

INTENTIONAL TORTS INSTRUCTIONS

Introduction

The Intentional Torts Instructions made their initial appearance in RAJI (CIVIL) 4TH. The common thread that ties together the instructions contained in this section is that liability is predicated upon intentional, rather than negligent conduct. Except in those cases in which only nominal damages are sought, the damages available for intentional torts are the same as those that can be for negligent conduct. *See* Personal Injury Damages 1 (Measure of Damages) and 4 (Punitive Damages). In the rare case in which only nominal damages are sought, an appropriate damage instruction should be drafted.

Included in the Intentional Torts section are instructions relating to claims for assault, battery, false imprisonment, intentional infliction of emotional distress, abuse of process, malicious prosecution, and aiding and abetting tortious conduct. Also included in this section are several instructions outlining the elements of affirmative defenses that may be applicable to an intentional tort claim. In particular, Intentional Torts 3, 4, 5, 6, 7, 8, 9, 10, and 12 set forth justifications for conduct that would otherwise constitute an assault or battery and are based upon statutes that provide comparable protection from criminal liability. *See* A.R.S. § 13-413.

Intentional Torts 13 and 14 set forth the elements applicable to a claim for false imprisonment and instigating or participating in false imprisonment. In contrast to a negligence claim, a false imprisonment claim does not require proof of physical injury. The plaintiff is entitled to compensation for loss of time, physical discomfort, or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, the plaintiff is entitled to damages for mental suffering, humiliation, and the like.

Abuse of process and malicious prosecution, distinctly different but often-confused torts, are addressed in Intentional Torts 18 and 19. Intentional Torts 18.1 through 18.3 describe the elements of a claim for abuse of process and defenses to such a claim if the actor's conduct is reasonably justified or that the use of process was not the actor's primary motivation. Although both torts arise out of the use of legal process, the former requires proof that the legal process was used to accomplish an ulterior purpose for which the process or procedure was not designed, while the latter requires proof that an action was unmeritorious, was initiated without probable cause, and was motivated by malice. Intentional Torts 20, 21, and 22 set forth alternative ways by which a defendant in a malicious prosecution action can establish that he had probable cause for initiating the legal proceeding on which the plaintiff's claim is based.

Finally, Intentional Torts 23 sets forth the elements of a claim for aiding and abetting the tortious conduct of another. Such claims can be asserted even in instances where the primary tortfeasor is not a named defendant. An aiding and abetting claim will have application in those instances where the defendant has not taken actions that are injurious to the plaintiff but has nevertheless provided substantial aid or assistance to another party known to be engaging in such harmful conduct.

REVISED ARIZONA JURY INSTRUCTIONS (CIVIL), 6TH

New Intentional Torts 24 – Members of the Committee had encountered the issue of spousal immunity in a variety of cases and determined that a standard instruction would be beneficial to the Bench and the members of the State Bar.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 1

Assault

[*Name of plaintiff*] claims that [*name of defendant*] assaulted him. On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] intended:
 - a. To cause harm or offensive contact with [*name of plaintiff*] [or a third person]¹ or
 - b. To cause [*name of plaintiff*] [or a third person] apprehension² of an immediate harmful or offensive contact; and
2. [*Name of defendant*] caused [*name of plaintiff*] apprehension of an immediate harmful or offensive contact.

[3. [*Name of plaintiff*]'s damages]³

A contact is offensive if it would offend a reasonable person.

SOURCE: RESTATEMENT (SECOND) OF TORTS §§ 21-34; *Garvia v. United States*, 826 F.2d 806 (9th Cir. 1987); A.R.S. § 13-1203(A)(2); RAJI (CRIMINAL) 12.02 (Threatening or Intimidating) and 12.03 (Assault).

¹This is commonly known as the doctrine of “transferred intent.” See RESTATEMENT (SECOND) OF TORTS §§ 23, 32; *Cf.* A.R.S. § 13-203(B)(1).

²Apprehension is not the same as fright. For a discussion of the term “apprehension,” see RESTATEMENT (SECOND) OF TORTS § 24, cmt. b. While the crime of assault requires “reasonable apprehension,” the tort of assault has no such requirement. Compare A.R.S. § 13-1203(A)(2) and RESTATEMENT (SECOND) OF TORTS § 27.

³Use this bracketed language if appropriate to the facts. A plaintiff is not required to prove damages, since the tort penalizes intentional conduct and damages are presumed. PROSSER, LAW OF TORTS § 7 (4th Ed. 1971). If plaintiff has actual damages, use RAJI (CIVIL) 6TH Personal Injury 1 (Measure of Damages) where actual damages are present. It may be appropriate to instruct the jury on punitive damages. See RAJI (CIVIL) 6TH, Personal Injury Damages 4 (Punitive Damages). An award of nominal damages, as opposed to actual damages, will not support an award of punitive damages. *Koepnick v. Sears Roebuck & Co.*, 158 Ariz. 322, 332, 762 P.2d 609, 619 (App. 1988).

