

# **PERSONAL INJURY DAMAGES INSTRUCTIONS**

## **Introduction**

In RAJI (CIVIL) 3d, the Damages Instructions were taken out of the Negligence Instructions section and placed in their own section. As these instructions are appropriate for use in all personal injury sections, not just negligence cases, the RAJI (CIVIL) 5th follows that format.

In the typical personal injury case, the basic instructions are in the Standard Instructions section, the case specific instructions are in the specialized sections (Fault, Negligence, Medical Negligence, Product Liability), and the damages instructions are in the Personal Injury Damages Instructions section.

Not all of the elements of damages will be appropriate for every case and in some instances can be redundant. Accordingly, the instructions will need to be modified based on the individual case.

Personal Injury Damages 4 (Punitive Damages) has been revised to incorporate recent case law in this area.

## PERSONAL INJURY DAMAGES 1<sup>0</sup>

### Measure of Damages

If you find [any] [*name of defendant*] liable to [*name of plaintiff*], you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [*name of defendant*] [party] [person]:<sup>1</sup>

1. The nature, extent, and duration of the injury.
2. The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
3. Reasonable expenses of necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future.<sup>2</sup>

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**USE NOTE:** <sup>1</sup> Use the appropriate bracketed language, as follows:

1. “defendant” – One defendant, no claim of plaintiff’s fault.
2. “any defendant” – More than one defendant, no claim of plaintiff’s fault
3. “any party” – One or more defendants, claim of plaintiff’s fault.
4. “any person” – One or more defendants, claim of non-party fault (with or without a claim of plaintiff’s fault).
5. Alternatives: Any appropriate combination of the above; or, identify by name all those who might be at fault; or, simply say: “. . . resulted from any fault in the case.”

**Modifications:** Depending on the evidence in the case, some of the elements in Paragraphs 2, 3, 4, 5, and 6 may be inapplicable or cumulative, and some unlisted elements may be applicable and not cumulative. Customize the instruction to fit the case.

**Property Damage Claim:** If there is a property claim, add, as the last element of the instruction: “(7) The difference in the value of the damaged property immediately before and immediately after the damage.”

<sup>2</sup> *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 129 P.3d 487 (Ct. App. 2006); *Saide v. Stanton*, 135 Ariz. 76, 77, 659 P.2d 35, 36 (1983).

<sup>3</sup> *International Harvester Co. v. Chiarello*, 27 Ariz. App. 411 (Ct. App. 1976). See also *Kaufman v. Langhofer*, 239 Ariz. 249, 222 P.3d 272 (Ct. App. 2009) (“A cause of action for loss of consortium is also limited to spouses, parents, and children.”) (citing *Barnes v. Outlaw*, 192 Ariz. 283, 286, 964 P.2d 484, 487 (1998) (spouses); *Villareal v. State Dep’t of Transp.*, 160 Ariz. 474, 477, 774 P.2d 213, 216 (1989) (parents); *Frank v. Superior Court*, 150 Ariz. 228, 234, 722 P.2d 955, 961 (1986) (children)).

## PERSONAL INJURY DAMAGES 1<sup>0</sup>

### Measure of Damages

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4. Lost earnings to date, and any decrease in earning power or capacity in the future.
5. Loss of love, care, affection, companionship, and other pleasures of the [marital] [parent-child] relationship.<sup>3</sup>
6. Loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the injury.<sup>4</sup>

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6. “defendant” – One defendant, no claim of plaintiff's fault.
7. “any defendant” – More than one defendant, no claim of plaintiff's fault
8. “any party” – One or more defendants, claim of plaintiff's fault.
9. “any person” – One or more defendants, claim of non-party fault (with or without a claim of plaintiff's fault).
10. Alternatives: Any appropriate combination of the above; or, identify by name all those who might be at fault; or, simply say: “. . . resulted from any fault in the case.”

**Modifications:** Depending on the evidence in the case, some of the elements in Paragraphs 2, 3, 4, 5, and 6 may be inapplicable or cumulative, and some unlisted elements may be applicable and not cumulative. Customize the instruction to fit the case.

