

Gross Negligence¹

PLF has also brought a claim against DFT for gross negligence. PLF claims that DFT's gross negligence caused DCD's [decedent's] death by [describe alleged acts or omissions]. A person/company can be grossly negligent by acting or by failing to act. PLF must prove that, more likely than not, DFT was grossly negligent.

Gross negligence is the failure to use even slight care to avoid creating an unreasonable risk of harm. It means indifference to DFT's duty to use reasonable care to avoid harm. Gross negligence is an extreme departure from what a reasonably careful [person/company] would do under similar circumstances.² The difference between negligence and gross negligence is a matter of degree. Gross negligence is very great negligence and goes significantly beyond the mere failure to use reasonable care.

To prove gross negligence, however, PLF does **not** have to prove that DFT intentionally or recklessly engaged in misconduct or wrongdoing.³

¹ Gross negligence and recklessness instructions apply most often in wrongful death cases. They do not apply to personal injury cases, unless there is a particular exception, such as where the plaintiff has signed a liability waiver, waiving claims for negligence. Gross negligence and recklessness typically are not subject to liability waivers.

² "The long-standing definition of gross negligence in Massachusetts was set forth in *Altman v. Aronson*, 231 Mass. 588, 591-592 (1919):

'Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.'

Aleo v. Toys R Us, 466 Mass. 398, 410 (2013).

³ *Maryland Casualty Company v. NSTAR Electric Company*, 471 Mass. 416, 427 (2015) (citations omitted).

You should consider DFT's conduct as a whole and consider the likely consequences of the act or failure to act. You should also consider that the necessary degree of care increases as the potential for harm increases.⁴ If DFT's act [failure to act] was likely to cause death or very serious injury, then you may find gross negligence, even if the act [failure to act] would otherwise be a simple lack of reasonable care, i.e., negligence.⁵ You may consider the combined effect of multiple failures to use reasonable care in determining whether DFT was grossly negligent.⁶ Whether or not an alleged act or failure to act is grossly negligent depends heavily on the facts as you find them to be.

To help as you consider the evidence, you should ask yourselves the following questions:

- Did the DFT voluntarily take an obvious risk in circumstances where failure to use reasonable care could be fatal or cause very serious injury?⁷
- Did the DFT persist in a clearly negligent course of conduct over a noticeable period of time?⁸
- Was DFT impatient with reasonable precautions?
- Was DFT deliberately inattentive?⁹
- If DFT was inattentive for just a moment, did s/he do so at a time when there was a risk of great and immediate danger?¹⁰

If the answer is "yes" to one or more of these questions, you may find DFT's conduct was grossly negligent. It is for you to decide whether the DFT's

⁴ *Lane v. Meserve*, 20 Mass. App. Ct. 659, 664 (1985).

⁵ *Parsons v. Ameri*, 97 Mass. App. Ct. 96, 106 (2020) (citations omitted).

⁶ *Williamson-Green v. Equip. 4 Rent, Inc.*, 89 Mass. App. Ct. 153, 157 (2016) (citations omitted).

⁷ *Parsons*, 97 Mass. App. Ct. at 107.

⁸ *Parsons*, 97 Mass. App. Ct. at 106, 109.

⁹ *Parsons*, 97 Mass. App. Ct. at 109.

¹⁰ *Christophers v. Father's Huddle Café, Inc.*, 57 Mass. App. 217 (2003) (citations omitted).

conduct was grossly negligent, once you have considered all of the circumstances and all of my instructions.

Question ___ asks: "Was DFT grossly negligent?" If you answer "yes," then you will go to question ___, which asks whether the DFT's gross negligence was a cause of DCD's death.