dangers of drowning in an observable body of water); *Derby v. Connecticut Light & Power Co.*, 167 Conn. 136, 142 (1974), cert. denied, 421 U.S. 931 (1975) (no duty when licensor has no actual or imputed knowledge of the dangerous condition); *Corcoran v. Jacovino*, 161 Conn. 462, 467 (1971) (duty to licensee); 1 Restatement (Second), Torts § 342 (1965). See also *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323,

327-28 (1992), citing W. Prosser and W. Keeton, Torts (5th Ed.) § 60, p. 416 (duty re: active operations).

Notes

Police officers and firefighters who are on private property in the exercise of their duties are treated as licensees. *Furstein v. Hill*, 218 Conn. 610, 615-16 (1991); *Morin v. Bell Court Condominium Assn., Inc.*, supra, 223 Conn. 328.

The Connecticut Supreme Court has consistently followed the Restatement of Torts § 342 for the duty owed by possessors of land to licensees, but the duty recognized in § 342 has changed over time. In 1939, the Restatement (First) of Torts § 342 stated that a duty exists only where the possessor of land knows of the dangerous condition ("knows of the condition"). In 1965, the Restatement (Second) of Torts § 342 broadened that duty to include circumstances where the possessor of land has reason to know of the dangerous condition ("knows or has reason to know of the condition").

The Restatement (Second) also added the third prong, whereby a possessor of land is not liable if the licensee knew or had reason to know of the dangerous condition and the risk involved. Query whether the third prong runs afoul of Connecticut's abolishment of the assumption of the risk doctrine and the adoption of comparative negligence.

Since 1965, the Connecticut Supreme Court has cited to both versions of § 342, leaving it debatable as to whether it is following the Restatement (First) or the Restatement (Second). Nevertheless, the committee believes that the court has adopted the Restatement (Second) version. In the cases where the court cited to the Restatement (Second), the issue of knowledge of the dangerous condition was directly at issue on appeal. *Derby v. Connecticut Light & Power Co.*, supra, 167 Conn. 136; *Furstein v. Hill*, supra, 218 Conn. 610. In contrast, in the three opinions citing to the Restatement (First), knowledge of the dangerous condition was not directly at issue, and only one of those cases, *Salaman*, was decided after the cases citing to the Restatement (Second). *Salaman v. Waterbury*, supra, 246 Conn. 298; *Corcoran v. Jacovino*, supra, 161 Conn. 462; *Dougherty v. Graham*, 161 Conn. 248 (1971).

A distinction exists between the phrases "reason to know" in this instruction and "should know" as used in Constructive Notice - Invitee, Instruction 3.9-13. "Both the expression 'reason to know' and 'should know' are used with respect to existent facts. These two phrases, however, differ in that 'reason to know' implies no duty of knowledge on the part of the [defendant] whereas 'should know' implies that the [defendant] owes another the duty of ascertaining the fact in question." *Furstein v. Hill*, supra, 218 Conn. 610, 625-26 n.5, quoting 1 Restatement (Second), Torts § 12, comment (a) (1965).

3.9-4 Status of Parties - Invitee

Revised to January 1, 2008

An invitee is one who either expressly or impliedly has been invited to go on the premises of the defendant. An invitee goes upon the premises at the express or implied invitation of the possessor for the possessor's benefit or for the mutual benefit of both. One who goes upon land in the possession of another as a business visitor is an invitee.

If you find that the plaintiff was an invitee, then the defendant owed (him/her) the following duties:

- 1) the duty to use reasonable care to inspect and maintain the premises and to make the premises reasonably safe;
- 2) the duty to warn or guard the visitor from being injured by reason of any defects that the invitee could not reasonably be expected to discover;
- 3) the duty to conduct activities on the premises in such a way so as not to injure the visitor.

Authority

Fleming v. Garnett, 231 Conn. 77, 83-84 (1994); *Warren v. Stancliff*, 157 Conn. 216, 218 (1968); cf. *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 327 (1992).

Notes

The standard of care owed to a social invitee is the same as the standard of care owed to a business invitee. General Statutes § 52-557a.

3.9-5 Status of Parties - Children

Revised to January 1, 2008

If certain conditions are present, the law imposes upon the possessor of land the duty to take reasonable care to safeguard children from danger even if they are trespassers on the property.

The conditions which must all be present to give rise to this duty are these:

- 1) the injury suffered by the child must be due to some structure, thing or other artificial condition on the premises;
- 2) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;
- 3) the condition is one that the possessor knows of or of which the possessor has reason to know;
- 4) the condition is one that the possessor realizes or should realize involves an unreasonable risk of death or serious bodily harm to such children;
- 5) children coming on the premises, because of their youth, would not discover the thing or condition, or realize the risk of meddling with it or coming within the area made dangerous by it;
- 6) the utility of maintaining the condition as it is and the burden of eliminating the danger by changing it or safeguarding it, are slight as compared with the risk to children; and
- 7) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

Authority

Duggan v. Esposito, 178 Conn. 156, 158-59 (1979), citing Restatement (Second), Torts § 339 (1965); see also *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 332-33 (1992).

3.9-6 Status of Parties - Invitee of Tenant/Common Areas

Revised to January 1, 2008

The plaintiff was upon the premises on the way to visit one of the tenants and for that purpose was using a (stairway / hallway / sidewalk) provided by the defendant for the common use of tenants. The duty of the landlord is the same for guests of tenants as for the tenants themselves, namely to use reasonable care to keep the common areas reasonably safe.

Authority

Gibson v. Hoppman, 108 Conn. 401 (1929); *Curran v. McCall*, 4 Conn. App. 531, 534-35 (1985).

3.9-7 Status of Parties - Business Invitee of Tenant

Revised to January 1, 2008

In this case, the landlord, *<name of landlord>*, leased the property to *<name of tenant>*, the tenant. If you find that the plaintiff was on the premises as an invitee (as previously defined) of the tenant, it was the legal duty of the tenant to use reasonable care to keep the premises reasonably safe for invitees. A question raised in this case is whether the lessor (landlord) also had a duty to the tenant's invitee. A landlord is liable if all of the following conditions exist:

- 1) if the landlord knows, or should know in the exercise of reasonable care, that conditions exist on the premises that are likely to cause injury to persons entering upon the premises, and
- 2) that the purpose for which the premises are leased involves the fact that people will be invited upon the premises to do business with the tenant as patrons or customers, and
- 3) that the landlord knows or should know that the tenant cannot reasonably be expected to remedy or guard against injury from the defect.

If the defect is in the structure of the building, it might take a substantial structural change to make it reasonably safe for use, and the tenant might have no right to make such a change. If the defect is one which obviously endangers the tenant's patrons and one which the tenant can easily make, then the landlord might reasonably expect that the tenant would take steps to guard patrons and customers from danger. This question of what the landlord may reasonably expect is a question of fact to be decided not only from the nature of the defect but from all the circumstances in the case.

A landlord is not liable for a defect arising from ordinary wear and tear during the term of the lease. However, if the lease expires and the landlord renews it, when the landlord knows or should know of such a defect which is the result of ordinary wear and tear, the landlord is liable if those three conditions which I have already defined for you co-exist.

Even if the landlord has an express or implied agreement with the tenant to make repairs, the landlord is not liable for failure to make a repair on the leased premises unless the landlord has knowledge or has been given notice (actual or constructive) that the repair was necessary.

In determining between the landlord and the tenant which of them owed a duty to the plaintiff, the general rule is that the tenant takes the premises as (he/she) finds them and bears the risk of any defective conditions that are within the area under the tenant's exclusive possession and control. This rule, however, does not apply to defects which are the result of faulty design or disrepair and which existed at the beginning of the tenancy, were not discoverable by the tenant on reasonable inspection, and were known, either actually or constructively, to the landlord.

Such defects are the responsibility of the landlord, provided the three tests outlined earlier have been met.

Authority

See *DesMarchais v. Daly*, 135 Conn. 623, 625-26 (1949) (duty to tenant's invitee); *Webel v. Yale*, 125 Conn. 515, 524-25 (1939) (same); *Thomas v. Roper*, 162 Conn. 343, 349-50 (1972) (duty as between landlord and tenant).

3.9-8 Status of Parties - Exceeding the Limits of Invitee

Revised to January 1, 2008

You have heard testimony that at the time of the accident the plaintiff was *<insert specific facts>* on the defendant's premises. The defendant has claimed that the plaintiff had exceeded the limits of the invitation at the time of the accident by leaving that portion of the premises intended for the use of patrons and entering a part where the possessor could not reasonably have foreseen that patrons would enter. The plaintiff disagrees and claims that even if you find a departure from the portion of the premises intended for the use of patrons, the plaintiff had the right to assume that the place where the accident occurred was one which patrons had the right to use.

You must decide whether the plaintiff remained an invitee on the defendant's premises or whether, under the circumstances, (she/he) became a trespasser. I instructed you earlier on those definitions.

There are circumstances under which a business invitee may go outside the portion of the premises which the possessor intends patrons to use and still be entitled to the exercise of reasonable care from the defendant. Such a situation occurs when the possessor, in view of all the circumstances, ought reasonably to have anticipated that patrons were likely to enter a part of the premises not primarily intended for their use.

If you find that the plaintiff was using the premises in a way that the defendant could have reasonably anticipated them to be used, then the plaintiff remained an invitee at the time of the accident. If you find that the plaintiff was using the premises in a way that the defendant could not have reasonably anticipated, then the plaintiff lost (his/her) invitee status.

Authority

Ford v. Hotel & Restaurant Employees & Bartenders International Union, 155 Conn. 24, 33-34 (1967).

Notes

"An invitation usually includes the use of such parts of the premises as the visitor reasonably believes are held open to him as a means of access to or egress from the place where his purpose is to be carried out." *Ford v. Hotel & Restaurant Employees & Bartenders International Union*, *supra*, 155 Conn. 33.

3.9-9 Control

Revised to September 28, 2012

The legal responsibility for maintaining premises in a reasonable safe condition depends upon who is in possession of the land, that is, who has control of the premises. "Control" means the power or authority to manage, superintend, direct, oversee, restrict or regulate.

In considering whether a party is one who controls the premises, you can consider evidence of the following:

- acts of maintenance, such as fixing, repairing, cleaning, painting, performing upkeep - or the power to direct those activities;
- acts of inspection such as conducting or directing inspections or surveys of the property;
- acts restricting or allowing entry onto the premises;
- acts warning others of conditions or boundaries on the property, or setting or laying out rules for conduct upon the property;
- using the premises or property to store things, or to receive mail, visitors, customers or deliveries.

You must determine whether the plaintiff has proved that the defendant was in control of the premises at the relevant time. If the plaintiff has not so proved, then you must end your inquiry and return a verdict for the defendant. If the plaintiff has so proved, then you must consider whether the plaintiff has proved the other necessary parts of (her/his) case in making a determination of your verdict.

Authority

See *LaFlamme v. Dallessio*, 261 Conn. 247, 256-57 (2002); *Panaroni v. Johnson*, 158 Conn. 92, 98-100 (1969); *Kirby v. Zlotnick*, 160 Conn. 341, 344 (1971).

Notes

Subsequent remedial measures, though not admissible to prove negligence, may be admissible and can be considered by the jury if offered to establish the defendant's control of the premises. *Hall v. Burns*, 213 Conn. 446, 457 (1990); *Wright v. Coe & Anderson, Inc.*, 156 Conn. 145, 155 (1968).

A case may involve a dispute over whether a defendant had control of the portion of the premises where the alleged defect was located, as distinguished from control of the larger area around it. In that instance, the judge should consider describing the precise area where the alleged defect was located, instead of using the general terms "premises" or "property."

3.9-10 Joint Control

Revised to January 1, 2008

More than one person or entity can be in control of a premises at the same time. This is called joint control. Where control is joint, responsibility for injuries suffered by a person upon the premises may be shared by more than one person or entity.

Authority

Cruz v. Drezek, 175 Conn. 230, 234 (1978); *Warren v. Stancliff*, 157 Conn. 216, 218 (1968).

Notes

If there is an issue of joint control, the court will usually have to determine whether an instruction must be given on joint and several liability or on apportionment of damages.

3.9-11 Notice and/or Control Admitted

Revised to January 1, 2008

A plaintiff who alleges that (he/she) suffered injuries resulting from a defective premises must prove two other items: first, that the defendant was in control of the premises; and second, that the defendant had notice of the defect.

In this case, the defendant has admitted that the defendant was in control of the premises, so you must take that to be true.

As to the issue of notice, the defendant admits that (he/she/it) knew of the existence of the condition that the plaintiff alleges was a defect, so you must take that to be true.

What is at issue is *<summarize the issue, e.g., the status of the plaintiff and the duty of care owed by the defendant, whether the condition constitutes a defect, whether or to what extent the plaintiff was injured in this incident, etc.>*

3.9-12 Actual Notice of Condition

Revised to January 1, 2008

In order for the plaintiff to recover, the plaintiff must also prove that the defendant had actual notice, that is, actually knew of the unsafe condition long enough before the plaintiff's injury to have taken steps to correct the condition or to take other suitable precautions.

If the condition is one that was created by the defendant (or one of the defendant's employees), then that constitutes actual notice.

Authority

Zarembski v. Three Lakes, Park, Inc., 177 Conn. 603 (1979); *Tuite v. Stop & Shop Cos.*, 45 Conn. App. 305, 308 (1997).

3.9-13 Constructive Notice - Invitee

Revised to January 1, 2008 (modified May 12, 2014)

In order for the plaintiff to recover in the absence of proof that the defendant created the condition or actually knew of it, the plaintiff must prove that the defendant had constructive notice. That means that the defendant, using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions.

You may consider whether the defendant inspected the premises on a reasonable basis or in a reasonable way in determining whether the defendant should have known of the unsafe condition. You may consider the length of time the condition had existed in determining whether the defendant should have known of the condition had the defendant used reasonable care.

Authority

Warren v. Stancliff, 157 Conn. 216, 219 (1968); *Cruz v. Drezek*, 175 Conn. 230, 234-35 (1978).

3.9-14 Imputing Knowledge to Principal from Agent

Revised to January 1, 2008

Actual or constructive notice to an employee acting in the course or scope of employment is considered under our law to be notice to the employer as well.

Authority

Gulycz v. Stop & Shop Cos., 29 Conn. App. 519, 521 (1992).

3.9-15 Notice of Specific Defect

Revised to January 1, 2008

The notice to the defendant must be of the specific defect or unsafe condition that the plaintiff claims caused the injury. It is not enough that the plaintiff prove the existence of certain conditions that would likely produce such a defect, even if such conditions did in fact produce the defect. Our law requires that the notice, whether actual or constructive, be of the very defect that resulted in the plaintiff's injury.

Authority

Kelly v. Stop & Shop, Inc., 281 Conn. 768, 776 (2007); *Cruz v. Drezek*, 175 Conn. 230, 234-35 (1978); *White v. E & F Construction Co.*, 151 Conn. 110, 114 (1963).

3.9-16 Reasonable Time to Remedy after Notice

Revised to January 1, 2008

In deciding the issue of notice, the subsidiary question is whether the defect had existed for such a length of time that the defendant, in the exercise of due care, should have discovered it in time to have remedied it prior to the plaintiff's fall. What constitutes a reasonable time is a question of fact for you to determine based on the circumstances you find to have existed in this case.

Authority

Kelly v. Stop & Shop, Inc., 281 Conn. 768, 777 (2007); *Morris v. King Cole Stores, Inc.*, 132 Conn. 489 (1946); *Schwarz v. Waterbury Public Market, Inc.*, 6 Conn. App. 429, 432 (1986).

3.9-17 Commercial Mode of Operation

Revised to December 10, 2010

The plaintiff has alleged that (his/her) injuries were caused by the mode by which the defendant operated the business, in particular, by the way the defendant designed, constructed or maintained <identify the mode of operation, e.g., the self-service arrangement>.

This is called the mode of operation rule. Under this rule, the plaintiff need not show that the defendant had notice of the particular item or defect that caused the injury. Rather, the plaintiff must prove:

1. that this mode of operation gave rise to a foreseeable risk of injury to customers [or other invitees],
2. that the defendant failed to exercise reasonable care to avoid foreseeable accidents created by this mode of operation, and
3. that the plaintiff's injury was proximately caused by such failure.

[It is not the law that a defendant who runs a business guarantees the safety of those who come to the premises. If a customer [or other invitee] is injured because of a negligent act that the defendant cannot reasonably be expected to foresee or guard against, then the defendant is not liable.]¹

¹ This language can be used here if it has not been previously used in the general premises liability part of the charge. *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 790 (2007).

Authority

Fisher v. Big Y Foods, Inc., 298 Conn. 414 (2010); *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 791-93 (2007).

Notes

It will be most common that this theory will be advanced by the plaintiff as an alternative to the traditional premises liability theory that requires proof of actual or constructive notice. The charge should make clear that the plaintiff can recover under either theory.

3.9-18 Defendant Does Not Guarantee Safety

Revised to January 1, 2008

It is not the law that the plaintiff is entitled to compensation merely because (he/she) is injured while on the premises controlled by another. The defendant is not required to guarantee the safety of all persons on the premises. Rather the defendant is only liable for the resulting injuries if the plaintiff meets the burden to prove the necessary elements of a defective premises claim as I now outline them for you.

3.9-19 Reasonable Care

Revised to January 1, 2008

In describing the duties involved in this case, I have used the term "reasonable care."

Reasonable care is defined as the care which an ordinarily prudent or careful person would use in view of the surrounding circumstances. You must determine the question by placing an ordinarily prudent person in the situation of the defendant and ask yourselves: what would such a person have done?

Note that it is the care that such a person would have used under the surrounding circumstances, that is, in view of the facts known or the facts of which the party should have been aware at the time. The standard of care required, that of an ordinarily prudent person under the circumstances, never varies, but the degree or amount of care may vary with those circumstances.

For example, in circumstances of slight risk or danger, a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of greater risk or danger, a correspondingly greater amount of care would be required to constitute reasonable care.

Notes

Alternate language describing "reasonable care" is used in the section on general negligence in Reasonable Care, Instruction 3.6-4. Neither charge is preferred and either may be used.

3.9-20 Plaintiff's Duty to Use Faculties

Revised to January 1, 2008

The defendant has raised a special defense and claims that the plaintiff did not make a proper use of (his/her) senses or faculties to avoid the injury, did not keep a proper lookout, and was not watchful. Under our law, the plaintiff is presumed to be in the exercise of due care; and if the defendant makes a claim to the contrary, the burden is on the defendant to prove it.

The defense is that the plaintiff failed to use due care to look out for (his/her) own safety. That means that the plaintiff was not acting as a reasonably prudent or careful person would have acted in view of the circumstances that you find existed at the time. If you find that the defendant has proved that the plaintiff was not using reasonable care to discover defects or dangerous conditions or to avoid such defects as (he/she) ought to have known about or ought to have been able to discover, then the defendant has proved the defense of contributory negligence and you must consider this negligence of the plaintiff in relation to that of the defendant.

Authority

General Statutes § 52-114 (presumption of due care); *Sitnik v. National Propane Corp.*, 151 Conn. 62, 65 (1963); *Olshefski v. Stenner*, 26 Conn. App. 220, 222-25 (1991).

3.9-21 Nuisance - Introductory Note

Revised to January 1, 2008

Most of the following nuisance instructions contain only the basic elements and do not include instructions on causation and damages, which are necessary parts of a complete charge. In some appellate cases, causation is included as an element of the cause of action; see *Tomasso Brothers, Inc. v. October Twenty-four, Inc.*, 221 Conn. 194, 197 (1992); *Filisko v. Bridgeport Hydraulic Co.*, 176 Conn. 33, 35-36 (1978); but since it is not included in some of the following instructions, the court must be sure to include it in the charge at an appropriate place.

3.9-22 Private Nuisance - Injury to Property

Revised to January 1, 2008

To recover damages for private nuisance, a plaintiff must prove that the defendant's conduct proximately caused an unreasonable interference with the plaintiff's use and enjoyment of (his/her) property. The interference may be either intentional or as a result of the defendant's negligence. *<Insert definition of negligence; if not already given.>*

In determining whether the interference is unreasonable, you must balance the interests of both parties, including the following factors: 1) the nature, extent and duration of the interfering use; 2) the nature of the use and enjoyment invaded; 3) the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; 4) whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of (his/her) property; and 5) any other factors that are relevant to the question of whether the interference is unreasonable.

No one factor should dominate this balancing of interests; all relevant factors must be considered in determining whether the interference is unreasonable. The determination of whether the interference is unreasonable should be made in light of the fact that some level of interference is inherent in modern society. There are few, if any, places remaining where an individual may rest assured that he will be able to use and enjoy (his/her) property free from all interference. Accordingly, the interference must be substantial to be unreasonable. Ultimately, the question of reasonableness is whether the interference is beyond that which the plaintiff should bear, under all of these circumstances, without being compensated.

<Insert instruction on legal causation. See Legal Cause, Instruction 3.1-1.>

Authority

Pestey v. Cushman, 259 Conn. 345, 361-62 (2002); 4 Restatement (Second), Torts § 822 (1979).

3.9-23 Private Nuisance - Damages

Revised to January 1, 2008

General

As damages for a private nuisance, the plaintiff is entitled to recover such out-of-pocket expenses as were proximately caused by the nuisance. The plaintiff is also entitled to recover damages for physical discomfort and annoyance.

Measure of damages - temporary v. permanent nuisance

While one element of nuisance is that the condition was a continuing one, there is no requirement that the condition last forever. Thus a nuisance may be temporary or permanent.

A permanent nuisance is one which inflicts a permanent injury upon real estate. If you find that this was a permanent nuisance, in addition to recovering any out-of-pocket expenses and recovering damages for physical discomfort and annoyance, the plaintiff is also entitled to recover for the depreciation in the value of the injured property.

A temporary nuisance is one that inflicts no permanent injury on the real estate but rather creates a temporary interference with the use and enjoyment of the property by the plaintiff. If you find that this was a temporary nuisance, in addition to recovering any out-of-pocket expenses and recovering damages for physical discomfort and annoyance, the plaintiff is also entitled to recover for the temporary reduction in rental value, as opposed to the depreciation of the market value.

Authority

See *Filisko v. Bridgeport Hydraulic Co.*, 176 Conn. 33, 40-41 (1978) (damages for private nuisance and measure of damages for temporary versus current nuisance as it refers to ownership of rental property).

3.9-24 Public Nuisance - Personal Injury

Revised to January 1, 2008

The plaintiff alleges that (he/she) sustained personal injuries because of a public nuisance on land under the control of the defendant. A public nuisance exists if:

- 1) the condition complained of has a natural tendency to create danger and inflict injury upon person or property;
- 2) the danger created is a continuing one;
- 3) the use of the land is unreasonable or unlawful; and
- 4) the condition or conduct complained of interferes with a right common to the general public. As to this element, the test is not whether the nuisance in fact annoyed a number of persons. Rather, the plaintiff must prove that the injury occurred while the plaintiff was exercising rights which are common to all members of the public, rights that anyone in that circumstance was entitled to engage in at the time.

If you find that the plaintiff has proved that the defendant allowed the land to be used in such a way that each element of a public nuisance has been established, then the plaintiff has established that the defendant is liable to the plaintiff, provided the plaintiff proves that the nuisance was a proximate cause of the injuries suffered by the plaintiff. If the plaintiff fails to prove any one element, then a public nuisance has not been established.

Authority

See *Keeney v. Old Saybrook*, 237 Conn. 135, 162-63 (1996) (public nuisance generally). "Nuisances are public where they violate public rights, and produce a common injury,' and where they constitute an obstruction to public rights, 'that is, the rights enjoyed by citizens as part of the public.' 39 Am. Jur. 286." *Higgins v. Connecticut Light & Power Co.*, 129 Conn. 606, 611 (1943) (discussing exercise of a common right).

3.9-25 Public or Private Nuisance - Municipality

Revised to January 1, 2008

A. General

In order to find a municipality liable for damages for nuisance, the plaintiff must prove that the municipality both created and maintained the condition.

Authority

Lukas v. New Haven, 184 Conn. 205, 209 (1981) (municipal liability in general). See also *Walsh v. Stonington Water Pollution Control Authority*, 250 Conn. 443, 463-64 (1999), regarding municipal liability for nuisance, and *Elliott v. Waterbury*, 245 Conn. 385, 421 (1998), regarding the necessity of proving that the municipality intentionally created the nuisance by some positive act, as an exception to governmental immunity.

See also General Statutes § 52-557n (a) (1) which provides no cause of action for defective road or bridge, except under General Statutes § 13a-149.

B. Intentional Failure to Act - Pollution

A municipality is liable for a public nuisance that it intentionally creates through its prolonged and deliberate failure to act to abate that nuisance.

Notes

Municipal liability for public nuisance in this context has so far been found only for failure to abate environmental pollution. *Keeney v. Old Saybrook*, 237 Conn. 135, 165 & n.25 (1996).

3.9-26 Public or Private Nuisance - Control

Revised to January 1, 2008

In order for the defendant to be liable for nuisance, the plaintiff must prove that the defendant exercised control over the property that is the source of the nuisance. This requires you to consider all of the factors which may indicate control. It is not merely a question of who owned the property, but who exercised the functions necessary to prevent the nuisance from occurring.

The question of whether the defendant maintains control over property sufficient to be liable for the nuisance is a question for you to answer based on all the evidence.

Authority

State v. Tippets-Abbott-McCarthy-Stratton, 204 Conn. 177, 184-85 (1987); *New London Federal Savings Bank v. Tucciarone*, 48 Conn. App. 89, 98-99 (1998).

3.9-27 Public Nuisance - Intentional or Negligent

Revised to January 1, 2008

A public nuisance can be created intentionally or negligently. A nuisance is created intentionally if the creator of the condition intends the act that brings about the condition. It does not mean that the creator intended a wrong, or intended an injury to occur, or even intended to cause a nuisance, but merely that the one who created the condition intended to act as (he/she) did.

If you find that a nuisance existed and that the act that created it was an intentional one, then this is called an absolute nuisance, and the creator of the nuisance is held strictly liable. That means the creator cannot claim comparative negligence on the part of the plaintiff as a defense, but must be fully responsible for any damages you find were proximately caused by the nuisance.

If you find that a nuisance existed and that it arose out of the creator's unintentional but negligent act -- that is, the failure to exercise due care -- then the resulting nuisance is called a negligent nuisance. That means that the creator is entitled to claim, and you may consider whether, the plaintiff contributed through the plaintiff's own negligence to the injuries (he/she) suffered.

Authority

See *Quinnett v. Newman*, 213 Conn. 343, 348 (1990), overruled on other grounds by *Craig v. Driscoll*, 262 Conn. 312, 313 (2003), and 4 Restatement (Second), Torts § 825 (1979) for discussion of absolute nuisance.

3.9-28 Duty to Protect from Wrongful Conduct of Third Persons

Revised to January 1, 2008

The plaintiff claims that the defendant was negligent in failing to provide adequate security to prevent a third person from committing crimes on the premises that were likely to cause harm to persons such as the plaintiff.

You have already been instructed on the duties owed to an invitee by one who controls the premises. In this case, if you find that the plaintiff was an invitee and if you find that the defendant was in control of the premises, the defendant owed a duty to take reasonable steps to safeguard the plaintiff on the premises from the criminal acts of third persons provided the plaintiff also proves 1) that the defendant had notice of the risk and 2) that the defendant's conduct placed the plaintiff within the scope of the risk.

Notice

The plaintiff must prove that the defendant actually knew about, or, in the exercise of reasonable care, should have known about crimes or conduct of the same general nature as that befalling the plaintiff occurring on the premises or in its immediate vicinity. If you find that the defendant a) knew or in the exercise of reasonable care should have known of such crimes, and b) that such crimes or conduct were of the same general nature as that befalling the plaintiff and c) that such crimes had previously occurred on the premises or the immediate vicinity, then the plaintiff has proved notice to the defendant. If you find that the plaintiff has failed to prove any one of these elements, you must find in favor of the defendant. If the plaintiff has proved all of these, then the plaintiff has satisfied the requirement that such notice be proved.

Scope of the Risk

The plaintiff must prove that it was reasonably foreseeable to the defendant that the failure to take steps reasonably necessary to safeguard the plaintiff would subject the plaintiff to the type of harm of which the defendant had notice. Even if the defendant had notice as I have defined it for you, the plaintiff must still prove that the defendant could reasonably foresee that failure to take action to warn or safeguard the plaintiff would subject the plaintiff to the same general type of harm -- what the law calls placing the plaintiff "within the scope of the risk."

If you find that the defendant could not reasonably foresee that the failure to take reasonable steps to safeguard the plaintiff was likely to subject the plaintiff to the same general type of harm of which the defendant had notice, then the plaintiff has failed to prove that the defendant's conduct placed the plaintiff within the scope of the risk. If you find that the defendant could reasonably foresee that the failure to take reasonable steps to safeguard the plaintiff would likely subject the plaintiff to the same general type of harm of which the defendant had notice, then the plaintiff has proved that the defendant's conduct placed the plaintiff within the scope of the risk and this element is satisfied.

If the plaintiff has proved the status of an invitee -- that the defendant was in control of the premises, that the defendant had notice of the risk, and that the defendant's conduct placed the plaintiff within the scope of the risk -- the plaintiff has proved the necessary elements of negligence and you must go on to consider proximate cause.

Notes

The court should consider whether, in addition to the "proximate cause" charge, the "superseding cause" charge must be given. <See *Proximate Cause - Superseding Cause, Instruction 3.1-8.*> See *Stewart v. Federated Department Stores, Inc.*, 234 Conn. 597, 607-608 (1995).

3.9-29 Negligence of Independent Contractor

Revised to January 1, 2008

The plaintiff claims that the defendant independent contractor, *<insert name of independent contractor>*, had a duty to the plaintiff to use reasonable care, and failed in that duty, causing injury to the plaintiff.

In this case, there is evidence that the defendant whom the plaintiff claims to have controlled the premises *<insert name of contracting party>* had a contract with *<insert name of independent contractor>*. You must first decide whether a contract existed between these defendants and whether it was for the performance of services that *<insert name of contracting party>* had a duty to perform in these circumstances. If you find that no such contract existed, or that there was a contract but not for services that *<insert name of contracting party>* had a duty to perform under the circumstances, then you must find for *<insert name of independent contractor>*.

If you find that there was a contract and that it was a contract for services that *<insert name of contracting party>* had a duty to perform under the circumstances, then you must go on to evaluate whether *<insert name of independent contractor>* used reasonable care in performing its duty in place of *<insert name of contracting party>*. If you find that *<insert name of independent contractor>* used reasonable care under the circumstances, then you must return a verdict for *<insert name of independent contractor>*. If you find that *<insert name of independent contractor>* did not use reasonable care under the circumstances, you must go on to evaluate whether that failure to use reasonable care was a proximate cause of the plaintiff's injuries.

Only if you find all of the following is *<insert name of independent contractor>* liable to the plaintiff:

- 1) that *<insert name of contracting party>* controlled the premises;
- 2) that *<insert name of independent contractor>* had a contract with *<insert name of contracting party>* to perform certain services that *<insert name of contracting party>* would have had a duty to perform under the circumstances;
- 3) that *<insert name of independent contractor>* failed to use reasonable care to perform those services; and
- 4) that the failure of *<insert name of independent contractor>* to use reasonable care was a proximate cause of injuries to the plaintiff.

If any one of these elements has not been proved, you must find in favor of *<insert name of independent contractor>* and against the plaintiff on this count.

If all of these elements have been proved, however, such that your finding is that <insert name of independent contractor> is liable to the plaintiff, that would also mean that you have found that <insert name of contracting party> is liable to the plaintiff, since <insert name of contracting party> hired <insert name of independent contractor>.

Notes

This charge falls most logically after the complete liability instruction has been given regarding the defendant who controls the premises, but before the charge on damages.

N.B. The liability of an independent contractor is restricted to one who has undertaken for consideration and in a commercial context to perform a duty owed by another to the plaintiff. The initial determination of whether the undertaking is such that the independent contractor owed a direct duty to the plaintiff under the circumstances is one for the court. Only if the court first makes that determination in favor of the plaintiff do the remaining issues go to the jury. See *Gazo v. Stamford*, 255 Conn. 245, 250 (2001) (independent contractor who removes snow and ice for one who controls premises owes duty to business invitees on premises).

3.9-30 State Highway Defect Case - § 13a-144

Revised to January 1, 2008

Note: This statute applies to highways, bridges or sidewalks. This instruction uses a highway as an example.

There is a statute that provides that a person who is injured by means of any defective highway that is the duty of the state commissioner of transportation to keep in repair may recover damages from the state.¹

In making a claim under this statute, the plaintiff must prove all of the following elements by a fair preponderance of the evidence:

- 1) that (he/she) gave the required statutory notice of injury;
- 2) that the highway was one that the commissioner of transportation and not some other person or entity, had a duty to maintain or repair;²
- 3) that the highway was defective; that is, that it was not reasonably safe for travel;
- 4) that the state had notice of the defect;
- 5) that the state failed to exercise reasonable care to remedy the defect; and
- 6) that the defect was the sole proximate cause of the plaintiff's injuries; that is, no other cause was a substantial factor in causing (his/her) injuries.

In order to be entitled to compensation from the defendant, the plaintiff must prove each and every one of these elements.³ If (he/she) has failed to prove any one of them, then (he/she) has failed to prove (his/her) claim.

Statutory notice of the injury

Note: If there is no issue over the statutory notice of injury, this portion may be deleted from the charge.

First, the plaintiff must prove that the applicable statutory notice was given.

The statute states that an action can only be brought against the commissioner of transportation because of a defective highway if the plaintiff provides written notice of the injury and a general description of the injury, including the cause, the time and the place of its occurrence. The notice must be given in writing to the commissioner within ninety days of the event.⁴

Whether the notice meets the requirements of the statute and whether it was given within the time prescribed in the statute are questions for you to determine. The notice that is mandated by

the statute includes five elements: 1) written notice of the injury, 2) a general description of the injury, 3) the cause, 4) the time, and 5) the place.⁵

The purpose of the notice requirement is so that the commissioner will have precise information to enable (him/her) to investigate the circumstances of the accident. The plaintiff must give such notice as a prerequisite of (his/her) right to recover damages.⁶

If you find that the notice was not given to the commissioner within the time prescribed by the statute or that the notice did not conform to the requirements of the statute, the plaintiff is not entitled to a verdict and thus you would need not deliberate further. You would return a verdict for the defendant.

Duty to maintain or repair

The next element that the plaintiff must prove is that the highway on which (he/she) claims to have been injured was one that the state, acting through its commissioner of transportation or the commissioner's employees, had a duty to maintain or keep in repair. The term "highway" can include more than just the traveled portion; it can include those areas related to travel such as the side of the road or perhaps, even a parking area, provided that the defect was "in, upon, or near the traveled path."⁷ You will have to determine whether the location in question was a "highway" that the commissioner had a duty to maintain or repair.

Defect in a highway

The next element that the plaintiff must prove is that there was a defect in the highway. A defect is "any object or condition in, upon or near the traveled path which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon"⁸ Again, the defect does not have to be on the actual traveled portion of the highway. Whether there is a defect in such proximity to the highway so as to be considered "in, upon or near the traveled path" of the highway, is a question of fact for you to resolve.⁹

The state does not guarantee the safety of travelers upon its highways. The obligation of the state is not to keep its highways in perfect condition. The duty of the state is to keep its highways in a reasonably safe condition.¹⁰

In making this determination, you should consider such factors as *<state factors that are applicable such as lighting, the location of the highway, the extent of the use as compared to other highways, the nature and use of traffic on it, the number of miles of streets located within the supervision of the state and the amount of money spent and number of employees and equipment involved in maintenance and repair of streets>*.¹¹

Notice of the defective condition

The next element that the plaintiff must prove is that the defendant knew or, in the exercise of due care in inspecting the highway, should have known that the highway at issue was in a defective condition. The plaintiff must prove that the defendant had notice of the particular defect itself which caused the injury and not merely notice of the conditions that in fact produced it.¹²

The plaintiff must prove that the defendant had either actual or constructive notice of the condition that is claimed to be the defect.¹³ Actual notice is something like a report of the condition to the defendant or observation of the condition by state employees responsible for the maintenance of the highway.

The other kind of notice is called constructive notice. If the condition that is claimed to be a defect was present for a sufficient length of time that the defendant should have discovered it using reasonable care to inspect highways, then the defendant had constructive notice.¹⁴

Failure to exercise reasonable care to remedy defect

The next element that the plaintiff must prove is that after having notice and having had a reasonable opportunity to do so, the state failed to take reasonable care to remedy the claimed defect.¹⁵ In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances that were known or should have been known to the defendant at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

Sole proximate cause

The plaintiff must finally prove that the highway defect was not just one cause among many of (his/her) injuries, but that it was the sole proximate cause; that is, the only substantial factor causing (his/her) injuries.¹⁶ The plaintiff must prove that the injuries claimed were caused solely by a defect in the highway.

The plaintiff was bound to use reasonable care for (his/her) own safety, that is, the degree of care that a reasonably prudent person would use in order to avoid injury.¹⁷ (He/She) could not be entirely heedless of the situation, but had a duty to reasonably use (his/her) vision and (his/her) faculties to observe (his/her) surroundings and to use reasonable care in view of any danger that was presented by the condition of the highway.¹⁸

A person who knows of a dangerous condition in the path of travel is not required to take an alternate route or a detour, but is bound to take precautions that an ordinary prudent person would take to avoid the dangerous condition.¹⁹ If a person makes the decision to pass over a dangerous condition that (he/she) knows about, then that person has a duty to use reasonable care in doing so. Knowledge of a dangerous condition generally requires greater care to meet the standard of care.²⁰

If you find that the plaintiff failed to prove that (he/she) was exercising reasonable care for (his/her) own safety and that (his/her) own negligence was a substantial factor in causing (his/her) injuries, then any defect in the highway would not be the sole proximate cause of the plaintiff's injuries, and you must find for the defendant.

¹ General Statutes § 13a-144.

² General Statutes §§ 13b-30, 13a-144; *Serrano v. Burns*, 248 Conn. 419, 428 (1999); *Amore v. Frankel*, 228 Conn. 358, 366-67 (1994).

³ *Bovat v. Waterbury*, 258 Conn. 574, 583-84 (2001); *Prato v. New Haven*, 246 Conn. 638, 642 (1998); *Lukas v. New Haven*, 184 Conn. 205, 207 (1981).

⁴ General Statutes § 13a-144; see also *Warkentin v. Burns*, 223 Conn. 14, 17 (1992); *Tyson v. Sullivan*, 77 Conn. App. 597, 607 (2003).

⁵ *Salemme v. Seymour*, 262 Conn. 787, 793 (2003); *Pratt v. Old Saybrook*, 225 Conn. 177, 180 (1993).

⁶ *Lussier v. Dept. of Transportation*, 228 Conn. 343, 354 (1994).

⁷ *Kozłowski v. Commissioner of Transportation*, 274 Conn. 497, 502-505 (2005); *Serrano v. Burns*, supra, 248 Conn. 426.

⁸ *McIntosh v. Sullivan*, 274 Conn. 262, 268-69 (2005); *Serrano v. Burns*, supra, 248 Conn. 425-26, quoting *Baker v. Ives*, 162 Conn. 295, 300 (1972).

⁹ *Serrano v. Burns*, supra, 248 Conn. 426; *Baker v. Ives*, supra, 162 Conn. 300; *Bellman v. West Hartford*, 96 Conn. App. 387, 396 (2006).

¹⁰ *McIntosh v. Sullivan*, supra, 274 Conn. 269; *Serrano v. Burns*, supra, 248 Conn. 426.

¹¹ *Hall v. Burns*, supra, 213 Conn. 474-75.

¹² *McIntosh v. Sullivan*, supra, 274 Conn. 270; *Prato v. New Haven*, supra, 246 Conn. 642.

¹³ *Hall v. Burns*, supra, 213 Conn. 462; *Ormsby v. Frankel*, supra, 54 Conn. App. 110.

¹⁴ *Baker v. Ives*, supra, 162 Conn. 305.

¹⁵ *McIntosh v. Sullivan*, supra, 274 Conn. 270; *Hall v. Burns*, supra, 213 Conn. 462.

¹⁶ *Prato v. New Haven*, supra, 246 Conn. 642 (maintaining that the "defect must have been the sole proximate cause of the injuries and damages claimed, which means that the plaintiff must prove freedom from contributory negligence"); *White v. Burns*, 213 Conn. 307, 333-34 (1990).

¹⁷ *Baker v. Ives*, supra, 162 Conn. 298-99.

¹⁸ *Krupien v. Doolittle*, 117 Conn. 534, 538 (1933); *Schupp v. Grill*, 27 Conn. App. 513, 518-19 (1992).

¹⁹ *Rodriguez v. New Haven*, 183 Conn. 473, 479 (1981).

²⁰ *Id.*; *Martins v. Connecticut Light & Power Co.*, 35 Conn. App. 212, 219 (1994).

Notes

The cases that apply for municipal liability under General Statutes § 13a-149 can also be used to support an action for state liability under General Statutes § 13a-144. See *Smith v. New Haven*, 258 Conn. 56, 64 (2001) (stating that cases dealing with § 13a-144, the state defective highway statute, "are nonetheless persuasive authority with respect to the construction of the municipal defective highway statute because §§ 13a-144 and 13a-149 have always been regarded as in pari materia as far as the scope of the governmental entity's obligation is concerned"); *Donnelly v. Ives*, 159 Conn. 163, 167 (1970) (stating that "on many occasions [the court has] looked to and applied the rationale in cases involving statutory actions against municipalities

under what is now General Statutes § 13a-149 since there is no material difference in the obligation imposed on the state by § 13a-144 and that imposed on municipalities by § 13a-149").