INTENTIONAL TORTS 2

Battery

[*Name of plaintiff*] claims that [*name of defendant*] committed a battery against [her/him]. On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] intended:
 - a. To cause a harm or offensive contact with [*name of plaintiff*] [or a third person]¹ or
 - b. To cause [*name of plaintiff*] [or a third person] apprehension² of an immediate harmful or offensive contact; and
2. [*Name of defendant*] caused a harmful or offensive contact with *name of plaintiff*.
- [3. [*Name of plaintiff*]'s damages.]³

A contact is offensive if it would offend a reasonable person.

[You may find [*name of defendant*] liable to [*name of plaintiff*] for battery, even though [*name of defendant*] did not intend to bring about the harmful or offensive contact that actually resulted.]⁴

SOURCE: RESTATEMENT (SECOND) OF TORTS §§ 13-20; A.R.S. § 13-1203(A)(1) and (3); RAJI (CRIMINAL) 12.03 (Assault). *See Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987).

¹ This is commonly known as the doctrine of “transferred intent.” *See* RESTATEMENT (SECOND) OF TORTS §§ 23, 32; *Cf.* A.R.S. § 13-203(B)(1).

² Apprehension is not the same as fright. For a discussion of the term “apprehension,” *see* RESTATEMENT (SECOND) OF TORTS § 24, cmt. b. While the crime of assault requires “reasonable apprehension,” the tort of assault has no such requirement. Compare A.R.S. § 13-1203(A)(2) and RESTATEMENT (SECOND) OF TORTS § 27.

³ Use this bracketed language if appropriate to the facts. A plaintiff is not required to prove damages, since the tort penalizes intentional conduct and damages are presumed. PROSSER, LAW OF TORTS § 7 (4th Ed. 1971). If plaintiff has actual damages, use RAJI (CIVIL) 4th Personal Injury 1 (Measure of Damages) where actual damages are present. It may be appropriate to instruct the jury on punitive damages. *See* RAJI (CIVIL) 4th Personal Injury Damages 4 (Punitive Damages). An award of nominal damages, as opposed to actual damages, will not support an award of punitive damages. *Koepnick v. Sears Roebuck & Co.*, 158 Ariz. 322, 332, 762 P.2d 609, 619 (App. 1988).

⁴ Use this bracketed language if appropriate to the facts.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 3

Justifiable Use of Force

A [parent] [guardian] [teacher] [correctional official] [person] responsible for the care and supervision of [a minor] [an incompetent person] [others] is justified in using physical force¹ [but not deadly physical force]² when used appropriately:

1. [To maintain [order or] discipline]; or
2. [To prevent suicide or self-injury].

[A person responsible for order where others are assembled may use deadly force where reasonably necessary to prevent death or serious physical injury].

[A physician or nurse may use physical force to render medical treatment in an emergency where consent cannot be obtained but would ordinarily be given by the victim or relative.]

SOURCE: RAJI (CRIMINAL) 4.031 (Justifiable Use of Force); A.R.S. § 13-403.

USE NOTE: Use this bracketed language if appropriate to the facts.

¹“Physical force” is defined in A.R.S. § 13-105(28).

²“Deadly physical force” is defined in A.R.S. § 13-105(12).

INTENTIONAL TORTS 4

Duress

A person compelled to commit [assault] [battery] by the threat or use of immediate physical force¹ against that person or another person is justified in committing [assault] [battery] if:

1. The threat or use of physical force could have resulted in serious physical injury; and
2. A reasonable person in the situation could not have resisted; and
3. [*Name of defendant*] did not intentionally, knowingly, or recklessly place [himself] [herself] in the duress situation; and
4. The [assault] [battery] which the [*name of defendant*] was compelled to commit did not involve homicide or serious physical injury.

SOURCE: RAJI (CRIMINAL) 4.12 (Duress); A.R.S. § 13-412.

USE NOTE: Use this bracketed language if appropriate to the facts.

¹“Physical force” is defined in A.R.S. § 13-105(28).

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 5

Justification for Self-Defense

[*Name of defendant*] claims that he acted in self-defense. A person is justified in using or threatening physical force¹ in self-defense if:

1. A reasonable person in [*name of defendant*]'s situation would have believed that the use or threat of physical force was immediately necessary to protect himself against another's use or attempted use of unlawful physical force; and
2. [*Name of defendant*] used or threatened no more physical force than would have appeared necessary to a reasonable person in [*name of defendant*]'s situation.

