PREMISES LIABILITY INSTRUCTIONS

Introduction

Premises Liability Instructions may be used in cases involving injuries resulting from the condition of property.

The primary revision to the Premises Liability Instructions, found at Premises Liability 1, 1A, and 2, is to add "unreasonably" to the discussion concerning notice of a dangerous condition. "Unreasonably" has been added in recognition that not all dangerous conditions impose liability. A definition of "unreasonably" is not provided because the parties are expected to argue what "unreasonably" means in the context of their specific case. The remainder of the Premises Liability Instructions have not been changed.

A person's status as invitee, licensee, or trespasser determines the degree of care the owner or possessor owes to the injured person.

An invitee, covered in Premises Liability Instructions 1, 1A, and 2, is generally a person who is on the property by express or implied invitation for a business purpose.

A licensee or guest, covered in Premises Liability Instructions 3 and 4, refers to a person on the property by express or implied invitation for a social purpose. A higher degree of care may be owed to a child guest.

A trespasser, covered in Premises Liability Instructions 5 and 6, refers to a person on the property without actual or implied permission. A higher degree of care may be owed to trespassing children under the attractive nuisance doctrine.

PREMISES LIABILITY 1

Notice of Unreasonably Dangerous Condition

As the owner of a business, [*name of defendant*] is required to use reasonable care to warn of or [safeguard] [remedy] an unreasonably dangerous condition of which [*name of defendant*] had notice. [*Name of plaintiff*] claims that [*name of defendant*] had notice of the unreasonably dangerous condition[1] that caused harm to [*name of plaintiff*]. [*Name of defendant*] had notice of the unreasonably dangerous condition if you find any of the following:

1. [*Name of defendant*] or its employees[2] created the condition; or
2. [*Name of* defendant] or its employees actually knew of the condition [in time to provide a remedy or warning]; or
3. The condition existed for a sufficient length of time that [*name of defendant*] or its employees, in the exercise of reasonable care, should have known of it.

If you find that [*name of defendant*] had notice of the unreasonably dangerous condition and failed to use reasonable care to prevent harm under the circumstances, then [*name of defendant*] was negligent.

SOURCE: *Preuss v. Sambo's of Ariz., Inc.,* 130 Ariz. 288, 289 (1981); *Andrews v. Fry's Food Stores,* 160 Ariz. 93, 95 (App. 1989); *Walker v. Montgomery Ward & Co.,* 20 Ariz. App. 255, 258 (1973).

USE NOTE: This instruction should be used with appropriate Fault Instructions 1-4 or 5-11. This instruction is for cases involving business invitees; it is not appropriate for cases involving licensees, trespassers, or persons acting in ways not permitted by the owner. *See*, *e.g. Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143 (1982) (department store employee using shortcut instead of sidewalk); *Shiells v. Kolt*, 148 Ariz. 424, 425 (App. 1986) (customer jumping over railing that separated pedestrians from traffic committed an unpermitted activity equivalent to going beyond an invited area).

COMMENT: [1] **Dangerous Condition:** It is conceivable that harm could arise from almost any object or condition. Negligence is the failure to correct or warn of an *unreasonably dangerous condition.* RESTATEMENT (SECOND) OF TORTS § 343. The Committee feels that the instruction should accurately state the law. It was felt that jurors understand the difference between those conditions which are dangerous but do not impose liability as opposed to those that are unreasonably dangerous.

[2] Under some circumstances, the actions of independent contractors may also be imputed to the owner. *Ft. Lowell–NSS Limited P'ship v. Kelly,* 166 Ariz. 96 (1990).

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PREMISES LIABILITY 1

Notice of Unreasonably Dangerous Condition

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Open and Obvious: The Committee concluded that an instruction on "open and obvious" should not be recommended reasoning that the concept was covered by Fault Instructions and Premises Liability Instruction 1. Recognizing that some courts may find it appropriate in some cases to give an instruction on "open and obvious," the Committee recommends that, if one is given, it be substantially as follows:

"[*Name of defendant*] claims that the condition which caused harm to [*name of plaintiff*] was open and obvious.