3.9-31 Municipal Sidewalk (Road, Bridge) Defect - § 13a-149

Revised to January 1, 2008 (modified July 1, 2008)

Note: This statute applies to roads, bridges or sidewalks. This instruction uses a sidewalk as an example.

There is a statute that provides that a person who was injured by means of a defective sidewalk may recover damages from the party bound to keep it in repair.¹

In making a claim under this statute, the plaintiff must prove all of the following elements by a fair preponderance of the evidence:

- 1) that (he/she) gave the required statutory notice of injury;
- 2) that the sidewalk where the injury occurred was one that the (city / town / borough) and not some other person or entity had a duty to maintain or repair;²
- 3) that there was a defect in the sidewalk;
- 4) that the city had notice of the defect;
- 5) that the city failed to exercise reasonable care to remedy said defect; and
- 6) that the defect was the sole proximate cause of the plaintiff's injuries; that is, no other cause was a substantial factor in causing (his/her) injuries.

In order to be entitled to compensation from the defendant, the plaintiff must prove each and every one of these elements.³ If (he/she) has failed to prove any one of them, then (he/she) has failed to prove (his/her) claim.

Statutory notice of the injury

Note: If there is no issue over the statutory notice of injury, this portion may be deleted from the charge.

First, the plaintiff must prove that the applicable statutory notice was given.

The statute states that an action can only be brought to recover damages caused by a defective sidewalk if the plaintiff provides written notice of the injury, with a general description of the injury, the cause, the time, and the place of its occurrence. This notice shall be given within ninety days thereafter to a selectman or clerk of the town, city or borough bound to keep the sidewalk in repair.⁴

Whether the notice meets the requirements of the statute and whether it was given within the time prescribed in the statute are questions for you to determine. The notice mandated by the statute includes five elements: 1) written notice of the injury, 2) a general description of the injury, 3) the cause, 4) the time, and 5) the place.⁵

The purpose of the notice requirement is so that officers of municipal corporations shall have precise information that will enable them to investigate the circumstances of the accident. The plaintiff must give such notice as a prerequisite of (his/her) right to recover damages.⁶

The statute provides that any notice given shall not be held invalid or insufficient by reason of an inaccuracy in describing the injury or in stating the time, place or cause, if it appears that there was no intention to mislead or that the city was not, in fact, misled.⁷

Duty to maintain or repair

The next element the plaintiff must prove is that the sidewalk on which (he/she) claims to have been injured was one that the city had a duty to maintain or repair.⁸ The city does not have a duty to repair areas of the sidewalk that are private.⁹ You will have to determine whether the plaintiff has proven that the location that has been identified as the area where the plaintiff was injured was a sidewalk that the city had a duty to maintain or to keep in repair.¹⁰

Defect in the sidewalk

The next element the plaintiff must prove is that there was a defect in the sidewalk. A defect is "[a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the [sidewalk] for the purpose of traveling . . ."¹¹ It is not the law that any flaw constitutes a defect, but rather to find the existence of the defect, you must determine that the sidewalk was not in a reasonably safe condition.¹²

The city does not guarantee the safety of travelers upon its sidewalks. The obligation of the city is not to keep its sidewalks in perfect condition. The task of making sidewalks safe at all times and under all circumstances is not imposed upon our cities. The duty of the city is to use reasonable care to keep its sidewalks in a reasonably safe condition for public travel.¹³

In making this determination, you should consider such factors as *<state factors that are applicable such as the lighting, the location of the sidewalk, the grade of the street, and the extent of the use of the area.>*¹⁴

Notice of the defective condition

The next element that the plaintiff must prove is that the city knew or, in the exercise of due care in inspecting the sidewalk, should have known that the sidewalk was in a defective condition. The plaintiff must prove that the defendant had notice of the particular defect itself which caused the injury and not merely notice of the conditions that in fact produced it.¹⁵

The plaintiff must prove that the defendant had either actual or constructive notice of the condition that is claimed to be the defect.¹⁶ Actual notice would be a report of the condition to

the city or observation of the condition by city employees responsible for maintenance of the sidewalk.

The other kind of notice is called constructive notice. If the condition that is claimed to be a defect was present for a sufficient length of time so that the defendant should have discovered it using reasonable care to inspect sidewalks, then the defendant had constructive notice.¹⁷

Failure to exercise reasonable care to remedy defect

The next element that the plaintiff must prove is that after having notice, and having had a reasonable opportunity to do so, the city failed to take reasonable care to remedy the claimed defect.¹⁸ In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendant at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

Sole proximate cause

The plaintiff must finally prove that the defect in the sidewalk was not just one cause among many causes of (his/her) fall, but that it was the sole proximate cause; that is, the only substantial factor causing (his/her) fall.¹⁹ <See Notes - Proximate cause below.> The plaintiff must prove that the injuries claimed were caused solely by a defect of the sidewalk.²⁰

The plaintiff, however, was bound to use reasonable care for (his/her) own safety; that is, the degree of care that a reasonably prudent person would use in order to avoid injury. The plaintiff cannot have been entirely heedless of the situation, but had a duty to reasonably use (his/her) vision and (his/her) faculties to observe (his/her) surroundings and to use reasonable care in view of any danger that was presented by the condition of the sidewalk.²¹

A pedestrian who knows of a dangerous condition in the path of travel is not required to take an alternate route or a detour, but is bound to take precautions that an ordinarily prudent person would take to avoid the dangerous condition, including moving to the portion of the sidewalk that is not defective. If the pedestrian makes the decision to pass over a dangerous condition that (he/she) knows about, then that pedestrian has a duty to use reasonable care in doing so.²² Knowledge of a dangerous condition generally requires greater care to meet the standard of reasonable care.²³

If you find that the plaintiff failed to prove that (he/she) was exercising reasonable care for (his/her) own safety and that (his/her) negligence was a substantial factor in causing (him/her) to fall, then any defect in the sidewalk would not be the sole proximate cause of the plaintiff's injuries, and you must find for the defendant.²⁴

¹ General Statutes § 13a-149; *Ferreira v. Pringle*, 255 Conn. 330, 341 (2001).

² *Serrano v. Burns*, 248 Conn. 419, 428-29 (1999).

- ³ *Bovat v. Waterbury*, 258 Conn. 574, 583-84 (2001); *Prato v. New Haven*, 246 Conn. 638, 642 (1998); *Lukas v. New Haven*, 184 Conn. 205, 207 (1981).
- ⁴ General Statutes § 13a-149; *Salemme v. Seymour*, 262 Conn. 787, 793 (2003); *Martin v. Plainville*, 240 Conn. 105, 109 (1997).
- ⁵ *Salemme v. Seymour*, supra, 262 Conn. 793; *Pratt v. Old Saybrook*, 225 Conn. 177, 180 (1993).
- ⁶ *Salemme v. Seymour*, supra, 262 Conn. 793; *Martin v. Plainville*, supra, 240 Conn. 111.
- ⁷ General Statutes § 13a-149; *Salemme v. Seymour*, supra, 262 Conn. 793-94.
- ⁸ *Serrano v. Burns*, supra, 248 Conn. 428; *Amore v. Frankel*, 228 Conn. 358, 365-66 (1994).
- ⁹ *Miller v. Grossman Shoes, Inc.*, 186 Conn. 229, 234 (1982).
- ¹⁰ *Serrano v. Burns*, supra, 248 Conn. 426; *Birchard v. New Britain*, 103 Conn. App. 79, 86-89 (2007); *Novicki v. New Haven*, 47 Conn. App. 734, 742 (1998).
- ¹¹ *McIntosh v. Sullivan*, 274 Conn. 262, 268-69 (2005); *Ferreira v. Pringle*, supra, 255 Conn. 342.
- ¹² *Mausch v. Hartford*, 184 Conn. 467, 469-70 (1981); *Older v. Old Lyme*, 124 Conn. 283, 284 (1938).
- ¹³ *McIntosh v. Sullivan*, supra, 274 Conn. 269; *Hall v. Burns*, 213 Conn. 446-77 (1990).
- ¹⁴ *Hall v. Burns*, supra, 213 Conn. 474-75; see also *Prato v. New Haven*, supra, 246 Conn. 645-46.
- ¹⁵ *McIntosh v. Sullivan*, supra, 274 Conn. 268; *Ormsby v. Frankel*, 255 Conn. 670, 675-77 (2001); *Prato v. New Haven*, supra, 246 Conn. 642.
- ¹⁶ *McIntosh v. Sullivan*, supra, 274 Conn. 269-70; *Ormsby v. Frankel*, supra, 255 Conn. 676-77; *Hall v. Burns*, supra, 213 Conn. 462.
- ¹⁷ *Baker v. Ives*, 162 Conn. 295, 305 (1972); see also *Prato v. New Haven*, supra, 246 Conn. 644-46; *Hall v. Burns*, supra, 213 Conn. 462, 479.
- ¹⁸ *McIntosh v. Sullivan*, supra, 274 Conn. 270; *Hall v. Burns*, supra, 213 Conn. 461-63.
- ¹⁹ *Bovat v. Waterbury*, supra, 258 Conn. 586-87; *Prato v. New Haven*, supra, 246 Conn. 642 (maintaining that the "defect must have been the sole proximate cause of the injuries and damages claimed, which means that the plaintiff must prove freedom from contributory negligence"); *White v. Burns*, 213 Conn. 307, 316, 333-34 (1990); *Carbone v. New Britain*, 33 Conn. App. 754, 758, cert. denied, 230 Conn. 904 (1994).
- ²⁰ *White v. Burns*, supra, 213 Conn. 316, 330-34; *Carbone v. New Britain*, supra, 33 Conn. App. 758.
- ²¹ See *Rodriguez v. New Haven*, 183 Conn. 473, 478 (1981).
- ²² *Id.*, 479.
- ²³ *Id.*
- ²⁴ See *id.*

Notes

The cases that apply for state liability under General Statutes § 13a-144 can also be used to support an action for municipal liability under General Statutes § 13a-149. See *Smith v. New Haven*, 258 Conn. 56, 64 (2001) (stating that cases dealing with § 13a-144, the state defective highway statute, "are nonetheless persuasive authority with respect to the construction of the municipal defective highway statute because §§ 13a-144 and 13a-149 have always been regarded as in pari materia as far as the scope of the governmental entity's obligation is concerned"); *Donnelly v. Ives*, 159 Conn. 163, 167 (1970) (stating that "on many occasions [the court has] looked to and applied the rationale in cases involving statutory actions against municipalities under what is now General Statutes § 13a-149 since there is no material difference in the obligation imposed on the state by § 13a-144 and that imposed on municipalities by § 13a-149").

Definition of "road"

For road/bridge cases, the term "road" can include more than just the traveled portion. It includes those areas related to travel, such as the side of the road or, perhaps, even a parking area. See, e.g., *Ferreira v. Pringle*, 255 Conn. 330, 347-351.

Proximate cause

While sidewalks are generally located within the municipal right of way and are therefore public and covered under General Statutes § 13a-149, this is not always the case. "Pursuant to General Statutes § 7-163a . . . a municipality may adopt an ordinance that shifts to the owner of land abutting a public sidewalk both the duty of care and liability with respect to the presence of snow and ice on the sidewalk." *Rivers v. New Britain*, 288 Conn. 1, 3 (2008). To the extent the sidewalk is private, the sole proximate cause standard does not apply. Nevertheless, "when . . . the state owns the land abutting a public sidewalk, an ordinance adopted by a municipality under § 7-163a does not relieve the municipality of liability for damages caused by the presence of ice and snow on the sidewalk." *Id.*, 4. "Section 7-163a does not waive the state's sovereign immunity from liability or suit." *Id.*, 9. See also General Statutes § 7-148 (c) (6) (C) (v).

3.9-32 Municipal Sidewalk (Road, Bridge) Snow and Ice - § 13a-149

Revised to January 1, 2008

Note: This statute applies to roads, bridges or sidewalks. This instruction uses a sidewalk as an example.

There is a statute that provides that a person who was injured by means of a defective sidewalk may recover damages from the party bound to keep it in repair.¹

In making a claim under this statute, the plaintiff must prove all of the following elements by a fair preponderance of the evidence:

- 1) that (he/she) gave the required statutory notice of injury;
- 2) that the sidewalk where the injury occurred was one that the (city / town / borough), and not some other person or entity, had a duty to maintain or repair;²
- 3) that there was a defect in the sidewalk;
- 4) that the city had notice of the defect;
- 5) that the city failed to exercise reasonable care to remedy the defect; and
- 6) that the defect was the sole proximate cause of the plaintiff's injuries; that is, no other cause was a substantial factor in causing (his/her) injuries.

In order to be entitled to compensation from the defendant, the plaintiff must prove each and every one of these elements.³ If (he/she) has failed to prove any one of them, then (he/she) has failed to prove (his/her) claim.

Statutory notice of the injury

Note: If there is no issue over the statutory notice of injury, this portion may be deleted from the charge.

First, the plaintiff must prove that the applicable statutory notice was given.

The statute states that an action can only be brought to recover damages caused by a defective sidewalk if the plaintiff provides written notice of the injury, with a general description of the injury, the cause, the time and the place of its occurrence. This notice shall be given within ninety days thereafter to a selectman or clerk of the town, city or borough bound to keep the sidewalk in repair.⁴

Whether the notice meets the requirements of the statute and whether it was given within the time prescribed in the statute are questions for you to determine. The notice mandated by the statute includes five elements: 1) written notice of the injury, 2) a general description of the injury, 3) the cause, 4) the time, and 5) the place.⁵

The purpose of the notice requirement is so that officers of municipal corporations shall have precise information that will enable them to investigate the circumstances of the accident. The plaintiff must give such notice as a prerequisite of (his/her) right to recover damages.⁶

The statute provides that any notice given shall not be held invalid or insufficient by reason of an inaccuracy in describing the injury or in stating the time, place or cause, if it appears that there was no intention to mislead or that the city was not, in fact, misled.⁷

Duty to maintain or repair

The next element is that the plaintiff must prove that the sidewalk on which (he/she) claims to have been injured was one that the city had a duty to maintain or repair.⁸ The city does not have a duty to repair areas of sidewalks that are private sidewalks.⁹ You will have to determine whether the plaintiff has proven that the location that has been identified as the area where the plaintiff was injured was a sidewalk the city had a duty to maintain or to keep in repair.¹⁰

Defect in the sidewalk

The next element the plaintiff must prove is that there was a defect in the sidewalk. A defect is "[a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the [sidewalk] for the purpose of traveling" ¹¹ The mere fact that there is ice and snow on the surface of the sidewalk does not mean that the sidewalk is defective. A sidewalk is defective as the result of ice and snow when it is not in a reasonably safe condition.¹²

The city does not guarantee the safety of travelers upon its sidewalks. The obligation of the city is not to keep its sidewalks in perfect condition. The task of making sidewalks safe at all times and under all such circumstances is not imposed upon our cities, especially in our climate, with respect to the accumulation of ice or snow. The duty of the city is to use reasonable care to keep its sidewalks in a reasonably safe condition.¹³ The duty to use reasonable care takes into account the variety of conditions and circumstances that are created by the rigors of our winters.¹⁴ *<The focus of this charge is defects caused by ice and snow. It is obvious that the injury might be caused by a combination of defects and you would charge accordingly.>*

Notice of the defective condition

The next element that the plaintiff must prove is that the city knew or, in the exercise of due care in inspecting the sidewalk, should have known that the sidewalk was in a defective condition. The plaintiff must prove that the defendant had notice of the particular defect itself which caused the injury and not merely notice of the conditions that in fact produced it.¹⁵

The plaintiff must prove that the defendant had either actual or constructive notice of the condition that is claimed to be the defect.¹⁶ Actual notice would be a report of the condition to

the city or observation of the condition by city employees responsible for maintenance of the sidewalk.

The other kind of notice is called constructive notice. If the condition that is claimed to be a defect was present for a sufficient length of time so that the defendant should have discovered it using reasonable care to inspect sidewalks, then the defendant had constructive notice.¹⁷

Failure to exercise reasonable care to remedy defect

The next element that the plaintiff must prove is that after having notice, and having had a reasonable opportunity to do so, the city failed to take reasonable care to remedy the claimed defect.¹⁸ In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendant at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

Sole proximate cause

The plaintiff must finally prove that the defect in the sidewalk was not just one cause among many causes of (his/her) fall, but that it was the sole proximate cause, that is, the only substantial factor, causing (his/her) fall.¹⁹ <See Notes - Proximate cause below.> The plaintiff must prove that the injuries claimed were caused solely by a defect of the sidewalk.²⁰

The plaintiff, however, was bound to use reasonable care for (his/her) own safety; that is, the degree of care that a reasonably prudent person would use in order to avoid injury. The plaintiff cannot have been entirely heedless of the situation, but had a duty to reasonably use (his/her) vision and (his/her) faculties to observe (his/her) surroundings and to use reasonable care in view of any danger that was presented by the condition of the sidewalk.²¹

A pedestrian who knows of a dangerous condition in the path of travel is not required to take an alternate route or a detour, but is bound to take precautions that an ordinarily prudent person would take to avoid the dangerous condition, including moving to the portion of the sidewalk that is not defective. If the pedestrian makes the decision to pass over a dangerous condition that (he/she) knows about, then that pedestrian has a duty to use reasonable care in doing so.²² Knowledge of a dangerous condition generally requires greater care to meet the standard of reasonable care.²³

If you find that the plaintiff failed to prove that (he/she) was exercising reasonable care for (his/her) own safety and that (his/her) negligence was a substantial factor in causing (him/her) to fall, then any defect in the sidewalk would not be the sole proximate cause of the plaintiff's injuries, and you would find for the defendant.²⁴

¹ General Statutes § 13a-149; *Ferreira v. Pringle*, 255 Conn. 330, 341 (2001).

- ² *Serrano v. Burns*, 248 Conn. 419, 428-29 (1999); *Lukas v. New Haven*, 184 Conn. 205, 207 (1981).
- ³ *Bovat v. Waterbury*, 258 Conn. 574, 583-84 (2001); *Prato v. New Haven*, 246 Conn. 638, 642 (1998); *Martin v. Plainville*, 240 Conn. 105, 109 (1997).
- ⁴ General Statutes § 13a-149; *Salemme v. Seymour*, 262 Conn. 787, 793 (2003); *Martin v. Plainville*, supra, 240 Conn. 109.
- ⁵ *Salemme v. Seymour*, supra, 262 Conn. 793; *Pratt v. Old Saybrook*, 225 Conn. 177, 180 (1993).
- ⁶ *Salemme v. Seymour*, supra, 262 Conn. 793; *Martin v. Plainville*, supra, 240 Conn. 111; *Pratt v. Old Saybrook*, supra, 225 Conn. 180-82.
- ⁷ General Statutes § 13a-149; *Salemme v. Seymour*, supra, 262 Conn. 793-94.
- ⁸ *Serrano v. Burns*, supra, 248 Conn. 428; *Amore v. Frankel*, 228 Conn. 358, 365-66 (1994).
- ⁹ *Miller v. Grossman Shoes, Inc.*, 186 Conn. 229, 234 (1982).
- ¹⁰ *Serrano v. Burns*, supra, 248 Conn. 426; *Birchard v. New Britain*, 103 Conn. App. 79, 86-89 (2007); *Novicki v. New Haven*, 47 Conn. App. 734 (1998).
- ¹¹ *McIntosh v. Sullivan*, 274 Conn. 262, 268-69 (2005); *Ferreira v. Pringle*, supra, 255 Conn. 342.
- ¹² *Mausch v. Hartford*, 184 Conn. 467, 469-70 (1981).
- ¹³ *McIntosh v. Sullivan*, supra, 274 Conn. 269; *Hall v. Burns*, 213 Conn. 446, 476-77 (1990).
- ¹⁴ *Baker v. Ives*, 162 Conn. 295, 300 (1972); *Wadlund v. Hartford*, 139 Conn. 169, 176 (1952).
- ¹⁵ *McIntosh v. Sullivan*, supra, 274 Conn. 268; *Ormsby v. Frankel*, 255 Conn. 670, 675-77 (2001); *Prato v. New Haven*, supra, 246 Conn. 642.
- ¹⁶ *McIntosh v. Sullivan*, supra, 274 Conn. 269-70; *Ormsby v. Frankel*, supra, 255 Conn. 676-77; *Hall v. Burns*, supra, 213 Conn. 462.
- ¹⁷ *Baker v. Ives*, 162 Conn. 295, 305 (1972); see also *Prato v. New Haven*, supra, 246 Conn. 644-46; *Hall v. Burns*, supra, 213 Conn. 462, 479.
- ¹⁸ *McIntosh v. Sullivan*, supra, 274 Conn. 270; *Hall v. Burns*, supra, 213 Conn. 461-63.
- ¹⁹ *Bovat v. Waterbury*, supra, 258 Conn. 586-87; *Prato v. New Haven*, supra, 246 Conn. 642 (maintaining that the "defect must have been the sole proximate cause of the injuries and damages claimed, which means that the plaintiff must prove freedom from contributory negligence"); *White v. Burns*, 213 Conn. 307, 316, 333-34 (1990); *Carbone v. New Britain*, 33 Conn. App. 754, 758, cert. denied, 230 Conn. 904 (1994).
- ²⁰ *White v. Burns*, supra, 213 Conn. 316, 330-34; *Carbone v. New Britain*, supra, 33 Conn. App. 758.
- ²¹ See *Rodriguez v. New Haven*, supra, 183 Conn. 478.
- ²² *Id.*, 479.
- ²³ *Id.*
- ²⁴ See *id.*

Notes

The cases that apply for state liability under General Statutes § 13a-144 can also be used to support an action for municipal liability under General Statutes § 13a-149. See *Smith v. New Haven*, 258 Conn. 56, 64 (2001) (stating that cases dealing with § 13a-144, the state defective highway statute, "are nonetheless persuasive authority with respect to the construction of the municipal defective highway statute because §§ 13a-144 and 13a-149 have always been regarded as in pari materia as far as the scope of the governmental entity's obligation is concerned"); *Donnelly v. Ives*, 159 Conn. 163, 167 (1970) (stating that "on many occasions [the court has] looked to and applied the rationale in cases involving statutory actions against municipalities under what is now General Statutes § 13a-149 since there is no material difference in the obligation imposed on the state by § 13a-144 and that imposed on municipalities by § 13a-149").

Definition of "road"

For road/bridge cases, the term "road" can include more than just the traveled portion. It includes those areas related to travel, such as the side of the road or, perhaps, even a parking area. See, e.g., *Ferreira v. Pringle*, 255 Conn. 330, 347-51.

Proximate cause

While sidewalks are generally located within the municipal right of way and are therefore public and covered under General Statutes § 13a-149, this is not always the case. To the extent the sidewalk is private, the sole proximate cause standard does not apply. Moreover, General Statutes § 7-163a allows a city or town, by ordinance, to shift liability to the owner or possessor of land abutting a public sidewalk only for injuries due to the presence of ice and snow. See *Willoughby v. New Haven*, 123 Conn. 446, 451 (1937); *Dreher v. Joseph*, 60 Conn. App. 257, 260-63 (2000); *Gould v. Hartford*, 44 Conn. Sup. 389, 396-97 (1997) (maintaining that § 7-163a does not authorize the municipality to reallocate the duty to remove ice and snow to the state where the department of transportation owns the land abutting the sidewalk); *Hutchinson v. Danbury*, Superior Court, judicial district of Danbury, Docket No. 331013 (February 8, 1999) (23 Conn. L. Rptr. 3); *Mahoney v. Mobil Oil Corp.*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 568849 (December 4, 1997) (21 Conn. L. Rptr. 138); see also General Statutes § 7-148 (c) (6) (C) (v). The sole proximate cause rule does not apply in such a case.

3.9-33 Strict Liability of One Who Keeps a Dog

Revised to January 1, 2008

Anyone who owns or keeps a dog is held strictly liable under our law for any damage caused by the dog, irrespective of whether the owner or keeper was negligent in controlling the dog. The statute is General Statutes § 22-357, and the relevant portions of the statute state:

"If any dog does any damage to either the body or property of any person, the owner or keeper . . . shall be liable for such damage, except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog."

A "keeper" of a dog means someone other than the owner who harbors or has possession of any dog.

The statute creates two exceptions to this rule of "strict liability." The first is that the statute exempts from liability the owner or keeper whose dog does damage to a person who was committing a "trespass or other tort." The word "tort" means a wrongful act. "Committing a trespass or other tort" means more than merely entering on the property or in the area where the dog was, but rather entering to commit an injury or a wrongful act. This means such wrongful acts committed against the person or property of the owner or keeper or (his/her) family, or similar wrongful acts, against which the dog, with its characteristic loyalty, would take defensive or protective action, or those, if committed against the dog, as would likely excite it to use its natural weapons of defense.

The second exception applies if you find that plaintiff was "teasing, tormenting, or abusing" the dog. Teasing, tormenting or abusing a dog means engaging in actions that would naturally annoy or irritate a dog and provoke it to retaliation. Such actions are those of such a nature as would naturally antagonize the dog and cause it to attack and which are improper in the sense that they are without justification.¹ Playing with the dog in a friendly manner does not fall within the definition of "teasing, tormenting, or abusing" the dog.²

So the elements that the plaintiff must prove are 1) that the defendants were the owners or keepers of a dog, 2) that the dog did, in the language of the statute, "any damage to . . . the body or property" of the plaintiff, and 3) that neither of the exceptions applies.

¹ *Kowal v. Archibald*, 148 Conn. 125, 128-30 (1961).

² *Weingartner v. Bielak*, 142 Conn. 516, 520 (1955).

Notes

There should usually be a charge on the issue of proximate cause to establish a nexus between the actions of the dog and the injury of which the plaintiff complains.

N.B. For a child under seven years of age at the time the damage was done, the statute creates a presumption that the child was not committing a trespass or other tort or teasing, tormenting or abusing the dog, so that the burden of establishing any such conduct is on the defendant. See General Statutes § 22-357.

3.9-34 Duty to Remove Snow and Ice - Ongoing Storm

New September 28, 2012

Under our law, [in the absence of unusual circumstances,] if the defendant had control over the premises, (he/she/it) is permitted to wait until the end of a storm and is given a reasonable time thereafter to remove ice and snow from <describe location of the fall>. This rule does not prevent you, the jury, from considering whether a storm has ended or whether the plaintiff's fall and injuries resulted from new <describe precipitation> or old <describe precipitation>. [The rule also permits you to consider whether there were unusual circumstances present which would make the defendant responsible for removing snow and ice from <describe location of the fall> outside walks and steps even if a storm has not ended.

There has been evidence presented in this case that <describe unusual circumstances present in the case>. If you find from the evidence that such circumstances existed at the time of the plaintiff's fall, you may find that the defendant breached (his/her/its) duty to maintain the premises under those circumstances. [<insert if applicable:> Your consideration of these issues will require you to answer interrogatories,¹ which I will explain to you later in these instructions.]

¹ Jury interrogatories are strongly recommended in any case where "unusual circumstances" are claimed. See *Cooks v. O'Brien Properties, Inc.*, 48 Conn. App. 339, 347 n.5

Authority

Gazo v. Stamford, 255 Conn. 245 (2001); *Kraus v. Newton*, 211 Conn. 191 (1989); *Umsteadt v. G. R. Realty*, 123 Conn. App. 73 (2010); *Cooks v. O'Brien Properties, Inc.*, 48 Conn. App. 339, 342 n.3 (1998); *Sinert v. Olympia & York Development Co.*, 38 Conn. App. 844, 848-49, cert. denied, 235 Conn. 927 (1995).

3.9-35 Ski Area Operator Liability, General Statutes §§ 29-211 and 29-212

New October 5, 2015

The plaintiff *<insert name of plaintiff>* alleges that (he/she) was injured as a result of the negligent conduct of the defendant, *<insert name of defendant>*, a ski area operator. A "ski area operator" is defined as a person or entity who owns or controls the operation of a ski area and their agents and employees. "Operation of the ski area" means those services offered by the operator as components of its business activity. In Connecticut, we have two statutes that describe when a ski area operator may or may not be liable to compensate a skier for injuries to (his/her) person or property sustained while skiing at the ski area.

[*<If the parties agree that the plaintiff was a "skier":>* The parties agree that *<insert name of plaintiff>* was a "skier" at the ski area of *<insert name of defendant>*.]

[*<If the parties dispute whether the plaintiff was a "skier":>* A "skier" is defined by statute to mean a person who is using a ski area for the purpose of skiing or who is on the skiable terrain of a ski area as a spectator or otherwise. "Skiing" is defined to include "sliding downhill or jumping on snow or ice using skis, snow blades, a snowbike, a sitski, or any other device that is controllable by its edges on snow or ice or is for the purpose of utilizing any skiable terrain"]

Under the applicable statutes, a ski area operator is not liable for harm to a skier or to the skier's property that is caused by the hazards inherent in the sport of skiing. Such hazards include, but are not limited to *<include as applicable>*:

- natural variations in the terrain of the trail or slope, as well as variations in surface or subsurface snow or ice conditions, but not variations that are caused by the ski area operator unless such variations are caused by snow making, snow grooming or rescue operations;
- bare spots that do not require the closing of the trail or slope;
- conspicuously placed or, if not so placed, conspicuously marked lift towers;
- trees or other objects not within the confines of the trail or slope;
- loading, unloading or otherwise using a passenger tramway without prior knowledge of proper loading and unloading procedures or without reading instructions concerning loading and unloading posted at the base of such passenger tramway or without asking for such instructions; and
- collisions with any other person by any skier while skiing, but not collisions with on-duty employees of the ski area operator who are skiing and are acting within the scope of their employment at the time of the collision.

The specific hazards that I just mentioned are not the only hazards that are inherent in the sport of skiing. As I have explained, a ski area operator is not liable for injuries suffered by skiers

while skiing if those injuries are caused by hazards that are inherent in the sport of skiing, including inherent hazards that I have not specifically mentioned.

I have just related for you those circumstances in which a ski area operator cannot be held liable for a skier's injuries or damage to a skier's property. When is a ski area operator liable for such harm? Ski area operators must perform certain duties, including, but not limited to *<include as applicable>*:

- conspicuously marking all trail maintenance vehicles and furnishing the vehicles with flashing or rotating lights which shall be operated whenever the vehicles are working or moving within the skiing area;
- conspicuously marking the location of any hydrant or similar device used in snow-making operations and placed on a trail or slope;
- conspicuously marking the entrance to each trail or slope with a symbol, adopted or approved by the National Ski Areas Association, which identifies the relative degree of difficulty of such trail or slope or warns that such trail or slope is closed;
- maintaining one or more trail boards, at prominent locations within the ski area, displaying such area's network of ski trails and slopes and designating each trail or slope in the manner described above and notifying each skier that the wearing of ski retention straps or other devices used to prevent runaway skis is required;
- conspicuously marking any lift tower that is located on a trail or slope and is not readily visible;
- in the event maintenance personnel or equipment are being employed on any trail or slope during the hours at which such trail or slope is open to the public, conspicuously posting notice thereof at the entrance to such trail or slope; and
- conspicuously marking trail or slope intersections.

This nonexhaustive list describes duties that a ski area operator is obligated to perform with reasonable care. If the agents or employees negligently fail to perform any of these tasks or perform one or more of them negligently, and those negligent actions or inactions were a cause of the injuries and damages that the plaintiff *<insert name of plaintiff>* claims (he/she) sustained, then the ski area operator *<insert name of defendant>* may be liable to the plaintiff [*<insert if comparative negligence is at issue:>* after applying the comparative negligence rules about which I will instruct you shortly].

<Instruct on other definitional sections if necessary.>

As you may have perceived, although a ski area operator is not liable for injuries or damages sustained by a skier as a result of hazards that are inherent in the sport of skiing, ski area operators may be liable if they fail to perform duties that are inherent in operating a ski area. The plaintiff has the burden of proving, by a preponderance of the evidence, that the unsafe condition or circumstance that caused (him/her) harm as a skier at the defendant's ski area was not a hazard that is inherent in the sport of skiing and that the ski area operator, through its agents or employees, breached the standard of reasonable care with respect to one or more of the ski area operator's duties. It is for you to determine the answers to these factual questions.

<Discuss specific allegations.>

<Instruct on negligence and causation.>

<Instruct on comparative negligence if applicable.>

Authorities

Jagger v. Mohawk Mountain Ski Area, Inc., 269 Conn. 672, 680, 687 (2004); *Id.*, 714-715 (Borden J., dissenting); General Statutes §§ 29-211 and 29-212.

Notes

General Statutes §§ 29-211 and 29-212 were described in *Jagger v. Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672 (2004), as creating an "analytical morass"; *id.*, 687; and as "legal schizophrenia"; *id.*, 706. In response to *Jagger*, the legislature amended those statutes in No. 05-78 of the 2005 Public Acts. In the legislative debate, the Supreme Court majority opinion was viewed as "dismantling" the protection to ski area operators originally intended by that provision and "gutting" the very purpose of § 29-212 by reducing the effect of that provision to that of the ordinary common-law rule for negligence cases. The legislative history is replete with references to the need to restore a "sole proximate cause" standard for liability by amending these provisions. However, the phrase "sole proximate cause" does not appear in the text of the amendments.

Our appellate courts have yet to construe these sections since the 2005 amendments. In the absence of further guidance, the committee has utilized Justice Borden's interpretation of the interplay of these statutes in his dissent in *Jagger*, *supra*, 705-715, in crafting this instruction.

The majority and dissent in *Jagger* agreed that the use of the phrase "assume the risk" does not refer to the special defense of assumption of the risk, but instead attempts to outline those circumstances in which a ski area operator has no duty of care and, therefore, cannot be negligent in the first place. *Id.*, 687, 707.

3.10 PRODUCT LIABILITY

3.10-1 Product Liability

3.10-2 Product Liability - Failure to Warn

**3.10-3 Product Liability - Comparative
Responsibility (Causation)**

3.10-4 Product Liability - Misuse of a Product

3.10-5 Product Liability - Malfunction Doctrine

**3.10-6 Product Liability - Alteration or
Modification**

3.10-1 Product Liability

Revised to March 23, 2012

Note: The following charge applies to the most common type of product liability action, one in which a tool or machine is claimed to be defective. This charge is not appropriate in cases in which the claimed defect concerns a product about which the ordinary consumer would have no basis for having any expectations about the item, for instance, complex machinery not encountered in the everyday experience of consumers. See *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 222 (1997). If there is a factual issue whether the defendant is "engaged in the business of selling such products," (§ 52-572m (a)), you will need to charge in more detail on that topic.

In the interest of avoiding unnecessary confusion, the language concerning bailments may be omitted if no such issue is presented in the case.

The plaintiff claims that the defendant is liable to (him/her) under the Connecticut Product Liability Act. [*optional:*> That Act is a statute enacted by the General Assembly. It provides that those who put defective products into the stream of commerce shall be liable to people who suffer injuries or damages resulting from those defective products. To be "liable" means to be required to pay compensation to an injured party.] In order to prove a claim under the Connecticut Product Liability Act, the plaintiff must prove all of the following things:

1. the defendant was a "product seller," within the terms of the statute;
2. the product was defective in the way claimed by the plaintiff;
3. the defect existed at the time the product left the defendant, and the product was expected to reach the user without substantial change in condition and did reach the user without substantial change in condition as to the feature claimed to be a defect; and
4. the defect proximately caused injury or damage to the plaintiff.

Product Seller

A person or entity is a "product seller" if, as a manufacturer, wholesaler, distributor or retailer, it is (in the business of selling or leasing/gives a bailment of) the product, whether the sale is for use by the buyer or for resale to another. If the other elements of a product liability claim are proved, a product seller is liable to any person who is injured by the product, not just to the person to whom it originally sold the product.

<Select one of the following, depending on allegations:>

- There is no dispute that the defendant (manufactured/sold) the *<identify product>* at issue in this case.
- There is a dispute whether the defendant was a product seller with regard to the product that the plaintiff claims caused (him/her) to suffer injuries and loss. You must consider all of the evidence on this issue and decide whether this defendant

has or has not been proved to be a "product seller" with regard to the product at issue. A "product seller" is any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. More than one entity may be a "product seller" with regard to the same item. If the defendant has been shown to be a product seller, then the defendant may be held liable to the plaintiff if (he/she) has proved the other elements of (his/her) claim under the Product Liability Act. If not, the defendant is not liable under the Connecticut Product Liability Act.

Existence of a Defect

The condition that the plaintiff claims is a product defect is *<identify alleged defect>*. In order to prove that the product was defective, the plaintiff must prove that the condition that is claimed to be a defect made the product unreasonably dangerous. A product is unreasonably dangerous if, at the time of sale, it is defective to an extent beyond that which would be contemplated by the ordinary consumer.

The plaintiff claims, in effect, that an ordinary consumer would expect *<explain plaintiff's position>*. In order to decide this issue of the expectations of a reasonable consumer, you should consider *<discuss the way the defect is claimed to have caused the injury>*. If you find that an ordinary consumer would expect *<the plaintiff's position>* and that the product did not meet the expectations that the ordinary consumer would have in this regard, then the plaintiff has proven the existence of a product defect. If an ordinary consumer would not expect *<the plaintiff's position>*, then the plaintiff has not proved that the design or feature at issue constituted a product defect.

A product seller, under Connecticut law, is not in the position of guaranteeing that no one will ever be injured while using its product, and a product seller is not liable for injuries simply because those injuries occurred during the use of its product.

Absence of Substantial Change

The plaintiff must also prove that the feature or condition that is claimed to be a defect, or to make the product defective, existed at the time that the product left the defendant, that the product was expected to reach the user without substantial change in condition as to the feature claimed to be a defect, and that the product in fact reached the ultimate user without substantial modification.

<Select one of the following, depending on the allegations:>

- In this case, there is no dispute that the product reached the user in the same condition in which it had left the seller.
- *<Insert Product Liability - Alteration or Modification, Instruction 3.10.6.>*

Proximate Cause

In addition to proving the other elements, the plaintiff must also show that the defect proximately caused the injury or loss.

<Insert appropriate instructions on proximate cause; see Proximate Cause, Instruction 3.1-3 and Proximate Cause - Substantial Factor, Instruction 3.1-4.>

Authority

General Statutes §§ 52-572m, 52-572p; *Wagner v. Clark Equipment Co.*, 243 Conn. 168 (1997); *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199 (1997).

Notes

In cases involving a claimed defect of a product about which the ordinary consumer would not have a basis for having any expectations, this charge, which incorporates the ordinary consumer expectation test, may not be appropriate. In *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199 (1997), the Supreme Court explained that "instructions based on the ordinary consumer expectation test would not be appropriate when, as a matter of law, there is insufficient evidence to support a jury verdict under that test. . . . In such circumstances, the jury should be instructed solely on the modified consumer expectation test" (Citation omitted.) *Id.*, 222-23. The court explained that "the jury should engage in the risk-utility balancing required by our modified consumer expectation test when the particular facts do not reasonably permit the inference that the product did not meet the safety expectations of the ordinary consumer." *Id.*, 222.

"[U]nder this modified formulation, the consumer expectation test would establish the product's risks and utility, and the inquiry would then be whether a reasonable consumer would consider the product design unreasonably dangerous." *Id.*, 220-21. "[T]he relevant factors that a jury may consider [under the modified consumer expectation test] include, but are not limited to, the usefulness of the product, the likelihood and severity of the danger posed by the design, the feasibility of an alternative design, the financial cost of an improved design, the ability to reduce the product's danger without impairing its usefulness or making it too expensive, and the feasibility of spreading the loss by increasing the product's price." (Emphasis in original.) *Id.*, 221.

The court further explained that "it is the function of the trial court to determine whether an instruction based on the ordinary consumer expectation test or the modified consumer expectation test, or both, is appropriate in light of the evidence presented. In making this determination, the trial court must ascertain whether, under each test, there is sufficient evidence as a matter of law to warrant the respective instruction." *Id.*, 223.

It is hard to envision a court giving both instructions.

3.10-2 Product Liability - Failure to Warn

Revised to January 1, 2008

The plaintiff claims that the defendant is liable under the Connecticut Product Liability Act because it did not provide adequate warnings or instructions to advise users of the product that they would have to do certain things to avoid being injured by using the product. Failure to provide adequate warnings or instructions, where they are necessary, constitutes a product defect for which a product seller is liable under the Connecticut Product Liability Act.

The plaintiff claims that *<explain the plaintiff's claim with regard to warnings>*.

A product seller is liable to a party who suffers injury or loss from the use of a product if the product could not be used safely by the ordinary consumer without adequate instructions or warnings.

You must decide whether a warning was necessary and, if it was, whether the warning was adequate. In deciding whether a warning was necessary, you may consider:

- the likelihood that the product would cause the harm suffered by the plaintiff;
- the ability of the product seller to anticipate at the time the product seller put the product into the stream of commerce that the expected product user would be aware of the risks involved in using the product and the nature of the potential harm;
- the technological feasibility and cost of warnings and instructions.

A product seller has a duty to warn of hidden dangers in the use of a product in the ordinary, customary way. A product seller also has a duty to warn of dangers that may result from misuse of a product if the misuse is of a type that the product seller reasonably should foresee.

A product seller does not have a duty to provide a warning as to a danger that is obviously involved in the customary, ordinary use of the product or that is obviously present if the product is misused.

A product seller is not liable for failure to warn of risks that were not known to it or that it could not reasonably have foreseen at the time it put the product into the stream of commerce.

Where the product seller has provided a warning, it may still be liable if the warning provided is not adequate to advise the ordinary user of the nature and extent of any danger associated with the reasonably anticipated use, or with the reasonably anticipated misuse of the product. In assessing whether the warning that has been provided is adequate, you should consider whether the danger is one that is obvious to a user and whether the warning is placed with proper prominence in relation to the risk to which the warning applies. To be adequate, a warning must be devised to communicate with the person best able to take or recommend precautions against the potential harm.