It is not enough that [*name of defendant*] believed physical force was necessary. *Name of defendant*'s belief must be measured against what a reasonable person would have believed in similar circumstances.

[However, a person may use or threaten deadly physical force² in self-defense only to protect himself against another's use or attempted use of unlawful deadly physical force.]³

Self-defense justifies the use or threat of physical force only while the apparent danger continues. The right to use or threaten physical force in self-defense ends when the apparent danger ends.

SOURCE: RAJI (CRIMINAL) 4.04 (Justification for Self-Defense); A.R.S. §§ 13-404(A) and 13-405, and *State v. Tuzon*, 118Ariz. 205, 575 P.2d 1231 (1978).

USE NOTE: A person cannot use physical force against another in response to verbal provocation alone or to resist a lawful arrest by a peace officer, or if the person provoked the other's use of unlawful physical force. See A.R.S. § 13-404(B); see also RAJI (CIVIL) 4th Intentional Tort 11 (No Justification for Provoking Another).

¹ "Physical force" is defined in A.R.S. § 13-105(28).

² "Deadly physical force" is defined in A.R.S. § 13-105(12).

³ Use this bracketed language if appropriate to the facts in a self-defense case where deadly physical force has been used.

INTENTIONAL TORTS 6
Justification for Defense of Another

[*Name of defendant*] claims that he was defending [*name of third person*]. A person is justified in using or threatening physical force¹ in defense of another person if:

1. A reasonable person in [*name of defendant*]'s situation would have believed that physical force was immediately necessary to protect another person against another's use or attempted use of unlawful physical force; and
2. [*Name of defendant*] used or threatened no more physical force than would have appeared necessary to a reasonable person in [*name of defendant*]'s situation.

It is not enough that *name of defendant* believed physical force was necessary. [*Name of defendant*]'s belief must be measured against what a reasonable person would have believed in similar circumstances.

[However, a person may use or threaten deadly physical force² in defense of another person only to protect that person against another's use or threatened use of unlawful deadly physical force.]³

The use or threat of physical force in defense of another person is justified only while the apparent danger continues. The right to use or threaten physical force in defense of another person ends when the apparent danger ends.

SOURCE: RAJI (CRIMINAL) 4.06 (Justification for Defense of a Third Person); A.R.S. § 13-406 and *State v. Tuzon*, 118 Ariz. 205, 575 P.2d 1231 (1978).

USE NOTE: A person cannot use physical force against another in response to verbal provocation alone or to resist a lawful arrest by a peace officer, or if the person provoked the other's use of unlawful physical force. See A.R.S. § 13-404(B); see also RAJI (CIVIL) 4th Intentional Tort 11 (No Justification for Provoking Another).

¹ "Physical force" is defined in A.R.S. § 13-105(28).

² "Deadly physical force" is defined in A.R.S. § 13-105(12).

³ Use this bracketed language if appropriate to the facts in a case where deadly physical force has been used.

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INTENTIONAL TORTS 7

Justification for Defense of Property

[*Name of defendant*] claims that he was defending his property. A person is justified in using or threatening physical force¹ to defend tangible, movable property if:

1. A reasonable person in [*name of defendant*]'s situation would have believed that physical force was immediately necessary to prevent another person from [committing] [attempting to commit] [theft of] [criminal damage to] the property; and
2. [*Name of defendant*] used or threatened no more physical force than would have appeared necessary to a reasonable person in the [*name of defendant*]'s situation.

The test is not whether [*name of defendant*] believed physical force was necessary. [*Name of defendant*]'s belief must be measured against what a reasonable person would have believed in similar circumstances.

[However, a person may not use deadly physical force² to prevent another from [committing] [attempting to commit] [theft of] [criminal damage] to property.]³

Defense of property justifies the use of physical force only while the apparent danger continues. The right to use physical force in defense of property ends when the apparent danger ends.

USE NOTE: A person cannot use physical force against another in response to verbal provocation alone or to resist a lawful arrest by a peace officer, or if the person provoked the other's use of unlawful physical force. *See* A.R.S. § 13-404(B); *see also* RAJI (CIVIL) 4th Intentional Torts 11 (No Justification for Provoking Another).

¹“Physical force” is defined in A.R.S. § 13-105(28).

²“Deadly physical force” is defined in A.R.S. § 13-105(12).

³ Use this bracketed language if appropriate to the facts in a case where deadly physical force has been used.

INTENTIONAL TORTS 8

Justification for Use of Deadly Force in Law Enforcement

In arresting or detaining a suspect or escapee, or in preventing escape after arrest or detention, a person is justified in using or threatening to use deadly physical force¹ only if the suspect or escapee is:

1. Resisting a legal duty with deadly physical force or with the apparent capacity to use deadly physical force; [or]
2. A felon who has escaped from confinement; [or]
3. A felon who is fleeing from justice or resisting arrest with physical force; [or]
4. Using or able to use physical force or deadly physical force against a peace officer who believes such force is necessary for self-protection.