Normally, a person need not safeguard or warn of a condition, which is sufficiently open and obvious, that it may reasonably be expected that persons will see and avoid it. Nevertheless, if under all of the circumstances it should reasonably have been anticipated that the condition could cause harm, then a person must use reasonable care to [correct] [safeguard] or warn of the condition, even if the condition was open and obvious."

The source for this Open and Obvious instruction is: *Markowitz v. Ariz. Parks Bd.,* 146 Ariz. 352, 356 (1985); *Tribe v. Shell Oil Co.,* 133 Ariz. 517, 519 (1982); *Andrews v. Fry's Food Stores,* 160 Ariz. 93, 95-96 (App. 1989); *Brierley v. Anaconda Co.,* 21 Ariz. App. 7 (1973).

PREMISES LIABILITY 1A

Notice of Unreasonably Dangerous Condition (Nonproprietary)

[*Name of defendant*] is required to use reasonable care to warn of or [safeguard] [remedy] an unreasonably dangerous condition of which [*name of defendant*] had notice. [*Name of plaintiff*] claims that [*name of defendant*] had notice of the unreasonably dangerous condition that caused harm to [*name of plaintiff*]. [*Name of defendant*] had notice of the unreasonably dangerous condition if you find any of the following:

1. [*Name of defendant*] created the condition; or
2. [*Name of defendant*] actually knew of the condition [in time to provide a remedy or warning]; or
3. The condition existed for a sufficient length of time that [*name of defendant*], in the exercise of reasonable care, should have known of it.

If you find that [*name of defendant*] had notice of the unreasonably dangerous condition and failed to use reasonable care to prevent harm under the circumstances, then [*name of defendant*] was negligent.

SOURCE: RAJI (CIVIL) 5th Premises Liability 1, as revised to eliminate references to business owner and employees.

USE NOTE: This instruction may be used in cases where the defendant is not operating a business and where plaintiff is or may be an invitee. This instruction should be used with appropriate Fault Instructions 1-4 or 5-11.

PREMISES LIABILITY 2

Mode of Operation Rule

Even if you find that [*name of defendant*] had no notice of the unreasonably dangerous condition that [*name of plaintiff*] claims caused harm, [*name of defendant*] was negligent if you find the following:

1. [*Name of defendant*] adopted a method of operation from which it could reasonably be anticipated that unreasonably dangerous conditions would regularly arise; and
2. [*Name of defendant*] failed to exercise reasonable care to prevent harm under those circumstances.

SOURCE: *Chiara v. Fry's Food Stores*, 152 Ariz. 398, 400-1 (1987); *Shuck v. Texaco Refining & Marketing, Inc.*, 178 Ariz. 295, 297 (App. 1994).

USE NOTE: This instruction should be used with appropriate Fault Instructions 1-4 or 5-11. This instruction is for cases involving business invitees; it is not appropriate for cases involving licensees, trespassers, or persons acting in ways not permitted by the owner. *See, e.g., Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143 (1982); *Shiells v. Kolt*, 148 Ariz. 424, 425 (App. 1986); *McKillip v. Smitty's Super Valu*, *Inc.,* 190 Ariz. 61, 64 (App. 1997).

PREMISES LIABILITY 3

Adult Guest
(Licensee)

If a property owner knows of a concealed danger upon the property, the property owner is negligent if a guest is not adequately warned about it. Whether a warning is adequate depends on what a reasonably careful property owner would do under similar circumstances.

[If a property owner willfully or wantonly causes injury to a guest, the property owner is at fault.][1]

SOURCE: *Shannon v. Butler Homes, Inc.,* 102 Ariz. 312, 316, 318 (1967); *Shaw v. Petersen,* 169 Ariz. 559 (App. 1991) (Fidel, J., concurring specially); *McLeod v. Newcomer,* 163 Ariz. 6 (App. 1989).