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<sup>3</sup> *International Harvester Co. v. Chiarello*, 27 Ariz. App. 411 (Ct. App. 1976). See also *Kaufman v. Langhofer*, 239 Ariz. 249, 222 P.3d 272 (Ct. App. 2009) (“A cause of action for loss of consortium is also limited to spouses, parents, and children.”) (citing *Barnes v. Outlaw*, 192 Ariz. 283, 286, 964 P.2d 484, 487 (1998) (spouses); *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 477, 774 P.2d 213, 216 (1989) (parents); *Frank v. Superior Court*, 150 Ariz. 228, 234, 722 P.2d 955, 961 (1986) (children)).

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<sup>4</sup> See *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 38-39, 31 P.3d 806, 812-13 (Ct. App. 2001) (holding that “hedonic damages can be a component of a general damages claim, distinguishable from, and not duplicative of, damages for pain and suffering.”); *but see Quintero v. Rogers*, 221 Ariz. 536, 539, 212 P.3d 874, 877 (Ct. App. 2009) (finding that “loss of enjoyment of life” damages are within the category of “pain and suffering” damages excluded by Arizona’s survival statute, A.R.S. § 14-3110.)

## PERSONAL INJURY DAMAGES 2

### Pre-Existing Condition, Unusually Susceptible Plaintiff

[*Name of plaintiff*] is not entitled to compensation for any physical or emotional condition that pre-existed the fault of [*name of defendant*]. However, if [*name of plaintiff*] had any pre-existing physical or emotional condition that was aggravated or made worse by [*name of defendant*]'s fault, you must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for that aggravation or worsening.

You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the fault of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

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**SOURCE:** JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 3928.

**USE NOTE: 1. Identification of Possible Parties at Fault:** The instruction is drafted for a one-defendant, no comparative fault case. In other cases, replace “defendant” here with the same language used in RAJI (CIVIL) 5th Personal Injury Damages 1 from the “[any] [defendant] [party] [person]” options.

**2. The Two Principles Covered by this Instruction:** Use the first paragraph when there is an issue of aggravation of pre-existing condition. (“Worsening” has been added as a clarification of “aggravation”; some may find the instruction just as clear with one or the other of those concepts removed.) Use the second paragraph when there is an issue of injury to an unusually susceptible person. Use both paragraphs if both issues are in the case.

**3. “Fault” or “Negligence”:** If desired, “negligence” can be substituted for “fault” in this instruction; the instruction will be correct either way.

## PERSONAL INJURY DAMAGES 3

### Damages for Wrongful Death of Spouse, Parent, or Child

If you find [*name of defendant*] liable to [*name of plaintiff*], you must then decide the full amount of money that will reasonably and fairly compensate [*name of each survivor*] [separately] for each of the following elements of damages proved by the evidence to have resulted from the death of [*name of decedent*].

1. The loss of love, affection, companionship, care, protection, and guidance since the death and in the future.
2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced, and reasonably probable to be experienced in the future.
3. The income and services that have already been lost as a result of the death, and that are reasonably probable to be lost in the future.
4. The reasonable expenses of funeral and burial.
5. The reasonable expenses of necessary medical care and services for the injury that resulted in the death.

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**SOURCE:** A.R.S. § 12-613; *City of Tucson v. Wondergem*, 105 Ariz. 429, 466P.2d 383 (1970); *Jeffery v. United States*, 381 F. Supp. 505, 510 (Ariz. 1974); *Salinas v. Kahn*, 2 Ariz. App. 181, 193-95, 407 P.2d 120, 132-34 (1965).

*See also White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 136, 163 P.3d 1083, 1086 (Ct. App. 2007); *Mullen v. Posada Del Sol Health Care Ctr.*, 169 Ariz. 399, 400, 819 P.2d 985, 986 (Ct. App. 1991).

**USE NOTE:** Depending on the evidence in the case, some of the elements in paragraphs 1 and 2 may be inapplicable or cumulative, and the elements listed in paragraphs 3, 4, and 5 may be inapplicable. Customize the instruction to fit the case.

## PERSONAL INJURY DAMAGES 4\*

### Punitive Damages

If you find [name of defendant] liable to [name of plaintiff], you may consider assessing additional damages to punish [name of defendant] or to deter [name of defendant] and others from similar misconduct in the future. Such damages are called “punitive” damages.

To recover punitive damages, [name of plaintiff] has the burden of proving by clear and convincing evidence, either direct or circumstantial, that [name of defendant] engaged in the misconduct with one or more of the following states of mind:

1. [Name of defendant] intended to cause injury; or
2. [Name of defendant] was motivated by spite or ill will; or
3. a. [Name of defendant] acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injure the rights of others; or  
b. [Name of defendant] consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.