SOURCE: RAJI (CRIMINAL) 4.10 (Justification for Use of Deadly Force in Law Enforcement); A.R.S. § 13-410.

USE NOTE: Defendant was not justified in using deadly physical force to stop fleeing felons who had engaged in extensive property damage to a bar, but who posed no threat of serious physical injury to the bar patrons. *State v. Olsen*, 157 Ariz. 603, 760 P.2d 603 (App. 1988).

¹“Deadly physical force” is defined in A.R.S. § 13-105(12).

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INTENTIONAL TORTS 9

Justification for Non-Deadly Physical Force in Law Enforcement

In arresting or detaining a suspect or escapee, or in preventing escape after arrest or detention, a person is justified in using physical force¹ if:

1. A reasonable person would believe that such force is immediately necessary to arrest or detain the suspect or escapee, or to prevent escape; and
2. The person makes known the purpose of the arrest or detention, if it is reasonable to do so; and
3. A reasonable person would believe the arrest or detention to be lawful.

SOURCE: RAJI (CRIMINAL) 4.09 (Justification for Physical force in Law Enforcement); A.R.S. § 13-409.

¹ “Physical force” is defined in A.R.S. § 13-105(28).

INTENTIONAL TORTS 10

Justification for Using Force in Crime Prevention

A person is justified in threatening or using both physical force¹ and deadly physical force² against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the commission of the crime(s) of arson of an occupied structure, burglary in the first or second degree, kidnapping, manslaughter, first or second degree murder, sexual conduct with a minor, sexual assault, child molestation, armed robbery, or aggravated assault.

There is no duty to retreat before threatening or using such force.

A person is presumed to be acting reasonably for the purposes of this section if he is acting to prevent the commission of any of the offenses listed above.

SOURCE: RAJI (CRIMINAL) 4.11 (Use of Force in Crime Prevention); A.R.S. § 13-411.

¹“Physical force” is defined in A.R.S. § 13-105(28).

²“Deadly physical force” is defined in A.R.S. § 13-105(12).

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 11

No Justification for Provoking Another

[*Name of defendant*]'s threat or use of physical force¹ against [*name of plaintiff*] is not justified if [*name of defendant*] provoked [*name of plaintiff*]'s use or attempted use of unlawful physical force.

However, [*name of defendant*] is justified in using or threatening to use force in self-defense, even though he provoked [*name of plaintiff*], if [*name of defendant*] proves:

1. [*Name of defendant*] [withdrew from the encounter] [or] [reasonably believed that it was unsafe to withdraw from the encounter and clearly communicated to [*name of plaintiff*] that he wanted to withdraw]; and
2. [*Name of plaintiff*] nevertheless continued or attempted to use unlawful physical force against [*name of defendant*].

SOURCE: RAJI (CRIMINAL) 4.043 (No Justification for Provoking Another); A.R.S. § 13-404(B)(3); RAJI (CRIMINAL) 4.08 (Justification for Defense of Property); A.R.S. § 13-408.

USE NOTE: Use bracketed language if appropriate to the facts.

¹Physical force” is defined in A.R.S. § 13-105(28).

INTENTIONAL TORTS 12

Justification for Defense of Premises

[*Name of defendant*] claims that he was defending [his residence or other premises] from criminal trespass. A person is justified in using or threatening physical force¹ or threatening deadly physical force,² to defend [his residence or other premises] from criminal trespass if:

1. A reasonable person in [*name of defendant*]'s situation would have believed that physical force was immediately necessary to prevent or terminate another person from [committing] [attempting to commit] a criminal trespass at [his residence or other premises]; and
2. The [*name of defendant*] used or threatened no more physical force than would have appeared necessary to a reasonable person in [*name of defendant*]'s situation.

The test is not whether [*name of defendant*] believed physical force was necessary. [*Name of defendant*]'s belief must be measured against what a reasonable person would have believed in similar circumstances.

[While a person may threaten to use deadly physical force to prevent another person from committing a criminal trespass, he may not actually use deadly physical force against another person to prevent him from committing a criminal trespass.]³

Defense of a person's [residence or other premises] justifies the use or threat of physical force only while the apparent danger continues. The right to use physical force to prevent or terminate criminal trespass ends when the apparent danger ends.

A person commits "criminal trespass" when he intentionally [knowingly] enters or remains at another's [residence or other premises] without authorization.

SOURCE: A.R.S. §13-407. The use of physical force in defense of premises is justified "to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission of a criminal trespass by the other person in or upon the premises." *State v. Hussain*, 189 Ariz. 336, 942 P.2d 1168 (App. 1997).