A product seller that provides an adequate warning is entitled to presume that such a warning will be heeded by the user, and if the product is safe for use so long as the warning is heeded, the product is not defective.

A product seller is not liable for failure to provide a warning if the plaintiff is aware of the danger.

Causation

If you find that the product is defective because it failed to provide a warning when one was reasonably required or because the warning was inadequate, then you will go on to consider the element of causation. The plaintiff has the burden of proving that the lack of a warning, or the lack of an adequate warning, was a proximate cause of the plaintiff's injuries. The plaintiff must prove that if adequate warnings or instructions had been provided, the plaintiff would not have suffered the harm. If the plaintiff would have suffered the harm even if adequate warnings or instructions had been provided, then the defendant is not liable for failure to warn.

Authority

General Statutes § 52-572q; *Haesche v. Kissner*, 229 Conn. 213 (1994); *Sharp v. Wyatt, Inc.*, 31 Conn. App. 824, aff'd, 230 Conn. 22 (1993); *Giglio v. Connecticut Light & Power Co.*, 180 Conn. 230 (1980); *Gajewski v. Pavelo*, 36 Conn. App. 601 (1994), aff'd, 236 Conn. 27 (1996).

Notes

In *Vitanza v. Upjohn Co.*, 257 Conn. 365, 378 (2001), the court held that the "learned intermediary doctrine" was applicable to product liability claims. "The learned intermediary doctrine provides that adequate warnings to prescribing physicians obviate the need for manufacturers of prescription products to warn ultimate consumers directly. The doctrine is based on the principle that prescribing physicians act as 'learned intermediaries' between a manufacturer and consumer and, therefore, stand in the best position to evaluate a patient's needs and assess [the] risks and benefits of a particular course of treatment." (Internal quotations omitted.) *Id.*, 376. The learned intermediary doctrine applies to prescription drugs; *Vitanza*, and also to prescription implantable medical devices such as pacemakers; *Hurley v. Heart Physicians, P.C.*, 278 Conn. 305, 317-18 (2006).

3.10-3 Product Liability - Comparative Responsibility (Causation)

New, March 1, 2009

If you find the defendant liable under the instructions I just gave you, based upon findings that its product was defective and that the defect was a proximate cause of the plaintiff's alleged injuries, you must go on to consider the defendant's special defense of comparative responsibility. To establish this defense, the defendant must prove by a fair preponderance of the evidence that the plaintiff bears at least partial responsibility for (his/her) own injuries because (he/she) engaged in (negligent/reckless/intentional) conduct of the kind alleged in the special defense and such conduct, like the defendant's defective product, was also a proximate cause of those injuries. Under our law, the plaintiff's recovery of damages for injuries proximately caused by a defective product is not barred if such injuries are also shown to have been caused by the plaintiff's own (negligence/recklessness/intentionally tortious) conduct. Instead, in such circumstances, (his/her) award of damages must be diminished by a percentage representing the measure of (his/her) own responsibility for those injuries compared to the combined responsibility of all parties, including (himself/herself), who have been shown to bear some responsibility for those injuries. If the defendant persuades you that the plaintiff did indeed engage in (negligent/reckless/intentional) conduct of the sort here alleged, and further that such conduct proximately caused the injuries (he/she) complains of in this case, then you must go on to determine the percentage of responsibility (he/she) personally must bear for those injuries, determined as a percentage of the combined responsibility of all parties found responsible for those injuries in this case.

Here, the defendant has alleged that the plaintiff bears at least partial responsibility for (his/her) own alleged injuries by engaging in the following acts of (negligence/recklessness/intentional) misconduct, which (he/she) claims to have proximately caused those alleged injuries: *<quote the specifications of negligence, recklessness or intentionally tortious conduct set forth in the special defense for which at least some evidence has been presented at trial>*. Under our law, a person engages in (negligence/recklessness/intentional tortious) conduct when *<here describe the elements of negligence or of any other type of tortious conduct by which the plaintiff is claimed to have caused (his/her) own injuries in the case>*. To prove that the plaintiff engaged in negligence [or other pleaded form of tortious conduct], in the manner described in the special defense, the defendant must prove the following essential elements by a fair preponderance of the evidence: *<here list the essential elements of the defendant's claim of negligence or other tortious conduct, as pleaded in the special defense>*.¹

(Negligence/Recklessness/Intentionally tortious) conduct is a proximate cause of an alleged injury when it is a substantial factor in bringing that injury about. In determining if the defendant has proved this second element of its claim of comparative responsibility, you must apply the same general instructions on legal causation which I previously gave you on the causation element of the plaintiff's product liability claim.

If the defendant persuades you by a fair preponderance of the evidence that the plaintiff engaged in (negligent/reckless/intentionally tortious) conduct in the manner here alleged and that such conduct proximately caused (his/her) alleged injuries, you must next determine the comparative responsibility of all parties for those injuries. The comparative responsibility of each party who is shown to have been responsible for the plaintiff's proven injuries must be determined by assigning him a percentage of the combined responsibility of all parties you find to be responsible for such injuries, totaling 100%. Because comparative responsibility is a special defense, the defendant bears the burden of proving the extent of the plaintiff's proportionate responsibility for (his/her) own injuries, expressed as a percentage of the combined responsibility of all parties whose responsibility for such injuries has been proved at trial.

In determining the comparative responsibility of the parties for the plaintiff's alleged injuries, you must consider, on a comparative basis, both the nature and the quality of each party's proven conduct.² Factors for assigning percentages of responsibility to each party whose legal responsibility has been established include the nature of the party's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct, as well as the strength of the causal connection between the party's risk-creating conduct and the harm.³ The nature of a responsible party's risk-creating conduct includes such things as how unreasonable the conduct was under the circumstances, in light of the extent to which it deviated from the legal standard applicable to it in this case; the circumstances surrounding the conduct; each party's abilities and disabilities; and each party's awareness, intent, or indifference with respect to the risks.⁴ The comparative strength of the causal connection and the harm depends on how attenuated the causal connection was, the timing of each person's conduct in causing the harm, and a comparison of the risks created by the conduct and the actual harm suffered by the plaintiff.⁵ Your task, after considering the responsible parties' proven conduct in light of these factors, is to assign to each party a percentage representing (his/her) proportion of the combined responsibility of all parties for the plaintiff's proven injuries, with the total of such individual percentages of responsibility equaling 100%.

¹ Before instructing on any particular specification of negligence (or other tortious conduct) set forth in the special defense, the court must obviously determine if the alleged conduct could support the proposed finding as a matter of law. See generally, *Barry v. Quality Steel Products, Inc.*, 280 Conn. 1, 22 (2006) (finding no error in the trial court's refusal to instruct that roof workers who fell and were injured due to the failure of the defendant's defective roof brackets could be found negligent, for comparative responsibility purposes, based upon their alleged failure to anticipate the failure of the brackets and to use backup systems to guard against the possible dangers resulting therefrom).

² This language comes directly from General Statutes § 52-572o (c).

³ This language comes directly from § 8 of Restatement (Third), Torts, Apportionment of Liability, which our Supreme Court referenced with approval in *Barry v. Quality Steel Products, Inc.*, supra, 280 Conn. at 21 (prescribing the manner in which a jury should be instructed as to the plaintiff's alleged negligence when it is pleaded as a basis for asserting the special defense of comparative responsibility). That Section, which sets forth generally applicable rules

apportioning responsibility among joint tortfeasors, applies directly to the apportionment of responsibility between the sellers of defective products which injure plaintiffs and plaintiffs whose tortious conduct contributes to their own product-related injuries under § 17 of the Restatement (Third), Apportionment of Liability. Section 17 provides as follows:

§ 17. Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others.

(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

⁴ This language comes directly from Comment c to § 8 of the Restatement (Third), Torts, Apportionment of Responsibility.

⁵ Id.

3.10-4 Product Liability - Misuse of a Product

Revised to January 1, 2008

The defendant has raised as a special defense the claim that the harm suffered by the plaintiff was caused by the plaintiff's misuse of the product. Specifically, the defendant alleges that *<explain allegations>*.

A person misuses a product if (he/she) uses it in a manner or for a purpose that is beyond or outside the normal use for which the product was designed or intended and that was not reasonably foreseeable to the seller.

[*<If there is a claim of use contrary to warnings:>* A person also misuses a product if (he/she) uses it in a manner than is contrary to the warnings or instructions provided with the product.]

If the plaintiff has proven that the product was defective AND the defendant has proven that it was misused, then you must determine the extent to which the defect and the misuse each contributed to causing the plaintiff's injuries.

If the defendant has proven that the plaintiff's injury was proximately caused solely by (his/her) misuse of the product, then the defendant is not liable, even if the product was defective in some way.

<Insert charges on proximate cause and on comparative responsibility where both user and product seller may be found to have contributed to causing the injury.>

Authority

General Statutes § 52-572o; *Elliot v. Sears, Roebuck & Co.*, 229 Conn. 500, 515 (1994).

3.10-5 Product Liability - Malfunction Doctrine

New December 9, 2011

When direct evidence of a specific defect is unavailable, you may rely on circumstantial evidence to infer that the product that malfunctioned was defective at the time it left the defendant's control if the plaintiff has presented evidence establishing that (1) the incident that caused the plaintiff's harm was of a kind that ordinarily does not occur in the absence of a product defect, and (2) any defect most likely existed at the time the product left the defendant's control and was not the result of other reasonably possible causes, such as operator error, not attributable to the defendant. These two inferences, taken together, permit you to link the plaintiff's injury to a product defect attributable to the defendant.

The malfunction theory does not relieve the plaintiff of proving that the product in question was defective. However, it does permit you to infer the existence of a defect without direct evidence of same.

Authority

Metropolitan Property & Casualty Ins. Co. v. Deere & Co., 302 Conn. 123, 132-49 (2011).

Notes

This charge must be given in conjunction with the circumstantial evidence charge, Direct and Circumstantial Evidence, Instruction 2.4-1. The type of circumstantial evidence may "includ[e] evidence of (1) the history and use of the particular product, (2) the manner in which the product malfunctioned, (3) similar malfunctions in similar products that may negate the possibility of other causes, (4) the age of the product in relation to its life expectancy, and (5) the most likely causes of the malfunction." *Metropolitan Property & Casualty Ins. Co. v. Deere & Co.*, supra, 302 Conn. 140-41. "If lay witnesses and common experience are not sufficient to remove the case from the realm of speculation, the plaintiff will need to present expert testimony to establish a prima facie case." *Id.*, 141.

3.10-6 Product Liability - Alteration or Modification

New March 23, 2012

The defendant claims that the product was altered or modified after the product left the defendant and that the alteration or modification caused the defect. Specifically, *<select one of the following as appropriate:>*

- the defendant claims that *<describe the alteration or modification>*.
- the parties agree that *<describe the alteration or modification>*.

In some circumstances, a product seller is not liable if a third party alters or modifies the product in a way that creates a defect. [*<insert if the parties do not stipulate to the alteration or modification:>* You must determine whether the product was altered or modified.] The defendant is not liable unless the plaintiff proves: *<charge the following as applicable:>*

- the injury or loss would have occurred notwithstanding the alteration or modification.
- the alteration or modification was in accordance with the defendant's instructions.
- the alteration or modification was made with the defendant's consent.
- the alteration or modification was the result of conduct that the defendant reasonably should have anticipated.

Authority

General Statutes § 52-572p; *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199 (1997).

Notes

This charge may be omitted if there is no issue of alteration or modification, and the jury should be told that it is not disputed that the product reached the user in the same condition in which it had left the seller. Though modification/alteration is sometimes raised as a special defense, the burden of proof to show the continuous character of the product remains with the plaintiff. The defendant must produce evidence of a specific alteration or modification. If it does this, the plaintiff has the burden of disproving the causative effect of the modification/alteration.

3.11 DEFAMATION

General

3.11-1 Defamation

Libel and Slander

3.11-2 Libel

3.11-3 Libel Per Quod

3.11-4 Libel Per Se

3.11-5 Slander Per Se

Damages

3.11-6 Damages - Retraction under General Statutes § 52-237

3.11-7 Damages for Libel Per Quod

3.11-8 Damages for Libel/Slander Per Se

Defenses

3.11-9 Defenses - Privilege

3.11-10 Defenses - Truth

3.11-11 Defenses - Public Figure

3.11-1 Defamation

Revised to January 1, 2008

The plaintiff alleges that (he/she) was defamed by the defendant. (Libel/Slander) is a form of defamation. The plaintiff's claim in this case is based on (libel/slander).

A defamatory statement is a false communication that tends to harm the reputation of another; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held; to deter third persons from associating or dealing with (him/her); or to excite adverse, derogatory, or unpleasant feelings or opinions against (him/her).

Statements claimed to be defamatory should be given their ordinary meaning, which is the same meaning that people of common and reasonable understanding would give to them in the context and under all the circumstances that were present at the time they were made. In determining whether a statement is defamatory, you are not bound by the interpretation of the statement offered by the plaintiff, the defendant or by any person hearing the statement. If the meaning of the statement is unclear, it is your job as the jury to determine what the meaning of the statement was.

To establish a case of defamation, the plaintiff must prove the following:

- 1) the defendant published a defamatory statement to a third person;
- 2) the defamatory statement identified the plaintiff to a third person; and
- 3) the plaintiff's reputation suffered injury as a result of the statement.

Publication means to make a statement to another orally, in writing, or by some other means of communication. The publication of the defamatory information can be done intentionally or negligently, so long as it is done in a manner such that in the ordinary course of events it will come to be communicated to a third person.

Authority

Craig v. Stafford Construction, Inc., 271 Conn. 78, 84 (2004); *Cweklinsky v. Mobil Chemical Co.*, 267 Conn. 210, 217 (2004); *Yavis v. Sullivan*, 137 Conn. 253, 260 (1950); *Gagnon v. Housatonic Valley Tourism Commission*, 92 Conn. App. 835, 847-48 (2006); *Gambardella v. Apple Health Care, Inc.*, 86 Conn. App. 842, 848 (2005); *Lowe v. Shelton*, 83 Conn. App. 750, 765, cert. denied, 271 Conn. 915 (2004); 3 Restatement (Second), Torts § 559, p. 156 (1977); 3 Restatement (Second), Torts § 577, p. 201 (1977).

Notes

The question of whether the plaintiff has established a prima facie case of defamation is one of law. *Gambardella v. Apple Health Care, Inc.*, 86 Conn. App. 842, 847 (2005). It is for the judge to determine whether a statement is libel or slander. *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 610-12 (1955).

Case law traditionally divides defamation into four elements: "(1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement." See, e.g., *Cweklinsky v. Mobil Chemical Co.*, 267 Conn. 210, 217 (2004). To avoid duplication, this charge uses only three elements.

3.11-2 Libel

Revised to January 1, 2008

Libel is written defamation. It is the publication of defamatory material by either written or printed words, or by some other form of printed communication that has the same potential harmful characteristics associated with written or printed words.

In this case the plaintiff claims that *<insert allegations>*.

In order to prove libel, the plaintiff must prove the following:

- 1) that the defendant published a writing to a third party;
- 2) that the writing identified the plaintiff, such that it would be reasonably understood that it was about the plaintiff;
- 3) that the writing was defamatory to the plaintiff; and
- 4) that the publication caused harm to the plaintiff.

Only if you find that the plaintiff has proven each of these elements, by a preponderance of the evidence, can you find that the plaintiff has established a case of libel.

Authority

Gagnon v. Housatonic Valley Tourism Commission, 92 Conn. App. 835, 847 (2006).

Notes

This charge should be preceded by Defamation, Instruction 3.11-1.

3.11-3 Libel Per Quod

Revised to January 1, 2008

The plaintiff alleges facts that (he/she) claims amount to a form of libel that is called libel per quod. Libel per quod is a written communication that is not libelous on its face, but becomes libelous in light of other, additional facts known by the recipient of the communication.

For the plaintiff to recover in an action for libel per quod, you must find, by a preponderance of the evidence, that the defendant has committed libel, as I have previously defined that term to you, but that the communication became libelous because of other facts known by the recipient of the communication. In addition, to recover in an action for libel per quod, the plaintiff must prove to you that (he/she) incurred actual damages.

Authority

Lowe v. Shelton, 83 Conn. App. 750, 765, cert. denied, 271 Conn. 915 (2004); *DeMorais v. Wisniowski*, 81 Conn. App. 595, 603-604, cert. denied, 268 Conn. 923 (2004); *Lega Siciliana Social Club, Inc. v. St. Germaine*, 77 Conn. App. 846, 852, cert. denied, 267 Conn. 901 (2003).

3.11-4 Libel Per Se

Revised to January 1, 2008

Certain written defamatory statements are considered to be so harmful in and of themselves that the person to whom they relate is entitled to recover general damages for injury to reputation, without proving that any special or actual damages were caused by the statements. These defamatory statements are called libel per se. Libel per se is a type of libel in which the defamatory meaning is apparent on the face of the statement.

When the defamatory words are libel per se, the law conclusively presumes that there is injury to the plaintiff's reputation. The plaintiff is not required to prove that (his/her) reputation was damaged. The plaintiff is entitled to recover, as general damages, for the injury to (his/her) reputation and for the humiliation and mental suffering caused by the libel.

In this case, the plaintiff claims that *<insert allegations>*.

If you find that the plaintiff has proven each of the elements of libel, as I have previously instructed you, then this would be libel per se because *<insert as appropriate:>*

- It charges one with a crime.
- It charges one with improper conduct or lack of skill in (his/her) profession and is likely to injure (him/her) in (his/her) profession or calling.

Authority

Gagnon v. Housatonic Valley Tourism Commission, 92 Conn. App. 835, 847-48 (2006); *Gambardella v. Apple Health Care, Inc.*, 86 Conn. App. 842, 850-51 (2005); *Lowe v. Shelton*, 83 Conn. App. 750, 766-67, cert. denied, 271 Conn. 915 (2004); *Lega Siciliana Social Club, Inc. v. St. Germaine*, 77 Conn. App. 846, 852-53, cert. denied, 267 Conn. 901 (2003); *Peters v. Carra*, 10 Conn. App. 410, 414 (1987).

Notes

This charge should be preceded by Defamation, Instruction 3.11-1, and Libel, Instruction 3.11-2, and be followed by Damages for Libel/Slander Per Se, Instruction 3.11-8.

Whether a publication is libelous per se is a question for the court. *Gagnon v. Housatonic Valley Tourism Commission*, 92 Conn. App. 835, 848 (2006). If the court finds that the statement made was libel per se, the court should so instruct the jury.

Whether a published article is libelous per se is determined on the face of the article itself. The statements contained therein, when viewed in the sense in which common and reasonable minds would understand them, are determinative. They may not be varied or enlarged by innuendo.

3.11-5 Slander Per Se

Revised to January 1, 2008

The plaintiff in this case is seeking to recover damages for slander. Slander is oral defamation of character. Slander is the speaking of defamatory words which injure the reputation of the person defamed or which deter people from associating with or dealing with the person defamed.

In most cases, a plaintiff must prove actual injury to (his/her) reputation in order to recover in an action for slander. Actual injury must be proven unless the slander occurred in one of the categories called slander per se. If a statement is slanderous per se, a person is entitled to recover for general damages to (his/her) reputation without having to prove that actual damage was caused by the statements. This is because the law conclusively presumes that these statements cause injury to a person's reputation.

In this case, the plaintiff claims that *<insert allegations>*.

If you find that the plaintiff has proven, by a preponderance of the evidence, that the defendant made the statement to a third person, which identified the plaintiff, such that it would be reasonably understood that it was about the plaintiff, then this would be slander per se because *<insert as appropriate:>*

- The statement falsely charges someone with having committed a crime that involves moral turpitude or for which an infamous penalty is attached.
- The statement falsely charges someone with having a loathsome or contagious disease.
- The statement falsely charges a woman with being unchaste.
- The statement falsely charges someone with incompetence or dishonesty in office.
- The statement falsely charges a professional person with general incompetence.
- The statement falsely charges a person with conduct or characteristics that would adversely affect (him/her) in (his/her) trade or business.

Authority

Moriarty v. Lippe, 162 Conn. 371 (1972); *Proto v. Bridgeport Herald Corp.*, 136 Conn. 557 (1950); *DeVito v. Schwartz*, 66 Conn. App. 228, 235-37 (2001); *Zeller v. Mack*, 14 Conn. App. 651 (1988).

Notes

This charge should be preceded by Defamation, Instruction 3.11-1, and be followed by Damages for Libel/Slander Per Se, Instruction 3.11-8.

The court should consider the continued viability of example three in light of Connecticut law on sexual discrimination and example four in light of freedom of speech concerns.

In an action for slander per se, a plaintiff can recover general, special and punitive damages, if appropriate.

Spoken words are not slanderous per se if they charge no more than specific acts, unless those acts are so charged as to amount to an allegation of general incompetence or lack of integrity.

3.11-6 Damages - Retraction under General Statutes

§ 52-237

New June 3, 2011

We have a statute in Connecticut which imposes some limits on the damages a plaintiff may recover in a libel case.

This statute gives the defendant the opportunity to publish a retraction of the writing that the plaintiff claims was libelous. If the defendant properly retracts the libel, the plaintiff's recovery is limited to those actual damages that (he/she) has specifically alleged and then proven.

You must find that four things happened before you may find that the defendant made a proper retraction:

1. the plaintiff made a written demand for a retraction;
2. the defendant published the retraction in as public a way as the original, allegedly libelous writing;
3. the retraction is sufficient to refute the original writing; and
4. the retraction was published within a reasonable time after the demand from the plaintiff.

If you find that the defendant has proven all four elements of a proper retraction, the plaintiff may only recover his special damages, which I will explain to you shortly.

Authority

General Statutes § 52-237.

Notes

If this charge is given, it is strongly recommended that interrogatories on the issue are submitted to the jury. On many occasions, there will be no factual dispute as to one or more of the required elements, particularly 1 and 2, and this should be made clear to the jury.

3.11-7 Damages for Libel Per Quod

Revised to January 1, 2008

In an action for libel per quod, the law does not presume that the plaintiff sustained injury to (his/her) reputation. As I have previously instructed you, to recover in an action of libel per quod, the plaintiff must prove to you that (he/she) incurred what is called actual damages, also called special damages, that is an actual injury or loss. The loss must be caused by the publication of the defamatory statement.

The special damages must be of a material nature and, generally, must be of a pecuniary nature, that is dealing with money.

<Insert relevant portions of instruction on special damages and punitive damages, contained in Damages for Libel/Slander Per Se, Instruction 3.11-8.>

The special damages can include both the damages that the plaintiff has already suffered and the damages that the plaintiff is likely to suffer in the future.

If the plaintiff has proven to you that as a result of the defamatory statements made by the defendant, (he/she) has suffered, or in reasonable probability will suffer, a financial loss, (he/she) is entitled to compensation for that loss. If (he/she) has failed to prove any such damage, your verdict must be for the defendant.

Authority

Urban v. Hartford Gas Co., 139 Conn. 301, 308 (1952).

Notes

Both special damages and punitive damages may be awarded in a claim for libel per quod. *DeVito v. Schwartz*, 66 Conn. App. 228, 235-36 (2001). The damage suffered must result from the conduct of someone other than the plaintiff or the defendant.

See General Statutes § 52-237 for the effect of a finding of malice in fact or the effect of a retraction made or refused.

3.11-8 Damages for Libel/Slander Per Se

Revised to January 1, 2008

In determining the amount of general damages to award for the injury to the plaintiff's reputation, you should consider what reputation the plaintiff had in the community when the (statement / writing) was made. You should consider all of the circumstances surrounding the making of the (statement / writing). You may also compensate the plaintiff for damages that (he/she) will likely incur in the future. These damages can include additional damage to (his/her) reputation that occurs as a result of the bringing of this lawsuit.

In addition to general damages awarded for the injury to the plaintiff's reputation, you may also award the plaintiff what are called special damages, or damages for economic loss. To recover special damages, however, the plaintiff must prove that (he/she) suffered economic loss that was legally caused by the publication of the defendant's defamatory (statement / writing), even where the defamation is (libel / slander) per se. General and special damages together comprise what are called compensatory damages, or damages that compensate the plaintiff for (his/her) loss.

If you find that the plaintiff has suffered a violation of (his/her) legal rights but (he/she) has not suffered an actual injury, (he/she) is entitled at least to nominal damages. Nominal damages may be awarded because you find that the defamatory material is of an insignificant character, or because you find that the plaintiff had a bad character, so that no substantial harm has been done to the plaintiff's reputation, or there is no proof that serious harm has been done to the plaintiff's reputation. Nominal damages are also awarded when they are the only damages claimed and the action is brought for the purpose of vindicating the plaintiff's character by a jury verdict that establishes that the defamatory material was false.

Punitive damages, which in Connecticut are limited to attorney's fees and expenses, may also be awarded. Punitive damages may be awarded if you find that the defendant's actions in this case were wilful, wanton or malicious, as I shall later define these terms. These damages, however, are not awarded as a matter of right, but rather as a matter of discretion, to be determined by you after you consider all of the evidence. Both nominal and punitive damages also may be awarded where the defamatory material is (libel / slander) per se.

To summarize, if the defamatory material is (libel / slander) per se, the plaintiff is entitled to an award of general damages for injury to reputation without proof of monetary loss, and an award of special damages upon proof of actual injury or loss. You may award punitive damages as a matter of discretion. At a minimum, where (libel/slander) per se has been established, a plaintiff should receive an award of at least nominal damages, usually one dollar, though not necessarily anything more.

Authority

Davidian v. Papanian, 115 Conn. 718, 719 (1932); *Craney v. Donovan*, 92 Conn. 236 (1917); *Lawton v. Weiner*, 91 Conn. App. 698, 720 (2005); *DeVito v. Schwartz*, 66 Conn. App. 228, 235-37 (2001).

Notes

See General Statutes § 52-237, applicable to libel actions only, for the effect of a finding of malice in fact or the effect of a retraction made or refused.

When punitive damages may be awarded, both attorneys may agree to have the court determine the amount of attorney's fees. In this situation, the jury need only determine if punitive damages are warranted.

3.11-9 Defenses - Privilege

Revised to January 1, 2008

As I have instructed you, the burden is on the plaintiff to prove that the defendant made the defamatory statement about (him/her). Even if the plaintiff does prove that the statement was made, the defendant claims that (he/she) is not liable because (he/she) had a right to make the statements. Under certain conditions, a person will not be liable for making a defamatory statement if that person had a right, or privilege, to make the statement.

In this case, the privilege that the defendant states (he/she) was exercising is that the statement was *<insert as appropriate:>*

- a statement made in good faith in the discharge of a public or private duty or in the pursuit of one's own rights or interests.
- criticism of, or allegations of misconduct against, a public official or candidate for public office where the statement made is relevant to whether the person should hold office or be elected.

In this case, the defendant claims that *<insert allegations>*.

The defendant has the burden to prove that the statements were made under circumstances that were substantially as (he/she) claimed them to be. If you find that the defendant has proven this to you, then as a matter of law, (his/her) statements were privileged. If you find that the defendant has not proven this to you, then the statements were not privileged.

If you do find that the defendant's statements were privileged, you must determine whether the defendant has misused (his/her) privilege. If you find that the defendant has acted maliciously and has not acted honestly or in good faith, (he/she) loses the privilege. Malice can include ill will or a desire to hurt another person, but it does not always have to include similar negative feelings. Malice can include any improper or unjustifiable motive. It can also include making a statement with knowledge that it is false or with reckless disregard of whether it is false or not. A negligent misstatement of fact is not enough.

If you find that the defendant did not make the statement in good faith and for the reason that (he/she) claims, but that (he/she) made it maliciously for an improper reason, then the statement was not privileged. You should consider all of the circumstances surrounding the making of the statement in making your determination of whether the statement was privileged and, if privileged, whether it was made in good faith or with malice.

The defendant has the burden to prove, by a preponderance of the evidence, that the statement was privileged. If privileged, then the plaintiff has the burden to prove, also by a preponderance of the evidence, that the privilege was misused because the statement was made maliciously.

Authority

Gaudio v. Griffin Health Services Corp., 249 Conn. 523, 545-46 (1999); *Chadha v. Charlotte Hungerford Hospital*, 97 Conn. App. 527, 537-38 (2006); *Miles v. Perry*, 11 Conn. App. 584 (1987).

Notes

This instruction covers what is commonly called qualified privilege. It is not intended to cover claims of absolute privilege concerning judicial or legislative proceedings or governmental acts. If there is an absolute privilege, damages cannot be recovered for a defamatory statement even if published falsely and maliciously. *Craig v. Stafford Construction, Inc.*, 271 Conn. 78, 84 (2004).

A defendant must specially plead a claim of privilege.

Whether a statement was privileged is a question of law for the court. Whether a defendant abused a privilege by acting maliciously is a question for the jury. 3 Restatement (Second), Torts § 619, p.316 (1977).

See General Statutes § 52-237, which is applicable to actions for libel, concerning the effect of malice in fact or the effect of a retraction made or refused.

3.11-10 Defenses - Truth

Revised to January 1, 2008

As I have instructed you, the burden is on the plaintiff to prove that the defendant made the defamatory statement about (him/her). Even if the plaintiff does prove that the statement was made, however, (he/she) cannot recover if the statement was, in fact, true.

In the defendant's answer, (he/she) raised the defense that the statement was true. The defendant, thus, has the burden of proving that the statement was true. The plaintiff does not have to prove that the statement was false. To sustain this burden, the defendant must prove that the statements were substantially true.

The defendant's proof that the statements were true must be as to all of the libelous statements that you may find (he/she) made. In addition, the statements must have been true at the time they were made, not true at an earlier time or prove to be true because of circumstances that occur after they were made.

If the defendant does prove, by a preponderance of the evidence, that the statements (he/she) made were substantially true at the time that (he/she) made them, then (he/she) must prevail on his defense and your verdict should be for the defendant.

Authority

Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 112-13 (1982);
Moynahan v. Waterbury Republican, Inc., 92 Conn. 331 (1918).

Notes

If the jury does not find that the defendant has proved the substantial truth of any statements made, they may still consider the evidence offered to refute a claim of malice or to refute a claim for punitive damages.

3.11-11 Defenses - Public Figure

New, March 1, 2009

The legal status of a person who asserts a claim of defamation determines what (he/she) must prove and by what standard (he/she) must prove it to prevail on (his/her) claim. Under our law, more particularly, there are separate rules and standards for deciding defamation claims brought by public figures and by private individuals. As the judge, it is my responsibility to decide, based upon the evidence presented at trial, if the plaintiff is a public figure or a private individual, and to instruct you accordingly. After considering the evidence in this case, I have determined that the plaintiff is a public figure.

A public figure is entitled to recover damages for defamation if (he/she) can prove by a fair preponderance of the evidence that the defendant published or broadcast defamatory information about (him/her), and can further prove by clear and convincing evidence that the defendant made (his/her) defamatory publication or broadcast with actual malice.

<Here instruct on the elements of defamation, defining the terms defamatory information, publish and broadcast.>

A defendant publishes or broadcasts a defamatory statement with actual malice when (he/she) acts either with actual knowledge that the statement is false or with reckless disregard of whether it is false. The making of a negligent misstatement is not enough to establish defamation. Instead, the evidence must show that the defendant, by (his/her) intentional or reckless conduct, engaged in purposeful avoidance of the truth.

The plaintiff must prove that the defendant acted with actual malice by the heightened standard of clear and convincing evidence.

<Insert instruction on Clear and Convincing Evidence, Instruction 3.2-2.>

Thus, as a public figure, (he/she) can only recover if you find, by clear and convincing evidence, that the defamatory statement was made with actual malice.

Authority

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Miles v. Perry*, 11 Conn. App. 584, 591, 529 A.2d 199 (1987); *Abdelsayed v. Narumanchi*, 39 Conn. App. 778, 668 A.2d 378 (1995), cert. denied, 237 Conn. 915, 676 A.2d 397, cert. denied, 519 U.S. 868, 117 S. Ct. 180, 136 L. Ed. 2d 120 (1996).

Notes

The defendant should raise, by special defense, the fact that (he/she) claims the plaintiff to be a public figure.

The court determines, as a matter of law, whether a plaintiff is a public figure. Someone may be a public figure in one context, but not in another. The determination of whether a plaintiff is a public figure should be made with reference to a limited and more meaningful context than the context used by society, in general. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. *Miles v. Perry*, 11 Conn. App. 584, 591, 529 A.2d 199 (1987).

3.12 EMOTIONAL DISTRESS

3.12-1 Intentional Infliction of Emotional Distress

3.12-2 Negligent Infliction of Emotional Distress

3.12-3 Bystander Emotional Distress

3.12-1 Intentional Infliction of Emotional Distress

Revised to January 1, 2008

There are four elements that must be established for a finding of intentional infliction of emotional distress: 1) that the defendant intended to inflict emotional distress, or that the defendant knew or should have known that emotional distress was the likely result of (his/her) conduct; 2) that the conduct was extreme and outrageous; 3) that the conduct was the cause of emotional distress experienced by the plaintiff; and 4) that the emotional distress sustained by the plaintiff was severe.

The defendant's liability for intentional infliction of emotional distress requires that you find that (his/her) conduct exceeded all bounds usually tolerated by decent society. Liability can be found only where the defendant's conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse (his/her) resentment against the actor, and lead (him/her) to exclaim, Outrageous! Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for liability based upon intentional infliction of emotional distress.

In order for the plaintiff to prevail on (his/her) claim of intentional infliction of emotional distress you must find that the plaintiff has proved all of the elements of intentional infliction of emotional distress.

If you find that the plaintiff has not proved all of the elements of intentional infliction of emotional distress, then you will return a defendant's verdict on this count.

Authority

Petyan v. Ellis, 200 Conn. 243, 253-54 (2003).

Notes

Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous and whether the plaintiff's distress is sufficient to satisfy the requirement of severe emotional distress are initially questions for the court to determine. Only where reasonable minds could differ do they become issues for the jury. *Bell v. Board of Education*, 55 Conn. App. 400, 409-10 (1999).

The jury must also find that the injuries claimed by the plaintiff were proximately caused by the defendant's conduct, so the court must also charge on causation.

3.12-2 Negligent Infliction of Emotional Distress

Revised to January 1, 2008

There are three elements that the plaintiff must prove for a finding of negligent infliction of emotional distress: 1) the defendant engaged in conduct that the defendant should have realized involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily injury; 2) that the conduct caused emotional distress to the plaintiff; and 3) the distress was of such a nature as might result in illness or bodily harm.

As to the first element, that is, that the defendant engaged in conduct that the defendant should have realized involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily injury, the plaintiff need not prove that the defendant intended to cause any harm or distress to the plaintiff but only that the defendant should have known that it was likely that a reasonable person under the circumstances would be distressed by the conduct and that that distress might result in illness or bodily injury. As to the second and third elements, you must determine whether the plaintiff actually experienced fear or distress, and if so, whether the fear or distress experienced by the plaintiff was reasonable in light of the conduct of the defendant. If you find that it was reasonable for the plaintiff to experience distress in light of the conduct of the defendant, then the plaintiff is entitled to prevail and you can go on to consider damages. Conversely, if any distress experienced by the plaintiff was unreasonable in light of the defendant's conduct, then you cannot find in favor of the plaintiff on this count and you must return a verdict for the defendant.

If you find that the plaintiff has proved all of the elements of negligent infliction of emotional distress, you will find for the plaintiff and award damages on this count as I will describe in the "damages" section of these instructions. If you find that the plaintiff has not proved the elements of negligent infliction of emotional distress then you will return a defendant's verdict on this count.

Authority

Larobina v. McDonald, 274 Conn. 394, 410 (2005); *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 446-47 (2003); Restatement (Second) of Torts, § 313 (2007).

3.12-3 Bystander Emotional Distress

New, December 7, 2015

A plaintiff who is a bystander may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if:

1. the bystander plaintiff is closely related to the primary victim of the accident or injury;
2. the bystander plaintiff's emotional distress is caused by the contemporaneous sensory perception of the event or conduct that resulted in the accident or injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the primary victim's condition or location;
3. the primary victim dies or sustains serious physical injury; and
4. as a result, the bystander plaintiff 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. The bystander plaintiff must suffer emotional distress that is severe enough to warrant a psychiatric diagnosis or to otherwise substantially impair (his/her) ability to cope with life's daily routine and demands.

Authority

Squeo v. Norwalk Hospital Association, 316 Conn. 558, 582, 591-92 (2015)

3.13 INTENTIONAL TORTS

3.13-1 Assault

3.13-2 Battery

3.13-3 False Imprisonment

3.13-4 Conversion

**3.13-5 Vexatious Suit - Claim under General
Statutes § 52-568**

3.13-6 Vexatious Suit - Claim at Common Law

3.13-7 [instruction deleted]

3.13-8 Abuse of Process

**3.13-9 Defense of Good Faith Reliance Upon
Advice of Counsel**

3.13-10 Invasion of Privacy - False Light

3.13-1 Assault

Revised to January 1, 2008

The plaintiff alleges that the conduct of the defendant constituted an assault.

An assault is an act that causes another person to be placed in imminent apprehension of a harmful or offensive contact with that person.

The plaintiff must have believed that the act would result in imminent contact unless prevented by self-defensive action or flight or the intervention of some outside force.

A harmful contact is one that causes physical impairment of the condition of another's body, physical pain, or illness. An offensive contact is one that offends a reasonable sense of personal dignity.

The act must be done by the defendant intentionally, wantonly, or without the exercise of due care.

Authority

Sansone v. Bechtel, 180 Conn. 96, 99 (1980); 2 Restatement (Second), Torts §§ 15, 19, 21, 24 (1965).

For additional discussion, see the note appended to Battery, Instruction 3.13-2.

3.13-2 Battery

Revised to January 1, 2008

The plaintiff alleges that the conduct of the defendant constituted a battery.

A battery is a harmful or offensive contact with the person of another.

A harmful contact is one that causes physical impairment of the condition of another's body, physical pain, or illness. An offensive contact is one that offends a reasonable sense of personal dignity.

The contact must be the direct and immediate consequence of a force exerted by the defendant intentionally, wantonly, or without the exercise of due care.

Authority

Sansone v. Bechtel, 180 Conn. 96, 99 (1980); 2 Restatement (Second), Torts §§ 13, 15, 19 (1965).

Notes

Connecticut does not follow the common-law rule that battery requires intent. *Sansone v. Bechtel*, supra, 180 Conn. 199, the most recent decision on the subject, states that "[w]e have long adhered to the rule that an unintentional trespass to the person, or assault and battery, if it be the direct and immediate consequence of a force exerted by the defendant wantonly, or imposed without the exercise by him of due care, would make him liable for resulting injury." (Internal quotation marks omitted.) This doctrine may eventually need to be reexamined in light of the Supreme Court's subsequent pronouncement that "[i]t is axiomatic, in the tort lexicon, that intentional conduct and negligent conduct, although differing only by a matter of degree . . . are separate and mutually exclusive." *American National Fire Ins. Co. v. Schuss*, 221 Conn. 768, 775 (1992). At present, however, *Sansone* remains controlling.

The court should additionally charge the jury on the meaning of "intentionally," "wantonly," or "due care," depending on the specific allegations in the case.

3.13-3 False Imprisonment

Revised to January 1, 2008

False imprisonment is the unlawful restraint by one person of the physical liberty of another. Restraint means the confinement of another person within boundaries fixed by the person imposing the confinement. Any period of such restraint, however brief in duration, is sufficient to constitute a basis for liability.

To prevail on a claim of false imprisonment, the plaintiff must prove that (his/her) physical liberty has been restrained by the defendant and that the restraint was against (his/her) will, that is, that (he/she) did not consent to the restraint or acquiesce in it willingly.

The plaintiff must additionally prove that the defendant acted with the purpose of imposing a confinement or with knowledge that such confinement would, to a substantial certainty, result from it.

The plaintiff must finally prove either that (he/she) was conscious of the confinement when it occurred or that (he/she) was harmed by the confinement.

Authority

Rivera v. Double A Transportation, Inc., 248 Conn. 21, 31 (1999); *Berry v. Loiseau*, 223 Conn. 786, 820 (1992); *Green v. Donroe*, 186 Conn. 265, 267-69 (1982); 1 Restatement (Second), Torts § 35 (1965).

3.13-4 Conversion

Revised to January 1, 2008

The plaintiff seeks to recover damages from the defendant for the alleged conversion of (his/her) personal property. A defendant is liable for conversion when (he/she), without authorization, assumes and exercises ownership or control over property belonging to someone else and thereby deprives the other person of the property, either permanently or for an indefinite period of time. Conversion can occur where a defendant wrongfully takes possession of the other person's property or where (he/she) wrongfully exercises control over the property. The essence of conversion is dealing with another's personal property in a manner that is adverse to and inconsistent with the ownership or possessory rights of the plaintiff in that property.

To bring a claim for conversion, the plaintiff must have been the "owner" of the property. An owner of property can be someone who has full, legal title, but also includes someone who may not have legal title but who has the right to immediate possession and control of the property.

Elements of Claim

To establish the defendant's liability for conversion, the plaintiff must prove four essential elements by a fair preponderance of the evidence:

- 1) that the property at issue belonged to the plaintiff. In other words, that at the time the defendant took (possession of / control over) the property, the plaintiff (owned / was entitled to take immediate possession of) the property;
- 2) that the defendant (took possession of / exercised control over) the plaintiff's property which deprived the plaintiff of the property either permanently or for an indefinite period of time;
- 3) that the defendant's conduct was unauthorized. In other words, the defendant's acts were wrongful, were without the plaintiff's permission, and without any other lawful authority; and
- 4) that the defendant's conduct caused harm to the plaintiff.

In this case, the plaintiff claims that *<insert plaintiff's allegations with reference to the appropriate elements>*.

