

# **NEGLIGENCE INSTRUCTIONS**

## **Introduction**

The only substantive change to the RAJI (CIVIL) 4th Negligence Instructions is 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]<sup>1</sup>. If you find from the evidence that a person has violated any of these laws, that person is negligent. You should determine whether that negligence was a cause of injury to [name of plaintiff].

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

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

**USE NOTE:** <sup>1</sup> 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 (Ct. App. 1986). However, the principle of negligence per se applies only to “statutes which express rules of conduct in specific and concrete terms as opposed to general or abstract principles.” *Griffith v. Valley of the Sun Recovery & Adjustment Bureau, Inc.*, 126 Ariz. 227, 229, 613 P.2d 1283, 1285 (Ct. 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 INSTRUCTIONS

### NEGLIGENCE 2

#### Driving Under the Influence of Alcohol

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

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**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) 4th Negligence 2 after giving A.R.S. § 28-1381(A) in RAJI (CIVIL) 4th 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).

**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) 4th 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) 28.692(A)(2) (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) 28.692(A)(1) (Driving While Under the Influence of Intoxicating Liquor) refers to impairment of a person's “ability to drive a motor vehicle,” and so does RAJI (CRIMINAL) 28.692(A)(14) (Impairment in the Slightest Degree).

RAJI (CIVIL) 4th 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 (Ct. App. 1989).

## 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.

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**SOURCE:** A.R.S. § 28-1381(G); RAJI (CRIMINAL) 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 (Ct. 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 (Ct. 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 INSTRUCTIONS

### 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.

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**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 (Ct. 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.

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.

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.

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**SOURCE:** RAJI (CIVIL) 3d Negligence 5; *Beliak v. Plants*, 84 Ariz. 211, 326 P.2d 36 (1958).

**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 INSTRUCTIONS

### 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.

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**SOURCE:** *Mybaver 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 *Mybaver*. 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 an instrumentality that was under defendant's exclusive control;
2. In the normal course of events, the accident would not have occurred unless defendant was negligent; and
3. Plaintiff is not in a position to show the particular circumstances which caused the accident.

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**SOURCE:** *Capps v. American Airlines, Inc.*, 81 Ariz. 232, 303 P.2d 717 (1956); *Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 873 P.2d 688 (Ct. App. 1994); *McDonald v. Smitty's Super Valu, Inc.*, 157 Ariz. 316, 757 P.2d 120 (Ct. App. 1988); PROSSER & KEETON, LAW OF TORTS 39 (5th ed. 1984).

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

**2. "Instrumentality":** The common formulations of the *res ipsa* doctrine use the phrase "agency or instrumentality." The instruction shortens the concept to one word, "instrumentality." In some cases, particularly if there are contested issues regarding the "exclusive control" element, 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.

**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 (Ct. App. 1971).

**2. Exclusive Control:** "Exclusive control" (by one or more defendants) is an element of the *res ipsa* doctrine in Arizona. *Jackson v. H. H. Robertson Co., Inc.*, 118 Ariz. 29, 574 P.2d 822 (1978); *McDonald v. Smitty's Super Valu, Inc.*, 157 Ariz. 316, 757 P.2d 120 (Ct. App. 1988).

**CAVEAT:** Literal and rigid application of the exclusive control rule can be misleading and even erroneous. *See McDonald*, 157 Ariz. at 320, *quoting* PROSSER & KEETON, LAW OF TORTS § 39 (5th ed. 1984) ("Control, if it is not to be pernicious and misleading, must be a very flexible term. . . .").

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NEGLIGENCE 7

Res Ipsa

*Continued*

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In *res ipsa* cases in which any aspect of the “exclusive control” element is a contested issue, the trial court may need to expand the instruction, or add instructions, to include definition and explanation of the meaning of “exclusive,” or of “control,” or of both, consistent with *Jackson*, *McDonald*, and authorities cited therein.

**3. Absence of Negligence on the Part of Plaintiff:** RAJI (CIVIL) Negligence 12 (1974) included a fourth element for *res ipsa*: “The accident was not due to any negligence on the part of the plaintiff.” RAJI (CIVIL) 4th does not include this element. Comparative fault law allows a plaintiff who is at fault to have a pro rata recovery from a defendant who is at fault. Arizona has had comparative fault law since the 1984 adoption of UCATA. A.R.S. § 12-2501 *et seq.*

Although there are no Arizona cases directly on the issue, several comparative fault states have addressed it, and they have eliminated from *res ipsa* any requirement that plaintiff prove that plaintiff was not at fault. *See, e.g., Montgomery Elevator Co. v. Gordon*, 619 P.2d 66 (Colo. 1980) (other states include Illinois, Kansas, New Mexico, Vermont, and Wisconsin). *See also* PROSSER & KEETON, LAW OF TORTS § 39 (5th ed. 1984).

