



## Closing argument for premises liability cases

### A SUCCESSFUL CLOSING ARGUMENT IN PREMISES CASES WILL FOCUS ON THE JURY INSTRUCTIONS

A good place to begin planning your closing is with a review of the jury instructions, the same CACI Jury Instructions (and the Sources and Authority) that will be read to and by jurors:

#### **1001. Basic Duty of Care**

A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others. In deciding whether [name of defendant] used

reasonable care, you may consider, among other factors, the following: (a) The location of the property; (b) The likelihood that someone would come on to the property in the same manner as [name of plaintiff] did; (c) The likelihood of harm; (d) The probable seriousness of such harm; (e) Whether [name of defendant] knew or should have known of the condition that created the risk of harm; (f) The difficulty of protecting against the risk of such harm; [and] (g) The extent of [name of defendant]'s control over the condition that created the risk of harm; [and] (h) [Other relevant factor(s).]

#### **1003. Unsafe Conditions**

[Name of defendant] was negligent in the use or maintenance of the

property if: 1. A condition on the property created an unreasonable risk of harm;

2. [Name of defendant] knew or, through the exercise of reasonable care, should have known about it; and

3. [Name of defendant] failed to repair the condition, protect against harm from the condition, or give adequate warning of the condition.

#### **1005. Business Proprietor's Liability for the Negligent/Intentional/ Criminal Conduct of Others**

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's

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harmful conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate such conduct.

### **1011. Constructive Notice Regarding Dangerous Conditions on Property**

In determining whether [name of defendant] should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough that [name of defendant] had sufficient time to discover it and, using reasonable care:

1. Repair the condition; or
2. Protect against harm from the condition; or
3. Adequately warn of the condition.

[[Name of defendant] must make reasonable inspections of the property to discover unsafe conditions. If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that [a store/[a/an] [insert other commercial enterprise]] owner using reasonable care would have discovered it.]

### **1012. Knowledge of Employee Imputed to Owner**

If you find that the condition causing the risk of harm was created by [name of defendant] or [his/her/its] employee acting within the scope of [his/her] employment, then you must conclude that [name of defendant] knew of this condition.

## **The common defenses**

Be sure to read the authorities that support the legal concepts stated within the instructions so that you can explain the simple logic behind the law to jurors. For example, a landowner owes a duty to exercise reasonable care to maintain his or her property in such a manner as to avoid exposing others to an unreasonable risk of injury. (*Alcaraz v. Vêce* (1997) 14 Cal.4th 1149, 1156.) Defendant landowner's failure to fulfill the duty is negligence. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371-372.) This duty is affirmative and

non-delegable. (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330.)

As to the "We didn't know it was dangerous" defense, remember that "the landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." (*Swanberg, supra*, 157 Cal.App.3d at 330 (original italics, citation and internal quotations omitted).) Also, if a dangerous condition has been created by the negligence of the owner or possessor or his or her employee in the course of employment, knowledge of the condition is imputed to the owner or possessor. (*Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806.)

As to the "It has never happened before" defense, remember that "[w]hen an unreasonable risk of danger exists, the landowner bears a duty to protect against the first occurrence, and cannot withhold precautionary measures until after the danger has come to fruition in an injury-causing accident." (*Robison v. Six Flags Theme Parks Inc.* (1998) 64 Cal.App.4th 1294, 1305.) Some judges will permit a jury instruction that covers this concept.

As to the "Why don't you watch where you are going" defense, pedestrians using a walkway have "a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger." (*Peters v. City & County of San Francisco* (1953) 41 Cal.2d 419, 424.)

As to the "open and obvious" defense, remember that "the obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it. The modern and controlling law on this subject is that 'although the obviousness of a danger may obviate the duty to warn of its existence, if it is

foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to remedy the danger, and the breach of that duty may in turn form the basis for liability...'" (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122.)

As to the "There is no violation of any code, ordinance or regulation" defense, remember that the "absence of any statute, rule, or ordinance or general common law requiring a landowner to" fix something unsafe on its property "does not preclude a duty of care from arising in the particular circumstances of" the case. (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1479.) For example, Defendant landowner could not argue that it had no duty to clean up a slippery spill on its floor that had been there for 10 hours because there is no specific "law, code, ordinance or regulation" that says a landowner has to clean up slippery spills. Whether or not there is a specific law, code, ordinance or regulation requiring the sweeping of a floor, fixing of a crack in the pavement, installation of bollards, etc., is irrelevant as the "law" regarding Defendant's duties as a landowner is covered by CACI jury instructions.

As to the "We complied with all codes, ordinances and regulations" defense, remember that compliance with building codes may absolve a defendant from negligence per se, but does not establish due care as a matter of law. (*Nevis v. Pacific Gas & Electric Co.* (1954) 43 Cal.2d 626, 630; *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901.) "One may act in strict conformity with [building codes] and yet not exercise the amount of care which is required under the circumstances." (*Perrine v. Pacific Gas & Elec. Co.* (1960) 186 Cal.App.2d 442, 448.)

## **Preparing your closing**

Your closing argument is the last chance you have to win or lose on liability, causation, or damages; your last opportunity to arm jurors on your side to

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convince other jurors; and your last chance to empower the jury to right this wrong.

