

FAULT INSTRUCTIONS

Introduction

The format of the Fault section with basic liability instructions for any fault case is retained in RAJI (CIVIL) 7TH Fault Instructions. Revisions to the RAJI (CIVIL) 4TH Fault Instructions were found at Fault 5 (Statement of Claims, Definitions of Fault and Negligence) and Fault 6 (Definition of Causation), both used in comparative fault cases.

There was no substantive change to the Fault 5 Instruction from the 3d Edition. The Use Note was revised to acknowledge that although the instruction is drafted for negligence claims, it may be modified for use in cases where fault is not based on negligence, because A.R.S. § 12-2506(F)(2) does not limit fault to negligence. The Comment updated the references to properly disclosed nonparties at fault.

The Fault 6 Instruction added a sentence to acknowledge that there may be more than one cause of an injury. The Source was updated to include such holding in *Ontiveros v. Borak*, 136 Ariz. 500, 505 (1983).

FAULT 1

Statement of Claim; Definition of Fault; Definition of Negligence (No Comparative Fault)

[*Name of plaintiff*] claims that [*name of defendant*] was at fault. Fault is negligence that was a cause of [*name of plaintiff*]'s injury.

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances.

SOURCE: RAJI (CIVIL) 3D Fault 1; A.R.S. § 12-2506(F)(2).

USE NOTE: Use Fault Instructions 1-4 when the only liability claim in the case is that a single defendant is at fault. If there is a claim by any party that someone other than or as well as a single defendant is at fault, do not use Fault Instructions 1-4; use the appropriate instructions from Fault 5-11, or Fault 12 if defendant has asserted a seat belt or motorcycle helmet defense.

COMMENT: Negligence Instruction 4 may have applicability in a noncomparative fault case, but it would be confusing if given in a comparative fault case. A defendant in a comparative fault case can, in fact, properly seek to reduce responsibility, if not completely avoid it, by claiming that some other person is at fault. Fault Instructions 6-11 cover the multiple causation issue in comparative fault cases.

FAULT 2

Definition of Causation (No Comparative Fault)

Before you can find [*name of defendant*] at fault, you must find that [*name of defendant*]'s negligence was a cause of [*name of plaintiff*]'s injury.

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

SOURCE: RAJI (CIVIL) 3d Fault 2; *McDowell v. Davis*, 104 Ariz. 69 (1968); *Porterie v. Peters*, 111 Ariz. 452 (1975).

USE NOTE: Use with Fault Instructions 1, 3, and 4. *See* Use Note and Comment to Fault Instruction 1.

FAULT 3

Plaintiff's Burden of Proof (No Comparative Fault)

[*Name of plaintiff*] must prove:

1. [*Name of defendant*] was at fault;
2. [*Name of plaintiff*] was injured; and
3. [*Name of plaintiff*]'s damages.

SOURCE: RAJI (CIVIL) 3d Fault 3.

USE NOTE: 1. Use with Fault Instructions 1, 2, and 4. *See* Use Note and Comment to Fault Instruction 1.

2. Property Damage Claim: If there is a property damage claim, add “and plaintiff’s property was damaged” to element 2, and add “and the damage to plaintiff’s property” to element 3.

3. Burden of Proof: This instruction should be followed (or preceded) by Standard Instruction 2, Burden of Proof (More Probably True).

COMMENT: Causation: RAJI (CIVIL) 4TH Negligence 9 had four elements: negligence, injury, causation, and damages. Because fault is an actionable wrong, plus causation, RAJI (CIVIL) 7TH Fault 3 has only three express elements: fault, injury, and damages. Absence of an express “causation” element from Fault 3 might cause some initial concern if Fault 3 is looked at in isolation. But Fault 3 will be preceded by Fault 1 and Fault 2 and should be viewed in that context. Both Fault 1 and Fault 2 clearly provide that causation is an essential element of fault; that “fault” means an actionable wrong, plus causation.

