

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.

If you decide that the defendant was negligent and that the defendant’s negligence was a contributing cause of (injury) (damage) to the (plaintiff) (plaintiff’s property) and you have determined the amount of damages for that injury, you must then decide whether the plaintiff was also negligent to some degree, and whether the plaintiff’s negligence was also a contributing cause of the (injury) (damage).

The definitions of negligence and legal cause which I gave you before apply here as well. The plaintiff also has a duty to use the degree of care in (his / her / their / its) own actions which a reasonably careful person would use under similar circumstances [optional: *plaintiff’s version of parties’ contentions*].

The defendant has the burden of proving by a preponderance

of the credible evidence that the plaintiff's own failure to use due care contributed to bringing about the plaintiff's damages.

If you find that the defendant's negligence caused injury to the plaintiff and that the plaintiff's own negligence also contributed to the causing of that injury, you must then apportion the relative responsibility of the two parties by assigning percentages totaling 100%, such as 90-10, 70-30 etc.

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.

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. 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.

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).