To prove this required state of mind by clear and convincing evidence, [name of plaintiff] must persuade you that the punitive damages claim is highly probable. This burden of proof is more demanding than the burden of proof of “more probably true than not true,” which applies to all other claims in this case, but it is less demanding than the burden of proof of “beyond a reasonable doubt,” which is used in criminal cases.

The law provides no fixed standard for the amount of punitive damages you may assess, if any, but leaves the amount to your discretion. [However, if you assess punitive damages, you may consider the character of [name of defendant]’s conduct or motive, the nature and extent of the harm to plaintiff that [name of defendant] caused, and the nature and extent of defendant’s financial wealth.]

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#### SOURCES:

1. **Elements of Punitive Damages:** *Bradshaw v. State Farm Mut. Auto. Ins.*, 157 Ariz. 411,422, 758 P.2d 1313, 1324 (1988); *Volz v. Coleman Co., Inc.*, 155 Ariz. 567, 570, 748 P.2d 1191, 1194 (1987); *Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 601-02, 734 P.2d 85, 86-87 (1987); *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073, 1080 (1987); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330-31, 723 P.2d 675, 679-80 (1986); *Rawlings v. Apodaca*, 151 Ariz. 149, 161-63, 726 P.2d 565, 577-79 (1986).
2. **Definition of Clear and Convincing:** *Thompson v. Better-Bilt Aluminum Prod. Co.*, 171 Ariz. 550, 557, 823 P.2d 203, 210 (1992); *State v. King*, 158 Ariz. 419, 422, 763 P.2d 239, 242 (1988); *State v. Renforth*, 155 Ariz. 385, 387, 746 P.2d 1315, 1317 (App. 1987).

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## PERSONAL INJURY DAMAGES 4

### Punitive Damages

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#### USE NOTES:

1. **State of Mind Categories 3(a) and 3(b):** Use the language most appropriate for the case. The statement in 3(a) is taken directly from *Bradshaw*; the statement in 3(b) is taken directly from *Gurule*. Although the statements cover the same principle, there are differences between the two. In some cases, therefore, one statement might be preferable to the other. Select one of the statements, but probably not both, as appropriate for the case. Or replace both statements with other satisfactory language expressing the same principle. *See* Comment 1, *infra*.
2. **Burden of Proof Paragraph:** The burden of proof contained in this instruction is for use when the only claim in the case requiring proof by clear and convincing evidence is for punitive damages. If the clear and convincing standard applies to both punitive damages and other kinds of claims in the case, delete the burden of proof paragraph here and use RAJI (CIVIL) 5th Standard 3. In either situation, also use RAJI (CIVIL) 5th Standard 2.
3. **Brackets:** The brackets in this paragraph indicate that some of the factors listed could be deleted or others added, depending on the evidence in a particular case.

#### COMMENTS:

1. **Evil Mind:** Beginning with the 1986 cases of *Linthicum* and *Rawlings*, the Arizona Supreme Court has redefined the conduct, state of mind, and level of proof required for assessment of punitive damages. In *Linthicum*, the court stated that a claim for punitive damages requires proof that the defendant's conduct was guided by an "evil mind". Although the case law since *Linthicum* has used the phrase "evil mind" as short hand to describe the state of mind to establish a claim for punitive damages, the Committee has concluded that the phrase "evil mind" should not be included in the jury instruction. The Committee reasoned that the phrase was a legal term of art that could be confusing to jurors because they might apply or be influenced by their own religious or social perspective. Accordingly, the instruction identifies the alternative ways of establishing "evil mind," but does not include the words "evil mind." RAJI (CIVIL) 5th Personal Injury Damages 4 provides alternative ways to show the "evil mind" element of a punitive damages claim. The specific language for these alternatives is directly from *Bradshaw* and *Gurule*. The Committee does not suggest that the alternatives set forth in the instruction are exclusive of all others, or that they have been stated here in the *only* correct way. The Arizona Supreme Court opinions contain many statements and expressions discussing and defining "evil mind." The trial court may find other "evil mind" statements or formulations more appropriate for a particular case than any of those provided in Personal Injury Damages 4; in that event, the instruction may serve as a template.
2. **Whether Aggravated or Outrageous Conduct Is a Required Element of Punitive Damages:** In *Rawlings*, the Arizona Supreme Court held that in order to recover punitive damages, there must be evidence that the "defendant's wrongful conduct was guided by evil