If modifying Fault 3 to include “causation” as an express element, consider replacing “fault” with “negligence” (or whatever actionable wrong is at issue in the case), thereby avoiding the redundancy and possible confusion of having causation expressed in one element and inherent in another.

FAULT 4

**Statement of Liability Issues
(No Comparative Fault)**

If you find that [*name of defendant*] was not at fault, then your verdict must be for [*name of defendant*].

If you find that [*name of defendant*] was at fault, then [*name of defendant*] is liable to [*name of plaintiff*] and your verdict must be for [*name of plaintiff*].

SOURCE: RAJI (CIVIL) 3d Fault 4.

USE NOTE: Use with Fault Instructions 1, 2, and 3. *See* Use Note and Comment to Fault Instruction 1.

COMMENT: This instruction has been modified to introduce the word “liable,” which appears in the Personal Injury Damages Instructions.

FAULT 5

Statement of Claims, Definition of Fault; Definition of Negligence (Comparative Fault)

[*Name of plaintiff*] claims that [*name of defendant*] was at fault. [*Name of defendant*] claims that [*name of plaintiff*] was at fault. [*Name of defendant*] also claims that _____ was at fault.¹

Fault is negligence that was a cause of [*name of plaintiff*]'s injury.

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances.

SOURCE: RAJI (CIVIL) 3d Fault 5; A.R.S. § 12-2506(F)(2).

USE NOTE: Comparative Fault: A comparative fault case is one with a claim by any party that someone other than, or as well as, a single defendant is at fault. That “someone” could be a plaintiff, other defendant, or properly noticed nonparty. A.R.S. § 12-2506(B) and (C). For any comparative fault case, use the appropriate instructions from Fault Instructions 5-11.

Fault Instruction 5 is drafted for a case in which one plaintiff and one defendant each claim the other was at fault [and defendant claims that one nonparty was at fault]. The instruction will need modification if the case involves additional fault claims.

The instruction is also drafted for a case in which the claims of fault are based on negligence. Under A.R.S. § 12-2506(F)(2), fault is not limited to negligence. It includes any “actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages.” Consequently, the second and third paragraphs will need to be modified if anyone claims that a party or non-party is at fault for some reason other than negligence.

¹If the liability of any nonparty is a comparative fault issue, that nonparty will have been specifically disclosed by the defendant making the claim. *See* Comment, *infra*. The specific identity of that nonparty should therefore be inserted into the instruction.

COMMENT: Nonparties’ Fault: A.R.S. § 12-2506(C) provides that the jury shall determine the relative degrees of fault of both parties and nonparties, but A.R.S. § 12-2506(B) and Rule 26(b)(5), Ariz. R. Civ. P., prohibit the jury from allocating any percentage of fault to a nonparty who has not been disclosed pursuant to Rule 26(b)(5) and Rule 38.1(b), Ariz. R. Civ. P.

FAULT 6
Definition of Causation
(Comparative Fault)

Before you can find any party [person]¹ at fault, you must find that party's [person's] negligence was a cause of plaintiff's injury.

Negligence causes an injury if it helps produce the injury, and if the injury would not have happened without the negligence. There may be more than one cause of an injury.

SOURCE: RAJI (CIVIL) 3d Fault 6; *Ontiveros v. Borak*, 136 Ariz. 500, 505 (1983); *Porterie v. Peters*, 111 Ariz. 452, 456 (1975); *McDowell v. Davis*, 104 Ariz. 69, 72 (1968).

USE NOTE: See Use Note and Comment to Fault Instruction 5.

¹ Use "person" if there is a claim that a nonparty is at fault. If liability of a nonparty corporation or other entity is at issue, modify further.

FAULT 7
Burden of Proof (All Parties)
(Comparative Fault)

[Name of plaintiff] must prove:

1. [Name of defendant] was at fault;
2. [Name of plaintiff] was injured; and
3. [Name of plaintiff]'s damages.

