NEGLIGENCE INSTRUCTIONS

Introduction

Changes in 2018 have been made to following Negligence Instructions: 1, 2, 5, 7, 8, 9 and 10. New Negligence 2A (Driving Under the Influence of any Drug, or its Impairing Metabolite, or a Vapor Releasing Substance Containing a Toxic Substance) was added. There were no changes to the Negligence Instructions in RAJI (CIVIL) 6th (2017). The only substantive change to the RAJI (CIVIL) 4th Negligence Instructions was in Negligence 3 conforming it to the revised, lower 0.08% statutory presumption of intoxication.

As in RAJI (CIVIL) 3d, many subjects related to negligence (such as Statement of Issues, Liability, Definition of Negligence, Seatbelt/Motorcycle Helmets, Causation and Burden of Proof) appear in the Fault Instructions as they are such an integral part of the larger liability concept of comparative fault.

NEGLIGENCE 1

Violation of Statute (Negligence Per Se)

I am now going to instruct you on certain laws [of the State of Arizona][1]. If you find from the evidence that a person has violated any of these laws, that person is negligent. You should then determine whether that negligence was a cause of injury to [*name of plaintiff*].

[**Insert applicable laws, edited and paraphrased for clarity**.]

SOURCE: *Orlando v. Northcutt*, 103 Ariz. 298, 300, 441 P.2d 58, 60 (1968).

USE NOTE: [1] Modify the instruction to fit the case. If the instruction is going to cite regulations or ordinances instead of, or as well as, statutes, use a more generic statement than "laws of the State of Arizona." The word "rules" might be appropriate, or it might be appropriate to simply end the first sentence after "laws."

COMMENT: 1. When Is Violation of a Statute Negligence Per Se?: "A persons who violates a statute enacted for the protection and safety of the public is guilty of negligence per se." *Good v. City of Glendale*, 150 Ariz. 218, 221, 722 P.2d 386, 389 (App. 1986). However, the principle of negligence per se applies only""when a person violates a specific legal requirement. . . . The statute must proscribe certain or specific acts. . . . Therefore, if a statute defines only a general standard of care . . . negligence *per se* is inappropriate." *Reyes v. Frank's Service & Trucking, LLC*, 235 Ariz. 605, 612-13, 334 P.3d 1264, 1271-72 (App. 2014); *see also Hutto v. Francisco*, 210 Ariz. 88, 91, 107 P.3d 934, 937 (App. 2005); *Griffith v. Valley of the Sun Recovery & Adjustment Bureau, Inc.*, 126 Ariz. 227, 229, 613 P.2d 1283, 1285 (App. 1980). For additional discussion of situations when the standard of conduct defined by the legislature may be adopted by the court, see RESTATEMENT (SECOND) OF TORTS § 286 (1965) (quoted in part in *Good*).

2. Do Not Use "At Fault" in This Instruction: Do not replace "negligent" with "at fault." Fault is negligence *plus* causation. Violation of a statute might be negligence per se, but causation is a separate issue.

NEGLIGENCE 2

Driving Under the Influence of Alcohol

A driver is under the influence of alcohol when alcohol impairs a driver's control of the vehicle to the slightest degree.

SOURCE: A.R.S. § 28-1381(A), and cases cited therein; *Noland v. Wootan*, 102 Ariz. 192, 427 P.2d 143 (1967).

CAVEAT: Consult latest statutes and case law before instructing on DUI.

USE NOTE: Give RAJI (CIVIL) 6th Negligence 2 after giving A.R.S. § 28-1381(A) in RAJI (CIVIL) 6th Negligence 1. (If drugs or vapors are involved, either instead of or in combination with alcohol, consult A.R.S. § 28-1381 and modify the instruction accordingly.) (The instructions use "alcohol" because that seems more commonly used by people in everyday life than "intoxicating liquor," which is what the statutes say; either way is correct.)

COMMENT: 1. DUI is Negligence Per Se: *Anderson v. Morgan*, 73 Ariz. 344, 241 P.2d 786 (1952). Driving while intoxicated amounts to negligence *per se*, but is not actionable negligence without showing of proximate cause. *Smith v. Chapman,* 115 Ariz. 211, 564 P.2d (1977).