**Outline:** Start early, and so you do not miss anything, outline the good and bad from the trial testimony and exhibits tracking the questions on the verdict form and key jury instructions and/or by witness. Anticipate what Defendant will argue to address it.

**Engage them with visuals:** Visual communication works. It grabs the attention of jurors, helps them understand, and makes them remember. The fact remains that a picture is worth a thousand words and with today's ever-decreasing attention span, you need to capture the interest of your audience and express your case in a way they can remember. You can and should argue your case visually through a mix of media, including charts, timelines, blow ups, videos, photographs, PowerPoint, etc. Also, use of sound can focus jurors on what is being said beyond the words being spoken.

**Be creative:** Take chances and think outside the box, create new paradigms, and be the outlier.

**Be organic:** Do not memorize your closing.

**No notes:** Use PowerPoint, the verdict form and/or jury instructions as an outline so you can throw away any notes.

**Use trial testimony and evidence:** Quote critical trial testimony and incorporate actual exhibits to bolster your credibility and as a contrast to the defense that frequently misstates or makes up evidence.

**Prepare for the worst:** Technology fails, the court won't let you use a graphic, defense attorney objects; just roll with the punches.

**Read and/or observe other trial lawyer's closings:** Just like rock and roll, we all borrow techniques from each other and learn new approaches every day; we can also learn how not to do things.

## Fundamentals of closing

**Start strong and direct:** Spend a few minutes upfront (without any distractions) and talk directly from your heart about the critical rule that applies, how

that rule was designed to prevent the very harm that brings you there, how that rule was broken and the harm that was caused.

**Thank the jurors:** Duh!

**Explain what you did and will or will not do:** Explain that you will not cover everything, but you will be and/or were thorough because you cannot ask jurors whether they understand a particular topic.

**Empower the jury:** Double duh! (And no, defense attorneys, I am not creating your Exhibit A to the motion in limine to prevent me from crying, wearing glasses, taking my jacket off or talking about reptiles/snakes or whatever you all come up with.)

**No notes, no shtick:** Do not use any notes (at most have an outline; typically, use a PowerPoint to structure your closing); be yourself; trust yourself; talk directly and use plain English; slow down if you speak fast; use dramatic pauses to emphasize key points.

**Do not overuse technology:** Don't use technology as a crutch or replacement for actual argument. Your slides should be concise and not have too much text. Paraphrase jury instructions or testimony when appropriate.

**Explain and discourage juror misconduct:** Explain to jurors what they cannot do and why misconduct threatens the entire process; for example, use the Prejudice Jury instruction (CACI 100) and describe how Defendant has been improperly trying to create prejudice.

**Weave in themes:** Weave in whatever themes you have been raising during trial.

**Address the personal responsibility theme/frivolous defenses:** Talk about how defendant has not accepted responsibility and/or the frivolous defenses/positions taken by Defendant (point out how that defense is not recognized by any law or jury instruction the judge read to them).

**Cover the verdict form:** Start and end main argument with the verdict form, going through each question and answering them for the jury, weaving in the key jury instructions.

**Get jurors to relate based on what you know about them:** Try to use examples that the jurors can relate to based on what you know about the jury from voir dire or your own investigation into the jurors' backgrounds.

**Summarize and compare/contrast:** Go through critical witness testimony and compare and contrast experts.

## Explaining key jury instructions

Jurors are eager to get to work and will look to you for instruction on how to begin. Tell jurors that only 9 out of 12 need to agree on each question. Explain the prejudice instruction. Explain the burden of proof. Explain the substantial factor/causation instructions. Take any confusing or complicated jury instructions that are key to your case and explain them in plain English and/or why that particular rule or law was created.

## Rules to live by

**One shot at justice:** Explain the finality of the process and how Plaintiff cannot come back – one shot at justice.

**K.I.S.S.:** Keep it simple, stupid; no big words; explain complicated concepts simply; think through analogies to make sure they apply, cannot be used against you, and don't alienate any jurors.

**Do not engage in misconduct/remedy alleged misconduct:** Argue only the facts in evidence and reasonable inferences or common experiences; if misconduct is alleged and/or occurs, try to remedy it.

**Concede what must be conceded/hit the bad head on:** Address and neutralize negative issues head on or concede them to get credibility (if your client was comparatively negligent, just admit it).

**Ask for a big award:** The secret to getting a big result is asking for a big result.

**Argue damages in multiple ways:** Some approaches work for some jurors and others work for others; arm all jurors with arguments on damages that resonate with them. Come up with a few different ways or methods for jurors to arrive at your damage numbers.

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**Stay classy:** Argue aggressively, attack the defense, but never personally attack the attorneys.

**Leave time and creative approaches for rebuttal:** Address all key issues in your initial closing but leave some time and some unique approach to damages for rebuttal when you can make arguments that Defendant cannot respond to. Stay on your toes to respond to issues raised by Defendant's closing.

**Have fun:** You are doing what you love to do and for all the right reasons: justice!

*Arash Homampour represents individuals in catastrophic injury/wrongful death, employment and insurance bad faith matters throughout the state. He was named one of the top 30 plaintiffs' attorneys in 2016 by the Los Angeles Daily Journal. He has appeared on cable station CNN as a legal commentator. He was named CAALA's 2010 Trial Attorney of the Year and has been nominated every year since 2004.*

