

# MEDICAL NEGLIGENCE INSTRUCTIONS

## Introduction

There was one substantive change to RAJI (CIVIL) 6<sup>th</sup> with the addition of the Medical Negligence 2 (Definition of Medical Negligence for Treatment in Emergency Departments – Plaintiff’s Burden of Proof) and subsequent instructions in this group have been renumbered accordingly.

The Medical Negligence Instructions are applicable to actions brought pursuant to A.R.S. Chapter 5.1, Actions Relating to Health Care (A.R.S. § 12-561 *et seq.*). In addition to the Preliminary and Standard Instructions contained in RAJI (Civil) 6<sup>th</sup>, other recommended instructions contained in RAJI (Civil) 6<sup>th</sup> may be applicable in a Medical Negligence case, such as certain Fault Instructions, Negligence Instructions, Personal Injury Damages Instructions, and should be considered.

Medical Negligence 1 contains the essential definitions, elements and burdens of proof for the basic Medical Negligence case, and provides Use Notes and Comments regarding the statewide standard of care for all health care providers, and the possible applicability of other instructions to a particular Medical Negligence case, depending upon the facts of the case. Comments 1 through 4 have been carried forward from RAJI (CIVIL) 3d and have been retained as they remain accurate and may provide guidance to the practitioner.

Medical Negligence 2 (Definition of Medical Negligence for Treatment in Emergency Departments – Plaintiff’s Burden of Proof) is premised on A.R.S. § 15-572 which provides for a clear and convincing burden of proof for providers rendering care “as a result of a disaster.”

Medical Negligence 3 (Limiting Instruction – Expert Witnesses) is premised upon 16 A.R.S., Civil Rule 26(b)(4)(D), formerly Rule 1(D)(4), Uniform Rules of Practice for Medical Malpractice Cases. The instruction may have utility in other cases.

Former Medical Negligence (Periodic Payments) was withdrawn in RAJI (CIVIL) 3<sup>rd</sup>, as Arizona’s periodic payment statutes, A.R.S. §§ 12-581 to 12-594 (renumbered at §§ 12-2601 to 12-2614, effective 1993), was declared unconstitutional in *Smith v. Myers*, 181 Ariz. 11, 887 P.2d 541 (1994). It has been removed from RAJI (CIVIL) 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup>.

Medical Negligence 4 (Collateral Source) (Collateral Source) is premised upon A.R.S. § 12-565.

## MEDICAL NEGLIGENCE 1

### Definition of Medical Negligence; Causation; Fault; Plaintiff's Burden of Proof

[Name of Plaintiff] claims that [name of defendant], a health care provider,<sup>1</sup> was at fault for medical negligence.

Medical negligence is the failure to comply with the applicable standard of care. To comply with the applicable standard of care, a [health care provider]<sup>1</sup> must exercise that degree of care, skill, and learning that would be expected under similar circumstances of a reasonably prudent [health care provider]<sup>1</sup> within this state.

Fault is medical negligence that was a cause of injury to [name of plaintiff]. Before you can find [name of defendant] at fault, you must find that [name of defendant]'s negligence was a cause of injury to [name of plaintiff]. Negligence causes an injury if it helps produce the injury, and if the injury would not have happened without the negligence.

On the claim of fault for medical negligence, [name of plaintiff] has the burden of proving:

1. [Name of defendant] was negligent;
2. [Name of defendant]'s negligence was a cause of injury to [name of plaintiff]; and
3. [Name of plaintiff]'s damages.

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**SOURCE:** RAJI (CIVIL) 3d Medical Malpractice 1 and 2; RAJI (CIVIL) 3d Negligence 2, 3, and 4; A.R.S. §§ 12-563 and 12-561(2); *McGuire v. DeFrancesco*, 168 Ariz. 88, 811 P.2d 340 (App. 1990); *Kronke v. Danielson*, 108 Ariz. 400, 499 P.2d 156 (1972); *Pollard v. Goldsmith*, 117 Ariz. 363, 572 P.2d 1201 (App. 1977); *Potter v. Wisner*, 170 Ariz. 331, 823 P.2d 1339 (1991); *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 699 P.2d 925 (App. 1985).

**USE NOTE:** <sup>1</sup> Insert the type and specialty, if any, of the defendant health care provider(s). A.R.S. § 12-561(1). With two or more defendants, also insert the specialty of each.

If there is no comparative fault issue, give RAJI (CIVIL) 5th Fault 4 (Statement of Liability Issues) after Medical Negligence 1. If there is any comparative fault issue, give RAJI (CIVIL) 5th Fault 7, Fault 8—and other applicable Fault instructions—after Medical Negligence 1.