2. Actual Physical Control: A.R.S. § 28-1381(A)(1) also makes it unlawful to be in actual physical control of a vehicle while intoxicated. "Actual physical control" is the apparent ability to start and move the vehicle, whereas "driving" entails some motion of the vehicle. As used in RAJI (CIVIL) 5th Negligence 2, "control" is synonymous with "driving," but in some cases it may not be. If language on actual physical control is relevant to the case, see RAJI (CRIMINAL) 3rd 28.1381(A)(1)-APC (Actual Physical Control) and *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983).

3. "**Ability" to Drive:** RAJI (CIVIL) Negligence 8 referred to impairment of a person's "ability to operate" a vehicle. RAJI (CRIMINAL) 3d 28.1381(A)(1)-1 (Driving While Under the Influence) refers to impairment of a person's "ability to drive a motor vehicle.".

RAJI (CIVIL) 5th Negligence 2 does not use the "ability to drive" language because none of the cases use it. The lead case is *Noland*, which states that: "In *Hasten v. State*, 35 Ariz. 427, 280 P.2d 670 (1929), we adopted the rule that one is guilty of the crime of driving while under the influence of intoxicants if his control of the vehicle is to the slightest degree affected by his consumption of the intoxicant. We have never departed from this rule of law." In *State v. Askren*, 147 Ariz. 436, 710 P.2d 1091 (Ct. App. 1985), the court affirmed the trial court's rejection of an "ability" instruction and stated that the "control" standard is "still the law in Arizona." *See also State v. Grimes*, 160 Ariz. 329, 773 P.2d 227 (App. 1989).

NEGLIGENCE 2 A

Driving Under the Influence of Any Drug, or Its Impairing Metabolite, or a Vapor Releasing Substance Containing a Toxic Substance

It is unlawful for a person to drive a vehicle when under the influence of any drug, or its impairing metabolite, or a vapor-releasing substance containing a toxic substance, or any combination of them.

A person is considered to be driving under influence of a drug, or its impairing metabolite, or a vapor-releasing substance containing a toxic substance, or any combination of them, if his or her control of a vehicle is impaired to the slightest degree.

SOURCE: A.R.S. § 28-1381(A)(1); *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 347, 322 P.3d 160, 164 (2014); *Dobson v. McClennen*, 238 Ariz. 389, 391, 361 P.3d 374, 376 (2015); *Noland v. Wootan*, 102 Ariz. 192, 193, 427 P.2d 143, 144 (1967); *Ishak v. McClennen*, 241 Ariz. 364, 366, 388 P.3d 1, 3 (App. 2016), rev. denied 2017; *State v. Grimes*, 160 Ariz. 329, 773 P.2d 227 (App. 1989); *State v. Askren*, 147 Ariz. 436, 438, 710 P.2d 1091, 1093 (App. 1985); *Davis v. Waters,* 103 Ariz. 87, 90, 436 P.2d 906, 909 (1968); *State ex rel. McDougall v. Albrecht*, 168 Ariz. 128, 132, 811 P.2d 791, 795 (App. 1991).

USE NOTE: Give RAJI (Civil) 5th Negligence 2A after giving A.R.S. § 28-1381(A) in RAJI (Civil) 6th Negligence 1 - Violation of Statute - (Negligence Per Se). Also see A.R.S. § 28-1381(A)(3) and A.R.S. § 13-3401.

COMMENTS 1. Driving while under the influence amounts to negligence per se. *Anderson v. Morgan*, 73 Ariz. 346, 347, 241 P.2d 786, 787 (1952); *Gibson v. Boyle*, 139 Ariz. 512, 520, 679 P.2d 535, 543 (App. 1983). Although driving while intoxicated amounts to negligence per se, it is not actionable negligence without a showing of proximate cause. *Smith v. Chapman*, 115 Ariz. 211, 214, 564 P.2d 900, 903 (1977); *Anderson v. Morgan*, 73 Ariz. 346, 347, 241 P.2d 786, 787 (1952).