[Name of defendant] must prove:

1. [Name of plaintiff] was at fault.
2. [Name of non-party] was at fault.¹

SOURCE: RAJI (CIVIL) 3d Fault 7.

USE NOTE: ¹ **Bracketed Option:** If the liability of any nonparty is a comparative fault issue, that nonparty will have been specifically disclosed by the defendant making the claim. *See* Comment to Fault 5 Instruction, *supra*. The specific identity of that nonparty should therefore be inserted into the instruction.

1. Comparative Fault: *See* Use Note to Fault 5 Instruction for definition of comparative fault. Fault Instruction 7 is drafted for a case in which one plaintiff and one defendant each claim the other was at fault [and defendant claims that one nonparty was at fault]. The instruction will need modification if the case involves additional fault claims. Use with appropriate instructions from Fault Instructions 5-11.

2. Causation: *See* Comment to Fault Instruction 3.

3. Property Damage Claim: If there is a property damage claim, add “and plaintiff’s property was damaged” to element 2 of plaintiff’s burden, and add “and the damage to plaintiff’s property” to element 3.

4. Basic Burden of Proof Instruction: This instruction should be followed (or preceded) by Standard Instruction 2, Burden of Proof (More Probably True).

FAULT 8

Statement of Liability Issues (Comparative Fault)

If you find that [name of defendant] was not at fault, then your verdict must be for [name of defendant].

If you find that [name of defendant] was at fault, then [name of defendant] is liable to [name of plaintiff] and your verdict must be for [name of plaintiff]. You should then determine the full amount of [name of plaintiff]'s damages and enter that amount on the verdict form. You should then consider [name of defendant]'s claim that [name of plaintiff] was at fault [and [name of defendant]'s claim that [name of non-party] was at fault].¹

SOURCE: RAJI (CIVIL) 3d Fault 8.

USE NOTE: ¹ **Bracketed Option:** See Use Note to Fault Instruction 7.

Comparative Fault: See Use Notes to Fault Instruction 5. Fault Instruction 8 is drafted for a case in which one plaintiff and one defendant each claim the other was at fault [and defendant claims that one nonparty was at fault]. The instruction will need modification if the case involves additional fault claims. Use with appropriate instructions from Fault Instructions 5-11.

COMMENT: Other Modifications: The instruction has been modified to introduce the word “liable,” which appears in the Personal Injury Damages Instructions.

The instruction has also been modified to include here, rather than in Fault Instructions 9, 10, and 11, the direction on when to determine damages.

FAULT 9

Plaintiff's Fault (Contributory Negligence)

On [name of defendant]'s claim that [name of plaintiff] was at fault, you must decide whether [name of defendant] has proved that [name of plaintiff] was at fault and, under all the circumstances of this case, whether any such fault should reduce [name of plaintiff]'s full damages. These decisions are left to your sole discretion.

If you decide that [name of plaintiff]'s fault should reduce [name of plaintiff]'s full damages, the court will later reduce those damages by the percentage of fault you have assigned to [name of plaintiff].

SOURCE: RAJI (CIVIL) 3d Fault 9; A.R.S. § 12-2506(B) and (C); ARIZ. CONST., art. 18, § 5; *Heimke v. Munoz*, 106 Ariz. 26 (1970).

USE NOTE: Always give Fault Instruction 11 when giving Fault Instruction 9; also give other appropriate instructions from Fault Instructions 5-10. Modify Fault 9 as necessary for multiple plaintiffs or multiple defendants. **Caveat:** There should be no mention of nonparties in Fault 9; Fault 9 relates only to a claim that plaintiff was at fault.

COMMENT: 1. Jury Discretion on Contributory Negligence (Now Known as Comparative Fault): Even though contributory negligence has been transformed by UCATA into comparative fault, and is no longer a complete bar to plaintiff's claim, the jury still has the complete discretion to: (1) determine whether the facts establish plaintiff's fault and, if they do, (2) whether the defense should be applied. ARIZ. CONST., art. 18, § 5; *Gunnerson v. Gunnerson*, 163 Ariz. 475 (App. 1989). See also *Schwab v. Matley*, 164 Ariz. 421 (1990); *Bauer v. Crotty*, 167 Ariz. 159 (App. 1991).

