COMPARATIVE NEGLIGENCE DEFENSE

In Massachusetts, there is a defense to negligence claims called the "comparative negligence" defense. The defendant, rather than the plaintiff, has the burden of proving the defense. Just as the plaintiff must prove (his / her / their / its) claim by a preponderance of the evidence, the defendant must prove the comparative negligence defense by a preponderance of the evidence.

This means that if you determine that the defendant was negligent and that the defendant's negligence caused the plaintiff's injuries, then you must also determine whether and the extent to which the plaintiff's own negligence contributed to those injuries. The defendant has the obligation of proving the plaintiff's negligence and its causal connection to the injuries by a preponderance of the evidence.

To accomplish this comparison, you should determine the percentage that the plaintiff was negligent and the percentage that the (defendant was) (defendants were) negligent. The combined total of the negligence of the plaintiff and (defendant) (defendants) must

equal 100 percent. In deciding issues of negligence, keep in mind the elements of negligence on which I have already instructed you. In essence, you are applying the elements of negligence to the plaintiff's own conduct.

Note: It is within the discretion of the judge to inform the jury that a finding of greater negligence of the plaintiff means a verdict for the defendant. As a general proposition, whether to tell jurors about the consequences of assignment of percentages of comparative negligence is within the discretion of the trial judge. *Mastaby v. Central Hosp. Inc.*, 34 Mass. App. Ct. 942, 943 (1993). However, where "the jurors ask questions as to the effect of their answers to special questions and a party requests that the judge inform the jurors as to the effects of their answers, the judge must do so." *Dilaveris v. W.T. Rich Co.*, 424 Mass. 9, 15 (1996). See also *Gonzalez v. Spates*, 54 Mass. App. Ct. 438, 446 (2002).

Optional charge: **If you find that the plaintiff was more than 50% comparatively negligent, the plaintiff will recover nothing. If you find the plaintiff was 50% or less comparatively negligent, the amount of damages which the plaintiff will recover will be reduced by the percentage of the plaintiff's own negligence. For example, if you find in favor of the plaintiff but also find that the plaintiff was 10% comparatively negligent, the clerk will reduce your award of damages by 10%. You should write in the full amount of damages on the verdict slip without making any deduction for comparative negligence. That is, your damage award on the verdict slip should reflect 100% of the damages the**

plaintiff(s) would be entitled to receive if not comparatively negligent. The clerk will then reduce the plaintiff's damages in proportion to the amount of negligence you attributed to the plaintiff.

NOTES:

1. The issue of whether a party was comparatively negligent is a question for the jury to decide. G.L. c. 231, § 8; *Pond v. Somes*, 302 Mass. 587, 590 (1939) (question of plaintiff's negligence was one for the jury).

2. Where more than one defendant is being sued, the jury is to compare the negligence of the plaintiff against the total negligence of all concurrent tortfeasors combined. G.L. c. 231, § 85.

3. In 1971, the Legislature enacted G.L. c. 231, § 85, abolishing the defense of assumption of the risk, and instead, "a doctrine of comparative negligence was adopted, whereby a plaintiff, whose own negligence was less than that of the defendant, would not be completely barred from recovery, but would be awarded proportionately reduced damages." *Riley v. Davison Const. Co.,* 381 Mass. 432, 436 (1980)

4. The defendant has the burden of proof. See G.L. c. 231, § 85; *Russell v. Berger*, 314 Mass. 500, 502 (1943).

5. While G.L. c. 231, § 85, reinstated the plaintiff's "presumption of due care," the Massachusetts higher courts do not favor use of that language in an instruction. *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 265 (1986) (nothing in statute requires that jury be told about presumption). See also *Flaherty v. Massachusetts Bay Transp. Authority*, 361 Mass. 853, 854 (1972); *Potter v. John Bean Division of Food Machinery & Chemical Corp.*, 344 Mass. 420, 425-426 (1962).