NEGLIGENCE 3

Presumptions of Intoxication

Arizona Revised Statutes § 28-1381(G) provides:

1. If a driver had a blood alcohol concentration of 0.05 percent or less at the time of driving, it may be presumed that he or she was not under the influence of alcohol.
2. If a driver had a blood alcohol concentration of more than 0.05 percent but less than 0.08 percent at the time of driving, there is no presumption that he or she was or was not under the influence of alcohol.
3. If a driver had a blood alcohol concentration of 0.08 percent or more at the time of driving, it may be presumed that he or she was under the influence of alcohol.

In deciding whether a person was under the influence of alcohol at the time of driving, you should consider all of the evidence.

SOURCE: A.R.S. § 28-1381(G); RAJI (CRIMINAL) 3d 28.693 (Presumptions of Intoxication).

CAVEAT: Consult latest statutes and case law before instructing on DUI.

USE NOTE: This instruction is a paraphrasing of the statute in existence at the time the instruction was approved. It is recommended for use in civil cases, but not in criminal cases.

COMMENT: 1. Relation Back: There is no presumption that a person's blood alcohol concentration (BAC) at the time of testing is the same as it was at the time of driving. The BAC reading should not come into evidence, and this instruction should not be given, unless there is evidence in the case relating the BAC test result back to the time of the driving. *Desmond v. Superior Court,* 161 Ariz. 522, 799 P.2d 1261 (1989).

2. Statutory Presumption: A.R.S. § 28-1381(G) creates a statutory presumption. This statutory presumption can be rebutted, but it does not vanish with presentation of evidence to the contrary. *Englehart v. Jeep Corp*., 122 Ariz. 256, 259, 594 P.2d 510, 513 (1979); *Starr v. Campos*, 134 Ariz. 254, 655 P.2d 794 (App. 1982). The weight to be given to this statutory presumption, and to all other competent evidence, is for the jury to decide. *State v. Superior Court*, 152 Ariz. 327, 329, 732 P.2d 218, 220 (App. 1986).

Although consideration was given to including a definition of "rebuttable presumption," the Committee decided that the permissive nature of the presumption ("it may be presumed"), and the last sentence of the instruction ("consider all of the evidence") were sufficient to allow the concept to be correctly understood and argued, and that a specific definition of "rebuttable" or "presumption" could cause verbosity and other problems. For a discussion of some good reasons why not to try to define "presumption," see UDALL & LIVERMORE, ARIZONA LAW OF EVIDENCE §§ 141-144 (1982).

NEGLIGENCE 4

Assume Laws Obeyed (Duty to Observe)

A driver is entitled to assume that another motorist will proceed in a lawful manner and obey the laws of the road—unless it should become apparent to that driver, acting as a reasonably careful person, that the other motorist is not going to obey the laws of the road.

All drivers have a continuing duty to make that degree of observation that a reasonably careful person would make under similar circumstances.

SOURCE: RAJI (CIVIL) 3d Negligence 4; *Marks v. Gooding*, 96 Ariz. 253, 256, 394 P.2d 192, 195 (1964); *Smith v. Delvin*, 151 Ariz. 481, 483, 728 P.2d 1231, 1233 (App. 1986).

USE NOTE: The two doctrines in this instruction apply to all active users of the road, including pedestrians, bicyclists, etc. The words "driver" and "motorist" can be replaced with words such as "person" or "pedestrian" as appropriate for the case. For a pedestrian case, see *Sheehy v. Murphy*, 93 Ariz. 297, 380 P.2d 152 (1963).

COMMENT: This instruction is intended to cover the areas of right-of-way, look-out, and the presumption that other drivers will comply with the law. The Committee is divided concerning continued approval of this instruction. Some members believe the substance of the instruction is covered by general fault instructions, and that this instruction is therefore cumulative and should rarely, if ever, be given. Other members believe that the instruction is not cumulative and is appropriate in some cases.

NEGLIGENCE 5

Negligence of a Child
(Duty of Adult to Anticipate Behavior of Children)

A child is not held to the same standard of care as an adult. An adult must anticipate the ordinary behavior of children, and that children might not exercise the same degree of care for their own safety as adults.

A child who does not use the degree of care that is ordinarily exercised by children of the same age, intelligence, knowledge, and experience under the existing circumstances is negligent.

