

*< Note: This instruction is for use only in medical malpractice wrongful death cases. There is a separate model instruction for medical malpractice where the injured person has not died.>*

## Medical Malpractice

As I explained before the trial began, the term “medical malpractice” is the same thing as “medical negligence.” “Medical malpractice” refers to medical negligence by a physician or other health care professional in providing medical care to a patient.

In order to prove medical negligence, PLF must show that the following [four/five] things are more likely true than not true:

0. *< If a doctor-patient relationship is contested>* that a **doctor-patient relationship** existed;
1. what the medical **standard of care** was in the circumstances of this case - in other words, what the defendant should have done;
2. that the defendant’s medical treatment **fell below that standard of care** - in other words, that the defendant was negligent;<sup>1</sup>
3. that the defendant’s negligence was a **cause** of the plaintiff’s injury or harm;
4. the extent of the alleged **injuries/harm**, which we call “damages.”

I will now explain each of these things in more detail.

### (a) Doctor-Patient Relationship

*< omit this section if this is uncontested>*

First, PLF must prove that, more likely than not, DFT and PLF had a doctor-patient relationship at the time of the alleged negligence. A doctor-patient

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<sup>1</sup> *Stepakoff v. Kantar*, 393 Mass. 836, 840-841 (1985).

relationship exists when the doctor participates in the evaluation, care, or treatment of the patient.

The doctor's relationship with the patient must involve more than a casual or informal conversation. For example, if I mention to a doctor at a neighborhood gathering that I am having some medical symptoms, that is not enough to establish a doctor-patient relationship. However, if a radiologist interpreted an x-ray in my medical records, then a doctor-patient relationship existed, even if I never met or spoke with that doctor.<sup>2</sup> A doctor-patient relationship may be formed by a virtual visit (such as a phone call or videoconference appointment) or an in-person visit, and the same principles I just outlined would apply.

*< For a claim against a medical provider based on his/her position in an organizational structure for failure to make appropriate policies and procedures:>* PLF claims that DFT had a duty to make appropriate policies and procedures and violated that duty. PLF cannot prevail on this claim based **only** on DFT's position in an organization. Rather, you must decide whether DFT owed a duty personally to the patient.<sup>3</sup> It is for you to decide whether DFT owed a duty to make appropriate policies and procedures and whether DFT owed this duty to PLF. You must make this decision based upon the facts as you find them to be and the expert evidence in this case. For example, the chief of medicine of a hospital does not have a doctor-patient relationship with every patient admitted to that hospital, simply because of his or her position. However, the laboratory director who is personally involved with the allegedly negligent policies and procedures in a laboratory may have a doctor-patient relationship with a patient, depending on the facts of the case.<sup>4</sup>

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<sup>2</sup> If the case involves a radiologist, it is better to give an example in a different specialty, such as: "However, if a pathologist interpreted the results of a tissue biopsy in my medical records, a doctor-patient relationship existed, even if I never met that doctor."

<sup>3</sup> *Santos v. Kim*, 429 Mass. 130 (1999).

<sup>4</sup> *Id.*

## (b) Standard of Care

First [Next], PLF must prove what standard of care DFT should have provided to DCD in this case.<sup>5</sup>

DFT owed a duty to treat DCD according to the “standard of care.” “Standard of care” means the degree of skill and care of the average doctor [provider] practicing in the defendant’s area of specialty, taking into account the advances in the profession and the medical resources available to the doctor [provider].<sup>6</sup> This standard of care required DFT to use the degree of skill and care of the average [*type of specialist*] practicing between [*dates – usually given in years.*]. You measure the standard of care as of the time of the events [e.g. - from 2016 to 2017].

This standard does not require doctors [providers] to provide the best care possible.<sup>7</sup> But a doctor [provider] must have and exercise the skill and expertise ordinarily possessed by other doctors [providers] in the same specialty.

The plaintiff has the burden to prove what standard of care would have been provided by the average qualified [*insert specialty*] providing similar care in [*insert year or years of alleged negligence*] under similar circumstances. You may not hold the defendant to some other standard of care. For example, what a different individual doctor did or would have done is not enough to show what care the average qualified doctor would provide.<sup>8</sup>

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<sup>5</sup> *Palandjian v. Foster*, 446 Mass. 100, 104 (2006).

<sup>6</sup> *Palandjian v. Foster*, 446 Mass. 100, 112 (2006); *McCarthy v. Boston City Hospital*, 358 Mass. 639, 643 (1971); *Brune v. Belinkoff*, 354 Mass. 102 (1968).

<sup>7</sup> *Palandjian v. Foster*, 446 Mass. 100, 105 (2006).

<sup>8</sup> *Palandjian v. Foster*, 446 Mass. 100, 104-105 & n.7 (2006).

You must determine this standard of care from the testimony presented by medical experts during the trial of this case.<sup>9</sup> [*< If medical treatises were admitted substantively, and not just for impeachment, add to the end of the last sentence:>* "as well as the contents of any medical treatises that were admitted in evidence."] The standard of care does **not** need to be in writing. If the experts disagree about the standard of care, you will have to resolve the conflict to determine the degree of care and skill of the average qualified [specialty] at the time and in the circumstances of DCD's medical treatment.

In deciding the standard of care for an average qualified [*insert specialty*] at that time, you may consider only testimony by witnesses whose education, training, and experience give them sufficient knowledge of what other doctors [providers] in that specialty typically did at that time.<sup>10</sup> That may include testimony by the parties' outside experts, as well as the testimony and statements of the defendant[s] [and other treating physicians].<sup>11</sup> An expert must be familiar with the standard of care through education, training, experience, and familiarity with the subject matter,<sup>12</sup> but does not have to be a specialist in DFT's area of practice.<sup>13</sup> Similarly, an expert does not have to practice in the same state or geographic area.<sup>14</sup>

You may not guess or speculate as to the applicable standard of care, or substitute your belief of what the standard of care should be. You may not do your own medical research, on the Internet or somewhere else, to try to

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<sup>9</sup> In the rare case that expert medical testimony is not required, this sentence should be omitted or modified.

<sup>10</sup> *Palandjian v. Foster*, 446 Mass. 100, 106 (2006).

<sup>11</sup> If applicable, add in any other source of expert testimony in the case. For example, there may be rare cases where a part of the standard of care comes by way of stipulation of the parties. If so, the instruction should include "or a stipulation of the parties."

<sup>12</sup> *Letch v. Daniels*, 401 Mass. 65, 68 (1987).

<sup>13</sup> *Letch v. Daniels*, 401 Mass. 65, 68 (1987).

<sup>14</sup> *Brune v. Belinkoff*, 354 Mass. at 108.

understand the standard of care. Instead, you must base your decision solely on the evidence presented here in the courtroom.

PLF must show, by expert medical testimony, what standard of care DFT should have followed on [*dates*]. If the standard of care has changed between that time and now, then you need to consider the standard of care that applied at the time DFT treated DCD.

### **(c) Falling Below the Standard of Care**

Second [Next], the plaintiff must prove that, more likely than not, the defendant was negligent, which means that PLF must prove that DFT provided medical care that fell below the standard of care that the average qualified doctor [provider] would have provided. Negligence might consist of doing something inconsistent with the standard of care, or failing to do something required by the standard of care.