The defendant has denied that (he/she) converted the plaintiff's *<insert description of personal property>*. The defendant claims that *<insert defendant's claims with reference to the elements in dispute>*.

The plaintiff has the burden to prove, by a preponderance of the evidence, each of the elements of conversion as I have previously instructed you. The defendant has no burden to disprove conversion. If you find that the plaintiff has not proved (his/her) claim of conversion as to any

of the personal property at issue, you must return a defendant's verdict on that claim. If, however, you find that the plaintiff has proved that the defendant converted all or some of (his/her) personal property, you must return a plaintiff's verdict after deciding what damages to award the plaintiff in connection with that claim.

Compensatory Damages

[<If there has been a total loss of property:> The rule of damages in a conversion case like this, where the plaintiff has alleged a total loss of ownership rights in its converted property, is that the plaintiff should recover the fair market value of the property at the time and place it was converted, together with simple interest at the rate of 10% per year running forward from the day it was converted to the day of the verdict. The fair market value of the property is the price that a willing buyer would pay a willing seller for the property after fair negotiations, where neither was under any undue compulsion to make the deal. You must determine, on the basis of the evidence presented, what the fair market value of the converted property was. The burden is on the plaintiff to prove the fair market value and you must do your best to determine its value on the basis of the evidence presented.]

[<If the property has been returned:> The rule of damages in a conversion case like this, where the converted property has been restored to and accepted by the plaintiff, is that the plaintiff should recover the reduction in the fair market value of the property caused by its conversion. You must determine the fair market value of the property at the time and place it was converted. From that amount, you must subtract the fair market value of the property at the time and place it was returned. The difference in fair market value is the measure of damages that you may award to the plaintiff. The fair market value of the property is the price that a willing buyer would pay a willing seller for the property after fair negotiations, where neither was under any undue compulsion to make the deal. You must determine, on the basis of the evidence presented, what the fair market value of the converted property was at the time of conversion and at the time of return. The burden is on the plaintiff to prove the fair market value, and you must do your best to determine its value on the basis of the evidence presented.]

If you find that the defendant is liable for conversion, you must record your finding and the amount of the plaintiff's damages in the space provided for that purpose on the Plaintiff's Verdict Form [and then go on to consider the plaintiff's further claim for punitive damages, if requested].

Consequential Damages

The plaintiff may also be entitled to recover consequential or incidental damages. Consequential damages in a conversion action are damages that result from the natural consequences of the act complained of even though they may not be the necessary result of it. An example of consequential damages may be compensation for loss of use of the property converted, or for lost profits caused by the loss of the property, but only for the period it would take a reasonable person to replace the item.

<Insert instruction on Damages - Consequential, Instruction 4.5-11>

In this case, the plaintiff claims that <insert plaintiff's claims with reference to consequential damages>.

It is not always possible to determine these damages with precise mathematical proof. The burden is on the plaintiff to present evidence with such a degree of certainty that you have a basis to make a fair and reasonable estimate of these damages, if you feel they are warranted.

Punitive Damages

In addition to compensatory damages, which are designed to compensate the plaintiff for (his/her) proven losses, the plaintiff claims other damages which we call punitive damages.

<Insert instruction on Damages - Punitive, Instruction 3.4-4>

If you find that the plaintiff is entitled to punitive damages, the measure of such damages will be determined by the court, by me -- after your verdicts are rendered. You need only make a finding whether or not the defendant's conversion of the property, if any, was such as to warrant an award of punitive damages. Please record your answer, "Yes" or "No," in the space provided for that purpose on the Plaintiff's Verdict Form.

Authority

Deming v. Nationwide Mutual Ins. Co., 279 Conn. 745, 770-71 (2006); *Label Systems Corp. v. Aghamohammadi*, 270 Conn. 291, 329 (2004); *Howard v. MacDonald*, 270 Conn. 111, 129 n.8 (2004); *Hi-Ho Tower, Inc. v. Com-tronics, Inc.*, 255 Conn. 20, 43 (2000); *Kuzemka v. Gregory*, 109 Conn. 117, 122 (1929).

Notes

"Conversions may be grouped into two general classes: (1) those where the possession is originally wrongful; and (2) those where it is rightful and subsequently becomes wrongful. Under the first class, wrongful use and the unauthorized dominion constitute the conversion; therefore no demand for the return of the personal property is required. Under the second class, since the possession is rightful and there is no act of conversion, there can be no conversion until the possessor refuses to deliver up the property upon demand." *Label Systems Corp. v. Aghamohammadi*, 270 Conn. 291, 331 n.30 (2004). Therefore, where possession is originally lawful, the plaintiff must also prove that (he/she) made a demand for the return of the property and that the defendant, without justification, refused to return the property to the plaintiff.

Although money can be subject to conversion, an action for conversion of funds cannot be maintained when the claim is a general obligation to pay money. The specific money claimed must have at one time belonged to the plaintiff or been in the possession of the plaintiff. *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 772 (2006).

"Conversion can be distinguished from statutory theft as established by [General Statutes] § 53a-119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Internal quotation marks omitted.) *Howard v. MacDonald*, 270 Conn. 111, 129 n.8 (2004).

See General Statutes § 53a-119 (10) for conversion of a motor vehicle and § 53a-119 (13) for conversion of leased property.

If the property converted does not have a market value that can be established, or if the property has a special or peculiar value to the owner, then the owner is entitled to recover "the value to him based on his actual money loss, all the circumstances and conditions considered, resulting from him being deprived of the property, not including, however, any sentimental or fanciful value he may for any reason place upon it." (Internal quotation marks omitted.) *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 222-23 (1984); *Kuzemka v. Gregory*, 109 Conn. 117, 122 (1929).

The plaintiff must plead consequential loss to be awarded damages therefore. *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 223-24 n.16 (1984).

If warranted, an instruction on mitigation of damages may be given.

3.13-5 Vexatious Suit - Claim under General Statutes

§ 52-568¹

Revised to January 1, 2008

In this case, plaintiff *<name of plaintiff>* seeks to recover damages from defendant *<name of defendant>* for vexatious suit based upon *<name of defendant>*'s alleged commencement and prosecution against (him/her) of a prior civil (action/proceeding)² entitled *<title of underlying civil action or proceeding>*, which I will refer to as "the underlying (action/proceeding)." This claim is brought under General Statutes § 52-568, which provides in part³ as follows:

"Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others . . . (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

To prevail under either subsection of this statute, *<name of plaintiff>* must prove four essential elements by a fair preponderance of the evidence:

- 1) that *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her), [either in *<name of defendant>*'s own name or in the name of another person or entity];
- 2) that *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her) without probable cause;⁴
- 3) that the underlying (action/proceeding) was finally terminated in a manner favorable to *<name of plaintiff>*;⁵ and
- 4) that *<name of defendant>*'s commencement and prosecution of the underlying (action/proceeding) against (him/her) without probable cause legally caused (him/her) to suffer at least some of the injuries or losses complained of in (his/her) complaint.

I will discuss these essential elements with you in detail before discussing the issue of damages.

Prosecution of underlying action or proceeding

<Name of plaintiff> claims that *<name of defendant>* commenced the underlying (action/proceeding) against (him/her) [in the name of *<named plaintiff in underlying action or proceeding>*] on or about *<date of commencement of underlying action or proceeding against the plaintiff>*, and thereafter prosecuted it [against (him/her)]⁶ until *<date of final termination of underlying action or proceeding against the plaintiff>*.

Without probable cause

A person has probable cause to commence or prosecute a civil (action/proceeding) on a claim of *<claim made in underlying action or proceeding as to which defendant allegedly lacked probable cause>* when (he/she) has knowledge of facts, actual or apparent, strong enough to justify a reasonable person in the belief that (he/she) has lawful grounds for prosecuting the defendant in the manner complained of.⁷ A person has lawful grounds for prosecuting a claim when (he/she) has a genuine belief in the existence of facts that support each essential element of that claim, when those facts would warrant a person of ordinary caution, prudence and judgment, under the circumstances, to entertain that belief.⁸

Under our law, one essential element of *<name of defendant>*'s claim of *<claim made in underlying action or proceeding as to which defendant allegedly lacked probable cause>*, as made against *<name of plaintiff>* in the underlying (action/proceeding), was that *<name and describe essential element of claim presented in underlying action or proceeding as to which defendant allegedly lacked probable cause>*. *<Name of plaintiff>* here alleges and has sought to prove that when *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her), (he/she) lacked probable cause to do so because (he/she) lacked knowledge of facts sufficient to justify a reasonable person in believing *<restate essential element of claim presented in underlying action or proceeding as to which the plaintiff claims that the defendant lacked probable cause>*.

<Discuss facts in support of and in opposition to the plaintiff's claim of lack of probable cause as to the element in question.>

Terminated in favor of plaintiff⁹

A civil (action/proceeding) finally terminates in a manner favorable to the defendant in that (action/proceeding) when it is dismissed, goes to judgment for the defendant or is unilaterally withdrawn by the plaintiff in that (action/proceeding), with no consideration of any kind.

[*<If favorable final termination element is uncontested:>* In this case, *<name of defendant>* has admitted in (his/her) answer that the underlying (action/proceeding) was finally terminated in a manner favorable to *<name of plaintiff>* on *<date of final termination of underlying action or proceeding with respect to plaintiff>* by *<manner in which the underlying action or proceeding finally terminated favorably to the plaintiff>*. You must therefore find that the third essential element of vexatious suit has been established as a matter of law.]

[*<If favorable final termination element is contested:>* In this case, *<name of defendant>* has denied that the underlying (action/proceeding) was terminated in a manner favorable to *<name of plaintiff>*. On that score, *<name of defendant>* claims, more particularly, that even though (he/she) withdrew the underlying (action/proceeding) [against *<name of plaintiff>*], (he/she) did not do so unilaterally, as required by law to constitute a favorable final termination, but did so instead in exchange for valuable consideration, consisting of *<nature of consideration allegedly exchanged for defendant's withdrawal of the underlying action or proceeding>*. A person acts unilaterally when (he/she) acts entirely on (his/her) own, without the agreement or participation of others. Under this definition, a person does not act unilaterally in withdrawing an (action/proceeding) against another person when (his/her) motivation for so doing, in whole or in

part, is the other person's agreement to give (him/her) valuable consideration – that is, anything of value, including consideration of the type here claimed by the defendant – in exchange for the withdrawal. Here, then, to establish the third essential element of vexatious suit, *<name of plaintiff>* must persuade you by a fair preponderance of the evidence both that *<name of defendant>* withdrew the underlying (action/proceeding) against (him/her) and that (he/she) did not do so, as claimed by *<name of defendant>*, in exchange for *<nature of consideration allegedly exchanged by plaintiff for defendant's withdrawal of the underlying action or proceeding against the plaintiff>*.]

Injuries or losses

Finally, a successful claimant in an action for vexatious suit is entitled to recover money damages for all injuries or losses (he/she) was legally caused to suffer due to the commencement and prosecution against (him/her) of the vexatious suit. Compensable injuries and losses may include any of the following, all of which are claimed by *<name of plaintiff>* against *<name of defendant>* in this case: *<here list all economic and noneconomic injuries and losses which are claimed in the plaintiff's complaint and supported by at least some evidence at trial>*.¹⁰ To establish the fourth essential element of vexatious suit, *<name of plaintiff>* must prove by a fair preponderance of the evidence that *<name of defendant>*, by commencing and prosecuting the underlying (action/proceeding) against (him/her) without probable cause, legally caused (him/her) to suffer at least some of the injuries or losses claimed by (him/her) in (his/her) complaint.

<Insert Legal Cause, Instruction 3.1-1.>

If, at the end of your deliberations, you find that *<name of plaintiff>* has failed to prove any essential element of (his/her) vexatious suit claim by a fair preponderance of the evidence, you must return a defendant's verdict on that claim. If, on the other hand, you find that *<name of plaintiff>* has proved each essential element of (his/her) vexatious suit claim, you must go on to determine what damages to award (him/her) on that claim.

The first step in determining what damages to award a plaintiff on a statutory claim of vexatious suit is to determine what actual compensable damages (he/she) has suffered as a result of the defendant's allegedly wrongful conduct. To that end, you must first determine which types of injuries and losses claimed by *<name of plaintiff>* were legally caused by *<name of defendant>*'s proven commencement and prosecution against (him/her), without probable cause, of the underlying (action/proceeding). You must then determine what amount of damages is fair, just and reasonable to compensate *<name of plaintiff>* for those proven injuries and losses under my general instructions on compensatory damages.

<Insert general instructions on compensatory damages, Damages - General, Instruction 3.4-1.>

Economic damages may be awarded for any financial loss or expense which *<name of plaintiff>* proves (he/she) was legally caused to sustain or incur as a result of *<name of defendant>*'s commencement and prosecution against (him/her), without probable cause, of the underlying (action/proceeding). Here, *<name of plaintiff>* seeks to recover economic damages for the following financial losses and expenses which (he/she) claims to have been legally caused by

<name of defendant>'s commencement and prosecution of the underlying (action/proceeding) against (him/her): <here list all financial losses and expenses for which the plaintiff seeks economic damages, as claimed in (his/her) complaint and supported by the evidence at trial (including, where appropriate, any expenses, including reasonable attorney's fees, incurred to defend against the underlying action or proceeding, any lost wages for time required to attend court proceedings in the underlying action or proceeding, any loss to business or property resulting from the commencement and prosecution of the underlying action or proceeding, and any reasonable and necessary medical expenses incurred to treat physical or mental injury caused by the commencement and prosecution of the underlying action or proceeding)>. If you find <name of defendant> liable for vexatious suit, as here alleged, and that that vexatious suit legally caused <name of plaintiff> to sustain or incur any such financial loss or expense, then you must award (him/her) fair, just and reasonable economic damages for that proven loss or expense, also in accordance with my general instructions on compensatory damages. [*Add the following where appropriate:*> You cannot, however, award any attorney's fees or costs necessary to bring the present claim for vexatious suit, but only those you find to have been reasonably incurred to defend against the underlying action or proceeding.]¹¹

Noneconomic damages may be awarded for any injury which <name of plaintiff> proves (he/she) was legally caused to suffer as a natural consequence of <name of defendant>'s commencement and prosecution against (him/her), without probable cause, of the underlying (action/proceeding). Here, <name of plaintiff> seeks to recover noneconomic damages for the following injuries which (he/she) claims (he/she) was legally caused to suffer as a result of <name of defendant>'s commencement and prosecution of the underlying (action/proceeding) against (him/her): <here list all types of emotional or physical injuries for which the plaintiff seeks noneconomic damages, as claimed by (him/her) in (his/her) complaint and supported by the evidence at trial (including, where appropriate, mental anguish, humiliation, embarrassment, mortification, shame, fear and damage to reputation)>. ¹² If you find that <name of defendant> commenced and prosecuted a vexatious suit against <name of plaintiff>, as here alleged, and that such vexatious suit legally caused <name of plaintiff> to suffer any such injury, then you must award (him/her) fair, just and reasonable noneconomic damages for that proven injury in accordance with my general instructions on compensatory damages.

After making your separate determinations as to economic and noneconomic damages, if you reach them in the course of your deliberations, you must record your findings on the appropriate lines of the Plaintiff's Verdict form, then add them together to calculate total actual compensatory damages on the line provided for that purpose.

Secondly, you will determine if <name of plaintiff> has proved, under subsection (2) of General Statutes Section 52-568, that <name of defendant> commenced and prosecuted the underlying (action/proceeding) against (him/her) with the malicious intent unjustly to vex and trouble (him/her).¹³ An intent, of course, is a purpose for which a person engages in particular conduct. A person acts intentionally with respect to a result when it is (his/her) conscious objective to bring about that result. A malicious intent is an evil or improper intent to cause harm. A person vexes another person when (he/she) annoys or irritates (him/her). A malicious intent unjustly to vex and trouble another person is thus not merely an intent to cause (him/her) annoyance, irritation, and trouble, but an intent to do so in bad faith, with the knowledge or

belief that there is no justification for so doing. Therefore, if you find that <name of defendant> commenced and prosecuted (his/her) claim of <claim made in underlying action or proceeding as to which defendant allegedly lacked probable cause> in the underlying (action/proceeding) with the improper intent to bother, annoy and trouble <name of plaintiff> in bad faith, knowing or believing that there was no reasonable basis for so doing, then you will find that (he/she) then acted with a malicious intent unjustly to vex and trouble (him/her). Lack of probable cause to commence the underlying (action/proceeding) may be considered as evidence of implied malice.

Third and finally, after you have decided whether or not <name of defendant> commenced and prosecuted the underlying (action/proceeding) against <name of plaintiff> with the malicious intent unjustly to vex and trouble (him/her), you will award <name of plaintiff> damages as follows. If you have found that <name of defendant> did commence and prosecute the underlying (action/proceeding) against <name of plaintiff> with malicious intent unjustly to vex and trouble (him/her), you will award <name of plaintiff> treble, or triple, damages – that is, three times the actual damages you have found that (he/she) is entitled to receive as fair, just and reasonable compensation for (his/her) proven injuries and losses. If, however, <name of plaintiff> has not persuaded you that <name of defendant> commenced and prosecuted the underlying (action/proceeding) against (him/her) with a malicious intent unjustly to vex and trouble (him/her), you will award (him/her) double damages – that is, twice the actual damages you have found that (he/she) is entitled to receive as fair, just and reasonable compensation for (his/her) proven injuries and losses.

After you make this final determination, you must multiply total actual compensatory damages by two (2) or three (3), in accordance with your finding, to calculate the amount of your verdict, then record the result on the line provided for that purpose on the Plaintiff's Verdict form.

¹ General Statutes § 52-568 provides in full as follows: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

² A statutory claim of vexatious suit under General Statutes § 52-568 can also be based upon the assertion, without probable case, of a defense to any civil action or complaint commenced and prosecuted by another. See note 3, *infra*.

³ Include in the instruction only so much of the text of the statute as is at issue in the case before the court.

⁴ "Whether particular facts constitute probable cause is always a question of law, and the conclusion of the trier is one of law that may be reviewed on appeal." *Paranto v. Ball*, 132 Conn. 568, 571 (1946).

⁵ Although the statute does not list favorable termination as an essential element of the cause of action therein described, the statute has long been held to have the same essential elements as the common-law claim for vexatious suit. *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 535 (1853). Hence, because termination of the prior suit in favor of the plaintiff is an essential

element of the common-law claim for vexatious suit, it is an essential element of the statutory claim as well. *Frisbie v. Morris*, 75 Conn. 637, 639 (1903).

⁶ Add the bracketed language only if the underlying action or proceeding was terminated earlier against the defendant rather than against one or more other parties.

⁷ *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, 281 Conn. 84, 100-101 (2007), quoting *DeLaurentis v. New Haven*, 220 Conn. 225, 256 (1991). It must be noted, however, that when the defendant is a lawyer who filed the underlying action on behalf of a client, the objective reasonableness of (his/her) belief in the existence of probable cause to commence and prosecute the action must be measured by the standard of the reasonable attorney familiar with the laws of this state, not that of the reasonable person. *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, supra, 281 Conn. 103.

⁸ *McGann v. Allen*, 105 Conn. 177, 186 (1926).

⁹ Typically, this element is uncontested. The alternative paragraph for when it is contested describes a particular circumstance in which a defendant might legitimately argue that the termination of the prior action does not constitute a termination favorable to the plaintiff. The withdrawal of an action for consideration does not constitute a favorable termination of the action because the act of tendering consideration for its termination suggests that it was prosecuted with probable cause.

¹⁰ See generally *Wocek v. Foley*, 193 Conn. 582, 588-89 (1984).

¹¹ See generally *Vandersluis v. Weil*, 176 Conn. 353, 358-59 (1976) (clarifying that, in a common-law action for vexatious suit, "[a]ny cost of litigation in a former trial less taxable costs would be compensatory damages suffered by a plaintiff by reason of a former suit" whereas any cost of litigation in the vexatious suit action itself would not be recoverable in that action except, in an appropriate case, as the maximum amount of any award of punitive damages).

¹² See generally *Wocek v. Foley*, supra, 193 Conn. 588.

¹³ This portion of the charge must obviously be eliminated if the plaintiff has not made a claim for treble damages under General Statutes § 52-568 (2).

Authority

General Statutes § 52-568; *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, 281 Conn. 84 (2007); *DeLaurentis v. New Haven*, 220 Conn. 225 (1991); *Vandersluis v. Weil*, 176 Conn. 353, 356-57 (1978); *Hebrew Home & Hospital, Inc. v. Brewer*, 92 Conn. App. 762, 766-67 (2005); see also *QSP, Inc. v. Aetna Casualty & Surety Co.*, 256 Conn. 343, 361 (2001); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cole*, 189 Conn. 518, 538 (1983); *Bridgeport Hydraulic Co. v. Pearson*, 139 Conn. 186, 194 (1952); *Wall v. Toomey*, 52 Conn. 35, 36 (1884).

Notes

A common-law count for vexatious suit (see Vexatious Suit - Claim at Common Law, Instruction 3.13-6) cannot be joined in a single action with a statutory count for vexatious suit under General Statutes § 52-568. See *Whipple v. Fuller*, 11 Conn. 582, 587 (1836). But see *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, 281 Conn. 84 (2007) (wherein the Supreme Court, without commenting on this issue, upheld the Appellate Court's affirmance of

parallel trial court rulings granting summary judgment on alternatively pleaded common-law and statutory claims of vexatious suit).

3.13-6 Vexatious Suit - Claim at Common Law

Revised to January 1, 2008 (modified April 5, 2012)

In this case, plaintiff *<name of plaintiff>* seeks to recover damages from defendant *<name of defendant>* for vexatious suit based upon *<name of defendant>*'s alleged commencement and prosecution against (him/her) of a prior civil (action/proceeding)¹ entitled *<title of underlying civil action or proceeding>*, which I will refer to as "the underlying (action/proceeding)." To prevail in an action for vexatious suit, a plaintiff must prove five essential elements by a fair preponderance of the evidence:

- 1) that *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her), [either in *<name of defendant>*'s own name or in the name of another person or entity];
- 2) that *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her) without probable cause;²
- 3) that *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her) with malice;
- 4) that the underlying (action/proceeding) against *<name of plaintiff>* was finally terminated in a manner favorable to *<name of plaintiff>*; and
- 5) that *<name of defendant>*'s commencement and prosecution of the underlying (action/proceeding) against (him/her), without probable cause and with malice, legally caused (him/her) to suffer at least some of the injuries or losses complained of in (his/her) complaint.

I will discuss these essential elements with you in detail before discussing the issue of damages.

Prosecution of underlying action or proceeding

<Name of plaintiff> claims that *<name of defendant>* commenced the underlying (action/proceeding) against (him/her) [in the name of *<named plaintiff in the underlying action or proceeding>*] on or about *<date of commencement of underlying action or proceeding>*, and thereafter prosecuted it [against (him/her)]³ until *<date of final termination of underlying action or proceeding against the plaintiff>*.

Without probable cause

A person has probable cause to commence or prosecute a civil (action/proceeding) on a claim of *<claim made in underlying action or proceeding as to which defendant allegedly lacked probable cause>* when (he/she) has knowledge of facts, actual or apparent, strong enough to justify a reasonable person in the belief that (he/she) has lawful grounds for prosecuting the defendant in the manner complained of.⁴ A person has lawful grounds for prosecuting a claim when (he/she) has a genuine belief in the existence of facts that support each essential element of

that claim, when those facts would warrant a person of ordinary caution, prudence and judgment, under the circumstances, to entertain that belief.⁵

Under our law, one essential element of *<name of defendant>*'s challenged claim of *<claim made in underlying action or proceeding as to which defendant allegedly lacked probable cause>*, as made against *<name of plaintiff>* in the underlying (action/proceeding), is that *<name and describe essential element of claim presented in underlying action or proceeding as to which defendant allegedly lacked probable cause>*. *<Name of plaintiff>* here alleges and has sought to prove that when *<name of defendant>* commenced and prosecuted the underlying (action/proceeding) against (him/her), (he/she) lacked probable cause to do so because (he/she) lacked knowledge of facts sufficient to justify a reasonable person in believing *<restate essential element of claim presented in underlying action or proceeding as to which the plaintiff claims that the defendant lacked probable cause>*.

<Discuss facts in support of and in opposition to the plaintiff's claim of lack of probable cause as to the element in question.>

Acted with malice

A person acts with malice when (he/she) acts primarily for an improper purpose – that is, for a purpose other than that of securing the proper adjudication of the claim on which the (action/proceeding) is based. A person thus acts with malice towards another person when (he/she) acts primarily out of hatred for or ill will towards that person, or with the intent to vex, harass or annoy (him/her). Malice may be inferred from lack of probable cause.⁶

Terminated in favor of plaintiff⁷

A civil (action/proceeding) finally terminates in a manner favorable to the defendant in that (action/proceeding) when it is dismissed, goes to judgment for the defendant or is unilaterally withdrawn by the plaintiff with no consideration of any kind.

[*<If favorable final termination element is uncontested:>* In this case, *<name of defendant>* has admitted in (his/her) answer that the underlying (action/proceeding) was finally terminated in a manner favorable to *<name of plaintiff>* on *<date of final termination of underlying action or proceeding with respect to the plaintiff>* by *<manner in which the underlying action or proceeding finally terminated favorably to the plaintiff>*. You must therefore find that the third essential element of vexatious suit has been established as a matter of law.]

[*<If favorable final termination element is contested:>* In this case, *<name of defendant>* has denied that the underlying (action/proceeding) was finally terminated in a manner favorable to *<name of plaintiff>*. On that score, (he/she) claims, more particularly, that even though (he/she) withdrew the underlying (action/proceeding) [against *<name of plaintiff>*],⁸ (he/she) did not do so unilaterally, as required by law to constitute final termination of the (action/proceeding) in a manner favorable to *<name of plaintiff>*, but did so instead in exchange for valuable consideration, consisting of *<consideration allegedly exchanged for withdrawal of prior claims>*. A person acts unilaterally when (he/she) acts entirely on (his/her) own, without the agreement or participation of others. Under this definition, a person does not act unilaterally in withdrawing an (action/proceeding) against another person when (his/her) motivation for so

doing, in whole or in part, is the other person's agreement to give (him/her) valuable consideration of any kind – that is, anything of value, including *<consideration of the type here claimed by the defendant>* – in exchange for the withdrawal. Here, then, to establish the third essential element of vexatious suit, *<name of plaintiff>* must persuade you by a fair preponderance of the evidence both that *<name of defendant>* withdrew the underlying (action/proceeding) against (him/her) and that (he/she) did not do so, as claimed by *<name of defendant>*, in exchange for *<nature of consideration allegedly exchanged by the plaintiff for the defendant's withdrawal of the underlying action or proceeding against the plaintiff>*.]

Injuries or Losses

Finally, a successful claimant in an action for vexatious suit is entitled to recover money damages for all injuries or losses (he/she) was legally caused to suffer due to the commencement and prosecution against (him/her) of the vexatious suit. Compensable injuries and losses may include any of the following, all of which are claimed by *<name of plaintiff>* against *<name of defendant>* in (his/her) complaint: *<here list all economic and noneconomic injuries and losses which are claimed in the plaintiff's complaint and supported by at least some evidence at trial>*⁹ To establish the fifth essential element of vexatious suit, *<name of plaintiff>* must prove by a fair preponderance of the evidence that *<name of defendant>*, by commencing and prosecuting the underlying (action/proceeding) against (him/her) without probable cause and with malice, legally caused (him/her) to suffer at least some of the injuries or losses claimed by (him/her) in this case.

<Insert Legal Cause, Instruction 3.1-1.>

If, at the end of your deliberations, you find that *<name of plaintiff>* has failed to prove any essential element of (his/her) vexatious suit claim by a fair preponderance of the evidence, you must return a Defendant's Verdict on that claim. If, on the other hand, you find that *<name of plaintiff>* has proved each essential element of (his/her) vexatious suit claim by that standard, then you must go on to determine what damages to award (him/her) on that claim.

In this case, the plaintiff seeks to recover [both]¹⁰ compensatory [and punitive] damages on (his/her) claim of vexatious suit. To determine what compensatory damages, if any, to award the plaintiff on that claim, you must first decide what injuries and losses claimed by (him/her) were legally caused by the defendant's proven commencement and prosecution against (him/her), without probable cause and with malice, of the underlying (action/proceeding). You must then determine what amount of damages is fair, just and reasonable to compensate the plaintiff for those proven injuries and losses under my general instructions on compensatory damages.

<Insert general instructions on compensatory damages, Damages - General, Instruction 3.4-1.>

Economic damages may be awarded for any financial loss or expense which *<name of plaintiff>* proves (he/she) was legally caused to sustain or incur as a result of *<name of defendant>*'s commencement and prosecution against (him/her), without probable cause and with malice, of the underlying (action/proceeding). Here, *<name of plaintiff>* seeks to recover economic damages for the following financial losses and expenses which (he/she) claims to have been legally caused by *<name of defendant>*'s commencement and prosecution of the underlying

(action/proceeding) against (him/her): *<here list all financial losses and expenses for which the plaintiff seeks economic damages, as claimed in the complaint and supported by the evidence at trial, including, where appropriate, any expenses, including reasonable attorney's fees, incurred to defend against the underlying action or proceeding, any lost wages for time required to attend court proceedings in the underlying action or proceeding, any loss to business or property resulting from the commencement and prosecution of the underlying action or proceeding, and any reasonable and necessary medical expenses incurred to treat physical or mental injury caused by the commencement and prosecution of the underlying action or proceeding¹¹>*. If you find *<name of defendant>* liable for vexatious suit, as here alleged, and that that vexatious suit legally caused *<name of plaintiff>* to sustain or incur any such financial loss or expense, then you must award (him/her) fair, just and reasonable economic damages for that proven loss or expense, also in accordance with my general instructions on compensatory damages. [*<Add the following where appropriate:>* You cannot, however, award any attorney's fees or costs necessary to bring the present claim for vexatious suit, but only those you find to have been reasonably incurred to defend against the underlying (action/proceeding).]¹²

Noneconomic damages may be awarded for any injury which *<name of plaintiff>* proves (he/she) was legally caused to suffer as a natural consequence of *<name of defendant>*'s commencement and prosecution against (him/her), without probable cause and with malice, of the underlying (action/proceeding). Here, *<name of plaintiff>* seeks to recover noneconomic damages for the following injuries which (he/she) claims to have been legally caused by *<name of defendant>*'s commencement and prosecution of the underlying (action/proceeding) against (him/her): (*<here list all types of emotional or physical injuries for which the plaintiff seeks noneconomic damages, as claimed in the complaint and supported by the evidence at trial, including, where appropriate, mental anguish, humiliation, embarrassment, mortification, shame, fear and damage to reputation>*).¹³ If you find that *<name of defendant>* commenced and prosecuted a vexatious suit against *<name of plaintiff>*, as here alleged, and that such vexatious suit legally caused *<name of plaintiff>* to suffer any such injury, then you must award (him/her) fair, just and reasonable noneconomic damages for that proven injury in accordance with my general instructions on compensatory damages.

After making your separate determinations as to economic and noneconomic damages, if you reach them in the course of your deliberations, you must record your findings on the appropriate lines of the Plaintiff's Verdict form, then add them together to calculate total compensatory damages on the line provided for that purpose.

[To determine what punitive damages, if any, to award the plaintiff on (his/her) claim of vexatious suit, you must be guided by my general instructions on punitive damages, which are as follows. *<Insert general instructions on punitive damages, Damages - Punitive, Instruction 3.4-4.>*].

¹ The commencement and prosecution of a criminal complaint, with malice and without probable cause, constitutes the distinct and different, but closely analogous, tort of malicious prosecution.

² *DeLaurentis v. New Haven*, 220 Conn. 225, 252-53 (1991) ("[w]hether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court, but

when the facts themselves are disputed, the court may submit the issue of probable cause in the first instance to a jury as a mixed question of fact and law").

³ Add the bracketed language only if the underlying (action/proceeding) was finally terminated earlier against the defendant rather than against one or more other parties.

⁴ *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, 281 Conn. 84, 100-101 (2007) (quoting *DeLaurentis v. New Haven*, supra, 220 Conn. 256.) It must be noted, however, that when the defendant is a lawyer who filed the underlying action on behalf of a client, the objective reasonableness of (his/her) belief in the existence of probable cause to commence and prosecute the action must be measured by the standard of the reasonable attorney familiar with the laws of this state, not that of the reasonable person. *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, supra, 281 Conn. 103.

⁵ *McGann v. Allen*, 105 Conn. 177, 186 (1926).

⁶ *Zenik v. O'Brien*, 137 Conn. 592, 596-97 (1951).

⁷ Typically, this element is uncontested. The alternative paragraph for when it is contested describes a particular circumstance in which a defendant might legitimately argue that the termination of the prior action does not constitute a termination favorable to the plaintiff. The withdrawal of an action for consideration does not constitute a favorable termination of the action because the act of tendering consideration for its termination suggests that it was prosecuted with probable cause.

⁸ See note 3, supra.

⁹ See generally *Wochek v. Foley*, 193 Conn. 582, 588-89 (1984).

¹⁰ Only use the bracketed language in the damages portion of this instruction when the plaintiff has demanded and attempted to prove (his/her) entitlement to recover punitive damages.

¹¹ *Wochek v. Foley*, supra, 193 Conn. 588-89.

¹² See generally *Vandersluis v. Weil*, 176 Conn. 353, 358-59 (1976) (clarifying that, in a common-law action for vexatious suit, "[a]ny cost of litigation in a former trial less taxable costs would be compensatory damages suffered by a plaintiff by reason of a former suit" whereas any cost of litigation in the vexatious suit action itself would not be recoverable in that action except, in an appropriate case, as the maximum amount of any award of punitive damages).

¹³ See generally *Wochek v. Foley*, supra, 193 Conn. 588.

Authority

Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP, 281 Conn. 84 (2007); *QSP, Inc. v. Aetna Casualty & Surety Co.*, 256 Conn. 343, 361 (2001); *Vandersluis v. Weil*, 176 Conn. 353, 356-57 (1978); *Wall v. Toomey*, 52 Conn. 35, 36 (1884); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cole*, 189 Conn. 518, 538 (1983).

Notes

A statutory count for vexatious suit (see Vexatious Suit - Claim under General Statutes § 52-568, Instruction 3.13-5) cannot be joined in a single action with a common-law count for vexatious suit. See *Whipple v. Fuller*, 11 Conn. 582, 587 (1836). But see *Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP*, 281 Conn. 84 (2007) (wherein the Supreme Court,

without commenting on this issue, upheld the Appellate Court's affirmance of parallel trial court rulings granting summary judgment on alternatively pleaded common-law and statutory claims of vexatious suit).

3.13-8 Abuse of Process

Revised to January 1, 2008

In this case, plaintiff *<name of plaintiff>* seeks to recover damages from defendant *<name of defendant>* for abuse of process. Under our law, a person commits an abuse of process when (he/she) uses a legal process against another person primarily to accomplish a purpose for which it is not designed. In light of this definition, *<name of plaintiff>* must prove two essential elements by a fair preponderance of the evidence to prevail on (his/her) claim of abuse of process:

- 1) that *<name of defendant>* used a legal process against (him/her/it), in (his/her/its) own name or in the name of another person or entity; and
- 2) that *<name of defendant>* used such legal process primarily to accomplish a purpose for which it is not designed.

In this case, *<name of plaintiff>* has based (his/her) claim of abuse of process upon *<name of defendant>*'s alleged use against (him/her) of (an execution / *<identify form of legal process>*)¹ in *<title and/or docket number of underlying case or proceeding in which defendant allegedly used the challenged execution or other legal process>*, which I will refer to as "the underlying (action/proceeding)," (on/between) *<the date(s) on/between which defendant allegedly used the challenged execution or other legal process against plaintiff>*. To establish the first essential element of abuse of process, *<name of plaintiff>* must prove that *<name of defendant>* did indeed use the challenged (execution / *<identify form of legal process>*) against (him/her) in the underlying (action/proceeding) at the time specified in (his/her) complaint. [*<Add if applicable>*: Here, because *<name of defendant>* has admitted in (his/her) answer that (he/she) used the challenged (execution / *<identify form of legal process>*) against *<name of plaintiff>* in that (case/proceeding) and at that time, it is uncontested, and thus you must find that the first essential element of abuse of process the plaintiff has established as a matter of law.]

<Name of plaintiff> further claims that *<name of defendant>*'s use of the challenged (execution / *<identify form of legal process>*) against (him/her) constituted an abuse of process because *<name of defendant>*'s primary purpose in so using it was *<insert as appropriate:>*

- to recover or secure an amount of money greater than that determined to be owed under a valid and specific legal judgment.
- *<state what plaintiff claims to have been defendant's primary purpose for using the challenged legal process against (him/her)>*.

Because the purpose for which (an execution / *<identify form of legal process>*) is designed² is *<insert as appropriate:>*

- to provide a means for a party to recover under a judgment for money damages, the liability for, and amount of which, has been specifically determined by a court.
- *<state the proper, intended purpose of the challenged legal process>*.

not to

- recover or secure an amount of money greater than that determined to be owed under a valid and specific legal judgment.
- *<restate what plaintiff claims to have been defendant's primary purpose for using the challenged legal process against (him/her)>.*

<name of plaintiff> can establish the second essential element of (his/her) abuse of process claim by proving, as (he/she) has alleged, that *<name of defendant>* used the challenged (execution / *<identify form of legal process>*) against (him/her) primarily for the latter, improper purpose.

To meet (his/her) burden of proof on this second essential element of abuse of process, *<name of plaintiff>* need not prove that *<name of defendant>*'s only purpose in using the challenged (execution / *<identify form of legal process>*) against (him/her) was the improper purpose I just described for you. Rather, (he/she) must prove that the alleged improper purpose was *<name of defendant>*'s **primary** purpose – that is, not merely an incidental purpose which (he/she) may also have had or entertained while otherwise properly using the challenged (execution / *<identify form of legal process>*) for its designed purpose.³

If, in the course of your deliberations, you find that *<name of plaintiff>* has failed to prove either essential element of (his/her) abuse of process claim by a fair preponderance of the evidence, then you must return a Defendant's Verdict on that claim. If, on the other hand, you find that *<name of plaintiff>* has proved both essential elements of (his/her) abuse of process claim by that standard, then you must go on to determine what damages to award (him/her) on that claim.

In this case, the plaintiff seeks to recover [both]⁴ compensatory [and punitive] damages on (his/her) claim of abuse of process. Compensatory damages for abuse of process are confined to those flowing from – that is, legally caused by – the abuse of process.⁵ To determine what compensatory damages, if any, to award the plaintiff on that claim, you must first decide what injuries and losses claimed by (him/her) were legally caused by the defendant's proven abuse of process. You must then determine what amount of damages is fair, just and reasonable to compensate the plaintiff for those proven injuries and losses under my general instructions on compensatory damages.

<Insert Damages - General, Instruction 3.4-1 and Legal Cause, Instruction 3.1-1.>

Economic damages may be awarded for any financial loss or expense which *<name of plaintiff>* proves (he/she) was legally caused to sustain or incur as a result of *<name of defendant>*'s abuse of process. Here, *<name of plaintiff>* seeks to recover economic damages for the following financial losses and expenses which (he/she) claims (he/she) was legally caused to sustain or incur as a result of *<name of defendant>*'s alleged abuse of process: *<list all types of financial losses for which the plaintiff seeks economic damages, as claimed in the complaint and supported by the evidence at trial, including, where appropriate, any loss to business or property resulting from the abuse, any reasonable and necessary medical expenses incurred to treat physical or mental injury caused by such abuse, and any expenses, including reasonable attorney's fees, incurred to protect against the abuse or to put it to an end)>*.⁶ If you find that *<name of defendant>* committed an abuse of process, as here alleged, and that that abuse of process legally caused *<name of plaintiff>* to sustain or incur any such financial loss or expense,

then you must award (him/her) fair, just and reasonable economic damages for that proven loss or expense, also in accordance with my general instructions on compensatory damages. [*Add the following where appropriate:*? You cannot, however, award any attorney's fees or costs necessary to bring the present lawsuit of <name of plaintiff> against <name of defendant>, only those you find were necessary to defend against or correct the abuse of process when it was taking place.^{7]}

Noneconomic damages may be awarded for any injury which <name of plaintiff> proves (he/she) was legally caused to suffer as a natural consequence of <name of defendant>'s abuse of process. Here, <name of plaintiff> seeks to recover noneconomic damages for the following injuries which (he/she) claims (he/she) was legally caused to suffer as a result of <name of defendant>'s alleged abuse of process: <list all types of emotional or physical injuries for which the plaintiff seeks noneconomic damages, as claimed in the complaint and supported by the evidence at trial, including, where appropriate, any injury to feelings because of the humiliation, disgrace or indignity of, and any injury to the person or physical suffering caused by, the abuse of process>.⁸ If you find that <name of defendant> committed an abuse of process, as here alleged, and that such abuse of process legally caused <name of plaintiff> to suffer any such injury, then you must award (him/her) fair, just and reasonable noneconomic damages for that proven injury in accordance with my general instructions on compensatory damages.

After making your determinations as to economic and noneconomic damages, if you reach them in the course of your deliberations, you must record your findings on the appropriate lines of the Plaintiff's Verdict form, then add them together to calculate total compensatory damages on the line provided for that purpose.

[To determine what punitive damages, if any, to award the plaintiff on (his/her) claim of abuse of process, you must be guided by my general instructions on punitive damages, which are as follows. <Insert Damages - Punitive, Instruction 3.4-4.>]

¹ The language pertaining to executions sets forth an instruction suitable for describing the elements of an abuse-of-process claim such as that discussed by the Supreme Court in *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 260 Conn. 766 (2002) (reversing trial court's granting of motion to strike abuse of process claim from plaintiff's complaint), and later by the Appellate Court in *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 97 Conn. App. 541, cert. denied, 280 Conn. 242, 243 (2006) (affirming judgment for plaintiff after court trial following remand on the previously stricken claim). The other option provides a template suitable for drafting an instruction on a claim based upon alleged abuse of a different form of legal process.