SOURCE: RAJI (CIVIL) 3d Negligence 5; *Beliak v. Plants*, 84 Ariz. 211, 326 P.2d 36 (1958); Ruiz v. Faulkner, 12 Ariz. App. 352, 470 P.2d 500 (1970); *Rosen v. Knaub*, 175 Ariz. 329, 857 P.2d 381 (1993).

USE NOTE: Instructions on a child's standard of care and on an adult's duty to anticipate a child's behavior have been combined here for convenience. In some cases, one or the other of these concepts will not apply and should be deleted from the instruction.

COMMENT: There is only one standard of care for motor vehicle operators. A child driver is held to the same standard of care as an adult. *Burns v. Wheeler*, 103 Ariz. 525, 446 P.2d 925 (1968).

NEGLIGENCE 6
Sudden Emergency

In determining whether a person acted with reasonable care under the circumstances, you may consider whether such conduct was affected by an emergency.

An "emergency" is defined as a sudden and unexpected encounter with a danger, which is either real or reasonably seems to be real. If a person, without negligence on his or her part, encountered such an emergency and acted reasonably to avoid harm to self or others, you may find that the person was not negligent. This is so even though, in hindsight, you feel that under normal conditions some other or better course of conduct could and should have been followed.

The existence of a sudden emergency and a person's reaction to it are only some of the factors you should consider in determining what is reasonable conduct under the circumstances.

SOURCE: *Myhaver v. Knutson*, 189 Ariz. 286, 942 P.2d 445 (1997).

COMMENT: The language of the first two paragraphs of this instruction comes from RAJI (CIVIL) 3d Negligence 6, and was approved by the Arizona Supreme Court in *Myhaver*. The court stressed, however, that a sudden emergency instruction should only be used in the rare case in which the emergency is not of the routine sort produced by the impending accident but arises from events that a person could not be expected to anticipate. The court also emphasized that it is important to explain to the jury that the existence of a sudden emergency and the reaction to it are not the only factors that the jury should consider in determining if a person's conduct was reasonable under the circumstances.

NEGLIGENCE 7
Res Ipsa

Ordinarily, the occurrence of an accident does not, by itself, mean that a particular person has been negligent. There is an exception. You may conclude that defendant has been negligent if you find that:

1. The accident occurred as a result of [describe nature of the thing, agent or instrumentality that caused injury] that was under [*name of defendant*]'s control;
2. In the normal course of events, the accident would not have occurred unless [*name of defendant*] was negligent; and
3. [*Name of plaintiff*] is not in a position to show the particular circumstances which caused the accident.

SOURCE: *Capps v. American Airlines, Inc.*, 81 Ariz. 232, 303 P.2d 717 (1956); *Jackson v. H. H. Robertson Co., Inc.*, 118 Ariz. 29, 32, 574 P.2d 822, 825 (1978); *Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 156 P.3d 1157 (App., 2007); *Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, 42 P.3d 621 (App. 2002); *Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 873 P.2d 688 (App. 1994); *McDonald v. Smitty's Super Valu, Inc.*, 157 Ariz. 316, 757 P.2d 120 (App. 1988); PROSSER & KEETON, LAW OF TORTS 39 (5th ed. 1984).

USE NOTES:

1. "Accident": If "accident" is for any reason inappropriate, substitute "injury" or other fitting word at each of the references to "accident."

2. "Agent or Instrumentality": The common formulations of the *res ipsa* doctrine use the phrase "agency or instrumentality" when referring to the thing that caused the injury. For clarity, the instruction allows the parties to choose more understandable language. If the injury causing instrumentality is known, and using its name fits in the context (for example, if a chair collapsed or a surgical instrument is left inside a wound) naming the instrumentality may aid jury's understanding. In some cases, it might be appropriate to use the full "agency or instrumentality" phrase. In most cases, however, the word "something" might be much clearer to a jury than either "agency" or "instrumentality." Modify the instruction for clarity in the context of the issues in the case.

