

OVERVIEW OF ELEMENTS

In this case, the plaintiff claims that (he / she / they / it) was injured [*if applicable: in a fall*] on property that was negligently maintained by the defendant. The plaintiff is asking to be compensated for those injuries. In order to succeed, the plaintiff must prove by a preponderance of the evidence the following four elements:

First: that the defendant owed (him / her / them / it) a duty of care;

Second: that the defendant breached or violated that duty of care, or in other words was negligent;

Third: that the defendant's negligence was a cause of some injury or harm to the plaintiff; and

Fourth: the amount of (his / her / their / its) damages caused by the defendant.

I will discuss each of these elements in more detail.

DUTY

As to the first element, duty, the law in Massachusetts is that an owner, or if not the owner, one who is in control of the real estate, which we call “the premises,” has a duty of reasonable care to all persons lawfully on the premises, which would include, among others, guests and customers. This duty requires the owner or one in control of the premises to take steps that are reasonable and appropriate to prevent injury under all of the circumstances, taking into account the foreseeability and likelihood of injury to others, the seriousness of the harm that may occur, the burden of avoiding its risks, and the proper allocation of the risks involved.

Duty: *Dos Santos v. Coleta*, 465 Mass. 148, 154 (2013), citing *Davis v. Westwood Group*, 420 Mass. 739, 742-743 (1995) and *Mounsey v. Ellard*, 363 Mass. 693, 708 (1973).

Jury determination of required care: *Quinn v. Morganelli*, 73 Mass. App. Ct. 50, 53 (2008); W. Page Keeton, *Prosser & Keeton on Torts* §§ 37, 53, at 235-33, 356-59 (5th ed. 1984).

SUPPLEMENTAL INSTRUCTIONS

1. **Duty to warn. This duty of care may include a duty to warn visitors of any dangers of which the owner or one in control of the premises is aware or reasonably should be**

aware. It is up to you to determine whether a condition existed requiring a warning and, if so, whether the warning given was sufficient.

A plaintiff is entitled to the presumption that, if a warning had been given by the defendant, the plaintiff would have heeded or followed the warning.

2. *Open and obvious condition.* An owner or one in control of the premises is relieved of the duty to warn of open and obvious dangers on the premises because the open and obvious nature of the danger makes a warning unnecessary for an ordinarily intelligent plaintiff. However, an owner or one in control of the premises is not relieved from a duty to remedy an open and obvious danger where the owner or person in control can and should anticipate that the unsafe condition may cause physical harm to a lawful visitor despite its known or obvious danger. Such reason to anticipate harm may arise in circumstances where it is foreseeable that a lawful visitor may be careless or distracted or where, to a reasonable person in the position of the visitor, the advantages of encountering the

known or obvious danger might outweigh the apparent risk. A lawful visitor's own negligence in encountering the open and obvious unsafe condition does not relieve the owner or person in control of the premises of the duty to remedy the condition where the visitor's negligence can and should have been anticipated.

NOTES:

1. **Existence of duty.** The existence of a duty is typically a question of law, not of fact. See *O'Sullivan v. Shaw*, 431 Mass. 201, 203 (2000), citing *Davis v. Westwood Group*, 420 Mass. 739, 742-743 (1995). Massachusetts courts have found that duty to exercise due care exists as a matter of law in various factual situations, including the following:
 - *An occupier of land* owes a duty of reasonable care to all lawful visitors. *Mounsey v. Ellard*, 363 Mass. 693, 707 (1973). An adult trespasser on land, on the other hand, is owed only the duty to refrain from wilful, wanton, and reckless conduct. *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 707 (1974) (owner's duty to avoid injuring trespasser in peril). See *Young v. Atlantic Richfield Co.*, 400 Mass. 837, 841-43 (1987), *cert. denied*, 484 U.S. 1066 (1988) and *Polak v. Whitney*, 21 Mass. App. Ct. 349, 351-54 (1985), for discussion of private and commercial landowners' duties to warn guests of possible dangers. See G.L. c. 231, § 85Q for child trespassers.
 - The status of a condition as open and obvious excuses a duty to warn of it but does not excuse the person in control of the property from a duty of due care with respect to it. *Dos Santos v. Coleta*, 465 Mass. 148, 161-63 (2013).
 - *A landlord* owes a duty of reasonable care. *Leavitt v. Glick Realty Corp.*, 362 Mass. 370, 376 (1972); see also G.L. c. 231, § 85Q (standard of care owed by landowners to children). A landlord in certain settings must also exercise reasonable care to repair defects. See *Bishop v. TES Realty Trust*, 459 Mass. 9 17-19 (2011); *Young v. Garwacki*, 380 Mass. 162, 167-69 (1980); *Crowell v. McCaffrey*, 377 Mass. 443, 445-50 (1979); *King v. G & M Realty Corp.*, 373 Mass. 658, 660-62 (1977); *Lindsey v. Massios*, 372 Mass. 79, 81-82 (1977); *Wilson v. Boston Redev. Auth.*, 366 Mass. 588, 592 (1975); accord G.L. c. 186, § 19. While a landlord has duty of reasonable care to protect a tenant from harm by another tenant's pit bull on the premises, see *Nutt v. Florio*, 75 Mass. App. Ct. 482, 486 (2009), a landlord should not be held liable for injuries inflicted by a tenant's dog on a public sidewalk, see *Creatini v. McHugh*, 99 Mass. App. Ct. 126, 129 (2021).
 - *A theater owner* has the same duty as a restaurant owner to protect patrons. *Rawson v. Mass. Operating Co., Inc.*, 328 Mass. 558, 560 (1952).
 - *A "good samaritan"* owes a duty of due care to one the person voluntarily seeks to rescue. *Davis v. Westwood Group*, 420 Mass. 739, 746 & n.12 (1995); *Black v. New York, New Haven, &*