You must decide whether or not the defendant(s) met the standard of care in light of the facts that the defendant(s) knew or reasonably should have known under the circumstances, at the time of the alleged negligence.

Even if the defendant(s) did not know some information, you must consider what s/he should have known at the time, if s/he had complied with the standard of care. Doctors cannot predict everything accurately, but they do need to comply with the standard of care in deciding whether to get more information through additional communication, testing, or other means.

#### **(1) Doctor's Judgment**

Doctors are expected to use their judgment as long as that judgment does not fall below the standard of care.

Sometimes more than one course of action or conclusion may be consistent with the required standard of care. If so, then a doctor [provider] may exercise his or her best judgment as to the appropriate steps to take, and doing so is not negligence. However, a doctor is negligent and may be held

liable for an error of judgment if that judgment represents a departure from the standard of care.

Evidence that another doctor might have treated the patient differently is not, by itself, evidence that DFT was negligent, because doctors are entitled to act within a range of medical judgment - as long as the judgment falls within the standard of care.

## **(2) No Guarantee**

Doctors do not guarantee a cure or a particular outcome.<sup>15</sup> They do not guarantee that treatment will improve the patient's condition, or that the patient's condition will not get worse, either by natural causes or even as a result of the treatment itself. A bad result or unfortunate medical outcome, standing alone, is not evidence of negligence. Doctors do not have to be perfect, but they must meet the standard of care.

## **(3) Effect of admissions**

[< *Give this instruction only if there is evidence of admissions by the defendant.*> You have heard evidence of statements allegedly made by DFT concerning his/her treatment of DCD. If you find that DFT made these statements and that DFT admitted s/he was negligent in these statements, then you may determine that DFT was negligent without any other expert medical opinion.]

Similarly, you have heard evidence of statements allegedly made by DFT concerning the cause of DCD's injuries. If you find that DFT made these statements and that DFT admitted that his/her actions or inactions caused DCD's injuries/death in these statements, then you may determine that DFT caused the injuries without any other expert medical opinion.

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<sup>15</sup> This paragraph may not be appropriate in certain cases of informed consent or *res ipsa loquitur*.

#### (4) Verdict Slip—Negligence

On the verdict slip, the first question is “Was DFT negligent in his/her treatment of DCD.” If you find that DFT was negligent—meaning you find that DFT provided medical care that fell below the standard of care that the average qualified doctor [provider] would have provided—then you should answer ‘YES’ and go to the next question on the slip. Otherwise, answer ‘NO’ and go no further.

##### (d) Causation

If you find that DFT was negligent, then you must decide whether PLF proved that, more likely than not, DFT’s negligence caused DCD’s injuries and death.<sup>16 17</sup> You must ask: “Would the same harm have happened without DFT’s negligence?” In other words, did the negligence make a difference to the outcome? If DFT’s negligence had an impact on DCD’s injuries (by causing them or worsening them) or caused DCD’s death to occur at an earlier date than it would have without the negligence, then the defendant[s] caused those injuries or caused the death. But if the negligence had no impact on PLF’s injuries or death,<sup>18</sup> meaning that<sup>19</sup> the same harm would have happened anyway, then DFT did not cause the injuries.<sup>20</sup>

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<sup>16</sup> *Palandjian v. Foster*, 446 Mass. 100, 104 (2006).

<sup>17</sup> A judge who prefers to use the technical legal phrase “but for cause” may do so here by, for instance, saying “DFT caused PLF’s harm if the harm would not have occurred absent, that is but for, DFT’s negligence.” See *Doull*, 487 Mass. at 6, quoting trial judge’s charge. In the pursuit of plain language, however, the above text does not use the phrase “but for,” which is not in common usage among jurors and may raise questions or create confusion.

<sup>18</sup> *Doull v. Foster*, 487 Mass. 1, 11 (2021) (“[T]he purpose of this but-for standard is to separate the conduct that had no impact on the harm from the conduct that caused the harm.”).

<sup>19</sup> *Luppold v. Hanlon*, 496 Mass. 148, 162 (2025).

<sup>20</sup> *Doull*, 487 Mass. at 12-13 (“[T]he focus instead remains only on whether, in the absence of a defendant’s conduct, the harm would have still occurred.”).

Often, an injury or death has more than one cause.<sup>21</sup> If the defendants' negligence was one of those causes, that is enough. The plaintiff does not have to show that the defendants' negligence was the only cause of the injuries or death. Nor does s/he have to show that the negligence was the largest or main cause, as long as the injuries or death would not have occurred without DFT's negligence.

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<sup>21</sup> "Where multiple causes are alleged, it is appropriate to instruct a jury that there can be more than one factual cause of a harm." *Doull v. Foster*, 487 Mass. 1, 13 n.13 (2021) See also *Id.* at 12 ("[T]here is no requirement that a defendant must be the sole factual cause of a harm."). Arguably, "there will always be multiple . . . factual causes of a harm, although most will not be of significance for tort law and many will be unidentified." Restatement of Torts (Third) § 26 comment c, quoted in *Doull*, 487 Mass. at 12, which also cited *June v. Union Carbide Corp.*, 577 F.3d 1234, 1242 (10th Cir. 2009) ("A number of factors [often innocent] generally must coexist for a tortfeasor's conduct to result in injury to the plaintiff. . . . That there are many factors does not mean that the defendant's conduct was not a cause"). Multiple causes appear in many commonly-litigated negligence cases, including those alleging comparative negligence, cases alleging independent negligence by multiple defendants (not based on vicarious liability), and cases involving environmental or organic causes, such as medical malpractice cases where an organic condition is a necessary cause of the death or injury.

*Doull* quoted further from the Restatement on the multiple cause issue:

In fact, there is no limit on how many factual causes there can be of a harm. . . .The focus instead remains only on whether, in the absence of a defendant's conduct, the harm would have still occurred. See [Restatement (Third) § 26 comment c] ("The existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur"). This is not a high bar. See *id.* at § 26 comment i ("Quite often, each of the alleged acts or omissions is a cause of the harm, i.e., in the absence of any one, the harm would not have occurred"). And acknowledging the potential for multiple but-for causes "obviates any need for substantial factor as a test for causation." Reporters' Note to Restatement (Third) § 26 comment j.

*Doull*, 487 Mass. at 12-13.



Here, again PLF must prove causation by expert medical evidence.<sup>22</sup> This evidence may be in the form of testimony or in the form of medical records,<sup>23</sup> autopsy reports,<sup>24</sup> or the death certificate.<sup>25</sup> .

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<sup>22</sup> *Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 70 (2020) (“if the causation question involves questions of medical science or technology, the jury requires the assistance of expert testimony”). Cf. *Pitts*, 82 Mass. App. Ct. at 290 (“No expert testimony is necessary for lay jurors to appreciate that allowing a nursing home patient to fall to the floor could cause a broken bone”).