Continued

NEGLIGENCE 7

Res Ipsa

Continued

3. Exclusive Control: "Exclusive control" (by one or more defendants) has historically been an element of the *res ipsa* doctrine in Arizona. *Jackson v. H. H. Robertson Co., Inc.*, 118 Ariz. 29, 32, 574 P.2d 822, 825 (1978); *McDonald v. Smitty's Super Valu, Inc.*, 157 Ariz. 316, 320-21, 757 P.2d 120, 124-25 (App. 1988). However, literal and rigid use of the term "exclusive" can be misleading and even erroneous. *See McDonald*, 157 Ariz. at 320, *quoting* PROSSER & KEETON, LAW OF TORTS § 39 (5th ed. 1984); and *Jackson*, 118 Ariz. at 32, 574 P.2d at 825 ("The 'exclusive control' requirement in a *res ipsa loquitur* case is really circumstantial evidence supporting the inference that the defendant(s) probably is responsible for the harm to the plaintiff."); *Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, 192, ¶ 7, 42 P.3d 621, 623 (App. 2002) (Purposefully omitted *exclusive* when listing the elements of *res ipsa loquitur*), *cited with approval in Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 57-58, ¶ 19, 156 P.3d 1157, 1162-63 (App. 2007); *Byars v. Arizona Public Service Co.*, 24 Ariz. App. 420, 426, 539 P.2d 534, 540 (1975), the test for "exclusive control" is "whether it is more probable than not that the accident was the result of defendants' negligence." For these reasons, the committee has removed the term "exclusive" from the recommended instruction.

In *res ipsa* cases in which some aspect of the "control" element is a contested issue, the trial court may need to expand the instruction, or add an instruction to include a definition or explanation of the meaning of "control," consistent with applicable case law.

COMMENT: 1. "May Conclude": "In this jurisdiction *res ipsa* does not raise a presumption, but merely a permissible inference. The jury is *permitted* to infer negligence from the circumstances, but is not *required* to do so even in the absence of rebutting evidence." *Holland v. Kitterman*, 14 Ariz. App 179, 182, 481 P.2d 549, 552 (App. 1971).

NEGLIGENCE 8

Negligent Infliction of Emotional Distress (Witnessing Injury to Another)

[*Name of plaintiff*] claims that [*name of defendant*]'s negligence caused [*name of plaintiff*] emotional distress. On this claim, [*name of plaintiff*] has the burden of proving:

1. [*Name of defendant]* was negligent;
2. [[*Name of defendant*]'s negligence created an unreasonable risk of bodily harm to both [*name of plaintiff*] and [*name of the person physically injured in the event*]; *(See Use Note 3)*];
3. [*Name of defendant*]'s negligence was a cause of bodily harm to [*name of the person physically injured in the event*];;
4. [*Name of plaintiff*] suffered emotional distress as a result of experiencing the event that caused bodily harm to [*name of the person physically injured in the event*];;
5. [*Name of plaintiff*] suffered physical injury or illness due to the emotional distress;
6. [*Name of Plaintiff*] and [*name of the person physically injured in the event*] had a close personal relationship; and
7. [*Name of plaintiff*]'s damages.

SOURCE: *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979).

USE NOTE 1: Use when the claim is based on witnessing injury to another person.

USE NOTE 2: When the plaintiff who is claiming emotional damage sustains any physical injury from an event that injures the third person, the limitations imposed by this instruction do not apply, and the plaintiff is entitled to recover damages for shock, emotional pain, discomfort and anxiety resulting from the injury-producing event. In *Ball v. Prentice,* 162 Ariz. 150, 781 P.2d 628 (App. 1989), a plaintiff, who sustained minor injuries in a collision, was allowed to seek damages for emotional suffering caused by the experience, including the trauma of witnessing the woman who caused the accident die at the scene. The court in *Ball*, relied on the "impact rule," which it described as follows:

> As one author has stated:
>
> > "Impact" has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. The requirement has even been satisfied by a fall brought about by a faint after a collision, or the plaintiff's own wrenching of her shoulder in reaction to the fright. "The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery."

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NEGLIGENCE 8

Negligent Infliction of Emotional Distress (Witnessing Injury to Another)

Continued

Ball v Prentice, 162 Ariz. at 152, 781 P.2d at 630. *Compare Transamerica Ins. Co. v. Doe,* 173 Ariz. 112, 116, 840 P.2d 288, 292 (App. 1992) (emotional distress caused by exposure to bodily fluids not compensable, unless blood transmits harmful pathogens).