2. Advising Jury of Effect of Comparative Fault: On advising the jury that plaintiff's damages may be reduced by the percentage of plaintiff's fault, see *Seppi v. Betty*, 579 P.2d 683 (Idaho 1978), and *Hammagren v. Wald Constr., Inc.*, 545 P.2d 859 (Or. 1976).

3. No Use of "Contributory Negligence" in the Instruction: The instruction does not use the words "contributory negligence," although it could. The instruction does use "plaintiff's fault," which is contributory negligence stated in a form consistent with comparative fault law and the other Fault Instructions.

FAULT 10
Plaintiff's Fault
(Assumption of Risk)

[*Name of defendant*] claims that [*name of plaintiff*] was at fault by assuming the risk of injury. A person assumes the risk of injury when he has knowledge of a particular risk, appreciates its magnitude, and voluntarily subjects himself to the risk under circumstances that show his willingness to accept that particular risk.

As to this claim, [*name of defendant*] must prove:

1. [*Name of plaintiff*] assumed a particular risk of injury; and
2. The particular risk was a cause of [*name of plaintiff*]'s injury.

You must decide whether [*name of defendant*] has proved that [*name of plaintiff*] was at fault by assuming the risk of injury and, under all the circumstances of this case, whether any such fault should reduce [*name of plaintiff*]'s full damages. These decisions are left to your sole discretion.

If you apply the defense of assumption of risk, the court will later reduce [*name of plaintiff*]'s full damages by the percentage of fault you have assigned to [*name of plaintiff*].

SOURCE: RAJI (CIVIL) 3d Fault 10; *Hildebrand v. Minyard*, 16 Ariz. App. 583 (1982); *Chavez v. Pima County*, 107 Ariz. 358 (1971); ARIZ. CONST., art. 18, § 5.

USE NOTE: Always give Fault Instruction 11 when giving Fault Instruction 10; also give other appropriate instructions from Fault Instructions 5-9. Modify Fault Instruction 10 as necessary for multiple plaintiffs or multiple defendants.

COMMENT: Use of “Assumption of Risk” in the Instruction: The instruction uses the words “assumption of risk” because this defense is very specific, and there is no way to talk about it, other than by name.

See also all Use Notes and Comments to Fault Instruction 9.

FAULT 11

Determining Relative Degrees of Fault (Comparative Fault)

[If you decide that [*name of plaintiff*]'s fault should reduce [*name of plaintiff*]' damages] [or] [If you find more than one [defendant] [person] at fault for [*name of plaintiff*]'s injury],¹ you must then determine the relative degrees of fault of all those whom you find to have been at fault.

The relative degrees of fault are to be entered on the verdict form as percentages of the total fault for [*name of plaintiff*]'s injury.

The fault of one person may be greater or lesser than that of another, but the relative degrees of all fault must add up to 100%. This will be clear from the verdict form.

SOURCE: RAJI (CIVIL) 3d Fault 11.

USE NOTE: This instruction should be used in every comparative fault case, whether Fault Instruction 9 or 10 is given or not. Modify the instruction as necessary for multiple plaintiffs, multiple defendants, or claims that one or more nonparties is at fault.

¹ Use the first bracketed clause, or some variation of it, when plaintiff's fault is at issue and when Fault 9 Instruction (or 10) is also given. Use the second bracketed clause, or some variation of it, when the fault of more than one defendant or nonparty is at issue.

COMMENT: See all Use Notes and Comments to Fault Instructions 5 and 9.

FAULT 12
Plaintiff's Fault
(Nonuse of Seat Belt/Motorcycle Helmet)

[*Name of defendant*] claims that [*name of plaintiff*] was at fault for not using a [seat belt] [motorcycle helmet].