<sup>23</sup> When proper notice and certification provisions are met, “hospital medical records ... or any report of any examination of said injured person . . . shall be admissible as evidence of the . . . diagnosis of said physician . . . , the prognosis of such physician . . . , the opinion of such physician . . . as to proximate cause of the condition so diagnosed. . . .” G. L. c. 233, § 79G. G. L. c. 233, § 79 provides for the admissibility of hospital and clinic records related to treatment and medical history. See also *Commonwealth v. Torres*, 479 Mass. 641, 653-654 (2018) (information that has some bearing on liability, which is contained in the medical records but is primarily for the purpose of medical diagnosis and treatment, may be properly admitted in evidence).

<sup>24</sup> “Autopsies performed by physicians are diagnostic in nature and yield detailed, intimate information about the subject’s body and medical condition. Therefore, they are medical records.” *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132, 134 (1989). Autopsy reports, in contrast to death certificates, are not considered public records. *Id.* at 136. It is common that autopsies are certified under G.L. c. 233, § 79G and admitted in evidence in civil wrongful death cases to prove, among other things, causation.

<sup>25</sup> G.L. c. 24, § 19 provides that:

The record of the town clerk relative to a birth, marriage or death shall be prima facie evidence of the facts recorded, but nothing contained in the record of a death which has reference to the question of liability for causing the death shall be admissible in evidence. A certificate of such a record, signed by the town clerk or assistant clerk, or a certificate of the copy of the record relative to a birth, marriage or death required to be kept in the department of public health, signed by the commissioner of public health or the registrar of vital records and statistics, shall be admissible as evidence of such record.

A death certificate is prima facie (not conclusive) evidence of the facts recorded, including the cause of death. *Miles v. Edward O. Tabor, M.D.*, 387 Mass. 783, 786 (1982). See also *Walcott v. Sumner*, 308 Mass. 413, 415 (1941).

[< *if foreseeable risk ("legal cause") is at issue* <sup>26</sup>> In addition, PLF must prove that the injury/death was, more likely than not, a predictable<sup>27</sup> result of DFT's negligence. You must ask: "Did DFT's negligence create a foreseeable risk of the type of injury that PLF suffered?" The risk was foreseeable if a reasonable person in DFT's position should have known that the negligence created a risk of this type of harm. PLF does not have to prove that DFT could or should have predicted the precise way in which the injury occurred, but s/he must show that his/her injury was a natural result of DFT's negligence.]

On the verdict slip, Question \_\_ asks: "Was DFT's negligence a cause of DCD's injuries?" If you find that DFT's negligence was a cause of DCD's injuries [and that the injuries were a predictable result of that negligence], then you should answer "Yes." Otherwise, answer "No."

< *If the case involves claims of lack of informed consent, insert model instruction for "Medical Malpractice—Lack of Informed Consent" here.*>

**(e) Comparative negligence < if asserted >**

As part of his/her/its defense, DFT claims that DCD was himself/herself negligent, and that DCD's own negligence caused his/her injuries or death. The verdict slip covers this issue in Questions \_\_ and \_\_. You will reach these questions only if you find that DFT was negligent and that his/her/its negligence was a cause of DCD's injuries.

Please note that these two questions are exceptions to my previous instructions, in which I told you that the plaintiff had the burden of proof.

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<sup>26</sup> In *Doull v. Foster*, 487 Mass. 1, 8 (2021), the court noted:

Additionally, for the defendant to be liable, the defendant must also have been a legal cause of the harm. This means that the harm must have been "within the scope of the foreseeable risk arising from the negligent conduct." *Leavitt*, 454 Mass. at 45. This aspect of causation is "based on considerations of policy and pragmatic judgment." *Kent*, 437 Mass. at 320–321, quoting *Poskus v. Lombardo's of Randolph, Inc.*, 423 Mass. 637, 640 (1996).

<sup>27</sup> As noted above, n. 2, this instruction uses the word "predictable" but the judge may decide to use the more technical term "foreseeable."

On Questions \_\_ and \_\_, the defendant(s) have the burden of proof. The plaintiff has no burden to prove anything on these questions.

### (1) Reasonable Care—for Comparative Negligence

Under the law, DCD must have used reasonable care to prevent harm to him/herself under the circumstances of this case. If s/he failed to do so, s/he was negligent. That failure might have occurred through action or inaction. You must consider all the evidence and then make a judgment about what a reasonably careful patient would have done.

You should consider what DCD did or failed to do to prevent harm to him/herself. Then you should consider all of the relevant circumstances. For example, you may ask the following questions:

- Where, when, and how did the incident occur?
- How likely was it that people could be injured?
- How serious was the potential injury?
- How obvious should the risk have been to DCD?
- [*< if applicable >* Was there any emergency?]
- How much [would it have cost] [of a burden would it have been] to avoid the injury?

Then you make a judgment. The law requires a person to use reasonable care to avoid suffering predictable injuries.<sup>28</sup> We ask you, the jury, to consider what a reasonable and careful person would have done under these circumstances. What you consider reasonable may vary depending on

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<sup>28</sup> This instruction reflects a conscious choice to avoid the traditional phrase “ordinary prudent person,” because the rarely-used word, “prudent,” may strike some jurors as peculiar, unhelpful or distracting. Following the case law, some judges may prefer to say: “The law requires a [company] [person] to act as an ordinary prudent person would act in the circumstances to avoid foreseeable injury.” See, e.g., *Sheehan v. Roche Bros. Supermarkets*, 448 Mass. 780, 790-792 (2007) (“an ordinarily prudent person in the defendant’s position”) (citation omitted); *Toubiana v. Priestly*, 402 Mass. 84, 88 (1988) (“Ordinarily, where a duty of care is established by law, the standard by which a party’s performance is measured is the conduct expected of an ordinarily prudent person in similar circumstances.”). If so, corresponding changes will be necessary throughout this instruction.

the circumstances of this case. A person should take greater precautions as the risk of harm increases. You should also ask yourself: "Did DCD actually know about any risks?" And, if not: "Should s/he have known about them?"

On the verdict slip, Question \_\_ asks "Was DCD negligent?" If you decide that DCD more likely than not failed to use reasonable care, then you answer "Yes," and go on to answer the next question. Otherwise, you answer "No" and then skip Question \_\_.

## (2) Causation—for Comparative Negligence

DFT must also prove that DCD's own negligence was a cause of his/her injuries. To determine this, you must apply the same definition of cause that I gave you in connection with Question \_\_.

If you find that DCD was negligent, and therefore answer "Yes" to Question \_\_, then you must compare the negligence of each party. You do this by determining the degree of negligence of each party. You express that comparison in percentages of negligence which, when added together, equal 100%. This is Question \_\_.

The plaintiff may recover against DFT only if you find that DCD's own negligence was less than or equal to the defendants' negligence.<sup>29</sup> But if you find that DCD was more negligent than DFT, then PLF cannot recover anything in this case.

Please note that I am asking you to determine the percentage of negligence, if any, of each side only so that the clerk can calculate damages based upon your decision. If you find that DCD was negligent by some percentage, you must **not** reduce the amount of damages you find on Question \_\_. Any reduction due to PLF's comparative negligence is the job of the clerk, not the jury.

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<sup>29</sup> G.L. c. 231, § 85.