USE NOTE: A person cannot use physical force against another in response to verbal provocation alone or to resist a lawful arrest by a peace officer, or if the person provoked the other's use of unlawful physical force. See A.R.S. § 13-404(B); see also RAJI (CIVIL) 4th Intentional Torts 11 – No Justification for Provoking Another.

¹ "Physical force" is defined in A.R.S. § 13-105(28).

² "Deadly physical force" is defined in A.R.S. § 13-105(12).

³ Use this bracketed language if appropriate to the facts in a case where deadly physical force has been used.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 13

False Imprisonment

[*Name of plaintiff*] claims that [*name of defendant*] is liable for false imprisonment.

On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] acted intentionally to restrain [*name of plaintiff*] [or another person] to an area within the [*name of defendant*]'s control;
2. [*Name of defendant*] acted without lawful authority and without [*name of plaintiff*]'s consent;
3. [*Name of defendant*]'s act resulted in the direct restraint of [*name of plaintiff*]'s liberty or freedom of movement, either by actual force or from [*name of plaintiff*]'s fear of force; [and]
4. [[*Name of defendant*]'s act would have caused a reasonably prudent person in the same situation as the *name of plaintiff* to believe that he was restrained; and]¹
5. [*Name of plaintiff*] was aware of [or was harmed by] the restraint.²

SOURCE: *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 947 P.2d 846 (App. 1997); *Deadman v. Valley Nat'l Bank*, 154 Ariz. 452, 743 P.2d 961 (App. 1987); *Wisniski v. Ong*, 84 Ariz. 372, 329 P.2d 1097 (1958); *Swetnam v. F.W. Woolworth Co.*, 83 Ariz. 189, 318 P.2d 364 (1957); RESTATEMENT (SECOND) OF TORTS §§ 35, 45A.

¹ Use the bracketed language as a separate element where restraint is in dispute.

² Use the bracketed language if plaintiff was unaware of the restraint at the time of the false imprisonment, but nevertheless was harmed. RESTATEMENT (SECOND) OF TORTS § 42.

COMMENT: Where restraint is pursuant to legal authority, the essential element of false imprisonment is lacking. *Slade v. City of Phoenix*, 112 Ariz. 298, 299, 541 P.2d 550, 551 (1975).

In contrast to a negligence claim, a false imprisonment claim does not require proof of physical injury to go forward. *Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 107, 901 P.2d 455 (App. 1995). The plaintiff is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, the plaintiff is entitled to damages for mental suffering, humiliation, and the like. *Id.* at 110.

The defendant need not use actual force to restrain the plaintiff. *Swetnam v. F.W. Woolworth Co.*, 83 Ariz. 189, 192, 318 P.2d 364, 366 (1957). The plaintiff need only fear that defendant will use force to restrain the plaintiff; words alone may satisfy this fear of restraint. *Id.*

INTENTIONAL TORTS 14

Instigating or Participating in False Imprisonment¹

[*Name of plaintiff*] claims that [*name of defendant*] is liable for instigating or participating in a false imprisonment.

If you find the [*name of plaintiff*] was falsely imprisoned,² you must then determine if [*name of defendant*] is liable to [*name of plaintiff*] for the false imprisonment. A defendant who intentionally instigates or participates in the unlawful restraint is liable to [*name of plaintiff*].

“Instigation” requires words or acts that direct, request, invite or encourage the act of false imprisonment. [*Name of defendant*] need not expressly direct the restraint of [*name of plaintiff*], and [*name of defendant*] need not be present when the restraint actually occurs. However, some words or acts by [*name of defendant*] that instigate the restraint of [*name of plaintiff*] must be present.

“Participation” means taking part in the act of false imprisonment by aiding another person in restraining [*name of plaintiff*].

SOURCE: *Deadman v. Valley Nat'l Bank*, 154 Ariz. 452, 461, 743 P.2d 961, 970 (App. 1987); RESTATEMENT (SECOND) OF TORTS § 45A.

USE NOTE: ¹ There may be circumstances where instigating or participating in a false imprisonment may not be actionable or may be privileged. *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 139; A.R.S. § 13-1805(C); *Gortarez By and Through Gortarez v. Smitty's Super Valu, Inc.*, 140 Ariz. 97, 680 P.2d 807 (1984); *Deadman v. Valley Nat'l Bank*, 154 Ariz. 452, 461, 743 P.2d 961, 970 (App. 1987). Under such circumstances the Court may wish to give an additional instruction regarding the applicable privilege or circumstances precluding the imposition of liability.

² Use with RAJI (CIVIL) 4th, Intentional Torts 8 (Justification for Use of Deadly Force in Law Enforcement).