USE NOTE 3: Zone of Danger: Element (2) "zone of danger" is required. *Keck v. Jackson*, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979). However, this element will often be decided by the court as a matter of law, and in those cases, element (2) should be omitted from the instruction. In rare cases, the issue of whether the plaintiff was within the zone of danger may be a jury question.

COMMENT 1: Close Personal Relationship: It remains an open question whether recovery will be allowed for a non-family member witnessing an injury to another. In *Keck v. Jackson*, 122 Ariz. 114, 115-16, 593 P.2d 668, 669-70 (1979), the supreme court stated that a "close personal relationship, either by consanguinity or otherwise," was sufficient to satisfy this element.

Keck involved a parent-child relationship. In *Hislop v. Salt River Project Agr. Imp. & Power Dist*., 197 Ariz. 553, 5 P.3d 267 (2000), Division One of the Arizona Court of Appeals refused to allow recovery by a co-worker and friend witnessing the injury, but declined to decide whether "the outer limit of liability . . . extends beyond the family unit." 197 Ariz. at 558, 5 P.3d at 272. The court explained that "*Keck* appears to be saying, in essence, that while Arizona will not adhere strictly to a blood relationship requirement, there must still be a familial relationship, or something closely akin thereto, between the victim and the bystander to warrant the bystander's inclusion as a recognized claimant." *Id.* at 555, 5 P.3d at 269.

It appears clear that a pet owner witnessing the injury or death of a beloved family companion is beyond the "outer limit." *See Kaufman v. Langhofer,* 223 Ariz. 249, 222 P.3d 272 (App. 2009) (refusing to extend NIED liability to death of "intelligent, affectionate, playful" scarlet macaw); *Roman v. Carroll*, 127 Ariz. 398, 621 P.2d 307 (App. 1980) (*Keck* cannot apply where the injury is to a dog, which is personal property).

COMMENT 2: Manifestation of Physical Injury or Illness: Arizona has recognized liability for emotional distress caused by witnessing injury to another. *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989); *see also* RESTATEMENT (SECOND) OF TORTS §§ 313 and 436. For recovery, Arizona requires that the emotional distress "must be manifested as a physical injury," and that the damages have been caused by "the emotional disturbance that occurred at the time of the accident, and not thereafter." *Keck*, 122 Ariz. at 115-16, 593 P.2d at 669-70; *see also Quinn v. Turner*, 155 Ariz. 225, 226, 745 P.2d 972, 973 (App. 1987) ("the emotional distress must manifest itself in some physical way").

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NEGLIGENCE 8

Negligent Infliction of Emotional Distress (Witnessing Injury to Another)

Continued

"Transitory physical phenomena" such as weeping and insomnia "are not the type of bodily harm which would sustain a cause of action for emotional distress." *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 379, 752 P.2d 28, 32 (App. 1988); *see also Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 10, 901 P.2d 455 (App. 1995) (child who experienced two months of bad dreams and sleep disturbance, which subsided without medical treatment did not have sufficient "physical injury" to support a negligence action—even though such damages may be recoverable in a false imprisonment claim).

Cases in which the emotional distress was considered sufficient to satisfy the "physical injury or illness" requirement include *Quinn v. Turner*, *supra* (plaintiff suffered from grinding of teeth, wetting himself at night, and marked behavioral changes that required treatment by psychologist and dentist); *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 302-03, ¶¶ 7-12, 995 P.2d 735, 738-39 (App. 1999) (symptoms included trouble sleeping, frequent bad dreams, frequent sleeplessness, impatience with his adult children, requiring counseling for anger and anxiety, and diagnosis of PTSD. The court noted: "In sum, the Arizona cases and Restatement § 436A make clear that a physical injury, as well as a long-term physical illness or mental disturbance, constitutes sufficient bodily harm to support a claim of negligent infliction of emotional distress.").

COMMENT 3: Damages: The damages instruction, RAJI (CIVIL) 5th Personal Injury Damages 1, may require modification to include certain types of emotional distress damages.