PREMISES LIABILITY: OVERVIEW OF ELEMENTS AND DUTY

Hartford R.R. Co., 193 Mass. 448, 450 (1907); Restatement (Second) of Torts § 323 (1977). *But cf.* G.L. c. 71, § 55A (public school teacher, principal, or school nurse rendering good faith emergency assistance not subject to “good samaritan” rule); G.L. c. 112, § 12B (physician or registered nurse rendering emergency assistance not subject to “good samaritan” rule); G.L. c. 258C, § 13 (no civil liability for person who, in good faith, provides or obtains assistance for victim of crime, provided that acts or omissions were not willful, wanton, or reckless conduct”).

- *The owner of a service elevator* owes a duty of reasonable care (ordinary prudence) to elevator users. *Toubiana v. Priestly*, 402 Mass. 84, 88 (1988).
- *The owner of a dog* is strictly liable for personal injury or property damage unless a plaintiff over age seven was trespassing, committing other torts, or teasing, abusing, or tormenting the dog. If the plaintiff was under age seven, the burden is on the defendant to rebut the presumption that the plaintiff was not trespassing or teasing. G.L. c. 140, § 155.

2. **Affirmative duty to act.** An affirmative duty to act with reasonable care to prevent harm to another caused by a third person arises where there is a “special relationship” between a defendant and a plaintiff, which exists in the following cases collected in *Irwin v. Town of Ware*, 392 Mass. 745, 757, 760 (1984); *see also* G.L. c. 258, § 10(j) (Massachusetts Tort Claims Act provision regarding violent or tortuous conduct of a third person).

- *A college* has a duty to exercise reasonable care to protect its students from third persons. *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 58 (1983).
- *A tavern keeper* has a duty of reasonable care to prevent harm to its patrons. *Kane v. Fields Corner Grille, Inc.*, 341 Mass. 640, 641 (1961).
- *A restaurant owner* has a duty to its patrons “to use reasonable care to prevent injury to [them] by third persons whether their acts [are] accidental, negligent or intentional.” *Carey v. New Yorker of Worcester, Inc.*, 355 Mass. 450, 452 (1969).
- *A motel owner* has a duty to prevent harm to a guest by a third party in a swimming pool on the premises. *Keating v. Jones Dev. of Mo., Inc.*, 398 F.2d 1011, 1014-15 (5th Cir. 1968).

3. **Duty to warn.**

- *Obvious Danger:* *O’Sullivan v. Shaw*, 431 Mass. 201, 210-211 (2000) (no duty to warn guest of open and obvious danger of diving headfirst into shallow end of swimming pool); *Young v. Atlantic Richfield Co.*, 400 Mass. 837, 842 (1987) (no duty to post a sign warning of other automobiles at a gas station), *cert. denied*, 484 U.S. 1066 (1988).
- *Warning Necessary:* *Noble v. Park Enters., Inc.*, 313 Mass. 454, 458(1943) (duty to warn where unguarded window fan blades cut child’s finger).
- *Narrow exception where no warning necessary:* *Ward v. Shnurr*, 103 Mass. App. Ct. 308, 315 (2023) (there is a narrow exception to a landowner’s duty of care where a person is injured by the very condition the landowner hired the person to remedy.)

4. **Limitation of liability for public recreational use.** The “recreational use statute”, G.L. c. 21, § 17C, provides, in part that, “any person having an interest in land ... who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor . . . shall not be liable for personal injuries or property damage sustained by such members of the public . . . while on said land in the absence of willful, wanton, or reckless conduct by such person.” The statute “merely provides an

exemption from liability for ordinary negligence claims; it does not provide immunity from suit.” *Lynch v. Crawford*, 483 Mass. 631, 637 (2019), quoting *Marcus v. City of Newton*, 462 Mass. 148, 150-151 (2012).