COMMENT: A defendant who does not expressly request or cause the restraint of another does not “instigate” or “participate” in the restraint, so long as his actions were reasonable in light of the facts then known or readily available to him.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 15

Defense to Instigating or Participating in False Imprisonment (Reasonable Actions)

A defendant who does not expressly request or cause the restraint of another does not “instigate” or “participate” in the restraint, so long as his actions were reasonable in light of the facts then known or readily available to him.

SOURCE: *Deadman v. Valley Nat'l Bank*, 154 Ariz. 452, 461, 743 P.2d 961, 970 (App. 1987).

COMMENT: There may be circumstances where instigating or participating in a false imprisonment may not be actionable or may be privileged. *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 139; A.R.S. § 13-1805(C); *Gortarez By and Through Gortarez v. Smitty's Super Valu, Inc.*, 140 Ariz. 97, 680 P.2d 807 (1984); *Deadman v. Valley Nat'l Bank*, 154 Ariz. 452, 461, 743 P.2d 961, 970 (App. 1987).

INTENTIONAL TORTS 16

Intentional Infliction of Emotional Distress (Elements of Claim)

[*Name of plaintiff*] claims that [*name of defendant*] intentionally or recklessly caused [him/her] emotional distress. On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*]'s conduct was extreme and outrageous;
2. [*Name of defendant*]'s conduct was either intentional or reckless; and
3. [*Name of defendant*]'s conduct caused [*name of plaintiff*] to suffer severe emotional distress.

Conduct is “extreme and outrageous” if an average member of the community would regard the conduct as atrocious, intolerable in a civilized community, and beyond all possible bounds of decency.

Conduct is “intentional” if the person seeks to cause emotional distress.

Conduct is “reckless” if the person is aware of and disregards the near certainty that the conduct would result in emotional distress.

Continued

SOURCE: *Ford v. Revlon*, 153 Ariz. 38, 734 P.2d 580 (1987); *Wallace v. Casa Grande Union High Sch. Dist. 82 Bd. Of Governors*, 184 Ariz. 419, 909 P.2d 486 (App. 1995); *Mintz v. Bell Atlantic Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 905 P.2d 559 (App. 1995); *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 888 P.2d 1375 (App. 1994); *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 149 Ariz. 76, 716 P.2d 1013 (1986); RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

USE NOTE: In appropriate cases, the court can instruct that action or inaction can be the conduct that is extreme and outrageous. *Ford v. Revlon*, 153 Ariz. 38, 43-44, 734 P.2d 580, 585-86 (1987).

USE NOTE: The trial court must first determine whether the alleged acts are sufficiently extreme and outrageous to state a claim for relief. *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. Of Governors*, 184 Ariz. 419, 428, 909 P.2d 486, 495 (App. 1995); *Mintz v. Bell Atlantic Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995). A plaintiff must show that the defendant's acts were “so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Mintz*, 183 Ariz. 550, 905 P.2d 559 (citing to RESTATEMENT (SECOND) OF TORTS, cmt. d) (1965). Only when reasonable minds could differ in determining whether conduct is sufficiently extreme or outrageous does the issue go to the jury. *Mintz*, 183 Ariz. 550, 905 P.2d 559; *Lucchesi*, 149 Ariz. at 79, 716 P.2d at 1016.

Relevant factors for the court in determining outrageous conduct may include: (1) defendant's knowledge that plaintiff is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity, *Mintz*, 183 Ariz. at 554, 905 P.2d at 563 (citing to

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INTENTIONAL TORTS 16

Intentional Infliction of Emotional Distress
(Elements of Claim)

Continued

RESTATEMENT (SECOND) OF TORTS § 46, cmt. f (1965)); (2) whether defendant's conduct was privileged or defendant has done no more than to insist upon his legal rights in a permissible way, *Mintz*, 183 Ariz. at 554, 905 P.2d at 563 (citing to RESTATEMENT (SECOND) OF TORTS § 46, cmt. (1965)); or (3) whether defendant abused a position or relationship with the plaintiff which gives the defendant actual or apparent authority over the plaintiff or power to affect his or her interests, RESTATEMENT (SECOND) OF TORTS § 46, cmt. e (1965). The court may instruct on these factors as appropriate.

COMMENT: This instruction is identical to Revised Arizona Jury Instructions 5th Ed., Employment Law 10 (Intentional Infliction of Emotional Distress (Elements of Claim)).