**COMMENT: 1. Statewide Standard of Care:** The second paragraph of Medical Negligence 1 should contain the words “within this state” whether the defendant is a general practitioner or a specialist. As fully explained in *McGuire*, A.R.S. § 12-563 adopts a statewide standard of care for all health care providers.

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## MEDICAL NEGLIGENCE INSTRUCTIONS

### MEDICAL NEGLIGENCE 1

#### Definition of Medical Negligence; Causation; Fault; Plaintiff's Burden of Proof

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**2. Absence from RAJI (CIVIL) 5th of RAJI (CIVIL) Medical Malpractice 3 (Duty to Refer to a Specialist), and 4 (Service Outside Field of Practice):** These two instructions, if modified to be consistent with Medical Negligence 1, could read as follows:

3. A [health care provider] has a duty to refer a patient to [a] [another] specialist if the standard of care requires such a referral under the circumstances.

4. A [health care provider] who undertakes diagnosis or treatment outside the [provider's] recognized field of practice is required to comply with the standard of care for physicians practicing in the field of medicine in which the diagnosis or treatment is undertaken.

A majority of the Committee regarded RAJI (CIVIL) Medical Malpractice 3 and 4 as inappropriate for inclusion in a body of recommended instructions because: (a) they are covered by the general propositions stated in Medical Negligence 1; (b) they relate to specific issues and, if this type of instruction is going to be recommended, fairness would seem to call for many other specific instructions being recommended; and (c) the medical negligence practitioners generally prefer to keep the standard of care instructions general, and to leave the specifics for expert testimony and argument.

**3. Absence from RAJI (CIVIL) 5th of RAJI (CIVIL) Medical Malpractice 5 (Specialists):** This instruction provided:

5. A specialist in \_\_\_\_, who undertakes diagnosis or treatment in his specialty is required to use the care, diligence, and skill ordinarily used by competent specialists in that field of medicine.

The instruction is incorrect because it does not provide for a statewide standard of care. *See* Comment 1, *supra*. If modified to correctly state the law, the instruction is covered by RAJI (CIVIL) 5th Medical Negligence 1.

**4. Absence from RAJI (CIVIL) 5th of RAJI (CIVIL) Medical Malpractice 6 (Error in Judgment):** This instruction, which would more properly be called an "Alternate Methods of Care" instruction, if modified to be consistent with RAJI (CIVIL) 5th Medical Negligence 1, would provide:

6. If you find that there is only one approved method of diagnosing or treating a particular condition or ailment, a [health care provider] is required to follow that method. If you find that there are two or more approved methods of diagnosing or treating a particular condition or ailment, a [health care provider] is required to select and follow one of the approved methods.

A majority of the Committee regarded the subject of this instruction as covered by Medical Negligence 1, and as more appropriate for evidence and argument.

## MEDICAL NEGLIGENCE 2

### Definition of Medical Negligence for Treatment in Emergency Departments

#### Plaintiff's Burden of Proof

[*Name of Plaintiff*] claims that [*name of defendant*] [an emergency health care provider] was at fault for medical negligence.

On the claim of fault for medical negligence, [*name of plaintiff*] has the burden of proving:

1. [*Name of defendant*] was negligent;
2. [*Name of defendant*]'s negligence was a cause of injury to [*name of plaintiff*]; and
3. [*Name of plaintiff*]'s damages.

[*Name of plaintiff*] must prove by clear and convincing evidence that [*name of defendant*] was negligent and [*name of defendant*]'s medical negligence was a cause of injury to [*name of plaintiff*].

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**SOURCE:** RAJI (CIVIL) 6th Medical Malpractice 1 and 2; RAJI (CIVIL) 6th Negligence 2, 3, and 4; A.R.S. §§ 12-572(A) (changes the burden of proof for treatment in emergency departments in compliance with the emergency medical treatment and labor act (EMTALA) [42 U.S.C. § 1395dd] to “clear and convincing evidence.”), 12-563 and 12-561(2); *Stafford v. Burns*, M.D., 241 Ariz. 474 (App. 2017) (holding that the defendant physician provided services in compliance with the Emergency Medical Treatment and Active Labor Act (EMTALA), and, thus, parents were required by statute to prove the claim by clear and convincing evidence); *Pollard v. Goldsmith*, 117 Ariz. 363 (App. 1977) (finding that plaintiff's expert was qualified to testify as to the minimum national standard of care wherever medicine is practiced would satisfy the jurisdictional standard of care in Arizona); *Potter v. Wisner*, 170 Ariz. 331, 823 P.2d 1339 (1991) (stating that “[a] plaintiff in a medical malpractice action must present expert testimony to establish (1) the general standard of care exercised by physicians in the defendant's field of practice under similar circumstances, and (2) that the defendant deviated from that standard of care in the present case.”); *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 699 P.2d 925 (App. 1985) (stating that expert testimony is generally required to establish proximate cause, unless a causal relationship is readily apparent to the trier of fact).