USE NOTE: Use this instruction if an "adult" guest is involved. Depending upon the circumstances, a "child" under the age of 18 years may be held to an adult standard. PROSSER & KEETON, LAW OF TORTS § 59 (5th ed. 1984), pp. 408-10. In many cases, the question regarding the standard to be utilized (child vs. adult) will be determined as a matter of law. In some cases, this may be a jury question. Diminished mental capacity may bear upon whether a person is found to be a child or an adult. *Id.* at 410. *See generally* Negligence Instruction 5. If the person injured is a child, or may be found to be a child, then this instruction should be given concurrently with Premises Liability Instruction 4. Use this instruction with Fault Instructions 1–4 (no comparative fault) or with Fault Instructions 5–11 (if comparative fault is an issue), as applicable.

[1] Use the second paragraph of the instruction only in those cases where the court determines that the nature of the conduct may reasonably be found to rise to the level of willful or wanton conduct. In that event, the second paragraph of this instruction should be used concurrently with Negligence Instruction 10 (Willful or Wanton Conduct). The common law invitee-licensee-trespasser classifications retain the concept of willful or wanton conduct with reference to licensees (guests); so the common law relating to what is willful or wanton conduct is still applicable. The limited and specific use of willful or wanton conduct common law principles with reference to licensee premises liability should not be confused with the higher standards for punitive damages, as set forth and discussed in Personal Injury Damages Instruction 4.

PREMISES LIABILITY 4

Child Guest
(Licensee)

A child guest's capacity to appreciate the extent of the risk of harm may determine whether a condition of the property is a concealed danger in relation to that child.

Whether a warning is adequate for a child guest depends on the capacity of the child to appreciate the extent of the risk of harm involved.

If a reasonably careful property owner should realize that the child would not be adequately warned of the risk of harm, then the property owner must exercise such care as a reasonably careful property owner would exercise toward children under similar circumstances. The property owner is negligent if the property owner fails to do so.

SOURCE: *Shannon v. Butler Homes, Inc.,* 102 Ariz. 312, 317 (1967); *Shaw v. Petersen,* 169 Ariz. 559 (App. 1991) (Fidel, J., concurring specially); *McLeod v. Newcomer,* 163 Ariz. 6 (App. 1989).

USE NOTE: Use this instruction if the person injured is or may be found to be a child. Use this instruction along with Premises Liability Instruction 3. Reference is made to the Use Note following Premises Liability 3, regarding the differing standards for adults and children and resolution of the question whether a particular person is a "child" or an "adult" for purposes of the application of the common law licensee classification. Negligence Instruction 5, Fault Instructions 1-4 (No Comparative Fault) or Fault Instructions 5-11 (Comparative Fault) should be utilized, as applicable, with this instruction.

PREMISES LIABILITY 5

Adult Trespasser

A trespasser is a person who goes on property without actual or implied permission.

If you find that [*name of plaintiff*] was a trespasser, [*name of defendant*] is at fault only if you find that [*name of defendant*] willfully or wantonly caused injury to [*name of plaintiff*].

SOURCE: *Webster v. Culbertson,* 158 Ariz. 159 (1988); *Barnhizer v. Paradise Valley Unified Sch. Dist.,* 123 Ariz. 253 (1979); *Spur Feeding Co. v. Fernandez,* 106 Ariz. 143 (1970); RESTATEMENT (SECOND) OF TORTS § 329.

USE NOTE: This instruction should be used with Negligence Instruction 10 (Willful or Wanton Conduct) and Fault Instructions 1-4 (No Comparative Fault) or Fault Instructions 5-11 (Comparative Fault), as applicable.

COMMENT: 1. This instruction only applies to "adult" trespassers. For discussion concerning who is an adult, see the Use Note following Premises Liability Instruction 3. If a "child" trespasser is involved, use Premises Liability Instruction 6.