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## PERSONAL INJURY DAMAGES 4

### Punitive Damages

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motives.” *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986). The Court continued, “When defendant's motives are shown to be so improper, *or* its conduct so oppressive, outrageous or intolerable that such an “evil mind” may be inferred, punitive damages may be awarded.” *Id.* at 162-63, 726 P.2d at 578-79. The day after the Supreme Court issued *Rawlings*, it stated in *Linthicum*, “While the necessary ‘evil mind’ may be inferred, it is still this ‘evil mind’ *in addition to* outwardly aggravated, outrageous, malicious, or fraudulent conduct which is required for punitive damages. We hold that before a jury may award punitive damages there must be evidence of an ‘evil mind’ *and* aggravated and outrageous conduct.” *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986) (emphasis added). The following year, the Supreme Court stated in *Gurule*, “Even if the defendant’s conduct was *not* outrageous, a jury may infer evil mind if defendant deliberately continued his actions despite the inevitable or highly probable harm that would follow.” *Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987) (emphasis added). Because neither *Linthicum* nor the subsequent cases that quote its language above clearly establish a separate element of “outwardly aggravated” or “outrageous” conduct that is not subsumed in the “evil mind” requirement, the Committee has concluded that the existing instruction’s focus on “evil mind” should be maintained.

- 3. DUI or Other Voluntary Intoxication Cases:** If there is adequate evidence that plaintiff’s injury resulted from defendant’s driving while under the influence of intoxicating liquors, a punitive damages instruction is probably warranted. However, “intoxication alone, in the absence of other compelling circumstances, may not warrant punitive damages.” *Olson v. Walker*, 162 Ariz. 174, 179, 781 P.2d 1015, 1020 (App. 1989).
- 4. Causation:** The plaintiff also must prove that the same conduct that provides the basis for punitive damages was a cause of, or contributed to, injury to the plaintiff. *Saucedo v. Salvation Army*, 200 Ariz. 179, 182, 24 P.3d 1274, 1277 (App. 2001) (act of leaving scene of hit and run could not establish “evil mind” for punitive damages because pedestrian died on impact and defendant’s failure to remain did not contribute to harm).

## PERSONAL INJURY DAMAGES 4

### Punitive Damages

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5. **Constitutional Issues:** Due process limits on punitive damages are imposed by courts rather than juries. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001). Thus, the constitutional issues associated with the imposition of punitive damages are not appropriate for consideration by juries or inclusion of jury instructions. To assist attorneys in understanding the three guideposts courts consider when evaluating after the trial whether an award of punitive damages violates the Due Process Clause, the Committee has provided the following citations: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (punitive damages cannot be awarded for causing injury to any nonparty) ; *Arellano v. Primerica Life Ins. Co., Co.*, 235 Ariz. 371, 378-80, 332 P.3d 597, 604-06 (App. 2014) (reducing punitive damages award with a 13:1 ratio of punitive to compensatory damages to 4:1 ratio under *Gore* and *Campbell*); *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 609-12, 277 P.3d 789, 806-09 (App. 2012) (where jury returned 355:1 punitive damages award, further reducing trial court's 4:1 award to 1:1); *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 489-92, 212 P.3d 810, 827-30 (App. 2009) (reducing jury's 8:1 punitive damages award to 1:1); *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 500-04, 200 P.3d 977, 997-1001 (App. 2008) (reducing jury's 6:1 punitive damages award to 1:1). Although an appellate court has discretion to consider a constitutional issue raised for the first time on appeal, due process concerns regarding the size of the punitive damages award should be raised with the trial court in order to preserve the issue for appeal. *See Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, 185, ¶¶ 24-25, 254 P.3d 418, 424 (App. 2011).

## **PERSONAL INJURY DAMAGES 5**

### **Mortality Tables and Life Expectancy**

A person aged \_\_\_\_ years has a life expectancy of \_\_\_\_ years. This is merely an estimate of the probable average remaining length of life of all persons of this age.

This estimate may be considered by you in determining the amount of damages for any permanent injury proved by the evidence to have resulted from the fault of [any] [*name of defendant*] [party] [person].

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**SOURCE:** National Vital Statistics Reports, Volume 61, No. 3, September 24, 2012.