NEGLIGENCE 9

Negligent Infliction of Emotional Distress (Direct)

[*Name of plaintiff*] claims that [*name of defendant*]'s negligence caused [*name of plaintiff*] emotional distress. On this claim, [*name of plaintiff*] has the burden of proving:

1. [*Name of defendant*] was negligent;
2. [*Name of defendant*]'s negligence created an unreasonable risk of bodily harm to [*name of plaintiff*];
3. [*Name of defendant*]'s negligence was a cause of emotional distress to [*name of plaintiff*];
4. [*Name of plaintiff*] suffered physical injury or illness due to the emotional distress.
5. [*Name of plaintiff*]'s damages.

SOURCE: *Quinn v. Turner*, 155 Ariz. 225, 745 P.2d 972 (Ct. App. 1987); RESTATEMENT (SECOND) OF TORTS §§ 436(2) and 426A.

USE NOTE 1: Use when the claim is based on emotional distress caused by an event or impact that endangered but did not physically injure plaintiff.

USE NOTE 2: Zone of Danger: This instruction covers cases where plaintiff's emotional distress was caused by experiencing an event that threatened the plaintiff's personal security. *Quinn v. Turner*, 155 Ariz. 225, 226, 745 P.2d 972, 973 (App. 1987). Element (2), "zone of danger," is required. *Id.* However, this element will often be decided by the court as a matter of law, and in those cases, element (2) should be omitted from the instruction. In rare cases, the issue of whether the plaintiff was in the zone of danger may be a jury question.

The court in *Quinn* recognized that in near-miss situations, a plaintiff who suffers serious emotional distress may be entitled to recover, even if a loved one was not injured in the occurrence. The court in *Quinn*, which involved a child standing near the point of impact of a violent auto collision, held that "a cause of action for negligent infliction of emotional distress also exists in a case where the plaintiff's shock or mental anguish developed solely from a threat to the plaintiff's personal security without witnessing an injury to another person." 155 Ariz. at 226, 745 P.2d at 973.

COMMENT 1: Manifestation of Physical Injury or Illness: In recognizing this tort, the court in *Quinn v. Turner*, 155 Ariz. 225, 745 P.2d 972 (App. 1987), held that "[p]hysical impact to the plaintiff is not necessary, but the emotional distress must manifest itself in some physical way. We believe that this has been the rule in Arizona at least since the decision in *Keck v. Jackson,* 122 Ariz. 114, 593 P.2d 668 (1979)." (See also Comment 2 to Negligence 8.)

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NEGLIGENCE 9

Negligent Infliction of Emotional Distress (Direct)

Continued

"Transitory physical phenomena" such as weeping and insomnia "are not the type of bodily harm which would sustain a cause of action for emotional distress." *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 379, 752 P.2d 28, 32 (App. 1988); *see also Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 10, 901 P.2d 455 (App. 1995) (child who experienced two months of bad dreams and sleep disturbance, which subsided without medical treatment did not have sufficient "physical injury" to support a negligence action—even though such damages may be recoverable in a false imprisonment claim).

Cases in which the emotional distress was considered sufficient to satisfy the "physical injury or illness" requirement include *Quinn v. Turner*, 155 Ariz. 225, 745 P.2d 972 (App. 1987). (plaintiff suffered from grinding of teeth, wetting himself at night, and marked behavioral changes that required treatment by psychologist and dentist); *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 302-03, ¶¶ 7-12, 995 P.2d 735, 738-39 (App. 1999) (symptoms included trouble sleeping, frequent bad dreams, frequent sleeplessness, impatience with his adult children, requiring counseling for anger and anxiety, and diagnosis of PTSD).

COMMENT 2: Damages: RAJI (CIVIL) 6th Personal Injury Damages may need modification to include certain types of emotional distress damages.

NEGLIGENCE 10

Willful or Wanton Conduct*
(Aggravated Negligence)

[*Name of defendant*] claims that [*name of plaintiff*] engaged in willful or wanton conduct. This type of fault involves aggravated negligence.

Willful or wanton conduct is action or inaction with reckless indifference to the results, or to the rights or safety of others. A person is recklessly indifferent if he knows or a reasonable person in his position ought to know that:

(1) The action or inaction creates an unreasonable risk of harm; and

(2) The risk is so great that it is highly probable that harm will result.