## 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 \_\_\_\_\_<sup>1</sup>;
3. [Name of defendant]'s negligence was a cause of bodily harm to \_\_\_\_\_<sup>1</sup>;
4. [Name of plaintiff]'s direct observation of the event resulting in bodily harm to \_\_\_\_\_<sup>1</sup>; caused [name of plaintiff] to suffer emotional distress;
5. [Name of plaintiff]'s emotional distress resulted in physical injury or illness to [name of plaintiff];
6. [Name of Plaintiff] and \_\_\_\_\_<sup>1</sup> had a close personal relationship; and
7. [Name of plaintiff] damages.

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**SOURCE:** *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Ball v. Prentiss*, 162 Ariz. 150, 152, 781 P.2d 628, 630 (Ct. App. 1989).

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

<sup>1</sup> Insert the name of the specific person involved in the event.

The damages instruction, RAJI (CIVIL) 4th Personal Injury Damages 1, may require modification to include certain types of emotional distress damages.

**COMMENT: 1. Zone of Danger:** Element (2) embodies Arizona's requirement that the plaintiff be within the "zone of danger." *Keck v. Jackson*, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979).

**2. Physical Injury:** 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 specifically 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.

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NEGLIGENCE INSTRUCTIONS

NEGLIGENCE 8

**Negligent Infliction of Emotional Distress  
(Witnessing Injury to Another)**

*Continued*

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**3. 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. This was dicta, as *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. However, it appears clear that a pet owner witnessing the injury or death of a beloved family companion is beyond the “outer limit.” See *Roman v. Carroll*, 127 Ariz. 398, 621 P.2d 307 (Ct. App. 1980) (*Keck* cannot apply where the injury is to a dog, which is personal property).

## 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]'s emotional distress resulted in physical injury or illness to [name of plaintiff]; and
5. [Name of plaintiff]'s damages.

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**SOURCE:** RAJI (CIVIL) 3d Negligence 9; *Quinn v. Turner*, 155 Ariz. 225, 745 P.2d 972 (Ct. App. 1987); RESTATEMENT (SECOND) OF TORTS §§ 436(2) and 426A.

**USE NOTE: Damages:** RAJI (CIVIL) 4th Personal Injury Damages may need modification to include certain types of emotional distress damages.

**COMMENT: 1. Zone of Danger:** This instruction covers cases of “shock or mental anguish developed solely from a threat to the plaintiff’s personal security.” *Quinn v. Turner*, 155 Ariz. at 226. The plaintiff must have been in the zone of danger from defendant’s negligence to recover. *Id.* This element, number 2 in the instruction, will often be established or not as a matter of law. In such cases, this element should be omitted. In rare cases, the zone of danger may be a jury question. *See Bowman v. Sears, Roebuck & Co.*, 369 A.2d 754, 757 (Pa. Super, 1976).

**2. Physical Injury:** RESTATEMENT (SECOND) OF TORTS § 436(1) creates liability for “violating a duty of care designed to protect another from a fright or emotional disturbance” where there is no risk of bodily injury. No Arizona case appears to have adopted the position, although several cases have cited to this RESTATEMENT section. This instruction does not cover emotional distress absent a risk of physical injury.

Under Arizona cases (and the majority rule), there is no recovery for emotional distress unless it is sufficiently severe that “physical harm develops as a result of plaintiff’s emotional distress.” *DeStories v. City of Phoenix*, 154 Ariz. 604, 608, 744 P.2d 705, 709 (Ct. App. 1987).

## NEGLIGENCE INSTRUCTIONS

### 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.<sup>1</sup>

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

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**SOURCE:** *Wareing v. Falk*, 182 Ariz. 495, 498, 897 P.2d 1381, 1384 (Ct. 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:** <sup>1</sup> If plaintiff claims that defendant is guilty of willful or wanton conduct that should be treated as comparative negligence and the 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 is guilty of willful or wanton conduct. This specific language was approved by the supreme court 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 previous version of this RAJI instruction. *Bauer* held that the jury must be instructed that, if it finds the plaintiff guilty of willful or wanton contributory negligence, it 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.

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## NEGLIGENCE 10

### Willful or Wanton Conduct

(Continued)

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**COMMENT: 1. No Right to Comparative Fault:** A.R.S. § 12-2501(C) provides that there is no right of contribution in favor of a tortfeasor and 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) 4th 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) 4th 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 (Ct. 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 (Ct. 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 (Ct. 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.”).

The court in *Wareing* at 501, referring to the willful and wanton conduct of the defendant stated:

We find the cited instruction [RAJI (Civil) 3rd] to be an incorrect statement of the law. This portion of the RAJI was correct statement of the law when Arizona followed the common law rule that a willful or wanton defendant may not assert the defense of contributory negligence to bar a plaintiff’s recovery. Because we hold that the legislature abolished this rule by adopting comparative fault, this portion of the RAJI [Civil 3rd] instruction should no longer be used.

\* A Key cite of *Wareing* reveals a yellow flag. The reason for this yellow flag is a Michigan appellate court that allegedly declines to follow *Wareing*. See *Lamp v. Reynolds*, 645 N.W.2d 311, 317-318 (Mich. Ct. App. 2002). However, a careful analysis of the holding in *Lamp* reveals that the Michigan appellate court actually follows *Wareing* while rejecting conflicting precedent from other jurisdictions.