## (f) Compensation for Damages

Finally, the plaintiff must prove, more likely than not, the amount of injury or harm, which I will refer to as “damages,” that was caused by the defendants’ negligence. In this case, the parties agree that PLF is seeking damages that relate to [*clarify as necessary*, such as, e.g., *failure to diagnose lung cancer or chemotherapy for the plaintiff’s second primary colon cancer, which was diagnosed in 2011 and was treated by chemotherapy over a period of several months in 2011 and 2012.*]

PLF is entitled to receive compensation for the following, if you reach the issue of damages:

< *Omit any category of damages that is not applicable.* >

### (1) Conscious Pain and Suffering

You should consider damages for DCD’s [decedent’s] conscious pain and suffering, if any. You will see that Question \_ asks: “What amount of money, if any, do you award as full and fair compensation for DCD’s conscious pain and suffering as a result of DFT’s negligence?” In answering this question, you may award damages only for any pain and suffering that DCD experienced while s/he was still alive and conscious.

There are two kinds of pain and suffering: physical pain and suffering and mental pain and suffering.

For physical pain and suffering, you must consider any physical injuries to DCD’s body resulting from DFT’s negligence. You must consider the pain and suffering that DCD endured, while conscious, in each part of his/her body because of the negligence.

You should also consider any conscious mental suffering that DFT’s negligence caused. Mental pain and suffering includes nervous shock, anxiety, embarrassment, or mental anguish resulting from the injury. Also, if DCD’s injuries caused him/her to lose enjoyment of activities such as work,

play, family life, or otherwise, then you should award damages for that reduction in the enjoyment of life.

[< *if there is evidence of loss of function*> You should also award a fair, reasonable sum for any [temporary or] permanent condition that DCD sustained, while conscious during his/her life, because of DFT's negligence. This could include any loss of bodily function [or scarring] [or loss of life expectancy proven with reasonable medical probability.] ]

[< *if there is evidence of a pre-existing condition*> If DCD suffered from a pre-existing medical [mental] condition, you may not award damages for that pre-existing condition itself. However, you should provide compensation for any worsening of an existing condition that resulted from DFT's negligence. You should ask yourself: "Did the negligence worsen DCD's pre-existing condition?" If so, then you may award damages only for the worsening of the condition.]

When you have determined the amount of damages for DCD's conscious pain and suffering, you write the amount, in words and numbers, in response to Question \_\_.

## **(2) Decedent's Medical Expenses**

You should consider any medical [doctor, hospital, chiropractic, nursing, or other expenses if reasonably and medically necessary] expenses that DCD incurred because of the negligence. You must compensate PLF for those expenses if they were reasonably necessary and were reasonable in amount. So, you must answer two questions:

- Were the medical services provided to DCD reasonably necessary because of an injury that resulted from the incident? ; and
- Were the charges themselves reasonable in amount?

The exhibits include doctors' reports, medical records, and medical bills relating to medical services provided to DCD. You may consider those exhibits as evidence of DCD's diagnosis, treatment, prognosis, and his/her

resulting disability or incapacity, if any. You may also consider them in deciding whether the defendant's negligence was a cause of DCD's injuries. And you may consider them on the question of reasonable medical expenses.

You do not have to believe something simply because it appears in a medical record or report. It is entirely up to you to decide whether you believe what appears in a record or report and how much importance to give the exhibit.

Although the use of health insurance and other reimbursement programs is widespread, that fact should not enter into your calculation. It is not relevant whether DCD paid his/her own medical expenses, or whether s/he was covered by insurance, or otherwise received reimbursement. If necessary, someone else will consider those matters, perhaps with information that is not even in evidence here. It would be unfair for you to speculate about such matters, because if you start guessing, you could easily guess wrong and do an injustice.

### **(3) Loss of Decedent's Income Prior to Death**

You should also award damages for any lost earning capacity resulting from DFT's negligence, but only for the period after the alleged negligence/injury and prior to death, for this category. Earning capacity is simply the ability to earn money. People can have an earning capacity whether they are employed, working at home, or retired, and even if they never worked a day in their life. If DCD had earning capacity before the incident, and lost the necessary physical or mental ability to earn money at the same level for some time because of DFT's negligence, then s/he is entitled to damages for lost earning capacity during that period.

You must consider DCD's own earning capacity, not that of an average person in his/her position. Earning capacity varies by person depending on a number of factors, including:

- What did DCD do until the incident, including his/her occupation?
- What did DCD earn before and after the injury?
- What were DCD's education, capacity, training, experience, health, and habits?
- What talents, skills, intelligence, and motivation did DCD have?; and
- What were DCD's interests?

You may not, however, consider anything that is only possible or speculative. Rather, you must decide what is reasonably likely.

[< ***Employer Payments, if applicable***> Even if a person does not lose wages because his/her employer continues his/her pay voluntarily, or as compensation for disability, s/he may nevertheless recover damages for impairment of earning capacity. It is not relevant whether DCD received disability payments. If necessary, someone else will consider those matters, perhaps with information that is not even in evidence here. It would be unfair for you to speculate about such matters.]

[< ***Claim Exceeding Prior Wages, if applicable***> A person may have an earning capacity that exceeds his/her wages in the job that s/he had before or at the time of the incident. Evidence of wages paid is only one factor in your determination of diminution of earning capacity. ]

#### **(4) Funeral [and Burial] Expenses**

Question \_\_ addresses the final area of damages, which are the reasonable and necessary funeral [and burial] expenses resulting from DCD's death. PLF is entitled to compensation for those expenses, but only if they were reasonable in amount and were reasonably necessary for the funeral. Here, you must answer two questions:

- First: were the funeral [and burial] services reasonably necessary because of an injury that resulted from DFT's negligence? and



- Second: were the charges themselves reasonable in amount? If not, you should decide what funeral [and burial] expenses, if any, were reasonable.

### **(5) Wrongful Death Damages to Next of Kin<sup>30</sup>**

Question(s) \_\_ [and \_\_] deal(s) with compensation to DCD's next of kin, namely [list names = NOK,<sup>31</sup> as well as relationships]. In a wrongful death case like this one, a [person who] negligently causes someone's death must pay money damages to the surviving [spouse, child(ren), next of kin] for the value of that lost life. For purposes of the wrongful death claim, the phrase, "lost value" includes but is not limited to, the loss of reasonably anticipated services, protection, care, assistance, companionship, society, comfort, guidance, net income, support, counsel, and advice. "Lost value" does not include grief, anguish, or bereavement at DCD's death.

[< *If there are multiple heirs, the judge may add*>: You will see that these questions call for you to answer separately as to each of the next of kin. ]

#### **a. Existence of a Loss**

[< *if the existence of a compensable NOK loss is contested, otherwise omit*> The parties dispute whether DCD's death caused NOK to suffer lost value as I have defined that word. Question \_\_ asks: "Was DFT's negligence a cause of lost value due to DCD's death for [NOK] [the following next of kin]?" If you answer Question \_\_ "Yes" [as to at least one surviving next of kin], then you must determine the amount of damages that NOK [each next of kin] suffered due to DCD's death. ]

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<sup>30</sup> While the substance of the Wrongful Death Act is set forth in G.L. c. 229, § 2, the next of kin who may be beneficiaries on a verdict slip are set forth in G.L. c. 229, § 1.