If you find that [*name of plaintiff*] willfully or wantonly caused [*name of plaintiff*]'s injury, and that [*name of defendant*] was at fault, then you should not determine relative degrees of fault. However, you may find for [*name of defendant*] or for [*name of plaintiff*], as you deem fit.[1]

***Read Use Note and Comment before using.**

SOURCE: *Armenta v. City of Casa Grande,* 205 Ariz. 367, 372-73, 71 P.3d 359, 364-65 (Ct. App. 2003); *Badia v. City of Casa Grande*, 195 Ariz. 349, 356-57, 988 P.2d 134, 141-42 (Ct. App. 1999); *Luchanski v. Congrove*, 193 Ariz. 176, 180, 971 P.2d 636, 640 (Ct. App. 1998); *Williams v. Thude*, 188 Ariz. 257, 259-60, 934 P.2d 1349, 1351-52 (1997); *Wareing v. Falk*, 182 Ariz. 495, 498, 897 P.2d 1381, 1384 (App. 1995) *Williams v. Thude*, 188 Ariz. 257, 934 P.2d 1349 (1997); A.R.S. § 12-2505(A); *Southern Pacific Transp. Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599 (1975), *cert. denied*, 425 U.S. 913 (1976).

USE NOTE: [1] If plaintiff claims that defendant engaged in willful or wanton conduct, then Fault instructions 5-8 should be used in determining the relative degrees of fault between a plaintiff and a willful or wanton defendant. *Thomas v. First Interstate Bank of Arizona, N.A.*, 187 Ariz. 488, 489-490, 930 P.2d 1002, 1003-1004 (Ct. App. 1996).

Use this instruction if defendant claims that plaintiff engaged in willful or wanton conduct. The supreme court approved this specific language in *Williams v. Thude*, 188 Ariz. 257, 934 P.2d 1349 (1997). The court expressly disapproved the instruction adopted by the court of appeals in *Bauer v. Crotty,* 167 Ariz. 159, 162-63, 805 P.2d 392, 395-96 (App. 1991) and incorporated in the 1991 and 1997 versions of this RAJI instruction. *Bauer* held that the jury must be instructed that, if it finds the plaintiff engaged in willful or wanton contributory negligence, they jury must choose either to award the plaintiff full damages or render a verdict for the defendant. 167 Ariz. at 168, 805 P.2d at 401. The supreme court rejected this "all or nothing" approach in favor of one advising the jurors that they should not compare fault, while leaving them free "to do whatever they choose with respect to the plaintiff's conduct." 188 Ariz. at 260, 934 P.2d at 1352.

Cont'd

NEGLIGENCE 10

Willful or Wanton Conduct

(Continued)

COMMENT: 1. No Right to Comparative Fault: A.R.S. § 12-2505(A) provides that there is no right to comparative negligence in favor of a claimant who has intentionally, willfully, or wantonly caused or contributed to an injury or wrongful death. RAJI (CIVIL) 6th Negligence 10 refers only to willful or wanton conduct; further modification will be necessary if there is also an issue of intentional conduct. RAJI (CIVIL) 6th Intentional Torts Instructions may be used to provide a definition of the intentional conduct. The terms willful and wanton and aggravated negligence should be replaced by the term "intentional." The definition of the intentional conduct can be inserted in place of the definition of "willful and wanton" conduct.

2. What If Plaintiff and Defendant Are Both Willful or Wanton?: In Arizona, a defendant that willfully and wantonly causes injury may reduce its liability by proving the plaintiff or a co-defendant was also at fault. *Wareing v. Falk*, 182 Ariz. 495, 498, 897 P.2d 1381, 1384 (App. 1995)* ("section 12-2506 of the UCATA allows a person defending a claim to seek a reduction in liability based on the claimant's comparative fault even if the defendant acted willfully or wantonly."); *see also Lerma v. Keck*, 186 Ariz. 228, 921 P.2d 28 (App. 1996) (willful and wanton defendants can benefit from the UCATA but willful and wanton plaintiffs cannot); *cf. Thomas v. First Interstate Bank of Arizona, N.A.*, 187 Ariz. 488, 489-490, 930 P.2d 1002, 1003-1004 (App. 1996) ("The legislature defined fault broadly to include all types of fault [i.e. intentional, willful and wanton conduct, and mere negligence] committed by all persons.").