2. If a person is privileged to enter the premises, *e.g.,* to recover personal property, that person is not a trespasser despite a lack of permission. *See* RESTATEMENT (SECOND) OF TORTS § 329 cmt. a. To avoid confusion, the privilege issue is not addressed in the instruction. Appropriate language may be added if applicable in a particular case.

3. A person who initially entered land with permission (*i.e.,* a licensee or invitee) may become a trespasser by exceeding the scope of the permission. *See Nicoletti v. Westcor, Inc.,* 131 Ariz. 140, 143 (1982); RESTATEMENT (SECOND) OF TORTS § 332 cmt. l.

4. Several exceptions to the general rule of a limited duty exist. For example, a possessor of land may be liable for injuries to trespassers caused by highly dangerous conditions or activities if the possessor knew or should have known that persons were trespassing in the vicinity of the dangerous condition or activity. *See Webster v. Culbertson,* 158 Ariz. 159, 161-62 (1988); RESTATEMENT (SECOND) OF TORTS §§ 334–337.

PREMISES LIABILITY 6

Child Trespasser
(Attractive Nuisance)

A trespasser is a person who goes on property without actual or implied permission.

If you find that [*name of plaintiff*] was a trespasser, [*name of defendant*] is at fault if you find that [*name of defendant*] willfully or wantonly caused injury to [*name of plaintiff*].

If you find that [*name of plaintiff*] was a child[1] trespasser, [*name of defendant*] is also negligent and at fault if you find all of the following:

1. [*Name of plaintiff*] was injured by a condition[2] on [*name of defendant*]'s property; and
2. [*Name of defendant*] knew or should have known that children were likely to trespass near the condition; and
3. [*Name of defendant*] knew or should have known that the condition posed an unreasonable risk of harm to children; and

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SOURCE: *Barnhizer v. Paradise Valley Unified Sch. Dist.,* 123 Ariz. 253, 255, 599 P.2d 209, 211 (1979); *Spur Feeding Co. v. Fernandez,* 106 Ariz. 143, 147, 472 P.2d 12, 16 (1970); RESTATEMENT (SECOND) OF TORTS § 339.

USE NOTE: This instruction should be used with appropriate Fault Instructions 1-4 (No Comparative Fault) or 5-11 (Comparative Fault), Negligence Instruction 5 (Negligence of Child), and Negligence Instruction 10 (Willful and Wanton), as applicable.

[1] This instruction only applies to "child" trespassers. For discussion concerning who is a child, see Use Note following Premises Liability Instruction 3. If an "adult" trespasser is involved, use Premises Liability 5.

[2] Under RESTATEMENT (SECOND) OF TORTS § 339, approved in *Barnhizer,* the attractive nuisance doctrine applies only to artificial, not natural, conditions. The drafters of the *Restatement* expressly failed to take a position on the soundness of the artificial-natural distinction. There are no Arizona cases which discuss the natural-artificial distinction in the attractive nuisance context. However, the Arizona Supreme Court has considered whether the conduct of a defendant may be actionable in relation to a "natural" condition. *See, e.g., Markowitz v. Ariz. Parks Bd.,* 146 Ariz. 352, 354-55 (1985); *cf.* A.R.S. § 33-1551 (recreational use statute), as construed in *Bledsoe v. Goodfarb,* 170 Ariz. 256 (1991).

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PREMISES LIABILITY 6

Child Trespasser
(Attractive Nuisance)

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4. Because of [her] [his] age, [*name of plaintiff*] did not understand the risk of harm involved;[3] and
5. The usefulness of the condition and the burden of eliminating the risk of harm are slight compared to the risk of harm to children; and
6. [*Name of defendant*] failed to use reasonable care to protect [*name of plaintiff*].

[3] In some cases, children have been held as a matter of law to appreciate the danger caused by the condition. *See Barnhizer v. Paradise Valley Unified Sch. Dist.,* 123 Ariz. 253, 255, 599 P.2d 209, 211 (1979) *; Carlson v. Tucson Racquet & Swim Club,* 127 Ariz. 247, 249, 619 P.2d 756, 758 (Ct. App. 1980).