<sup>31</sup> If there are more than two or three next of kin entitled to claim wrongful death damages, the trial judge may prefer to state the names of qualifying claimants once and then use the phrase "next of kin" or "surviving family members" instead of listing multiple names each time.

## b. Compensation for the Loss

Question \_\_ asks what amount of money will fully and fairly compensate NOK [each next of kin] for DCD's "lost value", as our law defines that phrase. If you reach this question [these questions], you should award an amount of money that will fully and fairly compensate the next of kin for the lost value of DCD's life. You must determine the fair monetary value of DCD to NOK on the day that s/he died, [insert date of death]. [*if there are multiple next of kin*] You will answer Question \_\_ separately for each of the next of kin, NOK].

You should compensate NOK for any or all of the following lost values, which also appear in the text of Question \_\_ on the verdict slip: the loss of DCD's reasonably expected society, companionship, comfort, guidance, counsel, net income, services, assistance, protection, care and advice, if any, to NOK.<sup>32</sup> This list is not exclusive; you may consider and compensate NOK for other losses as long as they represent the fair value of the loss of DCD and do not duplicate the items I mentioned.

[*if net income is an issue*:> Most of those items are self-explanatory, but I'll give you some further guidance on one item, namely the loss of "net income." During the trial, you heard testimony about DCD's [gross] [net] income and DCD's expectations on how long s/he would work. That does not directly match the test for damages, because, as I have said, the question is not what DCD lost; the question is the loss of net income, if any, that NOK suffered because of DCD's death. So, you may be wondering why there was testimony about DCD's expected [gross] [net] earnings. The answer is that his/her [anticipated net earnings may help you estimate] [anticipated gross earnings may help you estimate DCD's net earnings and, therefore,] the amount s/he was likely to contribute to NOK if s/he had lived. So you may consider evidence of DCD's [net] [gross earnings], but

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<sup>32</sup> If the parties contest the existence of any loss, the judge may wish to omit or shorten this paragraph, as the jury already will have heard these principles. See above.

only for the purpose of determining the portion of DCD's income that NOK would likely have received. In deciding that issue, you may have to reach conclusions by relying upon your good judgment, best reasoning, and life experiences to reach a number that reflects NOK's loss of the benefit of DCD's earnings in the past and through the rest of their joint lifetimes.]

### **c. No Compensation For Bereavement**

While you must consider certain losses, such as loss of companionship and net income, you may not consider certain other things. Although losing a loved one is very difficult emotionally, the law does not allow NOK [any of the survivors] to recover damages for their grief, anguish, or bereavement. The monetary value of DCD's life depends upon the companionship, emotional, financial, and other benefits s/he would have provided to NOK if s/he had lived. Therefore, you must not award damages for NOK's grief, anguish, or bereavement.

### **d. Future Damages, If Applicable**

If you find that NOK will suffer any future loss of DCD's value, you should also award damages for that future loss. [You will see that I have divided Question \_\_\_ into two parts. Question \_\_\_) addresses any damages suffered in the past. Question \_\_\_) is for any future damages.]

There will be no future trial to evaluate any future damages that NOK may suffer. So, you must keep in mind that NOK will receive any judgment in this case in a lump sum and may invest it and earn money. Therefore, if you award damages for future loss, you must reduce that portion of the damages to its present value as of [year case was filed], when this case was filed.<sup>33</sup> The figures in Question \_\_\_ must reflect present value. You cannot award damages for the time after the expected end of DCD's life if s/he had recovered from his/her illness in [year of death].

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<sup>33</sup> See *Griffin v. General Motors Corp.*, 380 Mass. 362, 367 (1980); *Copson vs. New York, New Haven, and Hartford Railroad Company*. 171 Mass. 233, 236-237 (1898).

If you award future damages, then you must also set forth the period of weeks, months, or years over which the future damages are intended to provide compensation.

< *instruction on pre-existing condition, if relevant*:> Sometimes a doctor is accused of negligently doing something that makes a patient's pre-existing condition or disease worse, or of negligently failing to do something that would have kept the pre-existing condition or disease from getting as bad as it did.

If you find that is what happened in this case, then (a) DFT is **not liable** for the pre-existing condition or disease that DFT did not cause, but (b) s/he is **liable** for the results of any additional injury or harm that would have been prevented if DFT had acted within the appropriate standard of care, even if those results were more severe than they would have been if DCD had been perfectly healthy and had not been suffering from the pre-existing condition.<sup>34</sup>

In other words, a doctor [medical provider] takes each patient as that patient is, and is liable for any worsening of the patient's condition that was caused by the doctor's [provider's] negligence.

The plaintiff must prove through expert testimony by [a] medical professional[s] that, more likely than not, the injuries for which the plaintiff seeks compensation were caused or made worse by DFT's negligence.<sup>35</sup> In the absence of credible testimony by a qualified medical expert, you may not speculate as to whether any negligence by DFT caused some part or all of the injuries suffered by DCD.

[< *Optional instruction to disregard insurance*:> Although the use of health insurance and other reimbursement programs is widespread, that fact should not enter into your calculation. It is not relevant whether DCD paid

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<sup>34</sup> *Wallace v. Ludwig*, 229 Mass. 251, 254-256 (1935); *Higgins v. Delta Elevator Service, Corp.*, 45 Mass. App. Ct. 643, 649 (1998).

<sup>35</sup> *Weinberg v. Massachusetts Bay Transp. Auth.*, 348 Mass. 669, 670-671 (1965).

his/her own medical expenses, or whether s/he was covered by insurance, or otherwise received reimbursement. If necessary, someone else will consider those matters, perhaps with information that is not even in evidence here. It would be unfair for you to speculate about such matters, because if you start guessing, you could easily guess wrong and do an injustice.]

### **(6) Conclusion on Compensatory Damages**

I'll conclude with some general rules about damages. The purpose of your damages award is to provide compensation for the injuries or harm caused by DFT's negligence. You must not use your damages award to reward PLF / NOK, nor may you use it to punish DFT.

The law gives you no special formula to assess PLF's damages. So, working together as the jury, you must use your wisdom, judgment, and sense of basic justice to translate into dollars and cents an amount that will fairly and reasonably compensate for the harm or injury caused by DFT's negligence. The plaintiff must show, more likely than not, what the damages are. However, the law does not require any witness to express an opinion about the amount of such damages. The plaintiff may prove damages by direct evidence, indirect evidence, or both.

Sometimes there is some uncertainty in proving one or more area of damages. There is no book or chart that tells you the value of a person's life. That does not necessarily prevent you from awarding full and fair compensation. It is true that the evidence must make it possible for you to determine damages in a reasonable manner. However, we leave the amount of damages to your judgment, as members of the jury, sometimes with little evidence. Even so, you may not determine the plaintiff's damages by guessing. It is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the damages.

[< *include if needed* > Second, the law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand

that any suggestions the lawyers make are not evidence and do not set any sort of standard or floor or ceiling for the amount of damages – it is up to you to evaluate the damages, based on the evidence and your own judgment.]