² Whether or not the primary purpose for which the defendant allegedly used the challenged legal process against the plaintiff is one for which such legal process was designed or intended is a question of law which the court must decide before sending the case to the jury. If the court determines that the alleged purpose in question is not one for which the challenged legal process was designed or intended, it must so inform the jury, then instruct the jury to find whether or not the plaintiff has proved that the defendant actually acted with that as (his/her) primary purpose.

See *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, supra, 260 Conn. 773-74.

³ In *Mozzochi v. Beck*, 204 Conn. 490, 494 (1987), our Supreme Court explained this requirement as follows: "Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of 'a legal process . . . against another primarily to accomplish a purpose for which it is not designed' (Emphasis added.) Comment b to § 682 explains that the addition of 'primarily' is meant to exclude liability 'when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.' See also 1 F. Harper, F. James & O. Gray, Torts (2d Ed. 1986) § 4.9; R. Mallen & V. Levit, Legal Malpractice (2d Ed. 1981) § 61; W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 121."

⁴ Only use the bracketed language in this portion of this instruction when the plaintiff has demanded and attempted to prove (his/her) entitlement to recover punitive damages.

⁵ See generally, *McGann v. Allen*, 105 Conn. 177, 184 (1926) ("[d]amages suffered through an abuse of legal process not malicious must be compensatory, that is compensation for the natural consequences resulting, which would include injury to the feelings because of the humiliation, disgrace or indignity suffered, together with injury to the person and physical suffering, as well as special damage incurred in consequence of the wrong, as loss to one's business or property, or expense caused in curing the physical or mental injury, or in protecting one's person from arrest or confinement").

⁶ *McGann v. Allen*, supra, 105 Conn. 184

⁷ *Id.* (compensatory damages cannot be awarded for attorney's fees incurred to defend a criminal prosecution following an unlawful post-arrest detention that itself was found to have constituted an abuse of process, because such fees had no relation to the abuse itself); see also *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, Superior Court, judicial district of Hartford, Docket No. CV 99 0590031 (February 17, 2005), *aff'd*, 97 Conn. App. 541, cert. denied, 280 Conn. 942, 943 (2006).

⁸ *McGann v. Allen*, supra, 105 Conn. 184.

Authority

Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P., 260 Conn. 766, 772-73 (2002); *Mozzochi v. Beck*, 204 Conn. 490, 494 (1987); *McGann v. Allen*, 105 Conn. 177 (1926); *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 97 Conn. App. 541, cert. denied, 280 Conn. 242, 243 (2006).

3.13-9 Defense of Good Faith Reliance Upon Advice of Counsel¹

Revised to January 1, 2008

Under our law, a defendant in a vexatious suit action has a complete defense to that action if (he/she) can prove by a fair preponderance of the evidence that (he/she) instituted the underlying civil (action/proceeding) against the plaintiff in good-faith reliance upon the advice of legal counsel, given to (him/her) after (he/she) has made a full and fair statement to such counsel of all facts (he/she) then knew or should have known concerning the basis for the underlying action. The fact that counsel's advice was unsound or erroneous will not affect the result.² This defense is designed to protect the interests of common citizens who, unschooled in the law, would otherwise be forced to put themselves at great financial risk every time they resorted to the courts to assert their legal rights.³

Consistent with this purpose, the defense has five essential elements which the defendant, *<name of defendant>*, must prove by a fair preponderance of the evidence if (he/she) is to prevail upon it in this case:

- 1) That (he/she) consulted with legal counsel about (his/her) decision to commence and prosecute the underlying civil (action/proceeding).
- 2) That (his/her) consultation with legal counsel was based upon a full and fair disclosure by (him/her) of all facts (he/she) then knew or should have known concerning the basis for the underlying (action/proceeding). No person can justifiably rely upon advice that (he/she) knows or should know to be untrustworthy due to (his/her) own failure to disclose relevant information to the person giving the advice.
- 3) That the lawyer to whom (he/she) turned for advice was one from whom (he/she) could reasonably have expected to receive an accurate, impartial opinion as to the viability of the underlying (action/proceeding) against *<name of plaintiff>*.⁴ Thus, although all lawyers are officers of the court, who are bound by their oaths "not knowingly [to] maintain or assist in maintaining any cause of action that is false or unlawful,"⁵ the law recognizes that they too are people whose judgment may sometimes be clouded by their personal allegiances, sympathies and prejudices. Where, then, a person claims that (he/she) has relied upon the advice of counsel for (his/her) decision to commence and prosecute an action or proceeding against another person, (he/she) must show that (his/her) counsel was one (he/she) could fairly have presumed to be unbiased and unprejudiced against that other person⁶
- 4) That, having sought such advice, (he/she) relied upon it. If (he/she) did not, then of course (he/she) has no defense even if counsel was consulted.

5) That (his/her) reliance on counsel's advice was made in good faith.

As used in the defense of good-faith reliance upon the advice of counsel, good faith is the genuine belief that one's underlying (action/proceeding) was fully justified, both in law and in fact.

<At this point, briefly summarize the claims of the defendant and the countering positions of the plaintiff on each contested element of the special defense. Be certain to emphasize, in so doing, that the defendant has the sole burden of proof with respect to each such essential element.>

If, at the end of your deliberations, you unanimously find that *<name of defendant>* has proved each essential element of this defense by a fair preponderance of the evidence, then you must return a defendant's verdict on the plaintiff's claim of vexatious suit.

¹ Taken generally from *Spear v. Summit Medical Center, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV 92 0525939 (April 16, 1998) and the authorities cited and analyzed therein.

² *Brodrib v. Doberstein*, 107 Conn. 294, 296-97 (1928); *Smith v. King*, 62 Conn. 515 (1893).

³ *Spear v. Summit Medical Center, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV 92 0525939 (June 17, 1996).

⁴ *Verspyck v. Franco*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 00 0178234 (December 20, 2002); *Evans v. Testa Development Associates*, Superior Court, judicial district of Hartford, Docket No. CV 01 0806425 (March 26, 2002) (31 Conn. L. Rptr. 535, 536).

⁵ General Statutes § 1-25.

⁶ *Brodrib v. Doberstein*, *supra*, 107 Conn. 297.

Authority

Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP, 281 Conn. 84 (2007); *Verspyck v. Franco*, 274 Conn. 105, 112 (2005); *Vandersluis v. Weil*, 176 Conn. 353, 361 (1978); *Brodrib v. Doberstein*, 107 Conn. 294, 296-97 (1928); *Smith v. King*, 62 Conn. 515 (1893).

3.13-10 Invasion of Privacy - False Light

New May 1, 2009

In this action, the plaintiff alleges that the defendant has invaded (his/her) privacy by placing (him/her) in a false light before the public. By this (he/she) means that the defendant publicized material about (him/her) that is false and is such a major misrepresentation of (his/her) character, history, activities or beliefs that a reasonable person in the plaintiff's position would either be expected to take serious offense or be justified in feeling offended or aggrieved.

To recover on this claim, the plaintiff must prove, by a preponderance of the evidence:

- 1) that the defendant publicized material or information about the plaintiff that was false;
- 2) that the defendant either knew that the publicized material was false and would place the plaintiff in a false light or acted with reckless disregard as to whether the publicized material was false and would place the plaintiff in a false light; and
- 3) that the material so misrepresented the plaintiff's character, history, activities or beliefs that a reasonable person in the plaintiff's position would find the material highly offensive.

In determining whether a reasonable person in the plaintiff's position would be seriously offended by the false material, you must determine whether, in the eyes of the community, the plaintiff would be justified in feeling offended or in feeling aggrieved.

Authority

Venturi v. Savitt, 191 Conn. 588, 468 A.2d 933 (1983); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982); *Honan v. Dimyan*, 52 Conn. App. 123, 726 A.2d 613, cert. denied, 249 Conn. 909, 733 A.2d 227 (1999); *Jonap v. Silver*, 1 Conn. App. 550, 474 A.2d 800 (1984); Restatement (Second) § 652E.

Notes

Invasion of privacy involves not one single tort, but is four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name. Otherwise they have almost nothing in common except that each represents an interference with the right of the plaintiff to be left alone. The four categories of invasion of privacy are: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public. See *Venturi v. Savitt*, 191 Conn. 588, 591, 468 A.2d 933 (1983); 3 Restatement (Second), Torts § 652A- E.

"Publicity" means that the matter is made public, by communicating it to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. 3 Restatement (Second), Torts § 652 D and E, comment (a).

Many times, the material that places someone in a false light is also defamatory. In those cases, actions for invasion of privacy and defamation are pleaded together. Each action, however, protects different interests: privacy actions involve injuries to emotions and mental suffering - defamation actions involve injury to reputation. Even if pleaded together, there can be only one recovery for any particular publication. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 128 n.19, 448 A.2d 1317 (1982). It is not necessary, however, that the offensive material also be defamatory.

To the extent that this claim may also involve freedom of the press, federal law is also relevant. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 129, 448 A.2d 1317 (1982).

3.14 EMPLOYMENT ACTIONS

**3.14-1 Discriminatory Employment Practices -
General Statutes § 46a-60**

3.14-2 Promissory Estoppel

3.14-3 Wrongful Discharge

3.14-4 Fraudulent/Intentional Misrepresentation

**3.14-5 Discharge in Violation of General Statutes
§ 31-51m, Whistleblower Statute**

**3.14-6 Retaliatory Discharge in Violation of
General Statutes § 31-290a**

**3-14-7 Wrongful Termination in Violation of
General Statutes § 31-51q - Freedom of
Speech**

**3.14-8 Suarez Exception to Workers'
Compensation**

3.14-1 Discriminatory Employment Practices - General Statutes § 46a-60

Revised to January 1, 2008

The plaintiff has alleged that the defendant violated Connecticut General Statutes § 46a-60 when it (discharged (him/her) from employment / took adverse action against (him/her)) on the basis of (his/her) race.¹ Connecticut General Statutes § 46a-60 provides: "(a) It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race"

In order to prevail on her claim under § 46a-60, the plaintiff must prove by a preponderance of the evidence that ((his/her) discharge / the adverse employment action) was due to intentional discrimination based on (his/her) race. Intentional race discrimination is proved in this case if the plaintiff demonstrates by a preponderance of the evidence that (his/her) race was a motivating factor for ((his/her) discharge / the adverse employment action) even though other factors also motivated the defendant's decision to (discharge / take adverse action) against (him/her). A "motivating factor" is a factor that made a difference in the defendant's decision.

The plaintiff does not have to prove that race was the sole or even the principal reason for the decision, as long as (he/she) proves that (his/her) race was a determinative influence in the decision. (He/She) may prove intentional discrimination directly by proving that a discriminatory reason more likely motivated the defendant's action in (discharging (him/her) / taking the adverse employment action) or indirectly by proving that the reason[s] given by the defendant for the discharge (was/were) unworthy of belief. If you find that the defendant's stated reason[s] are not credible, then considering all the circumstances, you may infer, although you are not required to infer, that race was a motivating factor in the defendant's decision, even if it may not have been the only motivating factor.

It is not your role to second-guess the defendant's business judgment. As long as race was not a motivating factor that made a difference in its decisions, the fact that an employer's decision was incorrect, unfair, unwise or capricious, or even based on personal favoritism or animosity is irrelevant.

¹ Section 46a-60 also prohibits discriminatory practices due to "color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness" Those words should be substituted for race in the instruction if applicable.

Authority

Jacobs v. General Electric, 275 Conn. 395, 400-404 (2005); *Board of Education v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505-507 (2003); *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53-54 (1990).

Third Circuit Pattern Jury Instruction No. 5.1.2; Diamond Volume, L. Sand et al., *Modern Federal Jury Instructions – Civil* (2006) pp. 3-188 - 3-189 (original available at <http://www.ca3uscourts.gov>). The cases cited above all follow federal law set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S.792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The charge does not refer to the prima facie or burden shifting aspects of *McDonnell Douglas* because whether or not a plaintiff has established a prima facie case is an issue for the court and many federal courts have found that the burden shifting language has no place in a jury charge. See e.g., *Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, n.1 (3rd Cir.1999) ("In *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) the court noted that 'the issue of whether a plaintiff made out a prima facie case has no place in the jury room. Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing.' Similarly, in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), the court observed that 'instructions incorporating the *McDonnell Douglas* paradigm "add little to the juror's understanding of the case, and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination."').

3.14-2 Promissory Estoppel

Revised to January 1, 2008

In order to prevail on (his/her) claim of promissory estoppel the plaintiff must prove by a preponderance of the evidence 1) that the defendant made a clear and definite promise to (him/her), 2) that the defendant should reasonably have expected the plaintiff to rely on the promise, and 3) that the plaintiff did rely on the promise to (his/her) detriment.

The defendant is not liable to the plaintiff if a reasonable person in the defendant's position should not have expected the plaintiff to rely on the promise.

Authority

Stewart v. Cendant Mobility Services Corp., 267 Conn. 96, 104-106 (2003) (contrary to certain language in *D'Ulisse-Cupo*, a promise need not be the functional equivalent of an offer to enter into a contract for it to support a claim of promissory estoppel); *D'Ulisse-Cupo v. Board of Directors of Notre Dame High School*, 202 Conn. 206, 213 (1987).

Notes

If the promise alleged is a promise to enter into a contract, the promise must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future. A mere expression of intention, hope, desire or opinion that shows no real commitment cannot be expected to induce reliance. See *Enterprise Leasing Corp. v. Dixon*, 1 Conn. App. 496 (1984) (trial "court found no promise of sufficient clarity to serve as a basis for reasonably justified reliance. These findings are not clearly erroneous.")

3.14-3 Wrongful Discharge

Revised to January 1, 2008

Under our law, contracts of employment for an indefinite term may be terminated by the employer at will or, in other words, at any time for any reason. However, there is an exception to this rule where the employee is terminated in violation of an important public policy. Such a termination is known as a wrongful discharge.

The plaintiff has alleged that (he/she) was wrongfully discharged from (his/her) employment. In order to prevail on (his/her) claim for wrongful discharge, the plaintiff must prove by a preponderance of the evidence that the defendant's conduct surrounding the termination of the plaintiff's employment violated an important public policy. The court has determined that <state the policy allegedly violated> is an important public policy.

Authority

Thibodeau v. Design Group One Architects, LLC, 260 Conn. 691, 699 (2002); *Fenner v. Hartford Courant Co.*, 77 Conn. App. 185, 194 (2003); *Carnemolla v. Walsh*, 75 Conn. App. 319, 323 n.5, cert. denied, 263 Conn. 913 (2003). It is for the court to determine whether an important public policy is at issue in the case.

Notes

Where an employee has a statutory remedy, i.e. an action under § 31-51m, (he/she) cannot bring a common-law wrongful discharge action. See *Burnham v. Karl & Gelb, P.C.*, 252 Conn. 153, 159-62 (2000); *Pickering v. Aspen Dental Management*, 100 Conn. App. 793 (2007); but see *Fenner v. Hartford Courant Co.*, supra, 77 Conn. App. 185.

3.14-4 Fraudulent/Intentional Misrepresentation

Revised to January 1, 2008

In order to prevail on (his/her) claim of fraudulent/intentional misrepresentation the plaintiff must prove 1) that the defendant made a false representation as a statement of fact, 2) the statement was untrue and the defendant knew it was untrue, 3) the defendant made the false statement in order to induce the plaintiff to rely on the false statement, and 4) the plaintiff did rely on the false statement to (his/her) detriment.

The plaintiff must prove the first three elements by clear and convincing evidence. (He/she) must prove the fourth element by a preponderance of the evidence.

Authority

Dalia v. Lawrence, 226 Conn. 51, 78 (1993); *Miller v. Appleby*, 183 Conn. 51, 55 (1981); *DeLuca v. C.W. Blakeslee & Sons, Inc.*, 174 Conn. 535, 546 (1978).

Notes

"The intentional withholding of information for the purpose of inducing action has been regarded . . . as equivalent to a fraudulent misrepresentation. 1 Restatement (Second), Contracts § 161. . . ." (Citations omitted.) *Pacelli Bros. Transportation, Inc. v. Pacelli*, 189 Conn. 401, 407 (1983).

See Clear and Convincing Evidence, Instruction 3.2-2.

3.14-5 Discharge in Violation of General Statutes § 31-51m, Whistleblower Statute

Revised to January 1, 2008

The plaintiff alleges that (he/she) was (discharged / disciplined / penalized) by the defendant because (he/she) reported violation of (state law or regulation / federal law or regulation / municipal ordinance or regulation) to <name>, a public body. Connecticut General Statutes § 31-51m provides:

"No employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action."

In order to prevail on (his/her) claim under § 31-51m, the plaintiff must prove by a preponderance of the evidence that (his/her) (discharge / discipline / penalty) was in retaliation for (his/her) report to <name>, a public body. Retaliation is proved in this case if the plaintiff demonstrates by a preponderance of the evidence that (his/her) report was a motivating factor for (his/her) (discharge / discipline / penalty) even though other factors also motivated the defendant's decision to (discharge / discipline / take adverse action) against (him/her). A "motivating factor" is a factor that made a difference in the defendant's decision.

The plaintiff does not have to prove that (his/her) report to <public body> was the sole or even the principal reason for the decision, as long as (he/she) proves that (his/her) report was a determinative influence in the decision. (He/She) may prove retaliation directly by proving that (his/her) report to <public body> more likely motivated the defendant's action in (discharging / disciplining / penalizing) (him/her) or indirectly by proving that the reason[s] given by the defendant for the (discharge / discipline / penalty) (was/were) unworthy of belief. If you find that the defendant's stated reasons are not credible, then considering all the circumstances you may infer, although you are not required to infer, that the plaintiff's report to <public body> was a motivating factor in the defendant's decision, even if it may not have been the only motivating factor.

It is not your role to second-guess the defendant's business judgment. The fact that an employer's decision was incorrect, unfair, unwise or capricious, or even based on personal favoritism or animosity is irrelevant, as long as the plaintiff's reporting of the violation was not a motivating factor that made a difference in its decisions.

Authority

Jacobs v. General Electric, 275 Conn. 395, 400, 401 (2005); *Board of Education v. Commission on Human Rights & Opportunities*, 266 Conn. 492 (2003); *Armone v. Enfield*, 79 Conn. App. 501, 507 (2003).

Notes

Where an employee has a statutory remedy, i.e., an action under § 31-51m, (he/she) cannot bring a common-law wrongful discharge action. See *Burnham v. Karl & Gelb, P.C.*, 252 Conn. 153, 159-62 (2000); but see *Fenner v. Hartford Courant Co.*, 77 Conn. App. 185, 194 (2003).

3.14-6 Retaliatory Discharge in Violation of General Statutes § 31-290a

Revised to January 1, 2008

The plaintiff has alleged that the defendant (terminated (his/her) employment / discriminated against (him/her)) in violation of Connecticut General Statutes § 31-290a. Connecticut General Statutes § 31-290a provides:

"(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter."

In order to prevail on (his/her) claim under § 31-290a, the plaintiff must prove by a preponderance of the evidence that ((his/her) discharge / the adverse employment action) was due to intentional discrimination based on (his/her) filing a claim for workers' compensation benefits. Intentional discrimination is proved in this case if the plaintiff demonstrates by a preponderance of the evidence that (his/her) filing a workers' compensation claim was a motivating factor for ((his/her) discharge / the adverse employment action) even though other factors also motivated the defendant's decision to (discharge / take the adverse action) against (him/her). A "motivating factor" is a factor that made a difference in the defendant's decision.

The plaintiff does not have to prove that the filing of a workers' compensation claim was the sole or even the principal reason for the decision, as long as (he/she) proves that it was a determinative influence in the decision. (He/She) may prove intentional discrimination directly by proving that (his/her) filing the workers' compensation claim motivated the defendant's action (in discharging (him/her) / taking the adverse employment action) or indirectly by proving that the (reason/reasons) given by the defendant for the discharge (was/were) unworthy of belief. If you find that the defendant's stated reason[s] are not credible, then considering all the circumstances you may infer, although you are not required to infer, that the filing of the workers' compensation claim was a motivating factor in the defendant's decision, even if it may not have been the only motivating factor.

It is not your role to second-guess the defendant's business judgment. As long as the filing of a workers' compensation claim was not a motivating factor that made a difference in its decisions, the fact that an employer's decision was incorrect, unfair, unwise or capricious, or even based on personal favoritism or animosity is irrelevant.

Notes

Otero v. Housing Authority, 86 Conn. App. 103, 108-109 (2004). Section 31-290a also prohibits adverse employment actions against someone who "otherwise exercised the rights afforded to him pursuant to the provisions of this [workers' compensation] chapter." If the plaintiff claims (he/she) was terminated because, for example, the employer refused to

accommodate (him/her) as required by the workers' compensation statutes, then the charge should be changed accordingly.

Third Circuit Pattern Jury Instruction No. 5.1.2; Diamond Volume, L. Sand et al., Modern Federal Jury Instructions – Civil (2006) pp. 3-188 - 3-189 (original available at <http://www.ca3uscourts.gov>). The cases cited above all follow federal law set forth in *McDonnell Douglas*. The charge does not refer to the prima facie or burden shifting aspects of *McDonnell Douglas* because whether or not a plaintiff has established a prima facie case is an issue for the court and many federal courts have found that the burden sifting language has no place in a jury charge. See e.g., *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) ("the issue of whether a plaintiff made out a prima facie case has no place in the jury room. Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing."); *Ryther v. Kare*, 11, 108 F.3d 832 (8th Cir. 1997) ("Instructions incorporating the *McDonnell Douglas* paradigm add little to the juror's understanding of the case, and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination."); *Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, n.1 (3rd Cir. 1999).

While this charge has not referred to the prima facie case or burden shifting for the reasons set forth above, the Appellate Court in *Otero v. Housing Authority*, supra, 86 Conn. App. 110-11, approved a charge that stated: "The plaintiff bears the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. In order to meet this burden, the plaintiff must present evidence that gives rise to an inference of unlawful discrimination."

3.14-7 Wrongful Termination in Violation of General Statutes § 31-51q - Freedom of Speech

New June 1, 2012

In this case, the plaintiff claims that (he/she) was discharged by the defendant in violation of a Connecticut statute, section 31-51q. The statute prohibits an employer from disciplining or discharging an employee on account of the employee's exercise of rights guaranteed by the First Amendment to the United States Constitution or sections 3, 4 or 14 of article first of the constitution of Connecticut, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer. The First Amendment to the United States Constitution and section 4 of article first of the constitution of Connecticut both protect freedom of speech, in addition to other rights which are not relevant to this case.

Under Connecticut law, the plaintiff must establish that the speech for which (his/her) employment was allegedly terminated was made by (him/her) as a private citizen and not as part of (his/her) job duties.¹ Even if you find that the plaintiff's speech was made as a private citizen and not as part of (his/her) job duties, it is not enough if the plaintiff complained about purely private matters, such as the terms and conditions of (his/her) employment. Instead, the plaintiff must have intended to speak on a broader issue of public concern. The issue you must then resolve is whether the plaintiff was speaking out on a public issue, or whether by so speaking (he/she) was instead attempting to resolve a private dispute regarding the terms and conditions of (his/her) own employment. In short, the plaintiff's comments are not protected under § 31-51q if they were only directed at issues concerning (himself/herself) and (his/her) employer.

The plaintiff claims that (his/her) <describe speech> raised a public issue regarding <state issue>.² The defendant denies that the plaintiff raised an issue of public concern. If you do find that the plaintiff has raised an issue of public concern, you will continue your deliberations concerning the other elements the plaintiff must prove because you have found that the plaintiff was exercising (his/her) constitutional rights when (he/she) spoke. If you do not find that the plaintiff raised an issue of public concern then you must end your deliberations with respect to this claim and enter a verdict in favor of the defendant because you have found that the plaintiff was not exercising (his/her) constitutional rights when (he/she) spoke.

In order to determine whether the defendant violated § 31-51q, the plaintiff must also prove to you that the exercise of a constitutional right was a "substantial" or "motivating" factor in (his/her) discharge. If you do find that a substantial or motivating factor in the plaintiff's discharge was the exercise of (his/her) constitutionally protected first amendment rights, you will continue your deliberations on this claim. If you do not find that a substantial or motivating factor in the plaintiff's discharge was the exercise of (his/her) constitutionally protected first amendment rights, you must find in favor of the defendant. Thus, if you find that the plaintiff would have been discharged even if (he/she) did not exercise (his/her) constitutional rights, you must find for the defendant. This is so even if you disagree with the action that was taken against the plaintiff or otherwise feel that it was inappropriate. Thus, if you find that the

defendant discharged the plaintiff because the defendant believed, in good faith, that the plaintiff's job performance merited such action, you must find for the defendant, regardless of whether you would have terminated the plaintiff's employment if you were in the defendant's shoes.

Even if you should find that the plaintiff was discharged because of (his/her) exercise of a constitutionally protected right, your inquiry cannot end there. In order to find for the plaintiff, you must also find:

1. that the exercise of such constitutional rights did not substantially or materially interfere with (his/her) bona fide job performance, and
2. that the exercise of such constitutional rights did not substantially or materially interfere with the working relationship between the plaintiff and the defendant.

If you find that the exercise of such constitutional rights did not substantially or materially interfere with the plaintiff's job performance or with (his/her) working relationship with the defendant, and that the exercise of those constitutional rights was a "substantial" or "motivating" factor in (his/her) discharge, then you will find in favor of the plaintiff. If you find that the exercise of such constitutional rights did substantially or materially interfere with the plaintiff's job performance or with (his/her) working relationship with the defendant, then even if the exercise of such rights was a "substantial" or "motivating" factor in (his/her) discharge, you will find in favor of the defendant.

In determining whether or not the exercise of such rights substantially or materially interfered with the working relationship between the plaintiff and the defendant, you may consider the content and tone of the plaintiff's speech.

¹ If there is an issue of whether the speech was made as part of the plaintiff's job duties, the court may need to charge on how the jury is to determine that issue. Although the Supreme Court in *Garcetti* stated that it did not have occasion to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate," it did note that "[t]he proper inquiry is a practical one." *Garcetti v. Ceballos*, 547 U.S. 410, 424, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

² The issue of whether the plaintiff's speech raised an issue of public concern may be resolved by summary judgment, and the charge would be modified to provide that the court has already determined that if the jury finds that the plaintiff's speech addressed that subject, it was a matter of public concern.

Authority

General Statutes § 31-51q; *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Schumann v. Dianon Systems, Inc.*, 304 Conn. 585 (2012); *Cotto v. United Technologies Corp.*, 251 Conn. 1 (1999); *Daley v. Aetna Life & Casualty Co.*, 249 Conn. 766 (1999).

Notes

This charge is only applicable to a violation of § 31-51q based on freedom of speech under the First Amendment to the United States Constitution and section 4 of article first of the constitution of Connecticut. It should not be used for violations based on freedom of religion or freedom of assembly pursuant to the First Amendment to the United States Constitution and sections 3 and 14 of article first of the constitution of Connecticut.

3.14-8 Suarez Exception to Workers' Compensation

New May 10, 2013

The plaintiff <name> claims that the defendant <name> is responsible for the injuries suffered by (him/her) on <insert date> in one or more of the following ways: <insert allegations>.

The law you must apply to the plaintiff's claims is as follows: When an employee is injured at work (his/her) exclusive remedy is a workers' compensation claim. The Connecticut Workers' Compensation Act, specifically General Statutes § 31-284 (a), states as follows: "An employer who complies with the [Act] shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment" This means that an employer cannot be subject to a civil action for damages related to injuries occurring to its employees while on the job. However there are some exceptions to this general rule. An exception to this general rule of exclusivity exists when a plaintiff employee can establish an intentional tort claim by demonstrating that (his/her) employer either:

1. actually intended to injure the employee - this is called the actual intent standard;
or
2. when the employer intentionally creates a dangerous condition that the employer actually believed would make the employee's injuries substantially certain to occur - this is called the substantial certainty standard.

Anything short of genuine intentional injury sustained by the employee and caused by the employer is compensable under the Workers' Compensation Act. The exception does not include accidental injuries caused by gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury. Intent refers to the consequences of an act and denotes that the actor desires to cause the consequences of (his/her) act, or that (he/she) believes that the consequences are substantially certain to follow from it. A result is intended if the act is done for the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue. An intended or wilful injury does not necessarily involve the ill will or malevolence shown in express malice, but it is insufficient to constitute such an intended injury that the act was the voluntary action of the person involved. Both the action producing the injury and the resulting injury must be intentional. The characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. The actual intent standard requires that the plaintiff demonstrate that the defendant deliberately caused (him/her) to injure (himself/herself) by <insert alleged conduct>. The substantial certainty standard requires that the plaintiff demonstrate that the defendant knew that the injury suffered by the plaintiff was substantially certain to follow from the defendant's actions. Substantial certainty means more than substantial probability, but does not mean actual or virtual certainty, or inevitability. Substantial certainty exists when the defendant cannot be believed if it denies that (he/she) knew the consequences were certain to follow. To satisfy the substantial certainty

standard, the plaintiff must show more than that the defendant exhibited a lackadaisical or even cavalier attitude toward worker safety.

Therefore, to escape the exclusivity of the Workers' Compensation Act, the victim of an intentional injury must prevail on the intended tort theory or the substantial certainty theory. Under the former, the actor must have intended both the act itself and the injurious consequences of the act. Under the latter, the actor must have intended the act and have known that the injury was substantially certain to occur from the act.

Even if you find that the conduct of which the plaintiff complains was intentional, as I have just described that to you, in order to hold the defendant liable, the plaintiff must also prove by a preponderance of the evidence that the alleged intentional misconduct was committed by someone who can be identified as the alter ego of the company or that the act was committed at the direction of the company.

The law in this area is that where a worker's personal injury is covered by the Workers' Compensation Act, statutory compensation is the sole remedy and recovery in common law tort against the employer is barred and this well established principal is not eroded when the plaintiff alleges an intentional tort by (his/her) supervisor. Thus it is not enough for a supervisory employee to have committed the alleged intentional act. The correct distinction to be drawn is between a supervisory employee and a person who can be characterized as the alter ego of the corporation. If the person who committed the intentional tort is of such rank in the corporation that (he/she) may be deemed the alter ego of the corporation under the standards governing disregard of the corporate entity, then attribution of corporate responsibility for the actor's conduct is appropriate. It is inappropriate where the actor is merely a foreman or supervisor. The distinction is based on identification, not agency. If the actor can be identified as the alter ego of the corporation, or the corporation has directed or authorized the assault, then the corporation may be liable in common-law tort; if the actor is only another employee who cannot be so identified, then the strict liability remedies provided by the Workers' Compensation Act are exclusive and cannot be supplemented with common-law damages. The distinction between a supervisor or other employee and the corporation for whom (he/she) works will be disregarded, and they will be treated as one, when a corporation is a mere instrumentality or agent of the individual actor who is of such a rank that (he/she) may be deemed the alter ego of the corporation. There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for the individual principal.

In other words, unless the plaintiff can demonstrate that the employee who allegedly committed the intentional misconduct could be considered the alter ego of the corporation, that is, one and the same, or that upper management employees somehow directed the supervisory employee to commit the alleged intentional misconduct causing the plaintiff to sustain injury, then the plaintiff cannot prevail and you should find in favor of the defendant in this case.

Authority

Stebbins v. Doncasters, Inc., 47 Conn. Sup. 638 (2002), aff'd, 263 Conn. 231 (2003); *Suarez v. Dickmont Plastics Corp.*, 242 Conn. 255 (1997); *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99 (1994).

3.15 TORTIOUS INTERFERENCE

3.15-1 Tortious Interference - General

3.15-2 Tortious Interference - Existing Contract

3.15-3 Tortious Interference - Business

Expectancy

3.15-4 Tortious Interference - Knowledge

**3.15-5 Tortious Interference - Interference Must
be Tortious**

3.15-6 Tortious Interference - Actual Loss

3.15-7 Tortious Interference - Damages

3.15-8 Tortious Interference - Punitive Damages

3.15-1 Tortious Interference - General

Revised to January 1, 2008

The plaintiff has claimed that the defendant tortiously interfered with its existing contract with <name of contracting party> [and/or with its business expectancy] to <identify subject matter of contract>. First, the plaintiff must prove that it had an existing contract with <name of contracting party> [or that it had a business expectancy]. Second, the plaintiff must prove that the defendant knew of that contract [or business expectancy]. Third, the plaintiff must prove that the defendant tortiously interfered with that contract [or business expectancy]. Finally, the plaintiff must prove it suffered an actual loss as a result of the defendant's alleged tortious interference. I will explain each of these four elements for you.

Authority

Collins v. Anthem Health Plans, Inc., 275 Conn. 309, 334 (2005); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 32-33 (2000); *Blake v. Levy*, 191 Conn. 257, 261-62 (1983); *Holler v. Buckley Broad. Corp.*, 47 Conn. App. 764, 769 (1998); *Hart, Ninlinger & Campbell Associates, Inc. v. Rogers*, 16 Conn. App. 619, 629 (1988).

3.15-2 Tortious Interference - Existing Contract

Revised to January 1, 2008

The first element that the plaintiff must prove is that (he/she/it) had an existing contract with <name of contracting party> to <identify subject matter of contract>. To prove this, the plaintiff must show <insert appropriate contracts instructions 4.1-1 through 4.1-12, depending upon issues involved>.

Notes

Use this only if the claim is for interference with a contract, rather than a business expectancy.

3.15-3 Tortious Interference - Business Expectancy

Revised to January 1, 2008

The first element that the plaintiff must prove is that (he/she/it) had a business expectancy to <identify business expectancy>. To prove this, the plaintiff must show that (he/she/it) had a reasonable prospect of entering into a contractual or a business relationship.

Authority

Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 29 n.8 (2000); *Sportsmen's Boating Corp. v. Hensley*, 192 Conn. 747, 753-54 (1984); *Busker v. United Illuminating Co.*, 156 Conn. 456, 461 (1968); *Selby v. Pelletier*, 1 Conn. App. 320, 323-24 (1984). See *Norden Systems, Inc. v. General Dynamics Corp.*, Superior Court, judicial district of Stamford, Docket No. CV 89 0101260 (November 8, 1990) (2 Conn. L. Rptr. 766) (holding that specific identification of a third party to the prospective business relation is required). See also 4 Restatement (Second) Torts § 766B, comment c (1979) (all potentially profitable prospective contractual relations, except those leading to contracts to marry, are protected).

Notes

Use this instruction only if the claim is for interference with a business expectancy, rather than an existing contract.

3.15-4 Tortious Interference - Knowledge

Revised to January 1, 2008

The plaintiff must prove that the defendant knew of the plaintiff's (contract / business expectancy). The defendant had to be actually aware that the plaintiff's (contract / business expectancy) existed. The defendant did not have to be aware of the details, merely that the (contract / business expectancy) existed. The plaintiff cannot recover for an unknowing interference.

Authority

Karabelas v. Munson, Superior Court, judicial district of Litchfield, Docket No. CV 93 0064071 (March 8, 1994); *Dairy Fresh, Inc. v. Coca Cola Bottling Co. of New York, Inc.*, Superior Court, judicial district of Hartford, Docket No. 386770 (February 18, 1992); *Steele v. J & S Metals, Inc.*, 32 Conn. Supp. 17, 19 (1974), quoting *Snow v. West*, 250 Ore. 114, 117, 440 P. 2d 864 (1968); 4 Restatement (Second) Torts § 766C (1979) (negligent interference is not sufficient).

3.15-5 Tortious Interference - Interference Must be Tortious

Revised to January 1, 2008

The plaintiff must show that the defendant interfered with <*insert contract or business expectancy*> and that the interference was tortious. Interference is tortious if it is wrongful. Not every act that disturbs a (contract / business expectancy) is wrongful. For example, competing for the same business is not by itself wrongful. To prove that the interference was tortious, the plaintiff must show that when the defendant interfered, (he/she/it) <*include only those that are claimed:*>

- engaged in (fraud / misrepresentation / intimidation / molestation
- acted maliciously. To act maliciously means to act intentionally without justification.

The plaintiff has the burden of proving that the defendant did not have justification for the interference.

Authority

Daley v. Aetna Life & Casualty Co., 249 Conn. 766, 805-06 (1999); *Robert S. Weiss and Associates, Inc. v. Wiederlight*, 208 Conn. 525, 536-37 (1988); *Blake v. Levy*, 191 Conn. 257, 261-62 (1983); *R an W Hat Shop, Inc. v. Sculley*, 98 Conn. 1, 13-18 (1922). See 4 Restatement (Second) Torts § 766 and comment s; §§ 767-768 (1979).

Notes

If the plaintiff claims that fraud or misrepresentation is the tortious activity, the court should instruct on the elements of fraud or misrepresentation. See Fraud or Intentional Misrepresentation, Instruction 3.16-2.

3.15-6 Tortious Interference - Actual Loss

Revised to January 1, 2008

If you find that the defendant tortiously interfered with the plaintiff's *<insert contract or business expectancy>*, then you must decide if the plaintiff has proven that (he/she/it) suffered an actual loss as a result of that interference. The plaintiff must prove that but for the tortious interference, there was a reasonable probability that the plaintiff would have entered into a (contract / business relationship with *<name of contracting party>* or made a profit from *<identify source of profit>*. The mere possibility of entering into a contract or making a profit is not enough. However, the plaintiff need not prove the specific amount of the loss in order to establish that (he/she/it) suffered an actual loss.

Authority

Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 29-30 n.8 (2000) (approving instruction that required "reasonable degree of certainty"); *Goldman v. Feinberg*, 130 Conn. 671, 674-76 (1944) (holding that a "reasonable probability" is required); *DiNapoli v. Cooke*, 43 Conn. App. 419, 428 (1996) (requiring a "reasonable probability"); *Selby v. Pelletier*, 1 Conn. App. 320, 323 (1984) (holding that "reasonable probability" of making a profit is required).

3.15-7 Tortious Interference - Damages

Revised to January 1, 2008

<Insert Separation of Liability and Damages, Instruction 2.7-1.>

<Insert Plaintiff's Burden of Proof as to Amounts, Instruction 4.5-4.>

Under Connecticut law, the plaintiff may recover for <include only those appropriate to the facts>:

- the loss of the benefits of the contract/business expectancy <insert Damages - Expectation/Benefit of the Bargain/Make Whole, Instruction, 4.5-6>;
- consequential damages caused by the interference <insert Damages - Consequential, Instruction 4.5-11>;
- lost profits <insert Damages - Lost Profits, Instruction 4.5-8>;
- emotional distress or actual harm to reputation if they are reasonably expected to result from the interference.

Authority

Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 29-31 n.8 (2000); 4 Restatement (Second) Torts § 774A (1979).

3.15-8 Tortious Interference - Punitive Damages

Revised to January 1, 2008

The plaintiff also seeks punitive damages. The plaintiff can recover punitive damages only if you find that the defendant had a reckless indifference to the rights of the plaintiff or committed an intentional or wanton violation of the plaintiff's rights. If you find that the plaintiff is entitled to punitive damages, you should indicate that on the verdict form, and I will determine the amount at a later hearing before me.

Authority

Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 29-31 n.8 (2000).

3.16 MISREPRESENTATION

3.16-1 Negligent Misrepresentation

3.16-2 Fraud or Intentional Misrepresentation

3.16-1 Negligent Misrepresentation

Revised to January 1, 2008

The plaintiff claims that the defendant made a negligent misrepresentation that *<insert alleged misrepresentation>*. First, the plaintiff must prove that the defendant supplied false information. Second, the plaintiff must prove that the defendant failed to exercise reasonable care in obtaining or communicating the information. Third, the plaintiff must prove that the defendant supplied the information to induce the plaintiff to act on it. Fourth, the plaintiff must prove that the plaintiff justifiably relied on the information to (his/her/its) injury.

Authority

Glazer v. Dress Barn, Inc., 274 Conn. 33, 72-73 (2005); *Daley v. Aetna Life & Casualty Co.*, 249 Conn. 766, 791-94 (1999); *D'Ulisse-Cupo v. Board of Directors of Notre Dame High School*, 202 Conn. 206, 217-219 (1987), citing 3 Restatement (Second) Torts § 552 (1979).

Notes

If the alleged misrepresentation is based on an omission to state a material fact when the defendant has a duty to speak, the instruction needs to be revised.

3.16-2 Fraud or Intentional Misrepresentation

Revised to June 24, 2011

The plaintiff claims that the defendant committed fraud when (he/she/it) *<insert relevant facts>*. First, the plaintiff must prove that the defendant made a false representation as a statement of fact. Second, the plaintiff must prove that the statement was untrue and known to be untrue by the defendant or that the defendant made the statement with reckless disregard for the truth of the matter. Third, the plaintiff must prove that the defendant made the statement to induce the plaintiff to act on it. Fourth, the plaintiff must prove that the plaintiff did act on the statement to (his/her/its) injury. The plaintiff must prove the first three elements by clear and convincing evidence and the fourth element by a preponderance of the evidence.¹

¹ If the charge is for an insurer's special defense of concealment or misrepresentation, the burden of proof is preponderance of the evidence for all four elements. *Rego v. Connecticut Ins. Placement Facility*, 219 Conn. 339, 345-47 (1991).

Authority

Updike, Kelly & Spellacy, P.C. v. Beckett, 269 Conn. 613, 643 (2004); *Barbara Weisman, Trustee v. Kaspar*, 233 Conn. 531, 539-40 (1995); *Kilduff v. Adams, Inc.*, 219 Conn. 314, 326-30 (1991).

Notes

The court needs to explain that the standard of proof is higher than the preponderance of the evidence standard. See Clear and Convincing Evidence, Instruction 3.2-2.