INTENTIONAL TORTS 17

**Intentional Infliction of Emotional Distress
(Extreme and Outrageous Conduct)**

This instruction is now part of **INTENTIONAL TORTS 16**.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 18.1

Abuse of Process – Elements of Liability

[Name of plaintiff] claims that [name of defendant] is liable for an abuse of process. For [name of plaintiff] to recover on this claim, [name of plaintiff] must prove all of the following:

1. [Name of defendant] willfully used against [name of plaintiff] [insert an appropriate description of the specific judicially sanctioned processes which plaintiff claims defendant abused, e.g., “a subpoena to be served upon the plaintiff directing him to...”]; and
2. [Name of defendant] used that process in a wrongful manner that was not proper in the regular course of the proceedings; and
3. [Name of defendant] used that process primarily for an improper purpose or ulterior motive; and
4. [Name of defendant]’s wrongful use of that process caused injury, damage, loss, or harm to [name of plaintiff].

SOURCE: *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257-59, ¶¶ 11-19, 92 P.3d 882, 887-889 (App. 2004); *Morn v. City of Phoenix*, 152 Ariz. 164, 166-68, 730 P.2d 873, 875-77 (App. 1986); *Nienstedt v. Wetzel*, 133 Ariz. 348, 353-54, 651 P.2d 876, 881-82 (App. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 682 (1977)); *Rondelli v. County of Pima*, 120 Ariz. 483, 489, 586 P.2d 1295, 1301 (App. 1978).

USE NOTES: Because abuse of process consists of the misuse of specific legal procedures rather than the maintenance or defense of the lawsuit as a whole, *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257-59, ¶¶ 11-19, 92 P.3d 882, 887-889 (App. 2004), the court must identify for the jury which specific legal procedures may, as a matter of law, give rise to the claim.

The allegations or factual circumstances in a particular case may make it appropriate for the court to clarify for the jury what other actions by the defendant did not constitute process and cannot give rise to liability. Such actions may include the failure to settle or make an appropriate offer to settle the claim, prelitigation conduct, or extrajudicial conduct. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257-59, ¶¶ 11-19, 92 P.3d 882, 887-889 (App. 2004).

INTENTIONAL TORTS 18.2

Abuse of Process – Reasonably Justifiable Conduct

Use of process is wrongful only if it is not reasonably justifiable in light of legitimate litigation goals and can be logically explained only by an improper purpose or ulterior motive, even if it was actually undertaken with bad intentions, such as spite, ill will, or an intent to harass.

SOURCE: *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 258-59, ¶¶ 15, 19, 92 P.3d 882, 888-89, (App. 2004); *Morn v. City of Phoenix*, 152 Ariz. 164, 166-68, 730 P.2d 873, 875-77 (App. 1986); *Nienstedt v. Wetzel*, 133 Ariz. 348, 353-54, 651 P.2d 876, 881-82 (App. 1982); *Rondelli v. County of Pima*, 120 Ariz. 483, 489, 586 P.2d 1295, 1301 (App. 1978); *Joseph v. Markovitz*, 27 Ariz. App. 122, 126, 551 P.2d 571, 575 (1976).

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 18.3

Abuse of Process – Primary Motivation

The plaintiff must prove that the defendant used the process primarily for an improper purpose or ulterior motive, instead of the purpose for which the process was intended or authorized. A primary improper purpose or ulterior motive requires more than an incidental motive of ill will to the plaintiff or benefit to the defendant, or an awareness that the action, though otherwise proper, will cause the opposing party to incur additional legal expenses or other injury.

SOURCE: *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 259, ¶¶ 18-19, 92 P.3d 882, 889 (App. 2004); *Nienstedt v. Wetzell*, 133 Ariz. 348, 354, 651 P.2d 876, 882 (App. 1982).

USE NOTES: The nature of the process that the plaintiff alleges was abused may make it appropriate for the court to instruct the jury as to the lawful purposes of that process or, where the defendant was an attorney engaged in representing a client, the ethical obligations of the attorney with respect to that client.

INTENTIONAL TORTS 19

Malicious Prosecution

[*Name of plaintiff*] claims that [*name of defendant*] is liable for malicious prosecution. In this claim [*name of plaintiff*] must prove:

1. [*Name of defendant*] initiated or took active part in the prosecution of a [criminal action] [civil proceeding] against [*name of plaintiff*];
2. The action or proceeding terminated in [*name of plaintiff*]'s favor;
3. [*Name of defendant*] acted without probable cause;
4. [*Name of defendant*] acted with malice; and
5. [*Name of defendant*]'s malicious conduct was a cause of injury, damage, loss or harm to [*name of plaintiff*].

SOURCE: *Overson v. Lynch*, 83 Ariz. 158, 317 P.2d 948 (1957); *McClinton v. Rice*, 76 Ariz. 358, 765 P.2d 425 (1953); *Cullison v. City of Peoria*, 120 Ariz. 165, 584 P.2d 1156 (1978); *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975); RESTATEMENT (SECOND) OF TORTS § 653, 674.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 20

Probable Cause for Criminal/Civil Prosecution

To constitute probable cause for the [prosecution of a criminal action] [initiation or maintenance of a civil proceeding] against the [*name of plaintiff*] in this case, the evidence must establish that:

If you find from all the evidence that the foregoing facts are true, you must find that there was probable cause for the [prosecution of the criminal action] [initiation or maintenance of the civil proceeding] against [*name of plaintiff*].

