



Roderick and Solange MacArthur Justice Center

POST-KINGSLEY AND CASTRO PROPOSED JURY INSTRUCTIONS AND CAUSES OF ACTION

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Proposed Jury Instructions for Non-Force Claims By Jail Detainees

The following suggested instructions are taken essentially verbatim from the slip opinion in *Castro v. County of Los Angeles*, No. 12-56829 (9th Cir. Aug. 15, 2016) (en banc), which is available here: <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/15/12-56829.pdf>.

Conditions of Confinement

To succeed in her/his claim about the conditions of her/his confinement, Plaintiff must prove each of the following things by a preponderance of the evidence:

- (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
- (2) Those conditions put the plaintiff at substantial risk of suffering serious harm
- (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and
- (4) By not taking such measures, the defendant caused the plaintiff’s injuries.

Failure to Protect

To succeed in her/his claim about the conditions of her/his confinement, Plaintiff must prove each of the following things by a preponderance of the evidence:

- (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
- (2) Those conditions put the plaintiff at substantial risk of suffering serious harm

(3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and

(4) By not taking such measures, the defendant caused the plaintiff’s injuries.

Medical Care

To succeed in her/his claim about failure to provide medical care, Plaintiff must prove each of the following things by a preponderance of the evidence:

(1) The defendant made an intentional decision with respect to plaintiff’s medical care;

(2) That care put the plaintiff at substantial risk of suffering serious harm

(3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable [doctor/nurse/medical provider] in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and

(4) By not taking such measures, the defendant caused the plaintiff’s injuries.

Suggested Tweaks to Causes of Action in Complaint

Jail Force Cases in Any Circuit

For jail excessive force case, the fault language in the complaint should track *Kingsley*, alleging that the force used was (1) intentional and (2) unreasonable and excessive.

Jail Non-Forces Cases (Medical Care, Failure to Protect, Conditions) Outside of the Ninth Circuit

The goal here is to both retain language in the cause of action section that follows your current circuit law regarding deliberate indifference for a failure to protect, conditions, or medical care claim and to add additional language that encompasses the *Kingsley/Castro* approach as an alternative standard.

Your current cause of action language probably includes a paragraph that reads something like this: “In violation of the Fourteenth Amendment, the individual Defendants knew of and disregarded a substantial risk of serious harm.” After this paragraph, you could add in the same count another paragraph along these lines: “In the alternative, the individual Defendants made an intentional decision with regard to [either (1) Plaintiff’s medical care or (2) the conditions under which Plaintiff was confined] that put plaintiff at substantial risk of suffering serious harm. The defendant did not take reasonable available measures to abate that risk, even though a reasonable [officer/doctor/nurse/medical provider] in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s

conduct obvious.” The second of these two options should work for either a conditions claim or a failure to protect claim.

You probably want a footnoted disclaimer to the second paragraph: “This portion of the claim is pled on the basis of a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Fed. R. Civ. P. 11(b)(2).”

Ninth Circuit

Force cases in the Ninth Circuit: Refer to “Jail Force Cases in Any Circuit,” above.

Failure to protect cases in the Ninth Circuit: You could replace your current deliberate indifference paragraph with: “The individual Defendants made an intentional decision with regard to the conditions under which Plaintiff was confined] that put plaintiff at substantial risk of suffering serious harm. The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious.” You do not need any Rule 11 footnote, because this is now the law of the Ninth Circuit under *Castro*.

Other jail cases in the Ninth Circuit: “In violation of the Fourteenth Amendment, the individual Defendants knew of and disregarded a substantial risk of serious harm.” After this paragraph, you could add in the same count another paragraph along these lines: “In the alternative, the individual Defendants made an intentional decision with regard to [either (1) Plaintiff’s medical care or (2) the conditions under which Plaintiff was confined] that put plaintiff at substantial risk of suffering serious harm. The defendant did not take reasonable available measures to abate that risk, even though a reasonable [officer/doctor/nurse/medical provider] in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious.” The second of these two options should work for either a conditions claim or a failure to protect claim.

Because *Castro* technically is limited to failure to protect cases, you may still want a footnoted disclaimer to the second paragraph: “This portion of the claim is pled on the basis of a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Fed. R. Civ. P. 11(b)(2).”