Nonuse of a [seat belt] [motorcycle helmet] bears on the issue of damages and not on any other issue.

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

1. That [*name of plaintiff*] did not use an available and operational [seat belt] [motorcycle helmet];
2. That [*name of plaintiff*]'s nonuse was unreasonable under all of the circumstances [, including consideration of whether [*name of plaintiff*] was of sufficient age and discretion to make nonuse unreasonable];¹ and
- 3A. [*Name of plaintiff*]'s nonuse caused injuries that would not have occurred had the [seat belt] [motorcycle helmet] been used.]²
- 3B. [*Name of plaintiff*]'s nonuse increased the injuries. The increase of injuries must be shown with reasonable probability.]

On [*name of defendant*]'s claim that [*name of plaintiff*] was at fault for not using a [seat belt] [motorcycle helmet], you must decide whether [*name of defendant*] has proved that [*name of plaintiff*] was at fault and, under all the circumstances of this case, whether any such fault should reduce [*name of plaintiff*]'s full damages. These decisions are left to your sole discretion.

If you decide that [*name of plaintiff*]'s fault should reduce [*name of plaintiff*]'s damages, the court will later reduce [*name of plaintiff*]'s full damages by the percentage of fault you have assigned to [*name of plaintiff*].

SOURCE: RAJI (Civil) 3d Fault 12; *Law v. Superior Court*, 157 Ariz. 147 (1988) (seat belt); *Warfel v. Cheney*, 157 Ariz. 424 (App. 1988) (motorcycle helmet); ARIZ. CONST., art. 18, § 5.

USE NOTE: ¹ Use bracketed material in cases where, for example, the plaintiff was a child or person of diminished capacity at the time of injury. The bracketed material need not be used if no factual issue is presented regarding age and discretion of the plaintiff.

² Use one or both of the bracketed elements if and as factually applicable. *Law*, 157 Ariz. at 157 includes these alternative elements in the “Resolution” section (Conditions 4 and 5).

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FAULT 12
Plaintiff's Fault
(Nonuse of Seat Belt/Motorcycle Helmet)

Continued

Nonuse of seat belt/motorcycle helmet (Fault 12) is included as an affirmative defense fault instruction to fit within the existing framework of Fault Instructions and Verdict Forms.

In a seat belt/motorcycle helmet nonuse case, use, as applicable, Standard Instructions, Fault Instructions 5-11 (Comparative Fault), Personal Injury Damages and the applicable Verdict Forms. “Form 2” of the Verdict Forms contains a blank for plaintiff’s degree of fault.

For additional analysis of these issues, see Siegel and Wright, *Determining Damages Under the Seat Belt Defense: How the Restraint Should Work*, 4 TRIAL PRACTICE NO. 3 (Fall 1993) at pp. 8-11, 15; and Painter, *Jurors Buckle Down on Seat Belt Offenders: Damages Reduced for Failure to Mitigate*, 5 TRIAL PRACTICE NO. 1 (Winter 1994) at pp. 12-13.

This instruction is not applicable in the occasional case in which the nonuse of a seat belt is claimed to be a cause of the mishap, rather than a cause of injury and damages, *See Kington v. Camden*, 19 Ariz. App. 361 (1973) (if driver had fastened her seat belt, she would not have lost control of her vehicle and caused crash), which *Law* recognizes as contributory negligence. 157 Ariz. at 150. *Law* quoting from a Florida case, also states: “Nonuse of an available seat belt, however, should not be considered by the triers of fact in resolving the issue of liability unless it has been alleged and proved that such nonuse was a proximate cause of the accident.” 157 Ariz. at 155.

A.R.S. § 28-907 provides for a child passenger restraining system when transporting a child four years of age or younger or forty or fewer pounds in weight. A.R.S. § 28-907(G) provides: “The requirements of this section or evidence of a violation of this section are not admissible as evidence in a judicial proceeding except in a judicial proceeding for a violation of this section.”