Finally, once you have calculated damages for [past, present, and future] loss, you should add each of these areas of damages to arrive at a total award. The total sum must not exceed fair compensation for the entire injury. You must avoid duplication or double counting of any elements of damages. When you have made your determination on the amount of damages, using the instructions I have just given, you should write down an amount both in numbers and in words on the verdict slip.

*< Note: In medical malpractice cases, G.L. c. 231, § 60F, requires that the verdict slip itemize the damages. Damages must be separated:*

*1) by category: a) medical expenses, b) loss of earning capacity, and c) pain and suffering/ loss of companionship, loss or impairment of bodily function/embarrassment, disfigurement/other items of general damages, and*

*2) by whether they are for past or future damages. For any future damages, the jury must state the period of time that the future damages are intended to cover, by stating the time in weeks, months, or years.>*

*< Note: If the defendants have not waived the \$500,000 cap on damages on a medical malpractice claim for pain and suffering/loss of companionship, impairment of bodily function/embarrassment, disfigurement/other items of general damages, the jury verdict should include a question asking whether there is a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances in the case such that this \$500,000 limitation would deprive the plaintiff of just compensation. G.L. c. 231, § 60H. >*

## Gross Negligence

< *Include these instructions on gross negligence in a wrongful death case if PLF is seeking punitive damages on the ground that DFT was grossly negligent.*<sup>36</sup>>

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 [doctor or other medical provider] can be grossly negligent by acting or by failing to act. The plaintiff must prove that, more likely than not, the defendants were grossly negligent.

### (a) Was There Gross Negligence

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 [doctor/nurse/other medical provider] would do under similar circumstances.<sup>37</sup> The difference between negligence and gross negligence is a matter of degree. Gross negligence is very great

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<sup>36</sup> 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.

<sup>37</sup> "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).

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.<sup>38</sup>

You should consider the defendant'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.<sup>39</sup> That is, the greater the danger, the more careful the defendant must be. 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.<sup>40</sup> You may consider the combined effect of multiple failures to use reasonable care in determining whether DFT was grossly negligent.<sup>41</sup> 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 DFT voluntarily take an obvious risk in circumstances where failure to use reasonable care could be fatal or cause very serious injury?<sup>42</sup>
- Did DFT persist in a clearly negligent course of conduct over a noticeable period of time?<sup>43</sup>
- Was DFT impatient with reasonable precautions?

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<sup>38</sup> *Maryland Casualty Company v. NSTAR Electric Company*, 471 Mass. 416, 427 (2015) (citations omitted).

<sup>39</sup> *Lane v. Meserve*, 20 Mass. App. Ct. 659, 664 (1985).

<sup>40</sup> *Parsons v. Ameri*, 97 Mass. App. Ct. 96, 106 (2020) (citations omitted).

<sup>41</sup> *Williamson-Green v. Equip. 4 Rent, Inc.*, 89 Mass. App. Ct. 153, 157 (2016) (citations omitted).

<sup>42</sup> *Parsons*, 97 Mass. App. Ct. at 107.

<sup>43</sup> *Parsons*, 97 Mass. App. Ct. at 106, 109.



- Was DFT deliberately inattentive?<sup>44</sup>
- 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?<sup>45</sup>

If the answer is “yes” to one or more of these questions, you may find the defendant’s conduct was grossly negligent. It is for you to decide whether DFT’s 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 DFT’s gross negligence was a cause of DCD’s death.

### **(b) Causation**

*< Option A and Option B are alternative model instructions. Pick one.>*

#### **Option A**

If you find that DFT was grossly negligent, then you must decide whether PLF proved that, more likely than not, DFT’s gross negligence caused DCD’s death. I have already instructed you on causation in the section on negligence. Here, you must apply all the same instructions on causation to determine whether any conduct that you find to be grossly negligent was a cause of DCD’s death. Obviously, anywhere in the previous instructions that I referred to “negligence” you need to substitute “gross negligence” for this section.

#### **Option B**

If you find that DFT was grossly negligent, then you must decide whether PLF proved that, more likely than not, DFT’s gross negligence caused DCD’s

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<sup>44</sup> *Parsons*, 97 Mass. App. Ct. at 109.

<sup>45</sup> *Christopherv. Father’s Huddle Café, Inc.*, 57 Mass. App. 217 (2003) (citations omitted).

death.<sup>46 47</sup> You must ask: "Would the same harm have happened without DFT's gross negligence?" In other words, did the gross negligence make a difference regarding DCD's death? If DFT's gross negligence had an impact on DCD's death (by causing it or causing the death to occur at an earlier date than it would have without the gross negligence), then it caused the death. But if the gross negligence had no impact on DCD's death<sup>48</sup> and the same harm would have happened anyway, then DFT did not cause the death.<sup>49</sup>

Often, a person's death has more than one cause.<sup>50</sup> If the defendants' gross negligence was one of those causes, that is enough. The plaintiff does not

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<sup>46</sup> *Palandjian v. Foster*, 446 Mass. 100, 104 (2006).

<sup>47</sup> A judge who prefers to use the technical legal phrase "but for cause" may do so here by, for instance, saying "DFT caused PLF's harm if the harm would not have occurred absent, that is but for, DFT's negligence." See *Doull*, 487 Mass. at 6, quoting trial judge's charge. In the pursuit of plain language, however, the above text does not use the phrase "but for," which is not in common usage among jurors and may raise questions or create confusion.

<sup>48</sup> *Doull v. Foster*, 487 Mass. 1, 11 (2021) ("[T]he purpose of this but-for standard is to separate the conduct that had no impact on the harm from the conduct that caused the harm.").

<sup>49</sup> *Doull*, 487 Mass. at 12-13 ("[T]he focus instead remains only on whether, in the absence of a defendant's conduct, the harm would have still occurred.").

<sup>50</sup> "Where multiple causes are alleged, it is appropriate to instruct a jury that there can be more than one factual cause of a harm." *Doull v. Foster*, 487 Mass. 1, 13 n.13 (2021) See also *Id.* at 12 ("[T]here is no requirement that a defendant must be the sole factual cause of a harm."). Arguably, "there will always be multiple . . . factual causes of a harm, although most will not be of significance for tort law and many will be unidentified." Restatement of Torts (Third) § 26 comment c, quoted in *Doull*, 487 Mass. at 12, which also cited *June v. Union Carbide Corp.*, 577 F.3d 1234, 1242 (10th Cir. 2009) ("A number of factors [often innocent] generally must coexist for a tortfeasor's conduct to result in injury to the plaintiff. . . . That there are many factors does not mean that the defendant's conduct was not a cause"). Multiple causes appear in many commonly-litigated negligence cases, including those alleging comparative negligence, cases alleging independent negligence by multiple defendants (not based on vicarious liability), and cases involving environmental or organic causes, such as medical malpractice cases where an organic condition is a necessary cause of the death or injury.

*Doull* quoted further from the Restatement on the multiple cause issue:

In fact, there is no limit on how many factual causes there can be of a harm. . . .The focus instead remains only on whether, in the absence of a defendant's conduct, the harm would have still occurred. See [Restatement (Third) § 26 comment c] ("The existence of other causes of the harm does not affect whether specified tortious conduct was a

have to show that the defendants' gross negligence was the only cause of death. Nor does s/he have to show that the gross negligence was the largest or main cause of death, as long as the death would not have occurred without DFT's gross negligence.