If the alleged fraud is based on an omission to state a material fact when the defendant has a duty to speak, the instruction needs to be revised.

3.17 DRAM SHOP

3.17-1 Dram Shop Act

3.17-1 Dram Shop Act

Revised May 10, 2013

The plaintiff *<name>* alleges that the defendant *<name>* violated a statute known as the Dram Shop Act, which reads, in relevant part that:

"If any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured . . . provided the aggrieved person or persons shall give written notice to such seller of such person's or persons' intention to bring an action under this section.¹ Such notice shall be given (1) within one hundred twenty days of the occurrence of such injury to person or property, or (2) in case of the death or incapacity of any aggrieved person, within one hundred eighty days of the occurrence of such injury to person or property. Such notice shall specify the time, the date and the person to whom such sale was made, the name and address of the person injured or whose property was damaged, and the time, date and place where the injury to person or property occurred. . . ."

To establish that the defendant *<name>* violated the statute, the plaintiff *<name>* must prove by a preponderance of the evidence that:

1. On *<insert date>*, the defendant *<name>*, through (his/her/its) agent or agents, sold alcoholic liquor to *<name of customer>*;
2. *<Name of customer>* was intoxicated at the time of the sale; and
3. In consequence of that intoxication, *<name of customer>* injured the plaintiff *<name>* or the plaintiff's *<name>* property.

The defendant *<name>* disputes that *<name of customer>* was intoxicated when (he/she/it) sold the liquor to (him/her). In order to impose liability under this act, the plaintiff *<name>* must prove, by a preponderance of the evidence, that *<name of customer>* was intoxicated when the defendant *<name>* sold the liquor to (him/her). The plaintiff *<name>* cannot prevail on (his/her) claim unless you find that *<name of customer>* was visibly or otherwise perceivably intoxicated when the defendant *<name>* sold (him/her) liquor. The plaintiff *<name>* need prove only that the signs of *<name of customer>*'s intoxication could have been observed, not that they would have been obvious to anyone coming into contact with (him/her). This means that although a person is not 'obviously intoxicated' the fact that (he/she) is 'intoxicated' would be discoverable by reasonably active observation of (his/her) appearance, breath, speech, and action. This may require the supplier of liquor to engage the prospective purchaser in conversation, to note specifically the details of the purchaser's physical appearance, to observe the purchaser's conduct during the course of (his/her) drinking at the supplier's establishment, or to scrutinize the action of the prospective customer in other ways by which the supplier may detect intoxication which is observable even though not obvious. Any perceptible indicator of

intoxication at the time of service, including excessive alcohol consumption itself, can be sufficient to permit recovery.

To be intoxicated is something more than to be merely under the influence of, or affected to some extent by, liquor. Intoxication means an abnormal mental or physical condition due to the influence of intoxicating liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions and energies. When it is apparent that a person is under the influence of liquor, when (his/her) manner is unusual or abnormal and is reflected in (his/her) walk or conversation, when (his/her) ordinary judgment or common sense are disturbed or (his/her) usual willpower temporarily suspended, when these or similar symptoms result from the use of liquor and are manifest, a person may be found to be intoxicated. (He/She) need not be 'dead-drunk.' It is enough if by the use of intoxicating liquor (he/she) is so affected in (his/her) acts or conduct that the public or parties coming in contact with (him/her) can readily see and know this is so.

Finally, the plaintiff <name> must also prove by a preponderance of the evidence that <name of customer>'s intoxication proximately caused the injury. I remind you that the plaintiff <name> does not have to prove that the liquor sold to <name of customer> by the defendant <name> produced or contributed to <name of customer>'s intoxication.

<Insert Proximate Cause - Definition, Instruction 3.1-3, and Proximate Cause - Substantial Factor, Instruction 3.1-4.>

¹ If notice is an issue, then you must read the notice portion of the statute.

Authority

General Statutes § 30-102; *O'Dell v. Kozee*, 307 Conn. 231 (2012); *Wentland v. American Equity Ins. Co.*, 267 Conn. 592, 603-605 (2004); *Sanders v. Officers Club of Connecticut, Inc.*, 196 Conn. 341, 349-50 (1985); *Pierce v. Albanese*, 144 Conn. 241, 253-55, appeal dismissed, 355 U.S. 15, 78 S. Ct. 36, 2 L. Ed. 2d 21 (1957).

3.18 RECKLESSNESS

3.18-1 General Recklessness

3.18-1 General Recklessness

New October 5, 2015

In the <insert count number> count, the plaintiff, <insert name of plaintiff>, alleges that the defendant, <insert name of defendant>:

<Insert specific allegations of reckless conduct.>

It is unnecessary to prove that the defendant actually intended to harm the plaintiff in order to establish that (he/she) acted recklessly. However, there is a wide difference between reckless behavior and mere negligence or even gross negligence. Thoughtlessness and inadvertence are not recklessness. Recklessness implies a conscious disregard of a high risk or egregious misconduct that involves an extreme departure from ordinary care and where danger is apparent. It connotes a willingness to take high risks, without regard to the consequences or the safety of others.

The state of mind amounting to recklessness may be inferred from conduct, but in order to infer it there must be something more than a failure to exercise a reasonable degree of watchfulness. To be reckless, the actor must recognize that his or her action or failure to act involves a risk to others substantially greater than that which is necessary to constitute negligence. It requires a conscious choice of a course of action either with knowledge that it will involve serious danger to others or with knowledge of facts which would disclose this danger to any reasonable person.

Where several acts of recklessness are the cause of but one injury, the plaintiff may allege all of the specific acts of recklessness in a single count as the cause of the injuries sustained. Proof of any one of those specific acts is sufficient to sustain the plaintiff's burden of proving that the defendant acted recklessly.

In order for the plaintiff to prevail on this count, the plaintiff must prove, by a preponderance of the evidence that:

1. The defendant engaged in the reckless conduct alleged; and
2. This reckless conduct proximately caused the injuries and damages claimed by the plaintiff.

If the plaintiff has failed to prove either element, then you must return a verdict in favor of the defendant on this count. If you find that the plaintiff has proven each element, then you would proceed to determine damages in accordance with my instructions as to this form of recklessness and fill out the appropriate plaintiff's verdict form.

Authorities

Matthiessen v. Vanech, 266 Conn. 822, 832-34 (2003); *Frillici v. Westport*, 264 Conn. 266, 277-78 (2003); *Dubay v. Irish*, 207 Conn. 518, 532-33 (1988); *Duley v. Plourde*, 170 Conn. 482, 485 (1976).

PART 4: CONTRACTS

NOTE: Use these instructions for common-law contract claims only. Do not use for claims under the Uniform Commercial Code.

4.1 EXPRESS CONTRACTS

4.2 INTERPRETATION OF EXPRESS CONTRACTS

4.3 IMPLIED CONTRACTS

4.4 LEGAL RELATIONSHIPS

4.5 DAMAGES/REMEDIES

4.1 EXPRESS CONTRACTS

4.1-1 Elements of an Express Contract

4.1-2 Necessity for Definite Terms

4.1-3 Consideration

4.1-4 Adequacy of Consideration

4.1-5 Invalidity of Past Consideration

4.1-6 Meeting of the Minds

4.1-7 Offer and Acceptance

4.1-8 Offer

4.1-9 Acceptance

4.1-10 Time of Acceptance

4.1-11 Duration of Offer

4.1-12 Revocation of Offer

4.1-13 Irrevocable Offers - Option Contracts

**4.1-14 Manner of Acceptance of an Option
Contract**

4.1-15 Breach of Contract

4.1-1 Elements of an Express Contract

Revised to January 1, 2008

The plaintiff claims that (he/she/it) entered into a contract with the defendant. A contract is an agreement enforceable at law. Contracts may be express or implied. If the agreement is shown by the direct words of the parties, spoken or written, the contract is an express one. If such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances, then the contract is an implied one.

Authority

Janusauskas v. Fichman, 264 Conn. 796 (2003); *Boland v. Catalano*, 202 Conn. 333, 338-39 (1987); *Skelly v. Bristol Savings Bank*, 63 Conn. 83, 87 (1893); *Atlas v. Miller*, 20 Conn. App. 680, 683 (1990); *Hale v. Benvenuti, Inc.*, 38 Conn. Sup. 634, 638-39 (1983); 1 Restatement (Second), Contracts §§ 1, 4.

Notes

There is no need to refer to both implied and express contracts if only one is at issue.

4.1-2 Necessity for Definite Terms

Revised to January 1, 2008

To be enforceable, an agreement must be definite and certain as to its essential terms and requirements.

Authority

Presidential Capital Corp. v. Reale, 231 Conn. 500, 506-07 (1994); *Dunham v. Dunham*, 204 Conn. 303, 313 (1987); 1 A. Corbin, *Contracts* (Rev. Ed. 1996) § 4.1, p. 525.

4.1-3 Consideration

Revised to January 1, 2008

The defendant claims that the contract alleged by the plaintiff is not enforceable because it was not supported by consideration. To be enforceable, a contract must be supported by valuable consideration. Consideration may take the form of a promise to do or give something of value or a promise not to do something. The essence of consideration is a benefit or detriment that has been bargained for and exchanged for the promise. For example, a contract whose only terms are "You agree to pay me \$200 next Tuesday" is not enforceable because you have not received anything of benefit and I have not given up anything. There is no consideration for your agreement to pay me \$200. But if we change the contract so that its only terms are: "I will agree to sell you my bicycle next Tuesday if you agree to pay me \$200," then the contract has consideration. You are receiving the benefit of the bicycle in exchange for giving up your \$200.

<Relate this to claims of the parties as to consideration or the lack thereof. If lack of consideration to support the contract is not at issue, then, of course, this section can be omitted.>

Authority

State National Bank v. Dick, 164 Conn. 523, 529 (1973); *Osborne v. Locke Steel Chain Co.*, 153 Conn. 527, 530-31 (1966); *Finlay v. Swirsky*, 103 Conn. 624, 631 (1925); *Gruber v. Klein*, 102 Conn. 34, 36-37 (1925); *General Electric Capital v. Transport Logistics*, 94 Conn. App. 541, 546 (2006); *First New Haven National Bank v. Statewide Motors Inc.*, 33 Conn. Sup. 579, 581-82 (1976); J. Calamari & J. Petrillo, *Contracts* (3rd Ed. 1987) § 4-2, pp. 187-90.

4.1-4 Adequacy of Consideration

Revised to January 1, 2008

In determining whether there is consideration to support a contract, the relative value of the consideration does not matter. Consideration is sufficient to support a contract even though it does not have a market value equal to that promised by the promisor.

Authority

Osborne v. Locke Steel Chain Co., 153 Conn. 527, 532 (1966); *General Electric Capital v. Transport Logistics*, 94 Conn. App. 541, 546 (2006); 2 A. Corbin, *Contracts* (Rev. Ed. 1966) § 5.14, p. 63.

Notes

Economic inadequacy may constitute some circumstantial evidence of fraud, duress, over-reaching, undue influence, mistake or that the detriment was not bargained for. See J. Calamari & J. Petrillo, *Contracts* (4th Ed. 1998) § 4.4, pp. 172-75.

If the transaction is a gift rather than a contract, no consideration is required. *Kriedel v. Krampitz*, 137 Conn. 532, 534 (1951); *Wasniewski v. Quick & Reilly, Inc.*, 105 Conn. App. 379, 382 (2008).

4.1-5 Invalidity of Past Consideration

Revised to January 1, 2008

The defendant claims that the contract is not enforceable because it is based on past consideration. Past consideration is not valid consideration. The plaintiff's promise to do something which (he/she/it) was already bound by (his/her/its) prior contract to do is past consideration. Past consideration is not sufficient to support an additional promise by the defendant. If you find that the plaintiff was already bound by (his/her/its) prior contract with the defendant to do <describe obligation>, then there can be no consideration for the contract at issue because the defendant would receive nothing more than that to which (he/she/it) is already entitled and the plaintiff has given nothing that (he/she/it) was not already under legal obligation to give.

Authority

Marcus v. DuPerry, 223 Conn. 484, 487 (1992); *Blakeslee v. Board of Water Commissioners*, 106 Conn. 642, 652 (1927); 3 S. Williston, *Contracts* (4th Ed. 1992) § 7:36, p. 569.

4.1-6 Meeting of the Minds

Revised to January 1, 2008

In order to form a binding contract, there must be mutual assent or a meeting of the minds at the time the contract was formed. In order for there to be a meeting of the minds, the parties must agree that they have entered into a contract and must have similar understanding as to the essential terms.

Authority

Bridgeport Pipe Engineering Co. v. DeMatteo Construction Co., 159 Conn. 242, 249 (1970);
Hoffman v. Fidelity & Casualty Co., 125 Conn. 440, 443-44 (1939).

4.1-7 Offer and Acceptance

Revised to January 1, 2008

In order to form a binding and enforceable contract, there must be an offer and an acceptance based on a similar understanding by the parties as to the essential terms of the contract.

Authority

Steinberg v. Reding, 24 Conn. App. 212, 214 (1991).

4.1-8 Offer

Revised to January 1, 2008

An offer is a clear, unambiguous expression of the terms under which someone is willing to enter into a contract.

Authority

1 A. Corbin, Contracts (Rev. Ed. 1996) § 1.11, p. 28.

4.1-9 Acceptance

Revised to January 1, 2008

The (offeror: defendant / plaintiff)¹ has claimed that (he/she/it) never entered into the contract claimed by the (offeree: defendant / plaintiff) because the (offeree: defendant's / plaintiff's) acceptance of the offer was not valid. In order to create a contract there must be acceptance which is an agreement to the terms of the offer. The acceptance of the offer must be explicit, full and unconditional. Any change from the material terms of the (offeror: defendant's / plaintiff's) offer invalidates the acceptance unless the (offeror: defendant / plaintiff) agrees to the change. Acceptance is not valid if it is based on a term or condition not specified in the offer. For example, if I offer to sell you my bicycle for \$200 and you respond that you will pay \$150 for the bicycle, you have not accepted my offer, and there is no contract. [However, your response could be a counteroffer, which I could accept by agreeing to sell the bicycle for \$150.]

¹ The term "offeror" and "offeree" have been inserted above as a guide. The charge should be given in terms of the "plaintiff" or the "defendant," depending on which one is the offeror and which one the offeree.

Authority

J. Calamari & J. Perillo, *Contracts* (4th Ed. 1998), § 2.2, pp. 26-27.

Notes

Under the UCC, Connecticut General Statutes § 42a-2-207 (1), "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."

4.1-10 Time of Acceptance

Revised to January 1, 2008

Acceptance occurs as soon as it is transmitted by a means which the (offeror: defendant / plaintiff)¹ has authorized, and it is put out of the (offeree: defendant's / plaintiff's) possession, regardless of whether or when the (offeror: defendant / plaintiff) receives it. The (offeree: defendant's / plaintiff's) act of signing the written offer did not become an acceptance of that offer until the signed offer was out of the (offeree: defendant's / plaintiff's) possession and on its way to the (offeror: defendant / plaintiff).

The (offeree: defendant / plaintiff) claims that (he/she/it) signed the contract from the (offeror: defendant / plaintiff) on <date> and <describe the act by which the offer left the offeree's possession, e.g., placed it in a post office box, gave it to a messenger in an envelope addressed to the offeror> on <date>. The (offeror: defendant / plaintiff) claims that (he/she/it) did not receive the contract signed by the (offeree: defendant / plaintiff) until <later date>. The time when the acceptance occurred is not the time when the (offeree: defendant / plaintiff) signed the contract and it is not the time when the (offeror: defendant / plaintiff) received the contract, it is the time when <insert the act previously described>.

¹ The term "offeror" and "offeree" have been inserted above as a guide. The charge should be given in terms of the "plaintiff" or the "defendant," depending on which one is the offeror and which one the offeree.

Authority

L. & E. Wertheimer, Inc. v. Wehle-Hartford Co., 126 Conn. 30, 35 (1939); *Lyon v. Adgraphics, Inc.*, 14 Conn. App. 252, 255 (1988), cert denied, 208 Conn. 808 (1988); see also 1 Restatement (Second), Contracts § 63, p. 151 (1981).

4.1-11 Duration of Offer

Revised to January 1, 2008

The (offeror: defendant / plaintiff)¹ claims that (his/her/its) offer required that the (offeree: defendant / plaintiff) accept it on or before <date>. The (offeree: defendant / plaintiff) claims that the (offeror: defendant / plaintiff) did not specify any time for acceptance in the offer.

If you find that the (offeror: defendant / plaintiff) did specify in the offer that acceptance must occur on or before <date>, then in order to form a valid contract, the (offeree: defendant / plaintiff) must have accepted the offer on or before <date>. If you find that the (offeror: defendant / plaintiff) did not specify a time limit for acceptance of the offer, then the (offeree: defendant / plaintiff) had a reasonable time in which to accept the offer and if (he/she/it) accepted the offer within a reasonable time, then a valid contract existed between the parties. [What is a reasonable time depends on the surrounding circumstances and the purpose of the contract.]

¹ The term "offeror" and "offeree" have been inserted above as a guide. The charge should be given in terms of the "plaintiff" or the "defendant," depending on which one is the offeror and which one the offeree.

Authority

1 A. Corbin, *Contracts* (Rev. Ed. 1996) § 2.14, p. 195 and § 2.16, pp. 203-205; *Eaton Factors Co. v. Bartlett*, 24 Conn. Sup. 40, 43, 1 Conn. Cir. Ct. 376, 379 (1962).

Notes

See Time Provisions, Instruction 4.2-9 (concerning contracts to be performed within a reasonable time, and contracts where time is of the essence).

4.1-12 Revocation of Offer

Revised to January 1, 2008

The (offeror: defendant / plaintiff)¹ claims that (he/she/it) revoked the offer on <date> when (he/she) <describe action which allegedly constitutes revocation>.

The (offeror: defendant / plaintiff) may revoke the offer at any time before the (offeree: defendant / plaintiff) has accepted it. Revocation is not effective unless it is communicated to the (offeree: defendant / plaintiff) before (he/she/it) has accepted the offer. Therefore, if you find that at the time the (offeror: defendant's / plaintiff's) action had the effect of communicating (his/her/its) revocation of the offer to the (offeree: defendant / plaintiff) on <date>, the revocation of the contract was valid unless you find that the (offeree: defendant / plaintiff) had accepted the offer before <date>.

¹ The term "offeror" and "offeree" have been inserted above as a guide. The charge should be given in terms of the "plaintiff" or the "defendant," depending on which one is the offeror and which one the offeree.

Authority

1 Restatement (Second), Contracts § 42, p. 113 & § 68, p. 163 (1981); 1 Page, Contracts, § 134, pp. 204-205; *MD Drilling and Blasting v. MLS Construction, LLC*, 93 Conn. App. 451, 455-56 (2006).

Notes

This rule may not apply if the contract expressly sets forth a time limitation for acceptance.

4.1-13 Irrevocable Offers - Option Contracts

Revised to January 1, 2008

The (offeree: defendant / plaintiff)¹ claims that (he/she/it) had an option contract from the (offeror: defendant / plaintiff). An option contract is a continuing offer to sell. It may not be revoked until after the time period fixed by the agreement of the parties. If, for example, I give you an option to purchase my bicycle for \$200 for a period of two weeks, then I cannot revoke the offer to sell the bicycle during that two week period, and at any time during those two weeks you can accept the offer and purchase the bicycle for \$200.

¹ The term "offeror" and "offeree" have been inserted above as a guide. The charge should be given in terms of the "plaintiff" or the "defendant," depending on which one is the offeror and which one the offeree.

Authority

Smith v. Hevro Realty Corp., 199 Conn. 330, 336 (1986); 1 A. Corbin, *Contracts* (Rev. Ed. 1996) § 2.23, pp. 235-39; 1 S. Williston, *Contracts* (4th Ed. 1990) § 5:15, p. 707.

Notes

This instruction assumes there is a valid option contract.

4.1-14 Manner of Acceptance of an Option Contract

Revised to January 1, 2008

The (offeree: defendant / plaintiff)¹ claims that on <date> (he/she/it) accepted the offer of the (offeror: defendant / plaintiff) under the option contract to <describe contract if necessary>. The (offeror: defendant / plaintiff) claims that the (offeree: defendant / plaintiff) did not accept the offer on <date set forth in option contract> because the (offeror: defendant / plaintiff) did not receive the acceptance until <later date>. If you find that the (offeror: defendant / plaintiff) did receive the (offeree: defendant's / plaintiff's) acceptance of the option offer on or before <date set forth in option contract>, then the acceptance was effective. If you find that the (offeror: defendant / plaintiff) did not receive the acceptance of the option offer until <later date>, then the acceptance was not effective.

¹ The term "offeror" and "offeree" have been inserted above as a guide. The charge should be given in terms of the "plaintiff" or the "defendant," depending on which one is the offeror and which one the offeree.

Authority

Smith v. Hevro Realty Corporation, 199 Conn. 330, 337 (1986).

Notes

Parties may agree to a different effective date for acceptance; otherwise, the date the acceptance is actually received by the offeror is the date of acceptance under an option contract.

Rule as to the time of acceptance of an option contract is different from the rule as to the time of acceptance of a contract. See Time of Acceptance, Instruction 4.1-10.

4.1-15 Breach of Contract

New September 28, 2012

The plaintiff claims that the defendant breached its contract with the plaintiff. In order to recover on a breach of contract claim, the plaintiff must prove:

1. the formation of an agreement with the defendant;
2. that the plaintiff performed (his/her/its) obligations under the agreement;
3. that the defendant failed to perform (his/her/its) obligations under the agreement;
and
4. as a result, the plaintiff sustained damages.

The plaintiff claims (he/she/it) had a contract with the defendant to *<describe nature of contract>*. The plaintiff claims that the defendant breached (his/her/its) contract with the plaintiff in that *<describe nature of breach>* and that as a direct and proximate result of defendant's actions, the plaintiff has been damaged.

Authority

Keller v. Beckenstein, 117 Conn. App. 550, 558, cert. denied, 294 Conn. 913 (2009).

4.2 INTERPRETATION OF EXPRESS CONTRACTS

4.2-1 Effect of Contract Language

4.2-2 Consideration of Surrounding Circumstances

4.2-3 Contracts Are Not Made in Court

4.2-4 Contract Construed against the One Who Drew It

4.2-5 Interpret Contract as a Whole

4.2-6 Effect of Incorporated Documents

4.2-7 Conflicting Provisions - Specific Terms Govern over General Terms

4.2-8 Negotiated Terms Prevail over Standardized Terms

4.2-9 Time Provisions

4.2-10 Implied Term: Custom in the Industry/Usage of Trade

4.2-11 Implied Covenant of Good Faith and Fair Dealing

4.2-12 Parol Evidence Rule

4.2-13 Material Breach of Contract

4.2-14 Substantial Performance of a Contract

4.2-15 Defense - Undue Influence

4.2-16 Defense - Duress

4.2-17 Defense- Accord and Satisfaction

4.2.19 Defense - Novation

**4.2-25 Defense - Anticipatory Breach
(Repudiation)**

4.2-26 Anticipatory Breach (Repudiation)

4.2-1 Effect of Contract Language

Revised to January 1, 2008

[<If dispute is about existence of terms:> The parties have a dispute as to whether the contract provides for <insert terms in dispute>. The plaintiff claims <insert plaintiff's contention>, and the defendant claims <insert defendant's contention>. The plaintiff must prove by a preponderance of the evidence that the contract contained the terms that the plaintiff seeks to enforce.]

[<If there is a dispute over meaning:> The parties have a dispute as to the meaning of the language of the contract that states <insert terms in dispute>. Here, the plaintiff claims that this term means <insert plaintiff's contention> and the defendant claims <insert defendant's contention>. The plaintiff must prove by a preponderance of the evidence that the disputed terms meant <insert plaintiff's contention>.]

To determine whether the contract provided <insert disputed issue>, you must decide whether it was the parties' intent to provide <insert disputed issue>. The first place to look to find the parties' intent is the wording that was used in the contract. Words in a contract are to be given their ordinary meaning [, unless they are special terms of trade or the parties have given them special meaning]. If you cannot determine what was intended from the language you may consider the circumstances surrounding the entering into the contract or other legal doctrines that I will provide to you in these instructions.

Authority

Ramirez v. Health Net of Northeast, Inc., 285 Conn. 1, 13-14 (2008); *Tomlinson v. Board of Education*, 226 Conn. 704, 722 (1993); *Southern New England Contracting Co. v. Norwich Roman Catholic Diocesan Corp.*, 175 Conn. 197, 199 (1978).

4.2-2 Consideration of Surrounding Circumstances

Revised to January 1, 2008

To determine the intent of the parties, you may interpret the contract language in light of the situation of the parties and the circumstances surrounding the making of the contract. You also may consider the motives of the parties and the ends that they sought to accomplish by their contract.

However, the circumstances surrounding the making of a contract, the purposes that the parties sought to accomplish and their motives cannot prove an intent contrary to the plain meaning of the language.

Authority

United Technologies Corp. v. Groppo, 238 Conn. 761, 772-73 (1996); *Zullo v. Smith*, 179 Conn. 596, 601 (1980); *Fairfield v. D'Addario*, 149 Conn. 358, 362 (1962); *Colonial Discount Co. v. Avon Motors, Inc.*, 137 Conn. 196, 200 (1950); *Bijur v. Bijur*, 79 Conn. App. 752, 758-59 (2003).

Notes

Even if the court determines that the parol evidence rule applies, this instruction may be given because parol evidence may be used to determine the meaning of terms to a contract. *Ruscito v. F-Dyne Electronics Co.*, 177 Conn. 149, 160 (1979); *Foley v. Huntington Co.*, 42 Conn. App. 712, 734, cert. denied, 239 Conn. 931 (1996).

4.2-3 Contracts Are Not Made in Court

Revised to January 1, 2008 (modified September 28, 2012)

It is not your function to remake the contract or to change the terms of the contract. You must determine the intent of the parties from the contract the parties themselves made and apply the terms of that contract that the parties in fact made.

Authority

Bank of Boston Connecticut v. Schlesinger, 220 Conn. 152, 159 (1991); *Barnard v. Barnard*, 214 Conn. 99, 110 (1990); *Jay Realty, Inc. v. Ahearn Development Corp.*, 189 Conn. 52, 55 (1983).

4.2-4 Contract Construed against the One Who Drew It

Revised to January 1, 2008

If you are unable to determine the intent of the parties from the language and the surrounding circumstances, you may construe that language against <insert name of drafter>, the party who drafted the contract.

However, you should not construe the contract against <insert name of drafter>, the party who drafted the contract, if it leads you to a result that was not intended by the parties or if it leads you to a result that is not a reasonable meaning of the contract.

Authority

Levine v. Advest, Inc., 244 Conn. 732, 755-56 (1998); *Sturman v. Socha*, 191 Conn. 1, 9 (1983); *Southern New England Contracting Co. v. State*, 165 Conn. 644, 656 (1974); *Ravitch v. Stollman Poultry Farms, Inc.*, 165 Conn. 135, 145-46 (1973).

Notes

In "contract of adhesion" cases, such as insurance cases, the contract language will be construed against the party responsible for drafting it. *Schilberg Integrated Metals Corp. v. Continental Casualty Co.*, 263 Conn. 245, 267-68 (2003); *Cody v. Remington Electric Shavers*, 179 Conn. 494, 497 (1980).

4.2-5 Interpret Contract as a Whole

Revised to January 1, 2008

When determining the intent of the parties, you should consider all relevant provisions of the contract. Assume that all language of the contract is necessary, unless this would be unfair or unreasonable.

Authority

Viera v. Cohen, 283 Conn. 412, 439-40 (2007); *White v. Kampner*, 229 Conn. 465, 473 (1994); *Barnard v. Barnard*, 214 Conn. 99, 109 (1990); *Lar-Rob Bus Corp. v. Fairfield*, 170 Conn. 397, 407 (1976).

4.2-6 Effect of Incorporated Documents

Revised to January 1, 2008

If you find that the parties entered into a contract that refers to other existing document[s] in such a manner as to establish that they intended to make the terms and conditions of that other document[s] part of their contract, you should interpret that incorporated document[s] as part of the contract between the parties according to the rules I have given you for interpreting contracts. The document[s] incorporated need not be attached to the contract nor signed nor initialed to be part of the contract unless the contract so requires.

In the absence of an express provision, incorporated documents may neither expand nor restrict the obligations of the parties under the basic contract.

Authority

Randolph Construction Co. v. Kings East Corp., 165 Conn. 269, 275 (1973); *Batter Building Materials Co. v. Kirschner*, 142 Conn. 1, 7 (1954); *566 New Park Associates, LLC v. Blardo*, 97 Conn. App. 803, 810-11 (2006).

4.2-7 Conflicting Provisions - Specific Terms Govern over General Terms

Revised to January 1, 2008

If you find that specific terms and general terms both apply to the same subject in the contract, you should favor the specific terms over the general terms. <Describe the specific and general terms at issue if necessary.>

Authority

Wesley v. Schaller Subaru, Inc., 277 Conn. 526, 545 (2006); *Miller Bros. Construction Co. v. Maryland Casualty Co.*, 113 Conn. 504, 514 (1931); 2 Williston, Contracts § 619.

4.2-8 Negotiated Terms Prevail over Standardized Terms

Revised to January 1, 2008

The parties have a dispute as to *<insert as appropriate:>*

- whether the contract provides for *<insert terms in dispute>*.
- the meaning of the language of the contract that states *<insert terms in dispute>*.

When you are determining the intent of the parties on this issue, you should favor terms that the parties specifically negotiated or added to the contract over terms that are part of a standard form.

Authority

Restatement (Second) of Contracts § 203 (d).

4.2-9 Time Provisions

Revised to January 1, 2008

Note: Give Instruction (A) or (B), not both. See notes below (A) as to when that instruction is appropriate.

A. Contracts where time is "of the essence"

The contract here provides that "time is of the essence." This means that if you find that the (defendant / plaintiff) failed to perform on or before <date, event, etc.>, you must find that the (defendant / plaintiff) breached the contract.

Authority

Grenier v. Compratt Construction Co., 189 Conn. 144, 151 (1983); *Hartford Electric Applicators of Thermalux, Inc. v. Alden*, 169 Conn. 177, 182 (1975); *Ravitch v. Stollman Poultry Farms, Inc.*, 165 Conn. 135, 149 (1973).

Notes

A contract must expressly state that "time is of the essence" or other language that clearly evidences the parties' intent that time be of the essence for this instruction to apply. *Kakalik v. Bernardo*, 184 Conn. 386, 392-94 (1981); *Hartford Electric Applicators of Thermalux, Inc. v. Alden*, 169 Conn. 177, 182 (1975). The fact that the contract stated a date for performance does not necessarily make time of the essence. *Grenier v. Compratt Construction Co.*, supra, 189 Conn. 151. However, language that is equivalent to "time is of the essence" may be enough. But see *Mihalyak v. Mihalyak*, 11 Conn. App. 610, 167 (1987) (holding that "forthwith" was not equivalent to "time is of the essence").

B. Contracts to be performed in a reasonable time

The parties dispute whether the (defendant / plaintiff) performed in a timely manner. The contract includes an implied agreement that the (defendant / plaintiff) would perform the contract within a reasonable time. The law does not specifically define "reasonable time." It is for you to decide whether the (defendant / plaintiff) performed in a "reasonable" time. What is reasonable depends on the nature, purpose and circumstances surrounding performance.

Authority

General Statutes § 42a-1-204 ("reasonable time"); *Christophersen v. Blout*, 216 Conn. 509, 513 (1990); *Texas Co. v. Crown Petroleum Corp.*, 137 Conn. 217, 227 (1950).

4.2-10 Implied Term: Custom in the Industry/Usage of Trade

Revised to January 1, 2008

The plaintiff claims that *<insert term>* should be implied in the contract because it is a (custom in the industry / usage of trade). The defendant denies this.

To establish this claim, the plaintiff has the burden to prove by a preponderance of the evidence the following facts:

- 1) that *<insert term>* was a (custom in the industry / usage of trade);
- 2) that each party knew or had reason to know of the (custom / usage); and
- 3) that neither party knew or had reason to know that the other party had intentions inconsistent with that (custom / usage).

If the plaintiff has established this claim, then you should consider the (custom / usage) to be a term of the contract, just as though the contract stated it expressly.

Authority

Mystic Color Lab, Inc. v. Auctions Worldwide, LLC, 284 Conn. 408, 425 (2007); *Presidential Capital Corp. v. Reale*, 231 Conn. 500, 511 (1994); *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co.*, 9 Conn. App. 30, 38, cert. denied, 201 Conn. 811 (1986). See Restatement (Second) of Contracts §§ 220-222.

Notes

If there is an express term in the contract that addresses the same subject as the custom or usage, that express term should be given greater weight. Restatement (Second) of Contracts § 203 (b).

4.2-11 Implied Covenant of Good Faith and Fair Dealing

Revised to January 1, 2008

Every contract contains an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other party to receive the benefits of the contract. The concept is essentially a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended. It is not a separate contractual claim and the covenant cannot be applied to achieve a result contrary to the clearly expressed terms of the contract between the parties.

Here, the (defendant / plaintiff) had an obligation to exercise good faith when (performing / enforcing) the following contract term: *<describe the contract term in issue>*.

You must decide whether the (defendant / plaintiff) fulfilled that obligation to exercise good faith.

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose and freedom from intention to defraud. It means being faithful to one's duty and obligation under the contract.

Good faith is defined as the opposite of bad faith. If the (defendant / plaintiff) engaged in bad faith you must find that (he/she/it) did not fulfill the covenant. Bad faith generally implies a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties. Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose. Bad faith contemplates a state of mind affirmatively operating with furtive design or ill will.

Authority

Renaissance Management Co. v. Connecticut Housing Finance Authority, 281 Conn. 227, 240 (2007); *Habetz v. Condon*, 224 Conn. 231, 238 (1992); *Eis v. Meyer*, 213 Conn. 29, 36 (1989); *Warner v. Konover*, 210 Conn. 150, 154 (1989); *Buckman v. People Express, Inc.*, 205 Conn. 166, 171-72 (1987) (specifically holding that the trial court's instruction was not in error); *Foley v. Huntington Co.*, 42 Conn. App. 712, 727 n.6 (1996) (quoting instruction on the implied covenant of good faith and fair dealing); *Feinberg v. Berglewicz*, 32 Conn. App. 857, 861 (1993); General Statutes §§ 42a-1-203 (obligation of good faith), 42a-2-103 (1) (b) (definition of good faith).

Notes

The Connecticut Supreme Court has stated that "[t]he concept of good faith and fair dealing is [e]ssentially . . . a rule of construction designed to fulfill the reasonable expectations of the

contracting parties as they presumably intended." (Internal quotation marks omitted.) *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 302 (2004); see also *Verrastro v. Middlesex Ins. Co.*, 207 Conn. 179, 190 (1988); *Magnan v. Anaconda Industries, Inc.*, 193 Conn. 558, 567 (1984).

One possible exception to the rule that the implied covenant cannot be applied to achieve a result contrary to express terms is where those express terms are contrary to public policy. *Eis v. Meyer*, 213 Conn. 29, 37 (1989).

4.2-12 Parol Evidence Rule

Revised to January 1, 2008

Note: This instruction may be used at the time the parol evidence is introduced during the trial, as well as at the conclusion of the trial. Use if there is a fully integrated contract, but terms are ambiguous and parol evidence can assist in interpreting those terms without varying or contradicting those terms.

The parties intended that <describe contract> be the complete contract. Therefore, you may consider the following evidence <insert evidence of earlier understandings> only for the purpose of determining the intent of the parties as to the meaning of <insert ambiguous terms>. I have found that the meaning of <insert ambiguous terms> is not clear. You may not consider that evidence of earlier oral or written understandings for the purpose of varying or contradicting the terms of that contract.

Authority

Alstom Power, Inc. v. Blacke-Durr, Inc., 269 Conn. 599, 609-10 (2004); *HLO Land Ownership Assocs. Ltd. Partnership v. Hartford*, 248 Conn. 350, 357-60 (1999); *TIE Communications, Inc. v. Kopp*, 218 Conn. 281, 288 (1991); *Security Equities v. Gimaba*, 210 Conn. 71, 78 (1989); *Vezina v. Nautilus Pools, Inc.*, 27 Conn. App. 810, 813-14 (1992).

Notes

Before using this instruction, first determine whether there is a complete integrated agreement such that the parol evidence rule applies. Then determine whether the contract language is ambiguous and if the proposed evidence will not vary or contradict the terms of the contract. If so, then the instruction may be given. See *Alstom Power, Inc. v. Blacke-Durr, Inc.*, 269 Conn. 599, 609-10 (2004); *HLO Land Ownership Associates Ltd. Partnership v. Hartford*, 248 Conn. 350, 360 (1999).

Even if the court determines that the parol evidence rule applies, parol evidence may be used to determine the meaning of terms to a contract as long as it does not vary or contradict those terms. *Ruscito v. F-Dyne Electronics Co.*, 177 Conn. 149, 160 (1979); *Foley v. Huntington Co.*, 42 Conn. App. 712, 734 (1996), cert. denied, 239 Conn. 931 (1996).

4.2-13 Material Breach of Contract

New November 1, 2009

The <party> claims that the <other party> failed to <describe> and that such failure was a material breach of the contract. A breach of contract is material if it deprives a party of a substantial benefit that the party reasonably expected to receive under the terms of the contract. If you find that <describe> was a substantial benefit and <other party> failed to <describe>, then you will find <other party> materially breached the contract.

Authority

See *Shah v. Cover-It, Inc.*, 86 Conn. App. 71, 75-76 (2004); *Strouth v. Pools by Murphy & Sons, Inc.*, 79 Conn. App. 55, 61 (2003); *Bernstein v. Nemeyer*, 213 Conn. 665, 672, 570 A.2d 164 (1990), in which the Connecticut Supreme Court endorsed the use of the multifactor test set forth in the Restatement (Second) of Contracts § 241 (1981):

In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Notes

The foregoing test may be confusing for a jury. Courts purporting to apply the test generally look to factors (a) and (d). See, e.g., *Bernstein v. Nemeyer*, supra, 213 Conn. 672; *Strouth v. Pools by Murphy & Sons, Inc.*, supra, 79 Conn. App. 60-61. Additional factors of the test should be included in the instruction if they apply.

4.2-14 Substantial Performance of a Contract

New March 5, 2010

The <party> claims that (he/she/it) has substantially performed the contract. Even if <party> has not complied exactly with the terms of a contract, (he/she/it) has substantially performed under the contract where (his/her/its) performance is so similar to the required performance that it is nearly equivalent to the performance for which the parties bargained. A party has substantially performed under the contract when any deviation from the contract is minor and unimportant and does not seriously impair the purpose of the provision of the contract in question.

ⁱIf <party> has not complied with a material term of the contract, (he/she/it) has not substantially performed the contract. <See Material Breach of Contract, *Instruction 4.2-13*.>

Authority

Argentinis v. Gould, 219 Conn. 151, 157 (1991); *Mortgage Electronic Registration Systems, Inc. v. Goduto*, 110 Conn. App. 367, cert. denied, 289 Conn. 956 (2008); *Borrelli v. H & H Contracting, Inc.*, 100 Conn. App. 680, 692 n.6 (2007), appeal dismissed, 285 Conn. 553, 940 (2008); S. Williston, *Contracts* (4th Ed. 2000) §§ 44.54, 44.55.

Notes

"Our precedent is clear: Parties are entitled to get that for which they bargain." *Borrelli v. H & H Contracting, Inc.*, 100 Conn. App. 680, 692 (2007), appeal dismissed, 285 Conn. 553 (2008). Only full performance discharges a party's duty under a contract: "Nothing less than full performance, however, has this effect and any defect in performance, even an insubstantial one, prevents discharge on this ground." 2 Restatement (Second), *Contracts* § 235, comment (a) (1981).

A substantial performance charge, however, is available in the context of a defense of a breach of contract claim. Under this doctrine, the contract breach is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial. *Borrelli v. H & H Contracting, Inc.*, supra, 100 Conn. App. 680, 692 n.6.

Additionally, a substantial performance charge may be available where plaintiffs may not have fully performed the contract but nonetheless seeks to pursue contract remedies. See, e.g., *Vincenzi v. Cerro*, 186 Conn. 612, 615 (1982). Such plaintiffs, however, may only recover under a contract theory if they have substantially performed: "Generally, when a builder breaches a bilateral construction contract by an unexcused failure to render substantial performance, he cannot maintain an action on the contract to recover the unpaid balance of the contract price because substantial performance, a constructive condition of the owner's duty to pay the balance, has not been satisfied. See 2 Restatement (Second), *Contracts* 237, comment (d); 3A A. Corbin, *Contracts* (1964) 701, 710; see generally *Lach v. Cahill*, 138 Conn. 418, 421, 85 A.2d 481 (1951); *Sheketoff v. Prevedine*, 133 Conn. 389, 392-93 (1947). The balance of the contract price, therefore, is not 'due' the builder. See 3A A. Corbin, supra, § 701." *Argentinis v. Gould*, 219 Conn. 151, 157 (1991).

Substantial performance is typically raised in the context of construction contracts; *Mortgage Electronic Registration Systems, Inc. v. Goduto*, 110 Conn. App. 367, 373, cert. denied, 289 Conn. 956 (2008); but has also been applied in the context of land sale contracts; *Mihalyk v. Mihalyk*, 11 Conn. App. 610, 616 (1987); and employment contracts. *Burns v. Gould*, 172 Conn. 210, 221 (1977).

The doctrine is inapplicable, however, to claims arising under the Uniform Commercial Code because, under the perfect tender rule, a buyer may reject an improper delivery if the goods or tender of delivery fail in any respect to conform to the contract. See General Statutes § 42a 2 601. But see *Franklin Quilting Co., Inc. v. Orfaly*, 1 Conn. App. 249, 251 n.3 (1984) (perfect tender rule requires a "substantial nonconformity" to the contract before buyer may reject goods).