**USE NOTES: 1.** Insert the type and specialty, if any, of the defendant health care provider(s). A.R.S. § 12-561(1). With two or more emergency care defendants, also insert the specialty of each. If there is no comparative fault issue, give RAJI (CIVIL) 6th Fault 4 (Statement of Liability Issues) after Medical Negligence 1. If there is a comparative fault issue, give RAJI (CIVIL) 6th Fault 7, Fault 8—and other applicable Fault instructions—after Medical Negligence 1. If there is no comparative fault issue, no Fault instructions should be given.

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## MEDICAL NEGLIGENCE INSTRUCTIONS

### MEDICAL NEGLIGENCE 2

#### Definition of Medical Negligence for Treatment in Emergency Departments

#### Plaintiff's Burden of Proof<sup>2</sup>

*Continued*

Medical negligence is the failure to comply with the applicable standard of care. To comply with the applicable standard of care, an [emergency health care provider] must exercise that degree of care, skill, and learning that would be expected under similar circumstances of a reasonably prudent [emergency health care provider] within this state.

Medical negligence causes an injury if it helps produce the injury, and if the injury would not have happened without the medical negligence.

[*Name of plaintiff*] must prove [his] [her] damages under a different standard of proof. The amount and extent of [*name of plaintiff*]'s damages are decided under the standard "more probably true than not true."

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2. For use in conjunction with Standard 2 and Standard 3.

3. A.R.S. § 15-572 also provides for a clear and convincing burden of proof for providers rendering care "as a result of a disaster." Under those circumstances, the committee recommends modifying this instruction to substitute "medical care as a result of a disaster" for "emergency medical care."

4. In cases involving multiple defendants, some of whom are non-emergency providers, practitioners may elect to use a combination of Medical Negligence 1 and Medical Negligence 2, or have those instructions read separately.

## MEDICAL NEGLIGENCE 3

### Limiting Instruction — Expert Witnesses

Court rules of procedure limit the number of expert witnesses each party can present in a medical negligence case. The rules limit the number of witnesses who can give opinions on the various issues in the case.

Do not speculate on the reasons for these rules. Do not draw any conclusions or inferences from the fact that more expert witnesses did not testify, or from the fact that some expert witnesses who did testify were not asked to give opinions regarding certain issues in the case.

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**SOURCE:** Rule 26(b)(4)(D), A.R.C.P., provides: “Each party shall presumptively be entitled to only one standard-of-care expert. Each side shall presumptively be entitled to only one expert on any other issue.”

**USE NOTE:** If giving this instruction with other Preliminary Instructions at the beginning of the case, change the verb tenses in the second paragraph (“did” to “do,” etc.).

## MEDICAL NEGLIGENCE INSTRUCTIONS

### MEDICAL NEGLIGENCE 4

#### Collateral Source

You have heard evidence concerning medical and disability benefits that [*name of plaintiff*] has received. It is within your discretion whether and to what extent you consider this evidence in evaluating [*name of plaintiff*]'s claim for damages.

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**SOURCE:** A.R.S. § 12-565.

## REVISED ARIZONA JURY INSTRUCTIONS (CIVIL), 7TH

### Cases

<i>Gregg v. National Medical Health Care Services, Inc.</i> , 699 P.2d 925 (Ct. App. 1985) .....	2
<i>Kronke v. Danielson</i> , 108 Ariz. 400, 499 P.2d 156 (1972).....	2
<i>McGuire v. DeFrancesco</i> , 168 Ariz. 88, 811 P.2d 340 (Ct. App. 1990) .....	2
<i>Pollard v. Goldsmith</i> , 117 Ariz. 363, 572 P.2d 1201 (Ct. App. 1977) .....	2
<i>Potter v. Wisner</i> , 170 Ariz. 331, 823 P.2d 1339 (1991) .....	2
<i>Smith v. Myers</i> , 181 Ariz. 11, 887 P.2d 541 (1994) .....	1

### Statutes

A.R.S. § 12-561 <i>et seq.</i> .....	1
A.R.S. § 12-561(1) .....	2
A.R.S. § 12-561(2) .....	2
A.R.S. § 12-563 .....	2
A.R.S. § 12-565 .....	1, 5

### Rules

Rule 26(b)(4)(D), A.R.C.P. ....	4
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