Here, again PLF must prove causation by expert medical evidence.<sup>51</sup> This evidence regarding the cause of death may be in the form of testimony or in the form of medical records,<sup>52</sup> autopsy reports,<sup>53</sup> or the death certificate.<sup>54</sup>

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necessary condition for the harm to occur"). This is not a high bar. See *id.* at § 26 comment i ("Quite often, each of the alleged acts or omissions is a cause of the harm, i.e., in the absence of any one, the harm would not have occurred"). And acknowledging the potential for multiple but-for causes "obviates any need for substantial factor as a test for causation." Reporters' Note to Restatement (Third) § 26 comment j.

*Doull*, 487 Mass. at 12-13.

<sup>51</sup> *Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 70 (2020) ("if the causation question involves questions of medical science or technology, the jury requires the assistance of expert testimony"). Cf. *Pitts*, 82 Mass. App. Ct. at 290 ("No expert testimony is necessary for lay jurors to appreciate that allowing a nursing home patient to fall to the floor could cause a broken bone").

<sup>52</sup> When proper notice and certification provisions are met, "hospital medical records ... or any report of any examination of said injured person . . . shall be admissible as evidence of the . . . diagnosis of said physician . . . , the prognosis of such physician . . . , the opinion of such physician . . . as to proximate cause of the condition so diagnosed. . . ." G. L. c. 233, § 79G. G. L. c. 233, § 79 provides for the admissibility of hospital and clinic records related to treatment and medical history. See also *Commonwealth v. Torres*, 479 Mass. 641, 653-654 (2018) (information that has some bearing on liability, which is contained in the medical records but is primarily for the purpose of medical diagnosis and treatment, may be properly admitted in evidence).

<sup>53</sup> "Autopsies performed by physicians are diagnostic in nature and yield detailed, intimate information about the subject's body and medical condition. Therefore, they are medical records." *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132, 134 (1989). Autopsy reports, in contrast to death certificates, are not considered public records. *Id.* at 136. It is common that autopsies are certified under G.L. c. 233, § 79G and admitted in evidence in civil wrongful death cases to prove, among other things, causation.

<sup>54</sup> G.L. c. 24, § 19 provides that:

The record of the town clerk relative to a birth, marriage or death shall be prima facie evidence of the facts recorded, but nothing contained in the record of a death which has reference to the question of liability for causing the death shall be admissible in evidence. A certificate of such a record, signed by the town clerk or

[<if foreseeable risk ("legal cause") is at issue<sup>55</sup> > In addition, PLF must prove that the death was, more likely than not, a predictable<sup>56</sup> result of DFT's gross negligence. You must ask: "Did DFT's gross negligence create a foreseeable risk of the type of harm that PLF suffered?" The risk was foreseeable if a reasonable person in DFT's position should have known that the gross negligence created a risk of this type of harm. PLF does not have to prove that DFT could or should have predicted the precise way in which the death occurred, but s/he must show that the death was a natural result of DFT's gross negligence.]

On the verdict slip, Question \_\_ asks: "Was DFT's gross negligence a cause of DCD's death?" If you find that DFT's gross negligence was a cause of DCD's death [and that the death was a predictable result of that gross negligence], then you should answer "Yes." Otherwise, answer "No."

### (c) Punitive damages for gross negligence

If you find that DFT was grossly negligent and that this gross negligence was a cause of DCD's death, then you will need to determine the amount of punitive damages. This means that if you answer "Yes" to Question \_\_\_\_\_

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assistant clerk, or a certificate of the copy of the record relative to a birth, marriage or death required to be kept in the department of public health, signed by the commissioner of public health or the registrar of vital records and statistics, shall be admissible as evidence of such record.

A death certificate is prima facie (not conclusive) evidence of the facts recorded, including the cause of death. *Miles v. Edward O. Tabor, M.D.*, 387 Mass. 783, 786 (1982). See also *Walcott v. Sumner*, 308 Mass. 413, 415 (1941).

<sup>55</sup> In *Doull v. Foster*, 487 Mass. 1, 8 (2021), the court noted:

Additionally, for the defendant to be liable, the defendant must also have been a legal cause of the harm. This means that the harm must have been "within the scope of the foreseeable risk arising from the negligent conduct." *Leavitt*, 454 Mass. at 45. This aspect of causation is "based on considerations of policy and pragmatic judgment." *Kent*, 437 Mass. at 320–321, quoting *Poskus v. Lombardo's of Randolph, Inc.*, 423 Mass. 637, 640 (1996).

<sup>56</sup> As noted above, n. 2, this instruction uses the word "predictable" but the judge may decide to use the more technical term "foreseeable."

with respect to any defendant, then in Question \_\_\_\_\_ you must determine what amount, if any, of punitive damages to award against that defendant.

Punitive damages are an award of money that is in addition to the compensatory damages that I just explained. Punitive damages are awarded to punish a defendant and to deter future wrongdoing, not to compensate for injury or harm. The plaintiff has the burden of proving that the Estate is entitled to recover punitive damages.

Though I am instructing you on the issue of punitive damages, that does not mean that I have any opinion on the correct answers to these questions. Once again, that is up to you.

The purposes of punitive damages include condemnation, punishment, and deterrence.

A punitive damage award is one that is enough to send a clear message to the defendant to condemn his/her reprehensible behavior. In other words, punitive damages are awarded to punish the defendant and make an example of him/her. The amount of a punitive damages award is one that is sufficient to send a clear message to the defendant to condemn the gross negligence;<sup>57</sup> however, a punitive damages award may not be a grossly excessive punishment.

In other words, punitive damages are awarded to punish a defendant, make an example of them, and deter others from behaving in a similar way in the future.<sup>58</sup>

You may award punitive damages only to punish a defendant for causing DCD's death.<sup>59</sup> You may not award damages to punish a defendant for wrongful conduct that did not harm DCD.<sup>60</sup>

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<sup>57</sup> *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 412 (2013).

<sup>58</sup> *Aleo, supra*.

<sup>59</sup> *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399, 407 (2021).

<sup>60</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 438 U.S. 408, 422 (2003).

[If applicable: And you also may not award damages to punish for injuries inflicted upon other people who are not parties to this lawsuit, even if injuries to other people were caused by the same wrongful conduct that harmed DCD.<sup>61</sup> However, you may consider evidence of harm to others, if that harm was caused by the same wrongful conduct that harmed DCD, for the purpose of deciding whether a defendant's conduct was so reprehensible that it deserves punishment.]<sup>62</sup>

In determining whether to award punitive damages against a defendant and, if so, in what amount, you may consider:

- the character and nature of that defendant's conduct;
- [If applicable:] the defendant's wealth, in order to determine what amount of money is needed to punish the defendant's conduct and to deter any future acts;<sup>63</sup>
- the actual harm suffered by DCD as a result of that defendant's conduct; and
- the magnitude of any potential harm to others if similar future behavior is not deterred.<sup>64</sup>

If you decide to impose punitive damages against a defendant, the amount you award must bear a reasonable relationship to the actual harm that defendant inflicted on DCD and must also bear a reasonable relationship to the severity of that defendant's misconduct.<sup>65</sup>

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<sup>61</sup> *Philip Morris USA v. Williams*, 549 U.S. 346, 353–357 (2007).