Furthermore, where a contract is fully performed, but the omissions and variations result from impracticability of performance, then the doctrine of substantial performance may not apply because impracticability may discharge the duty to perform the variations on the contract. See *Grenier v. Compratt Construction Co.*, 189 Conn. 144 (1983); 2 Restatement (Second), Contracts § 235, comment (a) (1981).

4.2-15 Defense - Undue Influence

New September 30, 2011

The defendant claims that the (contract, lease, etc.) is not enforceable because (he/she) executed it when (he/she) was subject to undue influence by <insert name>.

Undue influence is the exercise of control over a person in an attempt to destroy (his/her) free will and cause (him/her) to do something different than (he/she) would do if left entirely to (his/her) own discretion and judgment. The acts of control by <insert name> over the defendant must be operative at the time the (contract, lease, etc.) is entered into.

In determining whether <insert name> has exercised undue influence over the defendant you may consider the following factors: the defendant's age and physical and mental condition; whether the defendant had independent or disinterested advice in the transaction; whether the defendant received adequate value under the (contract, lease, etc.); the defendant's needs and distress. The defendant must prove undue influence by a preponderance of the evidence.

Authority

Gengaro v. New Haven, 118 Conn. App. 642, 649-50 (2009); *Jenks v. Jenks*, 34 Conn. App. 462, 468 (1994), rev'd on different grounds, 232 Conn. 750 (1995); *Pickman v. Pickman*, 6 Conn. App. 271, 275-76 (1986).

Note

If undue influence is raised against a fiduciary, see Fiduciary Duty, Instruction 3.8-2.

4.2-16 Defense - Duress

New December 9, 2011

The defendant claims that if the <specify transaction> existed, it is not enforceable because (he/she/it) agreed to it under duress.

To demonstrate duress, the defendant must prove three elements. First, the defendant agreed to the alleged <specify transaction> because of a wrongful act or threat by the plaintiff. In this case, the defendant claims that the wrongful act(s) or threat(s) (is/are) <insert threat/wrongful act alleged>. Second, the wrongful act or threat induced a fearful state of mind in the defendant that left (him/her/it) no reasonable alternative but to agree to the <specify transaction>. Third, the defendant otherwise would not have agreed to the <specify transaction> absent the wrongful act(s) or threat(s).

Authority

R. F. Daddario & Sons, Inc. v. Shelansky, 123 Conn. App. 725, 739 (2010); *Cox v. Burdick*, 98 Conn. App. 167, 177-78, cert. denied, 280 Conn. 951 (2006); *Barbara Weisman, Trustee v. Kaspar*, 233 Conn. 531, 549-50 n.15 (1995).

Notes

Because the Appellate Court's four-part test [(1) a wrongful act or threat, (2) that left the victim no reasonable alternative, and (3) to which the victim in fact acceded, and that (4) the resulting transaction was unfair to the victim] in the foregoing authorities included concepts of unfairness, impossibility and lack of reasonable alternatives, the Civil Jury Instruction Committee decided that the "no reasonable alternative" standard encompassed the essence of the test.

Duress must be pleaded as a special defense pursuant to Practice Book § 10-50.

Although the Connecticut Appellate and Supreme Courts have not stated the burden of proof, in at least two instances, the Superior Court has stated the burden as preponderance of the evidence. *Pogacnik v. Margueron*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 91 0116631 (July 10, 1995, *Karazin, J.*) (preponderance) and *Statewide Grievance Committee v. Timbers*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 99 0171925 (August 2, 2000, *Karazin, J.*), aff'd, 70 Conn. App. 1, cert. denied, 261 Conn. 908 (2002), cert. denied, 537 U.S. 1192, 123 S. Ct. 1274, 154 L. Ed. 2d 1027 (2003). This is consistent with the Supreme Court's opinion in *Stuart v. Stuart*, which in dicta questioned the soundness of the clear and convincing standard for common-law fraud. 297 Conn. 26, 38-44 (2010) ("the general rule [is] that when a civil statute is silent as to the applicable standard of proof, the preponderance of the evidence standard governs factual determinations required by that statute"). But see *In re Mason*, 300 B.R. 160, 165 (Bankr. D. Conn. 2003), citing 25 Am. Jur. 2d, Duress and Undue Influence § 28 (1996) (clear and convincing); 25 Am. Jur. 2d, Duress and Undue Influence § 34 (2004) (clear and convincing); 28 S. Williston, Contracts (4th Ed. 1995) § 71:10, p. 632-34 (2003) (clear and convincing).

If duress is raised against a fiduciary, see Fiduciary Duty, Instruction 3.8-2.

4.2-17 Defense - Accord and Satisfaction

New June 1, 2012

The defendant claims that (he/she) does not owe any money to the plaintiff on the contract because the parties have reached an accord and satisfaction. In this case, the defendant claims that (he/she/it) has (paid to/performed for) <describe> the plaintiff and the plaintiff has accepted that (payment/performance) in satisfaction of the defendant's obligations under the contract. In order for an accord and satisfaction to occur, there must be a good faith dispute about the amount that is owed [or about the existence of a debt] and that the plaintiff must have understood that the (payment/performance) by the defendant was made as full satisfaction of the defendant's obligations under the original contract.

Therefore, if you find that the defendant offered the (payment/performance) to fully satisfy (his/her/its) obligations under the contract and the plaintiff accepted the (payment/performance) with that understanding, then the defendant owes nothing further to the plaintiff. The defendant bears the burden of proving accord and satisfaction.

¹ In 2005, § 42a-1-207 was repealed. See Public Acts 2005, No. 05-109.

Authority and Notes

Reference to consideration has been omitted. The law is that an accord and satisfaction must be supported by consideration. However, an accord and satisfaction is sufficiently supported by consideration if it settles a monetary claim that is unliquidated in amount. *Association Resources, Inc. v. Wall*, 298 Conn. 145, 187 (2010), citing *County Fire Door Corp. v. C.F. Wooding Co.*, 202 Conn. 277, 282 (1987). In *County Fire Door Corp.*, the court stated: "It may well be that an accord is enforceable, even in the absence of consideration, if it is supported by a debtor's reasonable and foreseeable reliance on a promise by a creditor to forgive the remainder of an outstanding debt." *Id.*, 281 n.2. The charge should refer to consideration only if it is an issue.

Note that *County Fire Door Corp.*, *supra*, held that when a creditor knowingly cashed a check explicitly tendered in full satisfaction of an unliquidated debt, it became bound by the terms of settlement that the check contained. Nevertheless, after *County Fire Door Corp.* was decided in 1987, the legislature amended its codification of the Uniform Commercial Code (UCC) in 1991 to explicitly exclude accord and satisfaction claims from General Statutes § 42a-1-207¹ and enacted General Statutes § 42a-3-311, which expressly governs accord and satisfaction claims based on the use of instruments. See Public Acts 1991, No. 91-304, §§ 37 and 111. Accordingly, this charge should not be used for claims based on the use of an instrument governed by the UCC.

4.2-19 Defense - Novation

New February 1, 2013

The defendant claims that (he/she/it) is not liable to the plaintiff under the contract because the plaintiff agreed that <insert name of new debtor> would take over the defendant's obligations under the contract. This substitution is called a novation. In order to prove a novation, the defendant must prove:

1. that the plaintiff has accepted <insert name of new debtor> in the place of the defendant as the person liable to the plaintiff under the contract; and
2. that the plaintiff has agreed to a discharge of the defendant's obligation to (him/her/it).

Authority

Spicer v. Spicer, 33 Conn. App. 152, 158, 159 (1993), cert. denied, 228 Conn. 920 (1994);
Ruwet-Sibley Equipment Corp. v. Stebbins, 15 Conn. App. 21, 26, cert. dismissed, 209 Conn. 806 (1988).

4.2-25 Defense - Anticipatory Breach (Repudiation)

New June 1, 2012

The defendant claims that the plaintiff committed an anticipatory breach of the contract. An anticipatory breach of contract occurs when one party to a contract indicates that (he/she/it) will not perform (his/her/its) obligations under the contract before the time for performance has arrived. This indication can occur either by a statement that the party will not perform or by an act that indicates an unwillingness to perform.

If you find that the plaintiff did anticipatorily breach the contract by <describe>, then the defendant had no obligation to perform (his/her/its) duties under the contract.

However, this is only a valid defense to the plaintiff's claim if you find that the defendant, as of the time of the plaintiff's repudiation, had fulfilled his duties under the contract.

Authority and Notes

Pullman, Comley, Bradley & Reeves v. Tuck-it-away, Bridgeport, Inc., 28 Conn. App. 460, 465, cert. denied, 223 Conn. 926 (1992). The so-called nonbreaching party's ability to recover for anticipatory breach is limited by his ability to perform under the contract. "In order to establish that the defendants anticipatorily breached the contract, the plaintiff must be able to show that it would have been able to perform its obligations on the date set for performance." *Land Group, Inc. v. Palmieri*, 123 Conn. App. 84, 93 (2010). The Restatement (Second) of Contracts § 254 (1) states that "[a] party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise." 2 Restatement (Second), Contracts § 254, p. 290 (1981).

"Repudiation can occur either by a statement that the promisor will not perform or by a voluntary, affirmative act that indicates inability, or apparent inability, substantially to perform." *Gilman v. Pedersen*, 182 Conn. 582, 584 (1981).

4.2-26 Anticipatory Breach (Repudiation)

New June 1, 2012

The plaintiff claims that the defendant committed an anticipatory breach of the contract. An anticipatory breach of contract occurs when one party to a contract indicates that (he/she/it) will not perform (his/her/its) obligations under the contract before the time for performance has arrived. This indication can occur either by a statement that the party will not perform or by an act that indicates an unwillingness to perform.

If you find that the defendant did anticipatorily breach the contract by <describe>, then the plaintiff may recover damages from the defendant without having to await the time for the defendant's performance under the contract.

In order to recover damages based on an anticipatory breach of contract, the plaintiff must also prove that (he/she/it) would have been able to perform under the contract on the date set for performance.

Authority and Notes

Pullman, Comley, Bradley & Reeves v. Tuck-it-away, Bridgeport, Inc., 28 Conn. App. 460, 465, cert. denied, 223 Conn. 926 (1992). The so-called nonbreaching party's ability to recover for anticipatory breach is limited by his ability to perform under the contract. "In order to establish that the defendants anticipatorily breached the contract, the plaintiff must be able to show that it would have been able to perform its obligations on the date set for performance." *Land Group, Inc. v. Palmieri*, 123 Conn. App. 84, 93 (2010). The Restatement (Second) of Contracts § 254 (1) states that "[a] party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise." 2 Restatement (Second), Contracts § 254, p. 290 (1981).

"Repudiation can occur either by a statement that the promisor will not perform or by a voluntary, affirmative act that indicates inability, or apparent inability, substantially to perform." *Gilman v. Pedersen*, 182 Conn. 582, 584 (1981).

4.3 IMPLIED CONTRACTS

4.3-1 Promissory Estoppel

**4.3-2 Contract Implied by Conduct
(Implied-in-Fact)**

**4.3-3 Unjust Enrichment (Implied-In-Law or
Quasi-Contract)**

**4.3-4 Statute of Limitations (Contract Implied by
Conduct)**

4.3-1 Promissory Estoppel

Revised to January 1, 2008

The plaintiff claims that (he/she/it) is entitled to recover based upon a legal principle known as promissory estoppel.

[<If the plaintiff has plead in the alternative:> For you to find for the plaintiff under this legal principle, you must first find that there was no written or oral contract expressed in words and no contract implied by conduct for <insert precise issue>. If you find that there was no contract for <insert precise issue> between the parties, you may consider whether the plaintiff is entitled to recover under promissory estoppel.]

To recover, the plaintiff must establish that 1) the defendant made a clear and unambiguous promise to <describe alleged promise>, 2) the defendant reasonably should have expected the plaintiff to <insert facts re: action/forbearance> in reliance on that promise, 3) the plaintiff reasonably <insert facts re: action/forbearance> based on that reliance, and 4) enforcement of that promise is the only way to avoid injustice to the plaintiff.

Authority

Glazer v. Dress Barn, Inc., 274 Conn. 33, 88 (2005); *Stewart v. Cendant Mobility Services, Corp.*, 267 Conn. 96, 104-106 (2003); *D'Ulisse-Cupo v. Board of Directors*, 202 Conn. 206, 213 (1987); Restatement (Second) of Contracts § 90 (1979). See also *Dacourt Group, Inc. v. Babcock Industries, Inc.*, 747 F. Supp. 157, 161 (D. Conn. 1990). For a discussion of instructing in the alternative, see *Suffield Development Associates Ltd. Partnership v. Society for Savings*, 243 Conn. 832, 846 (1998).

4.3-2 Contract Implied by Conduct (Implied-in-Fact)

Revised to January 1, 2008

The plaintiff claims that the defendant breached a contract implied by conduct. Even if there was no oral or written contract expressed in words, there still could be a contract based on conduct if the plaintiff establishes that the plaintiff and the defendant agreed, by actions or conduct, to <insert alleged terms of contract>. To determine whether this contract exists, you must consider only whether the conduct and acts of the parties show an agreement to <insert alleged terms of contract>. If, based upon the acts and conduct of the parties, you determine that the defendant agreed to <insert alleged terms of contract>, and that the defendant breached that agreement, the plaintiff may recover.

Authority

Janusauskas v. Fichman, 264 Conn. 796, 804-805 (2003); *Bershtein, Bershtein & Bershtein v. Nemeth*, 221 Conn. 236, 241-42 (1992); *Coelho v. Posi-Seal International, Inc.*, 208 Conn. 106, 111-12 (1988); *Brighenti v. New Britain Shirt Corp.*, 167 Conn. 403, 406-407 (1974); *Corriveau v. Jenkins Bros.*, 144 Conn. 383, 387 (1957).

4.3-3 Unjust Enrichment (Implied-In-Law or Quasi-Contract)

Revised to January 1, 2008

The plaintiff seeks to recover the value of <insert goods/services> (he/she/it) provided because the defendant was unjustly enriched by the plaintiff's provision of <insert goods/services>. Unjust enrichment means that it is contrary to equity and good conscience for the defendant to retain a benefit that has come to the defendant at the expense of the plaintiff.

To find unjust enrichment, you must find that the plaintiff has provided <insert goods/services>, that the defendant has benefited from those <insert goods/services>, that the defendant unjustly did not pay for that benefit, and that the defendant's failure to pay hurt the plaintiff.

[<If the plaintiff has pleaded unjust enrichment in the alternative to breach of contract:> For you to find for the plaintiff under this legal principle, you must first find that there was no written or oral contract expressed in words and no contract implied by conduct for the plaintiff to provide <insert goods/services>. If you find that there was a contract for the plaintiff to provide <insert goods/services>, you may not find that the defendant was unjustly enriched.]

Authority

Meaney v. Connecticut Hospital Assn., 250 Conn. 500, 511 (1999); *Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 283 (1994); *Bershtein, Bershtein & Bershtein v. Nemeth*, 221 Conn. 236, 242 (1992); *National CSS, Inc. v. Stamford*, 195 Conn. 587, 597 (1985); *Brighenti v. New Britain Shirt Corp.*, 167 Conn. 403, 407 (1974). For a discussion of instructions for cases in which the plaintiff has pleaded contract and unjust enrichment claims in the alternative, see *Meaney v. Connecticut Hospital Assn.*, 250 Conn. 500, 515-23 (1999), and *Suffield Development Associates Ltd. Partnership v. Society for Savings*, 243 Conn. 832, 846 (1998).

4.3-4 Statute of Limitations (Contract Implied by Conduct)

Revised to January 1, 2008

The defendant has asserted the defense of statute of limitations to the plaintiff's claim of breach of implied contract. If you find that there was an implied contract and that <*insert alleged breach*> was a breach of that implied contract by the defendant, you must consider this defense. If you find that the defendant has established that the <*insert alleged breach*> occurred more than six years before the plaintiff served the defendant with this lawsuit, you must find that the plaintiff's claim is barred by the statute of limitations and render a defendant's verdict on that count.

Authority

General Statutes § 52-576; *Anderson v. Bridgeport*, 134 Conn. 260 (1948).

4.4 LEGAL RELATIONSHIPS

4.4-1 Minors

4.4-2 Guardianship

4.4-3 Mental Illness or Defect

4.4-4 Agency - Defined

4.4-5 Capacity to Contract - Actual or Implied Authority

4.4-6 Capacity to Contract - Apparent Authority

4.4-7 Ratification by the Principal

4.4-8 Knowledge or Notice of Agent Imputed to Principal

4.4-9 Termination of Agent's Actual Authority

4.4-10 Termination of Agent's Actual Authority - Notice to Third Parties

4.4-11 Termination of Agent's Apparent Authority

4.4-18 Joint Ventures

4.4.19 Joint and Several Contracts

4.4-22 Assignment

4.4-25 Direct or Intended Beneficiary

4.4.26 Rights of Beneficiary and Promisee

4.4-30 Bailor-Bailee Relationships -- Bailment Bailor-Bailee

4.4-31 Bailor-Bailee Relationship

4.4-1 Minors

New, February 3, 2009

The defendant has raised the affirmative defense of minority. The defendant is not legally responsible to the plaintiff for breach of contract if the defendant was a minor, that is, under the age of 18,¹ at the time (he/she) entered into the contract.

¹ General Statutes § 1-1d defines the term "minor."

Authority

Yale Diagnostic Radiology v. Estate of Harun Fountain, 267 Conn. 351 (2004) (Connecticut recognizes the common-law rule that a minor child's contracts are voidable. Under this rule, a minor may ratify or avoid contractual obligation upon reaching majority. Rule does not apply to contracts for goods or services necessary for minor's health and sustenance. Such contracts cannot be avoided by the defense of minority.)

Notes

Three Connecticut statutes reference, and perhaps modify, the common law rule. General Statutes § 38a-284 provides that minors of the age of fifteen and over may enter into contracts for life, health and accident insurance. General Statutes § 42a-3-305 (b) provides a defense of infancy against a holder in due course who is seeking to enforce a negotiable instrument. General Statutes § 36a-297 provides that minors may enter into a contract to open an account with a bank or credit union.

4.4-2 Guardianship

New, February 3, 2009

The plaintiff claims that the defendant is liable under the contract because, even though the defendant was a minor when the contract was entered into, the defendant's guardian, <name>, entered into the contract on (his/her) behalf. A guardianship is a relationship established by law in which one person, called a "guardian," acts for another, called a "ward," in this case the defendant, whom the law regards as incapable of managing his/her own affairs.

A guardian does not have the power to bind the ward to any contract unless the contract has been approved by the Probate Court. Thus, for the defendant to be liable, the plaintiff must prove that: (1) <name of guardian> was, at the time of the contract, appointed by the Probate Court as the defendant's guardian; and (2) the Probate Court approved of the guardian entering into the contract in dispute.

Authority

General Statutes § 52-570a (c); *Elmendorf v. Poprocki*, 155 Conn. 115, 120 (1967); *Stempel v. Middletown Trust Co.*, 127 Conn. 206, 220-23 (1940); 39 Am. Jur. 2d Guardian and Ward § 99.

4.4-3 Mental Illness or Defect

New, February 3, 2009

The defendant has raised the affirmative defense of mental illness or defect. To establish this defense, the defendant must prove by a preponderance of the evidence that at the time the defendant entered into the claimed contract, the defendant did not have sufficient mental capacity to understand the nature and effect of the contract.

Authority

Cotrell v. Connecticut Bank & Trust, 175 Conn. 257, 261 (1978); *Webster v. Woodford*, 3 Day 90 (1808); 17A Am. Jur. 2d Contracts § 23.

4.4-4 Agency - Defined

New, February 3, 2009

The plaintiff claims the defendant is liable because [A] is the defendant's agent. To find that [A] is in fact the defendant's agent, you must find that three things have occurred between [A] and the defendant.

First, the defendant must have in some way communicated (his/her) intention to [A] that [A] would act for (him/her) in connection with the undertaking *<describe it>*.

Second, [A] must have agreed to act for the defendant in connection with the undertaking; and Third, the defendant and [A] must have agreed or understood that the defendant would be in control of the undertaking.

If you find that these three things have occurred, then you must find that [A] is in fact the defendant's agent.

Authority

National Publishing Co. v. Hartford Fire Ins. Co., 287 Conn. 664, 677-78 (2008);
McLaughlin v. Chicken Delight, Inc., 164 Conn. 317, 322 (1973); Black's Law Dictionary 62 (6th ed. 1990).|

4.4-5 Capacity to Contract - Actual or Implied

Authority

New March 5, 2010

The defendant *<name of principal>* claims that (he/she/it) is not liable to the plaintiff for *<specify transaction>* because *<name of agent>* did not have the authority to enter into *<specify transaction>* that is the basis of the plaintiff's claim against the defendant. The acts of an agent may impose liability on a principal for a transaction either because the principal expressly gave the agent authority to bind (him/her/it) by (his/her/its) actions or because the authority of the agent to do so may be implied from the circumstances. It is up to you to decide whether *<name of agent>* had either express or implied authority to bind the defendant in the *<specify transaction>*.

If you find from the evidence that the defendant expressly gave *<name of agent>* authority to bind (him/her/it) in the *<specify transaction>*, then the defendant is liable to the plaintiff for *<specify transaction>*.

If you do not find that the defendant expressly authorized *<name of agent>* to bind (him/her/it) in the *<specify transaction>*, you still must decide whether *<name of agent>* had implied authority to do so. The law presumes that a principal intends (his/her/its) agent to have the powers reasonably necessary to carry out the principal's expressed purposes.

The question of what is reasonably necessary to carry out the principal's expressed purposes is a question of fact for you to decide. In deciding whether *<name of agent>* had the implied authority to bind the defendant in the *<specify transaction>*, you must consider all the circumstances of *<name of agent's>* relationship with the defendant [including business or industry customs]. You may make reasonable and logical deductions or inferences from the evidence of the acts and statements of the defendant and *<name of agent>* in deciding whether *<name of agent>* had implied authority to bind the defendant in the *<specify transaction>*.

If you find that *<name of agent>* had the implied authority to bind the defendant, then the defendant is liable to the plaintiff for *<name of agent's>* acts in the *<specify transaction>*.

Authority

Connecticut National Bank v. Giacomi, 242 Conn. 17, 70 (1997); *Czarnecki v. Plastics Liquidating Co.*, 179 Conn. 261, 268 (1979); *Fireman's Fund Indemnity Co. v. Longshore Beach & Country Club, Inc.*, 127 Conn. 493, 498 (1941); *Ackerson v. Erwin M. Jennings Co.*, 107 Conn. 393, 397-98 (1928); 3 Am. Jur. 2d, Agency § 70 (2002).

Notes

A reference to business or industry customs will be appropriate if evidence of such customs has been admitted.

4.4-6 Capacity to Contract - Apparent Authority

New March 5, 2010

The defendant *<name of principal>* maintains that (he/she) is not liable to the plaintiff because *<name of agent>* did not have either express or implied authority to enter into *<specify transaction>* that is the basis of the plaintiff's claim. Even if you do not find that the *<name of agent>* had either express or implied authority, you must still decide whether (he/she/it) had apparent authority. Apparent authority is that authority which a principal, through (his/her/its) own acts or statements, causes or allows a third person to believe (his/her/its) agent possesses.

Consequently, apparent authority is to be determined, not by the agent's own acts, but by the acts of the agent's principal. The plaintiff has the burden of proving that *<name of agent>* had apparent authority to enter into *<specify transaction>* on behalf of the defendant, and (he/she/it) must prove that the defendant caused the plaintiff to believe that *<name of agent>* had such authority.

To prove that *<name of agent>* had apparent authority to bind the defendant by (his/her/its) actions the plaintiff must show:

- (1) that the acts or statements of the defendant would lead a reasonable person to believe that *<name of agent>* had sufficient authority to enter into *<specify transaction>* or that the defendant knowingly allowed *<name of agent>* to act as if (he/she/it) had such authority; and
- (2) that, as a result, the plaintiff, acting in good faith, reasonably believed that *<name of agent>* had the authority to bind the defendant to (his/her/its) actions.

If the plaintiff does prove both of these elements, then you must find that *<name of agent>* had apparent authority to bind the defendant by (his/her/its) actions in *<specify transaction>*, and that, therefore, the defendant is liable to the plaintiff. If the plaintiff fails to prove either one of these elements, then you may not find that *<name of agent>* had apparent authority to bind the defendant, and the defendant is not liable to the plaintiff for *<specify transaction>*.

Authority

Tomlinson v. Board of Education, 226 Conn. 704, 734-35 (1993); *Yale University v. Out of the Box, LLC*, 118 Conn. App. 800, 808 (2010).

4.4-7 Ratification by the Principal

New October 8, 2010

Even if you do not find that <name of agent> acted with express, implied or apparent authority to bind the defendant in the <specify transaction>, the defendant may still be liable to the plaintiff if the defendant ratified the actions of <name of agent>.

To establish that the defendant ratified the actions of <name of agent>, the plaintiff must prove all of the following facts:

1. that the defendant had full knowledge of the material circumstances surrounding the <specify transaction>; and
2. that the defendant, having the opportunity to reject <specify transaction>, willingly accepted the resulting benefits and obligations.

Ratification can be proven by direct or circumstantial evidence. Consequently, in deciding whether the defendant ratified the transaction, you should consider all the facts and circumstances as to whether the defendant expressed (his/her/its) intent to do so or whether such intent can be reasonably and logically inferred.

If you find all of these facts to have been proven by the plaintiff, the defendant is bound by all of the terms of <specify transaction> and is, therefore, liable to the plaintiff for <specify>. If the plaintiff has failed to prove any one of these facts, then the defendant is not liable to the plaintiff.

Authority

Russell v. Dean Witter Reynolds, Inc., 200 Conn. 172, 185 (1986); *New Milford Block & Supply Corp. v. N. Grondahl & Sons, Inc.*, 51 Conn. App. 454, 458, cert. denied, 248 Conn. 901 (1999).

4.4-8 Knowledge or Notice of Agent Imputed to Principal

New March 5, 2010

If you find that <name of agent> knew or should have known of <specify fact(s)>, then, under our law, you must find that <name of principal> had knowledge of that same fact.

Authority

Wesley v. Schaller Subaru, Inc., 277 Conn. 526, 539-41 n.15 (2006); *E. Udolf, Inc. v. Aetna Casualty & Surety Co.*, 214 Conn. 741, 746 (1990); 1 Restatement (Third), Agency §§ 5.01 - 5.04 (2006).

4.4-9 Termination of Agent's Actual Authority

New March 5, 2010

The defendant claims that the agency relationship between (him/her/it) and <name of agent> was terminated before <name of agent> entered into the <specify transaction> which is the basis of the plaintiff's claim in this case. The defendant has the burden of proving that the agency relationship between (him/her/it) and <name of agent> had been terminated.

The defendant claims that the agency relationship was terminated <select one or more:>

- when the time specified in the agency agreement expired.
- when the purpose of the agency had been accomplished.
- when the parties agreed to termination.
- when the agency had been revoked by the principal.
- when the agency had been renounced by the agent.
- by operation of law.

If you find that the agency had been terminated by the defendant and that the plaintiff had notice of that termination, prior to <specify transaction> which is the basis of the plaintiff's claim, then you must find that the defendant is not liable to the plaintiff for <specify>.

Authority

3 Am. Jur. 2d, Agency §§ 35, 37, 40, 41, 45, 52-59, 342 (2002).

4.4-10 Termination of Agent's Actual Authority - Notice to Third Parties

New March 5, 2010

If you find that the agency relationship of the defendant and *<name of agent>* had been terminated before *<name of agent>* entered into the *<specify transaction>* which is the basis of the plaintiff's claim in this case, the defendant must also prove:

1. that (he/she/it) gave written or oral notice of that termination to the plaintiff; or
2. that the plaintiff was otherwise aware of the termination; or
3. that the defendant publicly gave notice of the termination by some method that was reasonably adapted to provide notice to (people/entities) such as the plaintiff.

If the defendant fails to prove at least one of these facts, (he/she/it) is still liable to the plaintiff for *<specify transaction>*. If (he/she/it) does prove both that the agency relationship was terminated and that the plaintiff knew or should have known of the termination, the defendant is not liable.

Authority

Fellows v. Hartford & New York Steamboat Co., 38 Conn. 197, 201 (1871); *Beucar v. Bristol Federal Savings & Loan Assn.*, 6 Conn. Cir. Ct. 148, 159 (1969); 3 Am.Jur. 2d, Agency §§ 50-51 (2002).

4.4-11 Termination of Agent's Apparent Authority

New June 3, 2011

The defendant claims that the apparent authority of *<name of agent>* to act for the defendant had terminated before *<name of agent>* entered into the *<specify transaction>*, which is the basis of the plaintiff's claim in this case. The defendant has the burden of proving that the apparent authority of *<name of agent>* had terminated.

To prove that the apparent authority of *<name of agent>* had terminated, the defendant must prove that the plaintiff had notice that the authority of *<name of agent>* had terminated or that the agent was no longer authorized to enter into the *<specify transaction>*.

The plaintiff had notice that the apparent authority of *<name of agent>* had been terminated if the defendant: *<charge the following as applicable:>*

- delivered oral, written or electronic notice to the plaintiff that the *<name of agent's>* authority had been terminated. [Additional charge for written or electronic notice: For written or electronic notice to be effective, you must find that it was given to the plaintiff personally or to his place of business or to a place designated by the plaintiff as one in which business communications are received or to a place where the defendant reasonably believed the plaintiff would receive such communications. You must also find that a reasonable time has elapsed between the delivery of the notice and the *<specify transaction>*.]
- published notice that *<name of agent's>* authority had been terminated by some method reasonably adapted, which could include electronic publication, to give such information to the plaintiff. You must also find that a reasonable time has elapsed between the publication of the notice and the *<specify transaction>*.

If you find that the defendant notified the plaintiff that (he/she/it) had terminated the *<name of agent's>* apparent authority to act on (his/her/its) behalf prior to the *<specify transaction>*, then you must find that the defendant is not liable to the plaintiff.

Authority

Ackerman v. Sobol Family Partnership, LLP, 298 Conn. 495, 509 (2010); *Tomlinson v. Board of Education*, 226 Conn. 704, 735 (1993); 1 Restatement (Third) Agency, § 3.11, Reporter's Notes, comment (a), p. 243 (2006); 1 Restatement (Second), Agency §§ 125, 136 (1958).

Notes

A third method of proving termination of apparent authority, as stated in *Tomlinson v. Board of Education*, supra, 226 Conn. 735 and *Ackerman v. Sobol Family Partnership, LLP*, supra, 298 Conn. 509, has been excluded from this charge. The third method, as quoted in those cases, states that termination can occur when "the agent is acting under a basic error as to the facts,"

paraphrasing the 1958 Restatement of the Law of Agency, which specified "facts, the failure to reveal which, were the transaction with the principal in person, would be ground for rescission by the principal." See 1 Restatement (Second), Agency, § 125 (c) (1958). The third method, though, was not at issue in either case, and it was dropped purposefully from the 2006 Restatement of the Law for Agency. The 2006 Restatement explained that the third method involved rescission of a contract and was therefore an issue of contract law rather than agency. 1 Restatement (Third) Agency, § 3.11, Reporter's Notes, comment (a), p. 243 (2006).

The 2006 Restatement also replaces the variety of ways a third person would have notice of termination with a single standard: "Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority." Compare 1 Restatement (Third) Agency, § 3.11 (2) (2006) with 1 Restatement (Second), Agency, § 136 (1958). Nevertheless, the Connecticut Appellate and Supreme Courts have not adopted or addressed this new standard.

If there is an express contractual provision regarding notice, portions of this charge may be irrelevant, and the judge should tailor the charge accordingly.

4.4-18 Joint Ventures

New October 8, 2010

A joint venture, also referred to as a joint adventure or a joint enterprise, exists where two or more persons combine their property, money, efforts, skill or knowledge in furtherance of a particular transaction [or course of transactions] and share in the profits or losses from the venture. [Although a profit motive is often recognized as one factor suggesting the existence of a joint venture, the absence of a profit motive is not fatal to the existence of a joint venture.] The contributions of the various participants need not be equal.

The relations and obligations of a joint venture in general are those which govern a partnership. A joint venture is a partnership that is limited to an agreement to join together for a particular transaction [or course of transactions].

Generally, there must be a contractual relationship between the participants. The relationship between contracting parties cannot amount to a joint venture unless the parties so intend. It is not necessary that there be an express written or oral contract to form a joint venture, for the conduct of the parties and other circumstances will often justify the inference that such an agreement existed. The relevant criteria to determine whether or not the parties intended a joint venture include:

1. an express or implied agreement to carry on a joint enterprise;
2. a manifestation of that intent by the parties;
3. a joint proprietary interest, as demonstrated by the contribution of property, finances, effort, skill or knowledge by each party;
4. some degree of joint control over the enterprise; and
5. a provision for the parties to share in both the profits and losses of the enterprise.

While none of these elements alone is sufficient, and while every element may not necessarily be present in every case, there must be a community of interest and a right to joint control in order to constitute a joint venture.

You must determine whether the association of <name> and [and <name>] in <description of alleged enterprise> constituted a joint venture.

If you find that there was a joint venture and that <name> [and <name>] (was/were) (a party/parties) in that joint venture, then I instruct you that:

[Each party to a joint venture is liable for the debts and obligations of the venture.] [and/or]
[Each party to a joint venture is liable for the (wrongful acts/negligence) of any other party to the

joint venture, which is committed within the scope, or in furtherance, of the business of the joint venture.]

Authority

Doe v. Yale University, 252 Conn. 641, 672-76 (2000); *Travis v. St. John*, 176 Conn. 69, 72-73 (1978); *Dolan v. Dolan*, 107 Conn. 342, 349-50 (1928); 46 Am. Jur. 2d, Joint Ventures, §§ 1, 8, 10, 34, 35 (2006).

Notes

There is no Connecticut authority expressly establishing that parties to a joint venture have liability for the debts of the venture and the torts of other parties to the venture committed while acting within the scope or in furtherance of the business of the venture. The liability instructions are based on the acknowledged parallel between the relations and obligations of joint adventurers and general partners. *Dolan v. Dolan*, supra, 107 Conn. 349-50; *Doe v. Yale University*, supra, 252 Conn. 672-76. With respect to general partners, the Uniform Partnership Act makes general partners jointly and severally liable for the obligations of the partnership (General Statutes § 34-327) and for the actionable wrongful conduct of any partner acting in the ordinary course of business of the partnership or with authority of the partnership. (General Statutes § 34-326). The general American rule is that these same liabilities attach to members of a joint venture. See 46 Am. Jur. 2d, Joint Ventures, §§ 34, 35 (2006).

Judges are cautioned that partnership liabilities are premised in part on the concept of agency, i.e. that each partner of a partnership is an agent of the partnership and the other partners when acting in furtherance of the partnership's business. 46 Am. Jur. 2d, Joint Ventures, § 34. The Connecticut caselaw on joint ventures, however, recites a concept that, unlike partners, joint venturers are not agents of the venture. See *Dolan v. Dolan*, supra, 349; *Doe v. Yale University*, supra, 674. For this proposition, *Doe* cites only *Dolan* and *Dolan* cites only *Keyes v. Nims*, 43 Cal. App. 1, 184 P. 695 (1919) where the Court of Appeals said without any citation of authority: "In a joint venture, no one of the parties thereto can bind the joint adventure." *Id.*, 9. American Jurisprudence states to the contrary without any acknowledgment of the "no agency" concept. "In accordance with the general rule that each member of a joint venture is deemed to be the agent of the other when acting in furtherance of the common objective, coadventurers are agents of each other as to third parties as to all acts within the scope of the enterprise. . . ." 46 Am. Jur. 2d, Joint Ventures, § 34 (2006).

Each judge charging on the liability of a joint venturer for obligations of the venture or torts of co-adventurers should assess the viability and impact of the "no agency" concept under Connecticut law.

4.4-19 Joint and Several Contracts

Revised to June 3, 2011

If you find that the contract was breached and that the breach caused damages to the plaintiff, you must then determine to what extent each of the defendants is liable for those damages.

Where each of the defendants agrees to be liable in full for performance of the contract, they each become fully responsible and liable for all damages resulting from a breach of the contract, whether they or one of their fellow defendants committed the breach.

Where each of the defendants agrees to be liable for only part of the performance of the contract, each is only responsible for performance of (his/her/its) obligations and only liable for damages resulting from (his/her/its) breach of those obligations. Under our law, there is a presumption that where two or more parties agree to the same performance, they are all fully liable for that performance, unless the contract says otherwise.¹

You must determine whether all the defendants intended to promise to the plaintiff the same performance regarding the obligation that was breached. If they did, they are all liable for the full damages resulting from the breach. If they did not, then you must determine (which/who) among the defendants is or are liable, and for each, for how much (he/she/it) is liable.

The first place to look to find the parties' intent is the wording that was used in the contract. Words in a contract are to be given their ordinary meaning [unless they are special terms of trade or the parties have given them special meaning]. If you cannot determine what was intended from the language of the contract, you may consider the circumstances surrounding the making of the contract. You may also consider the motives of the parties and the end they sought to accomplish by the contract. However, the circumstances surrounding the making of the contract, the purposes the parties sought to accomplish, and their motives cannot prove an intent contrary to the plain meaning of the language.

Finally, what is important is the intent the defendants expressed to the plaintiff. The fact that among themselves the defendants may have intended a certain division of responsibility or liability is not relevant if that intent was never expressed to the plaintiff. The defendants' liability must be determined based on what the defendants actually communicated to the plaintiff through the contract and, if necessary, the surrounding circumstances.

It is possible that the defendants all agreed to be liable for the performance of part of the contract, but individually liable for the performance of other parts of the contract. If so, the charge should be modified accordingly.

¹ It is possible that the defendants all agreed to be liable for the performance of part of the contract, but individually liable for the performance of other parts of the contract. If so, the charge should be modified accordingly.

Authority

Updike, Kelly & Spellacy, P.C. v. Beckett, 269 Conn. 613, 658-66 (2004); Effect of Contract Language, Instruction 4.2-1; Consideration of Surrounding Circumstances, Instruction 4.2-2.

4.4-22 Assignment

New, March 1, 2009

An assignment is a transfer of rights and/or obligations under a contract to a third party. The party transferring rights and/or obligations is called the assignor, and the third party receiving the rights and/or assuming the obligations is called the assignee.

In this case, the defendant <name> claims that (he/she/it) is not liable to the plaintiff <name> for any breach of the <identify contract> because the defendant assigned all of (his/her/its) obligations arising from the contract to <assignee>. As a general rule, a party to a contract may not unilaterally assign or transfer that party's obligations under the contract and thereby avoid responsibility for any failure on the part of the assignee to fulfill the terms of the contract.

However, a party to a contract may properly assign such obligations if the other party to the contract consents to the assignment. In such a case, the assignor no longer has any liability for nonperformance of the contract that occurred after the assignment. Unless the contract specifies otherwise, consent may be given orally or in writing. Also, unless the contract expressly or impliedly prohibits assignments, consent may be inferred from the lack of a timely objection by the plaintiff after the plaintiff received notice of the proposed assignment.

In order for the defendant to prevail on this special defense, (he/she/it) must prove to you, by a preponderance of the evidence, that:

- (1) (He/She/It) assigned (his/her/its) obligations under the contract to <assignee>;
- (2) <Assignee> agreed to assume such obligations; and
- (3) The plaintiff consented to the assignment.

Authority

Rosetti v. New Britain, 163 Conn. 283, 290-291 (1972); *Mall v. LaBow*, 33 Conn. App. 359, 362 (1993); 6 Am. Jur. 2d, Assignments § 9, 11 (1963).

Notes

This instruction applies in cases where the defendant has alleged the assignment of all contractual obligations as a special defense. In the case of a partial assignment of fewer than all obligations under the contract, then the instruction should be modified accordingly. It is possible that the special defense will be material only to those breach of contract claims based on obligations that have been proved to be assigned and be inapplicable to other claims of breach of contract.

4.4-25 Direct or Intended Beneficiary

New June 1, 2012

Our law classifies beneficiaries to a contract into two categories: "intended beneficiaries," who have a right to enforce a contract made by others, and "incidental beneficiaries," who have no such right. The plaintiff claims that the parties to the contract <*name parties to the contract*> intended to confer a direct obligation from <*name defendant(s)*> to the plaintiff as an intended beneficiary and that the plaintiff is entitled to sue to enforce the contract <*describe action requested*>. If you find that the plaintiff is correct, (he/she/it) would be considered an intended or direct beneficiary of that contract with the right to enforce it against <*name defendant(s)*>. If you find that the parties to the contract did not intend to create an obligation to the plaintiff and that the benefit which the plaintiff was receiving from the contract was merely consequential or indirect, then you must find that the plaintiff was merely an incidental beneficiary and cannot enforce the contract.

[<*Charge if third party beneficiary is being implied from the contract:*> It is not necessary that there be express language in the contract creating a direct obligation to the plaintiff.] The critical fact which you must determine is whether <*name parties to the contract*> intended to create a direct obligation from <*name defendant(s)*> to the plaintiff for (his/her/its) benefit. You must determine whether this intent existed by considering the terms of the contract <*if desired, insert terms upon which parties rely*> and the circumstances surrounding its making, including the motives and purposes of the parties to the contract at the time of its creation.