If you find that such facts are not true, you must find that there was not probable cause for the [prosecution of the criminal action] [initiation or maintenance of the civil proceeding] against [*name of plaintiff*].

[[*Name of defendant*] acted without probable cause in [initiating or procuring the arrest or prosecution of the [*name of plaintiff*] in the criminal action] [commencing or maintaining the civil proceeding].]

SOURCE: *Slade v. City of Phoenix*, 112 Ariz. 298, 541 P.2d 550 (1975); *Cullison v. City of Peoria*, 120 Ariz. 165, 584 P.2d 1156 (1978); *Hansen v. Garcia, Fletcher, Lund & McVean*, 148 Ariz. 205, 713 P.2d 1263 (1985).

INTENTIONAL TORTS 21

Existence of Probable Cause

One who initiates or continues proceedings against another has probable cause for doing so if he correctly or reasonably believes:

1. That the person whom he accuses has acted or failed to act in a particular manner; and
2. That those acts or omissions constitute the [offense] [civil wrong] that he charges against the accused, and
3. That he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the proceedings.

SOURCE: RESTATEMENT (SECOND) OF TORTS § 662 (1977).

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 22

Probable Cause for Prosecution (Advice of Counsel)

If you find that the [*name of defendant*], in good faith, sought the advice of an attorney before [procuring the arrest of [*name of plaintiff*]] [or] [initiating the prosecution of the criminal action] [commencing or maintaining the civil proceeding against [*name of plaintiff*]] and made a full, fair and complete disclosure to such attorney of all pertinent and material facts of which the [*name of defendant*] had knowledge tending to prove or disprove the [criminal charge] [civil allegations] and thereafter the [*name of defendant*] acted upon the advice of the attorney and in the belief of [*name of plaintiff*]'s [guilt of the offense] [civil liability for the alleged wrong], then you must find that there was probable cause in [procuring the arrest of [*name of plaintiff*]] [or] [initiating the prosecution of the criminal action] [commencing or maintaining the civil proceeding against [*name of plaintiff*]].

SOURCE: *Tate v. Connel*, 3 Ariz. App. 534, 416 P.2d 213 (1966); *Joseph, M.D. v. Markovitz, M.D.*, 27 Ariz. App. 122, 551 P.2d 571 (1976).

USE NOTE: Use bracketed language if appropriate to the facts.

INTENTIONAL TORT 23

Aiding And Abetting Tortious Conduct

[*Name of plaintiff*] claims that [*name of defendant*] aided and abetted [named party] and that [*name of defendant*] is therefore liable for the consequences of [named party's] conduct. On this claim, [*name of plaintiff*] must prove:

1. [*Name of third party*] engaged in conduct for which he [is] [would be]¹ liable to the [*name of plaintiff*];
2. [*Name of defendant*] was aware that [named party] was going to engage in such conduct; and
3. [*Name of defendant*] provided substantial assistance or encouragement to [named party] with the intent of promoting the conduct.

INTENTIONAL TORTS INSTRUCTIONS

INTENTIONAL TORTS 24

Community Liability for Intentional Tort of a Spouse

If you find that [*name of acting spouse*] committed [*description of tortious conduct*] while married to [*name of non-acting spouse*], then you must decide whether the marital community is liable for [*description of tortious conduct*] of [*name of acting spouse*].

The marital community is liable if [*name of plaintiff*] proves:

1. [*Description of tortious conduct*] was intended to or did benefit the community; or
2. [*Name of non-acting spouse*] consented to or later approved [*description of tortious conduct*] of [*name of acting spouse*].

SOURCE: *Selby v. Savard*, 134 Ariz. 222, 229, 655 P.2d 342, 349 (1982); *Shaw v. Greer*, 67 Ariz. 223, 229-30, 194 P.2d 430, 434 (1948).

COMMENT: There is no presumption of community liability if the action is based on alleged tortious conduct. *Selby v. Savard*, 134 Ariz. 222, 229, 655 P.2d 342, 349 (1982); *Garrett v. Shannon*, 13 Ariz. App. 332, 334, 476 P.2d 538, 540 (1970). “Because a malicious tort does not ordinarily benefit the community, the community is not liable without proof of the non-tortfeasor spouse’s knowledge of, consent to, or ratification of the other spouse’s wrong.” *Selby*, 134 Ariz. at 229, 655 P.2d at 349.