<sup>62</sup> *Philip Morris USA v. Williams*, 549 U.S. 346, 353–357 (2007).

<sup>63</sup> See *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 827 (1997); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 438 U.S. 408, 427–428 (2003) (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring)).

<sup>64</sup> See *Gyulakian v. Lexus of Watertown, Inc.*, 475 Mass. 290, 297 n.13 (2016); see also *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion) (“It is appropriate to consider ... the possible harm to other victims that might have resulted if similar future behavior were not deterred.”).

<sup>65</sup> See *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 827 (1997); accord *Philip Morris USA v. Williams*, 549 U.S. 346, 351 (2007); *BMW of North Amer. v. Gore*, 517 U.S. 559, 575–581 (1996).

If you are answering Question \_\_\_\_ with respect to multiple defendants, you must make a separate decision as to what amount of punitive damages, if any, is appropriate for each of those defendants.

## Damages – Loss of Consortium Prior to Death

*< If there is any claim for loss of consortium , add either or both of the following instructions to the section on Compensation for Damages, above.>*

*< Note: Most wrongful death cases do not also have claims for loss of consortium of the decedent's spouse/parent/minor or disabled child, due to the typically short time frame between alleged negligence/injury and death. But if these claims exist, they are on behalf of the spouse/parent/minor or disabled child for the period prior to death only. All claims from the point of death forward are covered under the wrongful death damages set forth above, which go to the next of kin, under G.L. c. 229, § 2.>*

### (1) Loss of Consortium – Spouse

In addition to DCD's claim, DCD's spouse, SPSE, also seeks damages for loss of his/her right to enjoy DCD's company, companionship and affection as a part of the marriage relationship. We call this a claim for loss of consortium.<sup>66</sup>

SPSE can recover for loss of consortium only if you find that DFT's negligence caused injury to DCD. In addition, SPSE must prove that DCD's injury caused harm to the marital relationship during the period after the alleged injury, but before DCD's death.

*[< If The Fact Of Loss Of Consortium Is Contested>* To prove harm to the marriage relationship, the plaintiff must prove that DFT's negligence caused some loss of the full enjoyment of the marriage. That may include any loss of right to enjoy the company, companionship and affection [including

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<sup>66</sup> See *Feltch v. General Rental Co.*, 383 Mass. 603, 607-609 (1981); *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 160 (1973); *Mouradian v. General Elec. Co.*, 23 Mass. App. Ct. 538, 544 (1987).

sexual relations] between the spouses, any loss of comfort or moral support any restrictions on the couple's social or recreational life, any loss of services that SPSE would have provided or any other harm to full enjoyment of the marriage. If you find that as a result of DFT's negligence, SPSE suffered a loss of consortium during the period prior to DCD's death, you should answer "yes" to question \_\_. If not, then answer "no."]

< *In all cases.* > Question \_\_ asks: "What total amount of money will fully and fairly compensate SPSE for loss of consortium prior to DCD's death?" To answer this question, you should determine how the marriage relationship changed because of DCD's injury. In awarding damages for loss of consortium, you may consider what amount of money will fairly and reasonably compensate SPSE for:

- loss of company and companionship;
- loss of comfort, and moral support;
- [loss of enjoyment of sexual relations or the ability to have children];
- any restrictions on social or recreational life;
- any loss of services that DCD would have provided to SPSE; and
- basically, any deprivation of the full enjoyment of the marital state.<sup>67</sup>

There is no special formula or rule to measure loss of consortium damages. You must make your determination(s) on [whether there was a loss of consortium, and if so,] the amount of damages, based on your own common sense, good judgment, experience, and conscience. You should award damages for all of SPSE's loss of consortium, whether or not PLF also suffered the same kind of harm to the marital relationship. To avoid duplication, however, you must not award SPSE any damages that belong to PLF. These damages are limited to the time period prior to death,

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<sup>67</sup> The Court should instruct the jury by "describing and distinguishing the different elements of compensable damage." *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 162 (1973).



because the damages that may be recovered after death have already been covered in instructions that I gave you earlier, and in different parts of the verdict slip.

## (2) Loss of Parental Society – Child/Later-Born Child/Disabled Adult

In addition to PLF's claim, DCD's [minor] child[ren], CHD, has brought a claim for damages to his/her right to enjoy the company, companionship and affection of his/her parent. We call this a claim for loss of parental society, during the period after the alleged injury but before DCD's death.<sup>68</sup>

[< *If Applicable—Later-Born Child.*> Even though CHD was born after PLF's injury, CHD can recover for loss of parental society if s/he proves, more likely than not, that two things are true: first, that s/he had already been conceived at the time of the injury and, second, that there was a reasonable expectation that CHD would have a parent-child relationship with DCD.

{< *If applicable*> CHD may recover for loss of society whether or not his/her parents were married when s/he was born.<sup>69</sup> }

[< *If Applicable—Disabled Adult.*> If DCD's adult child, CHD, proves that s/he is a mentally or physically disabled adult and was physically, emotionally, and financially dependent upon DCD, CHD can recover for loss of parental society resulting from DCD's injuries.<sup>70</sup>]

CHD can recover for loss of parental society only if you find that DFT's negligence caused injury to DCD. In addition, CHD must prove that DCD's injury harmed the parent-child relationship.

[< *If the fact of loss of parental society is contested.*> To prove that DCD's injury harmed that relationship, PLF must prove that DFT's negligence caused some loss of full enjoyment of the parent-child relationship. That may include any loss of right to enjoy the parent's company, companionship

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<sup>68</sup> See *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507 (1980).

<sup>69</sup> *Angelini v. OMD Corp.*, 410 Mass. 653, 661-663 (1991).

<sup>70</sup> *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262 (1986).

and affection, any loss of comfort or moral support, any restrictions on their social or recreational life, any loss of services that PLF would have provided for CHD or any other harm to full enjoyment of the parent-child relationship. If you find that as a result of DFT's negligence, CHD suffered or will suffer a loss of parental society, you should answer "yes" to question \_\_. If not, then answer "no."]

< *In all cases*:> Question \_\_ asks: "What total amount of money will fully and fairly compensate CHD for loss of parental society?" To answer this question, you should determine how the parent-child relationship changed because of DCD's injury. In awarding damages for loss of parental society, you may consider what amount of money will fairly and reasonably compensate CHD for:

- loss of the parent's company, companionship, guidance and nurture;
- loss of comfort, solace, and moral support;
- any significant restructuring of the child's life due to the parent's injury or harm
- any loss of services that PLF would have provided to CHD; and
- basically, any deprivation of the full enjoyment of the parent-child relationship.

There is no special formula or rule to measure damages for loss of parental society. You must base your determination(s) on [whether there was a loss of parental society, and if so,] the amount of damages, upon your own common sense, good judgment, experience, and conscience. To avoid duplication, however, you must not award to CHD any damages that belong to PLF. These damages are limited to the time period prior to death, because the damages that may be recovered after death have already been covered in instructions that I gave you earlier, and in different parts of the verdict slip.