Authority

Wasniewski v. Quick & Reilly, Inc., 292 Conn. 98, 109 (2009); *Gazo v. Stamford*, 255 Conn. 245, 261 (2001); *Gateway Co. v. DiNoia*, 232 Conn. 223, 231 (1995); *Connecticut National Bank v. Douglas*, 221 Conn. 530, 545 (1992); *Knapp v. New Haven Road Construction Co.*, 150 Conn. 321, 325 (1963); *Colonial Discount Co. v. Avon Motors, Inc.*, 137 Conn. 196, 201 (1950); *Grigerik v. Sharpe*, 45 Conn. App. 775, 781 (1997), rev'd on other grounds, 247 Conn. 293 (1998); 2 Restatement (Second), Contracts § 302 (1981); 17A Am. Jur. 2d, Contracts § 433 (2004).

Notes

If the contract language is clear and unambiguous, this determination is made by the court as a matter of law. Otherwise, charge the jury using the appropriate instructions on the interpretation of contracts.

4.4-26 Rights of Beneficiary and Promisee

New September 28, 2012

If you find that the plaintiff is an intended beneficiary under the contract, you must then determine if <name defendant(s)> breached the contract. The plaintiff's right(s) (is/are) no greater than the right(s) of the actual parties to the agreement, <name parties to the contract>. <Instruct on allegations of Breach of Contract, Instruction 4.1-15.>

Authority

17A Am. Jur. 2d, Contracts § 448, p. 471.

Notes

If the contract language is clear and unambiguous as to the nature of the defendant's performance, then the determination of the rights and obligations of the parties to the contract is made by the court as a matter of law. Otherwise, the jury should be instructed as provided in section 4.2, Interpretation of Express Contracts.

4.4-30 Bailor-Bailee Relationships – Bailment

Bailor-Bailee

New May 1, 2009

A bailment is a delivery of personal property by one person to another for a particular purpose, in accordance with a contract providing that when the purpose is fulfilled, the property will be returned. The person who owns the property and delivers it to another is the bailor. The person who receives the property is the bailee. [In this case, the return of the property is conditioned upon payment of a fee to the bailee.] Bailment is the name given to the contractual relationship between a bailor and a bailee. A bailment contemplates redelivery of the property by the bailee to the bailor.

Authority

Mystic Color Lab, Inc. v. Auctions Worldwide, LLC, 284 Conn. 408, 419-420 (2007); *B.A. Ballou and Co., Inc. v. Citytrust*, 218 Conn. 749, 753 (1991); *On Site Energy Corp. v. Spring Pond Corp.*, 5 Conn. App. 326 (1985); Black's Law Dictionary (8th Ed. 2004); 8A Am. Jur. 2d, Bailments, §§ 1, 2 (2009).

4.4-31 Bailor-Bailee Relationship

New March 5, 2010

If you find that a bailment was created, the defendant <name>, as the bailee, was required to use reasonable care under the circumstances to protect the plaintiff's property. The plaintiff <name> claims that when (he/she/it) requested the return of the personal property, the defendant (failed to return it/returned it in a damaged condition).

The defendant does not deny that the <specify property> was delivered to (him/her/it) and that (he/she/it) (failed to return it/returned it in a damaged condition). However, (he/she/it) claims that <specify the basis of defendant's explanation>.

Once a bailment has been established and the bailee (failed to return the property/returned it in a damaged condition), there arises a presumption that the damage or loss was the result of the bailee's lack of reasonable care, or negligence.

The defendant then must prove the actual circumstances involved in the (loss/damage) to the plaintiff's property, thereby rebutting the presumption of negligence. This proof must include what caused the (loss/damage), and what, if any, precautions were taken to prevent the (loss/damage). It is not enough to only show that the property was (damaged/lost) by <specify cause of loss or damage: fire, theft, etc.>. The defendant must also prove the circumstances leading up to the <specify cause of loss or damage: fire, theft, etc.>, including any precautions that were taken. If the defendant has not proved the actual circumstances of the (loss/damage) and not successfully rebutted the presumption of negligence by evidence of precautions taken, due care exercised or otherwise, then you must find that the defendant was negligent in failing to protect the plaintiff's property.

If you find that the defendant used reasonable care to protect the plaintiff's property, then you must find for the defendant. If you find that the defendant did not use reasonable care to protect the plaintiff's property, and if the <specify cause> was the result of the defendant's negligence, then you must find that the defendant is liable to the plaintiff for damages.

Authority

Griffin v. Nationwide Moving and Storage Co., Inc., 187 Conn. 405, 408-10 (1982); *F&F Distributors, Inc. v. Baumert Sales Co.*, 164 Conn. 52, 53 (1972); *Barnett Motor Transportation Co. v. Cummins Diesel Engines of Connecticut, Inc.*, 162 Conn. 59 (1971); *National Broadcasting Co. v. Rose*, 153 Conn. 219, 225 (1965); *Murray v. Paramount Petroleum & Products, Inc.*, 101 Conn. 238, 242 (1924); *Welch v. Boston & Albany R. Co.*, 41 Conn.333 (1874); *Alvarado v. Giedraitis*, 33 Conn. Sup. 758 (1976); *In re Central Rubble Products, Inc.*, 31 B.R. 865 (D. Conn.1983); 8 Am. Jur. 2d, Bailments § 213 (1977).

Notes

There appears to be no substantial difference in the bailee's obligation not to be negligent when the bailment is gratuitous and not for hire. *National Broadcasting Co. v. Rose*, 153 Conn. 219, 224 (1965).

The committee acknowledges that there are two possible interpretations under the case law regarding the burden of proof: (1) when the presumption is overcome, then the burden shifts to the plaintiff to prove negligence; or (2) if the presumption is overcome, then the defendant is not negligent. Judges may apply either interpretation and charge accordingly. These interpretations may be reconciled if the plaintiff has submitted evidence of the defendant's negligence, independent of the presumption of negligence. In such a case the defendant may have to overcome that specific evidence as well in order to prevail.

4.5 DAMAGES/REMEDIES

Damages - General

4.5-1 Introduction to General Damages

4.5-2 Damages - General

4.5-3 Components of Damages

4.5-4 Plaintiff's Burden of Proof as to Amounts

**4.5-5 Plaintiff Cannot Recover More than Once
for Same Loss**

Types of Damages

**4.5-6 Damages - Expectation/Benefit of the
Bargain/Make Whole**

4.5-7 Damages - Cover

4.5-8 Damages - Lost Profits

4.5-9 Damages - Reliance

4.5-10 Damages - Liquidated

4.5-11 Damages - Consequential

4.5-12 Damages - Incidental

Damages for Implied Contracts

4.5-13 Unjust Enrichment (Restitution)

Defenses to Damages Reductions

4.5-14 Mitigation of Damages

Additional Awards

**4.5-15 Interest Pursuant to General Statutes §
37-3a**

4.5-16 Interest Based on Contract

4.5-17 Attorneys' Fees Based on Contract

4.5-1 Introduction to General Damages

Revised to January 1, 2008

Note: There are no instructions for equitable forms of relief such as specific performance and rescission, because those are for the court, not the jury, to determine.

The instructions for elements of liability are not repeated here. See preceding sections for instructions on liability components.

It is recommended that the court use jury interrogatories and a verdict form in conjunction with giving these instructions. Where helpful, the court should vary these instructions to make specific reference to the verdict form and interrogatories.

4.5-2 Damages - General

Revised to January 1, 2008

If you find that the defendant is liable to the plaintiff for any of the <*identify contractual cause(s) of action*>, then you must determine the amount of money to award to the plaintiff as contract damages. The following instructions tell you how to do that.

If you find that the defendant is not liable for any of the <*identify contractual cause(s) of action*>, then you do not need to consider the subject of damages. The fact that I am telling you about the law of contract damages does not mean that I believe that you will, or should, find against the defendant.

Notes

The court may decide to bifurcate the trial of liability and damages or may decide to bifurcate the jury's deliberations on liability and damages. If so, this introduction should be revised accordingly.

4.5-3 Components of Damages

Revised to January 1, 2008

Damages for breach of contract are measured as of the time of the breach. These damages may consist of *<include as applicable:>*

- direct damages (expectation, reliance),
- liquidated damages,
- consequential damages,
- incidental damages,

all of which I will explain in a moment.

[*<Include as applicable:>*

- In addition, you may award interest.
- In addition, you may award attorneys' fees.
- You may reduce or eliminate your award of damages if and to the extent that the defendant establishes that the plaintiff failed to mitigate (his/her/its) damages.]

Notes

Give this instruction by individual cause of action to avoid duplicate awards of damages in multiple count cases.

4.5-4 Plaintiff's Burden of Proof as to Amounts

Revised to January 1, 2008

The plaintiff must prove by a preponderance of the evidence the amount of any damages to be awarded. The evidence must give you a sufficient basis to estimate the amount of damages to a reasonable certainty. Although damages may be based on reasonable and probable estimates, you may not award damages on the basis of guess, speculation or conjecture.

Authority

Leisure Resort Technology, Inc. v. Trading Cove Associates, 277 Conn. 21, 35 (2006); *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 69 (1998); *West Haven Sound Development Corp. v. West Haven*, 207 Conn. 308, 317 (1988); *Bronson & Townsend Co. v. Battistoni*, 167 Conn. 321, 326-27 (1974); *Bertozzi v. McCarthy*, 164 Conn. 463, 468 (1973).

Notes

This burden of proof instruction is not repeated throughout each of the individual damages instructions set forth below, except the instruction on lost profits.

4.5-5 Plaintiff Cannot Recover More than Once for Same Loss

Revised to January 1, 2008

The plaintiff cannot recover more than once for the same loss, even if (he/she/it) prevails on two or more causes of action.

I have provided you with a verdict form, and I will go through it with you to make sure you understand where there is a potential for the plaintiff to recover more than once for the same loss.

<Explain verdict form.>

4.5-6 Damages - Expectation/Benefit of the Bargain/Make Whole

Revised to January 1, 2008

Any damages you award on the ___ count should be designed to place the plaintiff, so far as can be done by money, in the same position as that which (he/she/it) would have been in had the contract been fully performed. You should determine the fair and reasonable value, in money, of the position the plaintiff would have been in if the defendant had fully performed the contract. Then you should determine the fair and reasonable value, in money, of the position the plaintiff was in at the time of the defendant's breach of the contract. The difference between the amount for performance and the amount for breach should be your award.

Authority

Ambrogio v. Beaver Road Associates, 267 Conn. 148, 155 (2003); *Beckman v. Jalich Homes, Inc.*, 190 Conn. 299, 309-10 (1983); *Lar Rob Bus Corp. v. Fairfield*, 170 Conn. 397, 404-405 (1976); *Bachman v. Fortuna*, 145 Conn. 191, 194 (1958).

4.5-7 Damages - Cover

Revised to January 1, 2008

Any damages you award on the ___ count may include the plaintiff's extra cost to make a reasonable purchase of comparable goods to substitute for those that the defendant seller was supposed to provide. If you find that the plaintiff, acting in good faith and without unreasonable delay, made a substitute purchase, and that the price paid for those substitute goods was more than what the plaintiff was to pay the defendant under the original contract, your award of damages should include that extra amount the plaintiff had to pay.

Authority

General Statutes § 42a-2-712; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cole*, 189 Conn. 518, 537 (1983).

4.5-8 Damages - Lost Profits

Revised to January 1, 2008

Any damages you award on the ___ count may include the plaintiff's lost profits. The plaintiff must prove that it is reasonably certain that the plaintiff would have earned those profits but for the defendant's breach. The plaintiff cannot recover for the mere possibility of making a profit. In addition, the evidence must afford you a sufficient basis for estimating the amount of lost profits with reasonable certainty.

[<If plaintiff also claims future lost profits:> The plaintiff also claims lost profits for the future, until <insert date>. That time period for awarding future lost profits must be reasonable and supported by the evidence.]

Authority

Cheryl Terry Enterprises, Ltd. v. Hartford, 270 Conn. 619, 639 (2004); *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 68-78 (1998); *Robert S. Weiss & Associates, Inc. v. Wiederlight*, 208 Conn. 525, 541-43 (1988); *Stern & Co. v. International Harvester Co.*, 148 Conn. 527, 533-34 (1961); *Steeltech Building Products, Inc. v. Edward Sutt Associates, Inc.*, 18 Conn. App. 469, 472 (1989).

Notes

If the plaintiff seeks both past and future lost profits, you may need to do separate instructions for each of those components. For example, interest cannot be awarded on future lost profits.

4.5-9 Damages - Reliance

Revised to January 1, 2008

Any damages you award on the __ count should compensate the plaintiff for any losses that (he/she/it) incurred because (he/she/it) relied upon the defendant to perform the contract. These damages should put the plaintiff in a position as if the plaintiff had never entered into a contract. The plaintiff must establish the fair and reasonable value of (his/her/its) loss that (he/she/it) sustained.

Authority

3 Restatement (Second), Contracts § 349 (1979); 11 Williston, Contracts (3d ed. 1979) §§ 1363, 1363A.

4.5-10 Damages - Liquidated

Revised to January 1, 2008

The plaintiff claims that the contract entitles (him/her/it) to liquidated damages. The contract provides <insert liquidated damages clause>. The plaintiff claims that that clause means <insert plaintiff's contention>. The defendant claims that that clause means <insert defendant's contention>. You should interpret what the parties meant by that clause in accordance with the instructions I gave you earlier on contract interpretation. <See Instructions 4.2-1 through 4.2-12.>

You should award the plaintiff liquidated damages if you find that these three conditions are met: 1) the damages that were to be expected as a result of a breach was of an uncertain amount or difficult to prove; 2) the parties intended to specify in the contract a certain liquidated sum to be awarded as damages; and 3) that certain sum specified in the contract was reasonable. You may not award liquidated damages together with actual damages.

Authority

Bellamare v. Wachovia Mortgage Corp., 284 Conn. 193, 195 (2007); *Hanson Development Co. v. East Great Plains Shopping Center, Inc.*, 195 Conn. 60, 64-65 (1985); *King Motors, Inc. v. Delfino*, 136 Conn. 496, 498 (1950).

Notes

Typically, this issue would not go to a jury. However, if there is a fact question as to the parties' intent, it may be appropriate to refer this to the jury. See 25 C.J.S. 1036 Damages § 102 (1966).

4.5-11 Damages - Consequential

Revised to January 1, 2008

In addition to damages for <describe theory(ies) of direct damages>, any damages you award on the __ count also may include amounts to compensate the plaintiff for consequential damages. Consequential damages are damages that are reasonably foreseeable to the defendant as the natural and probable results of (his/her/its) breach. The plaintiff claims that <insert claimed damages> are consequential damages. If you find that <insert claimed damages> was reasonably foreseeable to the defendant as the natural and probable results of (his/her/its) breach, then your award should include the fair and reasonable value of these as consequential damages.

Authority

Ambrogio v. Beaver Road Associates, 267 Conn. 148, 155 (2003); *Gaynor Electric Co. v. Hollander*, 29 Conn. App. 865, 869 (1993); *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). See General Statutes § 42a-2-715 (2).

4.5-12 Damages - Incidental

Revised to January 1, 2008

In addition to damages for <describe theory(ies) of direct damages>, any damages you award on the ___ count also may include amounts to compensate the plaintiff for incidental damages. Incidental damages are reasonable expenses incidental to the breach. The plaintiff claims that <insert claimed damages> were incidental damages. If you find that the plaintiff reasonably incurred those costs either in responding to the breach or in securing the benefit that the defendant's performance was to have provided, then you should award the fair and reasonable value of those costs as incidental damages.

Authority

Gaynor Electric Co. v. Hollander, 29 Conn. App. 865, 869 (1993). See General Statutes § 42a-2-715 (1).

Notes

There is a distinction between consequential damages and incidental damages. Consequential damages are damages resulting from the breach, whereas incidental damages are expenses incidental to the breach. *Gaynor Electric Co. v. Hollander*, supra, 29 Conn. App. 869; General Statutes Annotated § 42a-2-715 (West 2002), comments 1 and 2, p.255.

4.5-13 Unjust Enrichment (Restitution)

Revised to January 1, 2008

In the ___ count, the plaintiff claims the defendant was unjustly enriched. <Refer to verdict form.> Any damages you award on the plaintiff's unjust enrichment claim are determined by the value of the benefit the plaintiff provided to the defendant. In other words, the amount of unjust enrichment is the value to the defendant of <insert property received or services rendered> to the defendant. The plaintiff must prove the fair and reasonable value of the <insert property received or services rendered> to the defendant. That value should be measured in terms of the benefit the defendant received by not providing proper compensation to the plaintiff for <insert goods/services provided>.

Authority

Vertex v. Waterbury, 278 Conn. 557, 573-75 (2006); *Meaney v. Connecticut Hospital Assn., Inc.*, 250 Conn. 500, 511-15 (1999); *Monarch Accounting Supplies, Inc. v. Prezioso*, 170 Conn. 659, 667 (1976); *Anderson v. Zweigbaum*, 150 Conn. 478, 482-84 (1963). See also *John T. Brady & Co. v. Stamford*, 220 Conn. 432, 447 (1991); *Bernstein v. Nemeyer*, 213 Conn. 665, 675-76 (1990).

Notes

Future losses are not properly includable because the award should be limited to the benefit received by the defendant up until the time of the breach. See, e.g., *Monarch Accounting Supplies, Inc. v. Prezioso*, supra, 170 Conn. 667.

4.5-14 Mitigation of Damages

Revised to January 1, 2008

The defendant has asserted a defense that any damages awarded should be reduced [or eliminated] for the plaintiff's failure to mitigate those damages. The defendant claims that the plaintiff could have <insert claim>. The plaintiff had a duty to exercise reasonable care to minimize the damages resulting from any breach by the defendant. The plaintiff's duty to exercise reasonable care to minimize damages does not require the plaintiff to waive (his/her/its) rights under the contract. It is the defendant's burden to prove by a preponderance of the evidence that the plaintiff failed to exercise reasonable care to minimize (his/her/its) damages. If you find that the defendant has met this burden, you must reduce any award of damages to the plaintiff by the amount that the defendant establishes that the plaintiff reasonably could have avoided.

Authority

Cweklinsky v. Mobile Chemical Co., 267 Conn. 210, 223 (2004); *Newington v. General Sanitation Service Co.*, 196 Conn. 81, 85-86 (1985); *Camp v. Cohn*, 151 Conn. 623, 627 (1964); 3 Restatement (Second), Contracts § 350 (1979).

4.5-15 Interest Pursuant to General Statutes § 37-3a

Revised to January 1, 2008

In addition to damages on the ___ count, you may award interest. This is intended to compensate the plaintiff for the loss of use of money that was not paid when it was due. To award interest, you must find that the plaintiff is entitled to an award of damages in the first place, and you must find under all of the circumstances that the defendant wrongfully detained money due to the plaintiff. There is no hard and fast rule for what constitutes wrongful detention. The question is whether justice requires that the plaintiff be paid interest for the loss of use of money.

If you decide to award interest, then you must compute the amount. Your verdict form will help you to do this. You must first determine the time period that the money was wrongfully detained. In this case, it is claimed that the wrongful detention began *<the date the defendant breached the contract or when the money under the contract became due and payable>*, and the end date would be *<date of the verdict>*. You need to determine the total number of days. Under our statutes you must divide that number of days by 360 days. You should then multiply that by ___ percent, which is our annual interest rate. You should then multiply that percentage by the total amount of damages to come up with the amount of interest.

Authority

Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc., 239 Conn. 708, 734-38 (1997) (holding that wrongful detention is determined "in view of the demands of justice rather than through application of an arbitrary rule"); *West Haven Sound Development Corp. v. West Haven*, 207 Conn. 308, 321 (1988); *Scribner v. O'Brien, Inc.*, 169 Conn. 389, 405-406 (1975); *Southern New England Contracting Co. v. State*, 165 Conn. 644, 664-65 (1974); *Bertozzi v. McCarthy*, 164 Conn. 463, 467 (1973); *Rapin v. Nettleton*, 50 Conn. App. 640, 651 (1998); *Sperry v. Moler*, 3 Conn. App. 692, 695-96 (1985). See General Statutes §§ 37-3a and 37-1.

Notes

Since some appellate decisions suggest that the jury, not the court, should calculate the interest, the court should provide the jury with a verdict form to guide the jury through that calculation. See, e.g., *Canton Motorcar Works, Inc. v. DiMartino*, 6 Conn. App. 447, 463-64, cert. denied, 200 Conn. 802 (1986).

Do not give this instruction if the contract provides for interest.

4.5-16 Interest Based on Contract

Revised to January 1, 2008

In addition to any damages you may award on the ___ count, the terms of the contract may entitle the plaintiff to interest. The contract provides <insert contract terms re: interest>. If you find that the contract provided for the award of interest and that the conditions set forth in the contract for an award of interest have been met, you should award interest.

If you decide that the terms of the contract have been met for awarding interest, you must compute the amount. The verdict form you have been given will help you to do this. First, you should determine the start date for any award of interest. This is the date (the money became due and payable / the defendant breached the contract). The end date is <probably the date of the verdict>. You must determine the total number of days. Then you must divide that total by _____ days [for a year].

[<If the language is clear on the rate:> The contract states that the rate of interest is ___ percent.]

[<If the language is not clear:> Using the instructions I have given you on interpreting contract language, you should determine the rate of interest that the parties intended.]

You must then multiply that percentage rate by the number you came up with earlier for the total number of days interest was due divided by _____ days. Finally, you must multiply that percentage by the total amount of damages to come up with the amount of interest.

Notes

Since some appellate decisions suggest that the jury, not the court, should calculate the interest, the court should provide the jury with a verdict form to guide the jury through that calculation. See, e.g., *Canton Motorcar Works, Inc. v. DiMartino*, 6 Conn. App. 447, 463-64, cert. denied, 200 Conn. 802 (1986).

When the contract purports to provide for interest, the court should first determine whether, under the principles of contract interpretation, the language is clear as to whether interest should be awarded and the rate for that interest. If either of these issues is unclear, the question should go to the jury.

If there is no contractual provision for interest, give the instruction for *Interest Pursuant to General Statutes § 37-3a*, Instruction 4.5-15.

4.5-17 Attorneys' Fees Based on Contract

Revised to January 1, 2008

Any damages you award on the __ count may include an award of attorneys' fees. If you find that the contract provided for the award of attorneys' fees and that the conditions in the contract for an award of attorneys' fees have been met, you should award attorneys' fees. The contract provides <insert section of contract on attorneys' fees.> You may only award attorneys' fees if they are provided for by the contract [or by a statute].

Authority

Piantedosi v. Floridia, 186 Conn. 275, 279-80 (1982); *State v. Bloomfield Construction Co.*, 126 Conn. 349, 359 (1940).

Notes

The court should try to resolve attorneys' fees issues in a separate proceeding before the court rather than the jury.

To recover the fees, the plaintiff also must establish the amount of attorneys' fees (he/she/it) has incurred and the reasonableness of the amount of those fees. The court should make that determination.

PART 5: MISCELLANEOUS ACTIONS

5.1 CIVIL RIGHTS

**5.2 CONNECTICUT UNFAIR TRADE
PRACTICES ACT**

5.1 CIVIL RIGHTS

**5.1-1 Use of Excessive Force (Violation of 42
U.S.C. § 1983)**

**5.1-2 Use of Excessive Force (Claim of Failure of
Police Officer to Intervene)**

5.1-1 Use of Excessive Force (Violation of 42 U.S.C. § 1983)

Revised to October 8, 2010

The plaintiff claims that the defendant violated (his/her) constitutional right not to be subjected to the use of excessive force by a police officer. (He/She) brings this claim under a federal law, 42 U.S. Code § 1983, that provides that a person acting under color of state law who violates a person's rights under the United States Constitution can be held liable for money damages to the person whose rights (he/she) has violated.

In order to prove this claim, the plaintiff must prove:

1. that the defendant was acting under color of state law,
2. that the defendant engaged in actions that deprived the plaintiff of (his/her) constitutional right not to be subjected to use of excessive force, and
3. that the defendant's acts were the proximate cause of the injuries or losses claimed by the plaintiff.

The first element, acting under color of state law, is not in dispute. Police officers get their authority under state law, so they are acting under color of state law when they act in their capacity as police officers.

The second element requires more explanation. The fourth amendment to the United States Constitution guarantees people the right not to be unreasonably seized by government officials, including police officers. This right is violated if a police officer subjects a person to excessive force. The right of a police officer to stop and arrest a person necessarily carries with it the right to use some degree of physical coercion or contact to effect the arrest. This does not mean, however, that the officer may use excessive amounts of force.

Force is excessive, and use of such force constitutes a violation of a person's rights under the fourth amendment, if the amount of force used would not be considered reasonable by a reasonably competent police officer in the circumstances presented at the exact time that the police officer used such force. The test is not whether the defendant thought (his/her) use of force was reasonable, but rather it is an objective standard: would a reasonably competent police officer consider the use of such amount of force under the circumstances at the time the force was used?

Applying this standard requires careful attention to the facts and circumstances of the case, including the severity of the crime at issue, whether the plaintiff posed an immediate threat to the safety of the officer or others, and whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight. Not every push or shove, even if it may later seem unnecessary in the peace of the courtroom, violates the fourth amendment. Your assessment of reasonableness must allow for the fact that the police officer may have had to make a split-second judgment concerning the amount of force that was necessary in circumstances that were tense, uncertain and rapidly evolving.

The issue is whether the force used was reasonable, not the officer's intent or frame of mind. An officer's bad intentions or hostile frame of mind toward the plaintiff will not make a fourth amendment violation out of the use of force that is a reasonable amount of force under the circumstances. An officer's good intentions will not make constitutional what is, in fact, an unreasonable use of force.

[<If the claim is use of deadly force:> In this case, the plaintiff claims that the officer used deadly force, that is, that (he/she) fired (his/her) gun at the plaintiff. The standard is that a police officer may use deadly force in two circumstances. The first is if (he/she) reasonably believes that such force is necessary to defend (himself/herself/others) from the actual use or imminent use of deadly physical force. The second is to prevent the escape of a felony suspect if the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others.]

It is these constitutional standards, rather than the text of any state statute or any departmental regulation, that should govern your consideration of this claim.

The facts are in dispute as to what the circumstances were when the defendant acted.

<Explain the dispute>.

You must determine what the circumstances were, as they presented themselves to the defendant, at the precise time that (he/she) acted. If you find that the defendant was in danger because of some conduct of (his/her) own, the fact that the police officer's own actions contributed to (his/her) being in danger has no bearing on the issue of whether the force used was excessive. You are simply to determine what the situation was at the time the defendant used force, and whether a reasonably competent police officer would not have used such force under the circumstances at the time.

The third element that the plaintiff must establish is that the defendant's use of force was the proximate cause of the injuries or losses that the plaintiff sustained. An injury or loss is proximately caused by an action if that action was a substantial factor in bringing about the injury or the loss. The injury or loss must also be either a direct result or a reasonably probable consequence of the act of the defendant. In other words, the plaintiff must satisfy you that (his/her) injuries or losses were the natural and probable consequence of the defendant's acts, and that the defendant ought to have foreseen that injury or loss was likely to result from such acts.

Authority

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); U.S. Constitution, amend. IV; 42 U.S.C. § 1983.

Notes

The most frequent claim of the use of excessive force by police officers is by assaulting an arrestee with fists or objects. Claims of wrongful use of deadly force by firing a gun are also common. This charge is written for the assault situation, with a variation set forth for claims of the wrongful use of deadly force. Where the use of force has resulted in death, the charge will need to be edited to reflect the fact that the claim is brought by a representative of the decedent's estate, asserting the decedent's constitutional right.

The elements of claims under 42 U.S.C. § 1983 are likely equivalent to those for claims of civil damages for violations of the Connecticut constitution, as recognized by *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 305 (1998), and for violations of the fourth amendment to the United States constitution, as recognized by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). A number of federal district court decisions have found that the civil claims recognized by *Binette* and *Bivens* have the same elements. See *Milardo v. Middletown*, United States District Court, Docket No. 3:06 CV 01 0712009 (D. Conn. March 25, 2009) and cases cited therein. Several federal circuit courts have reached the same conclusion for civil claims pursuant to *Bivens* and 42 U.S.C. § 1983. See *Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987); *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 262 (7th Cir. 1984) ("We assume for a moment that the pleading requirements are identical . . . and that to state a claim under either, [the plaintiff] must allege both that he has been deprived of a right secured by the Constitution, and that the deprivation occurred under color of law."); *Paton v. La Prade*, 524 F.2d 862, 871 (3d Cir. 1975).

5.1-2 Use of Excessive Force (Claim of Failure of Police Officer to Intervene)

Revised to January 1, 2008

The plaintiff claims that the defendant police officer, *<insert name of officer>*, violated (his/her) constitutional right not to be subjected to use of excessive force by failing to stop Officer *<name of other officer>* from using excessive force. The law is that an officer who is present at the scene and who has an opportunity to intervene to prevent use of excessive force is equally liable to the plaintiff if (he/she) fails to take reasonable steps to protect the plaintiff from another officer's use of excessive force.

Liability for failure to intervene may be imposed only if the officer had a realistic opportunity to intervene in a timely fashion. You should consider how close the officers were to one another and the rapidity with which the events occurred in making this determination.

5.2 CONNECTICUT UNFAIR TRADE PRACTICES ACT

5.2-1 CUTPA - General

5.2-2 CUTPA - Conduct of Trade or Commerce

5.2-3 CUTPA - Unfair Trade Practice - "Cigarette Rule"

5.2-4 CUTPA - Offends Public Policy

5.2-5 CUTPA - Immoral, Unethical, Oppressive or Unscrupulous

5.2-6 CUTPA - Substantial Injury

5.2-7 CUTPA - Deceptive Act or Practice

5.2-8 CUTPA - Breach of Contract

5.2-9 CUTPA - Ascertainable Loss

5.2-1 CUTPA - General

Revised to January 1, 2008

The plaintiff claims that the defendant violated the Connecticut Unfair Trade Practices Act, a Connecticut law, commonly known as CUTPA. The plaintiff must prove this claim by a preponderance of the evidence. The plaintiff must prove that the defendant engaged in an unfair method of competition or an unfair or deceptive act or practice in the conduct of trade or commerce and that this caused the plaintiff to sustain an ascertainable loss.

Authority

General Statutes § 42-110b (a).

5.2-2 CUTPA - Conduct of Trade or Commerce

Revised to January 1, 2008

As the first step in deciding whether the defendant violated CUTPA, you must first determine whether the defendant's actions were carried out in the course of (his/her/its) trade or commerce. An action is carried out in the defendant's trade or commerce if it is part of *<include only those terms applicable to the facts of the case:>*

- the advertising,
- the sale or rent or lease,
- the offering for sale or rent or lease, or
- the distribution

of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in Connecticut. The conduct at issue must occur in the defendant's primary trade or business; it must not be merely incidental to the defendant's trade or business. If you do not find that the conduct occurred in the defendant's trade or commerce, you must find that there was no CUTPA violation.

Authority

General Statutes § 42-110a (4); *McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 523, cert denied, 277 Conn. 928 (2006) ("CUTPA violation may not be alleged for activities that are incidental to an entity's primary trade or commerce").

5.2-3 CUTPA - Unfair Trade Practice - "Cigarette Rule"

Revised to January 1, 2008

The plaintiff claims that the defendant's <insert conduct> constituted an unfair trade practice that violates CUTPA. Certain guidelines have been established as to what constitutes an unfair trade practice. The plaintiff must establish that the defendant's <insert conduct> meets at least one of the three following criteria:

- 1) it offends public policy as it has been established by statutes, the common law or other established concept of unfairness; or
- 2) it is immoral, unethical, oppressive or unscrupulous; or
- 3) it causes substantial injury to consumers, competitors or other business persons.

I will now give additional instructions on these criteria.

Authority

Edmands v. CUNO, Inc., 277 Conn. 425, 450 n.16 (2006); *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 43 (1998); *Fink v. Golenbock*, 238 Conn. 183, 215 (1996); *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 507 (1995); *Tarka v. Filipovic*, 45 Conn. App. 46, 55, cert. denied, 242 Conn. 903 (1997); *Meyers v. Cornwell Quality Tools, Inc.*, 41 Conn. App. 19, 35 (1996).

Notes

Use this instruction and the three that follow only if the CUTPA claim is for an "unfair trade practice."

Many Connecticut cases also make this statement in conjunction with the "Cigarette Rule": "An act or practice may be unfair because of the degree to which it meets one of the criteria or because, to a lesser extent, it meets all three." This sentence directly contradicts another sentence that appears in all of those cases: "The plaintiff must establish that the defendant's conduct meets at least one of the three following criteria." The cases cite Statement of Basis and Purpose, Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities, 43 Fed. Reg. 59,614 and 59,635 (1978) for this proposition. Although that sentence does indeed appear in the Federal Register, there is no explanation there. This quote only appears in Connecticut CUTPA caselaw. It does not appear in FTC Act cases or in other states' unfair trade practices statute cases. Moreover, in the Connecticut cases in which an unfair trade practice was found, the court or jury also found that at least one of the three prongs of the Cigarette Rule was violated. Indeed, it appears to be impossible to meet the "substantial injury" prong to a "lesser extent" under the caselaw on that prong.

5.2-4 CUTPA - Offends Public Policy

Revised to January 1, 2008

The plaintiff asserts that the defendant's <insert conduct> constituted an unfair trade practice because it "offends public policy." The public policy of the State of Connecticut is <describe policy>. You must decide whether the defendant's conduct offended that public policy.

[<If violation of a statute is claimed:> Violation of a statute does not automatically result in a CUTPA violation. Therefore, even if you find that the defendant violated a statute, you must still decide whether the plaintiff has proved that the defendant's statutory violation "offends public policy."]

Authority

Edmands v. CUNO, Inc., 277 Conn. 425, 450 n.16 (2006); *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 43 (1998); *Jacobs v. Healey Ford-Subaru, Inc.*, 231 Conn. 707, 727 (1995); *Normand Josef Enterprises v. Connecticut National Bank*, 230 Conn. 486, 524-25 (1994); *Weglarz v. Plaza Ford, Inc.*, Superior Court, judicial district of Middlesex, Docket No. CV 94 0071519 (August 30, 1995).

Notes

Use this instruction only if there is a claim under this prong.
The court needs to tell the jury what the public policy is.

5.2-5 CUTPA - Immoral, Unethical, Oppressive or Unscrupulous

Revised to January 1, 2008

The plaintiff asserts that the defendant's <*describe conduct*> constituted an unfair trade practice because it was "immoral, unethical, oppressive or unscrupulous." You need to determine whether the defendant's conduct was "immoral, unethical, oppressive or unscrupulous."

Authority

Walk v. Lupia Renovating Co, Inc., Superior Court, judicial district of New Britain, Docket No. CV 00 0504205 (April 18, 2001).

Notes

Use this instruction only if there is a claim under this prong.

5.2-6 CUTPA - Substantial Injury

Revised to January 1, 2008

The plaintiff asserts that the defendant committed an unfair trade practice because there was "substantial injury to consumers, competitors or other business persons." The plaintiff must prove that the defendant's conduct, <describe conduct>, caused an injury that is: 1) substantial; 2) not outweighed by countervailing benefits to consumers or competition; and 3) that the consumers or competitors could not reasonably have avoided. The plaintiff must prove all three of these elements.

Authority

McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 569-70 (1984); *Calandro v. AllState Ins. Co.*, 63 Conn. App. 602, 613 (2001); *Prishwalko v. Bob Thomas Ford, Inc.*, 33 Conn. App. 575, 585-86 (1994).

Notes

Use this instruction only if there is a claim under this prong.

5.2-7 CUTPA - Deceptive Act or Practice

Revised to January 1, 2008

The plaintiff claims that the defendant's <describe conduct> was deceptive and that it therefore violated CUTPA. The plaintiff must prove three requirements. First, there must be a representation, omission, or other practice likely to mislead consumers. The plaintiff does not have to prove that the defendant intended to deceive those customers or that the defendant knew that his statement or act was false. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material -- that is, likely to affect consumer decisions or conduct.

Authority

Cheshire Mortgage Service, Inc. v. Montes, 223 Conn. 80, 106 and n.36 (1992); *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990), cert. denied, 498 U.S. 1088 (1991), citing *Figgie International, Inc.*, 107 F.T.C. 313, 374 (1986); *Web Press Services Corp. v. New London Motors, Inc.*, 203 Conn. 342, 362-63 (1987).

Notes

This instruction is not intended for an "unfair trade practice" or "unfair method of competition" violation of CUTPA.

5.2-8 CUTPA - Breach of Contract

Revised to January 1, 2008

The plaintiff claims that the defendant breached a contract by *<specify details>* and that this breach violated CUTPA. A simple breach of contract does not violate CUTPA unless the breach was an unfair trade practice or deceptive act or practice as defined in these instructions. Under certain circumstances, parties may breach contracts without offending traditional notions of fairness. However, under other circumstances, a breach of contract may be so unfair or offensive as to constitute a violation of CUTPA. The plaintiff must prove that the contract was breached and that the breach meets the requirements for unfair trade practices or deceptive acts or practices as defined in these instructions.

Authority

Hudson United Bank v. Cinnamon Ridge Corp., 81 Conn. App. 557, 569-71 (2004); *Paulus v. LaSala*, 56 Conn. App. 139, 153 (1999); *Lester v. Resort Camplands International, Inc.*, 27 Conn. App. 59, 71-73 (1992); *Greene v. Orsini*, 50 Conn. Sup. 312, 314-316 (2007); *Harold Cohen & Co., Inc. v. Harco International, LLC*, Superior Court, judicial district of Middlesex, Docket No. CV 99 0089169 (May 2, 2001); *Enviro Express, Inc. v. Bridgeport Resco Co.*, Superior Court, judicial district of Fairfield, Docket No. CV 00 0374626 (February 15, 2001); *Groglio v. Elrac, Inc.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 97 0160928 (January 19, 1999); *Production Equipment Co. v. Blakeslee Arpaia Chapman, Inc.*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 94 0247485 (January 3, 1996) (15 Conn. L. Rptr. 558).

5.2-9 CUTPA - Ascertainable Loss

Revised to January 1, 2008

Even if the plaintiff proves that the defendant committed an unfair trade practice or a deceptive act or engaged in unfair competition that violates CUTPA, the plaintiff cannot recover unless (he/she/it) sustained an "ascertainable loss." The plaintiff has the burden of proving this "ascertainable loss." A loss is a deprivation, detriment or injury. A loss is ascertainable if it is capable of being discovered, observed or established, but need not be measured by a dollar amount.

Authority

Collins v. Anthem Health Plans, Inc., 275 Conn. 309, 344-45 (2005); *Service Road Corp. v. Quinn*, 241 Conn. 630, 644 (1997); *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 613 (1981); *Prishwalko v. Bob Thomas Ford, Inc.*, 33 Conn. App. 575, 586 (1994).

PART 6: VERDICT FORM - SAMPLES

**6.1 Verdict Form - Simple Apportionment of
Negligence (Plaintiff)**

**6.2 Verdict Form - Apportionment and
Comparative Negligence (Plaintiff)**

6.1 Verdict Form - Simple Apportionment of Negligence (Plaintiff)

Revised to January 1, 2008

CV 06 1234567

SUPERIOR COURT

MARY PLAINTIFF

JUDICIAL DISTRICT OF

VS.

NEW HAVEN

THOMAS TORTFEASOR

AUGUST 9, 2007

VERDICT FOR PLAINTIFF

We, the jury, find the issues in favor of the plaintiff MARY PLAINTIFF and against the defendant THOMAS TORTFEASOR and award damages as follows:

SECTION ONE: PERCENTAGE OF NEGLIGENCE

Percentage of total negligence attributable to defendant THOMAS TORTFEASOR and to APPORTIONMENT RESPONDENT, if any:

(If defendant's portion is 0%, use defendant's verdict form.)

THOMAS TORTFEASOR	1a. _____%
APPORTIONMENT RESPONDENT	1b. _____%
TOTAL	1c. _____%

SECTION TWO: FINDINGS OF DAMAGES

Economic Damages:	2a. \$ _____
Noneconomic Damages:	2b. \$ _____
TOTAL	2c. \$ _____

SECTION THREE: ALLOCATION AND AWARD OF DAMAGES

Reduction in damages attributable to the negligence of THOMAS TORTFEASOR, if any:
(Multiply line 2c by the percentage on line 1a.)

3. \$ _____

The above findings and allocations constitute our award of damages to the plaintiff MARY PLAINTIFF against the defendant THOMAS TORTFEASOR.

Date

Jury Foreperson

6.2 Verdict Form - Apportionment and Comparative Negligence (Plaintiff)

Revised to January 1, 2008

CV 06 987654

SUPERIOR COURT

PAUL PLAINTIFF

JUDICIAL DISTRICT OF

VS.

NEW HAVEN

DORA DEFENDANT

JANUARY 11, 2008

VERDICT FOR PLAINTIFF

We, the jury, find the issues in favor of the plaintiff PAUL PLAINTIFF as follows:

SECTION ONE: FINDINGS OF FAIR, JUST AND REASONABLE DAMAGES

Economic Damages: 1a. \$ _____

Noneconomic Damages: 1b. \$ _____

TOTAL 1c. \$ _____

SECTION TWO: PERCENTAGE OF NEGLIGENCE

Percentage attributable to the defendant DORA DEFENDANT 2a. _____%

Percentage attributable to AR, if any 2b. _____%

Percentage attributable to plaintiff PAUL PLAINTIFF if any 2c. _____%

(If more than 50%, use "Verdict for Defendant" Form

Total Negligence of Liable Parties 2d. _____%

SECTION THREE: ALLOCATION AND AWARD OF DAMAGES

Percentage of damages awarded to plaintiff PAUL PLAINTIFF:

(Multiply line 1c by the percentage on line 2a and write the answer on Line 3.)

3. \$ _____

The above findings and allocations constitute our award of damages to the plaintiff PAUL PLAINTIFF against the defendant DORA DEFENDANT.

Date

Jury Foreperson