

## Professional Negligence

In this case, PLF has brought a claim for “professional negligence” against DFT, which we sometimes call “malpractice.”

PLF contends that DFT was negligent in providing [legal, accounting, architectural, engineering, insurance, etc.] services by [failing to adequately settle a legal claim, failing to obtain adequate insurance coverage, failing to account for certain tax deductions on tax returns, etc.].

To prove professional negligence, PLF must prove the following five things are more likely true than not true:

1. < *Only if disputed.*> That PLF had an [attorney, accountant, engineer, etc.]-client relationship with DFT [or that DFT otherwise owed PLF a duty of care].
2. What the standard of professional care was that DFT owed to PLF in the circumstances of this case.
3. That DFT’s [legal, accounting, engineering, etc.] services fell below the standard of professional care, that is, DFT was negligent.
4. That DFT’s negligence was a cause of PLF’s harm.
5. That PLF suffered harm.

I will now provide you with more information about these things.

### (a) Duty Of Care

< *If plaintiff is claiming a client relationship, instruct as follows as to existence of duty.*>

The first thing PLF must prove is that DFT owed PLF a duty of care.

DFT will have a duty of care if DFT had an [attorney, accountant, engineer, etc.]-client relationship with PLF. That relationship may arise from an

agreement between the parties, and the agreement may be in writing or oral.

The parties' conduct may also create an [attorney, accountant, engineer, etc.]-client relationship. To decide whether an [attorney, accountant, engineer, etc.]-client relationship existed here, you should look at all of the circumstances, such as the nature and extent of any previous professional relationship between the parties, whether DFT charged PLF for his/her/its services, whether DFT believed PLF was his/her/its client, whether DFT told others that PLF was his/her/its client, whether PLF openly requested DFT's advice or services, and whether DFT agreed to perform services for PLF.

***< If plaintiff does not claim a client relationship, but alleges defendant owed duty to third parties, instruct as follows as to existence of duty:>***

The first thing PLF must prove, more likely than not, is that DFT owed PLF a duty of care.

An [attorney, architect, engineer, etc.] owes a duty of care to people s/he knew or should have known would rely on his/her/its [services, advice, plans, etc.] even if they have not entered into an agreement for services.<sup>1</sup>

To prove DFT owed PLF a duty of care, PLF must show DFT knew or reasonably should have known that s/he/it would rely on DFT's [services, advice, plans, etc.].

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<sup>1</sup> *LeBlanc v. Logan Hilton J.V.*, 463 Mass. 316, 328 (2012) (architect may be liable to third persons not in privity of contract "who are foreseeably exposed to danger and injured as a result of [his] negligent failure to carry out that obligation.") (citations omitted); *DaRoza v. Arter*, 416 Mass. 377, 382 (1993) ("An attorney [ ] may owe a duty to someone who is not his client 'who the attorney knows will rely on the services rendered[,]'. . . . only if the attorney reasonably should have foreseen reliance on the part of the third party.") (citations omitted); *Quigley v. Bay State Graphics*, 427 Mass. 455, 459 (1998) (insurance agent may be liable to third party for failure to procure insurance coverage for agent's insured).

*< If plaintiff claims to have reasonably relied on an accountant's report or information, instruct as follows as to existence of duty.>*

The first thing PLF must prove, more likely than not, is that DFT owed him/her/it a duty of care.

An accountant who issues [an audit report, a financial statement, an opinion letter, etc.] owes a duty of care to people s/he/it knew at the time s/he/it published or distributed the [audit report, financial statement, etc.] would rely on it.

To prove DFT owed PLF a duty of care, PLF must show DFT actually knew two things at the time s/he/it published or distributed the [audit report, financial statement]:<sup>2</sup>

- that PLF was among the group of potential people who would rely on the [audit report]; and,
- the specific financial transaction for which the [audit report] was prepared.

#### **(b) Standard Of Professional Care**

[First,] Second, PLF must prove, more likely than not, what standard of professional care DFT owed PLF in performing the [legal, accounting, engineering, etc.] services.

When DFT forms an [attorney, accountant, engineer, etc.]-client relationship s/he/it must serve the client according to the "standard of professional care."

The standard of professional care is the skill, knowledge, and care that an average qualified [attorney, accountant, architect, etc.] would have used at

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<sup>2</sup> *Nycal Corp. v. KPMG Peat Marwick LLP*, 426 Mass. 491, 496, 498 (1998) (limiting the duty owed to a third party by an accountant issuing a report to instances of "actual knowledge on the part of accountants of the limited -- though unnamed -- group of potential [third parties] that will rely upon the [report], as well as actual knowledge of the particular financial transaction that such information is designed to influence.") (citation omitted).

the time in similar circumstances.<sup>3</sup> This is not something we usually know or is a matter of common knowledge, so it must be shown by expert testimony.

When determining the standard of professional care, you may consider DFT's education, training, and experience as [a lawyer, an accountant, etc.]. But, you must determine the standard of care as of the date of DFT's alleged negligence, which PLF claims occurred during [add dates], not the standard of care as it may exist today.

You must determine the standard of professional care from the expert testimony you heard during the trial of this case.<sup>4</sup> The standard of care does not need to be written anywhere.

If the experts disagree about the standard of care, you will have to resolve those conflicts to determine the degree of care and skill of the average qualified [specialty] at the time and in the circumstances of PLF's matter or case. You may not, however, guess or speculate about the applicable standard of care, or apply your own standard of care. You must base your decision about the standard of care upon the expert testimony that you decide is persuasive.

The expert testimony does not have to come from a specialist in the DFT's area of practice or in the same geographic area. However, the expert must be familiar with the standard of professional care through education,

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<sup>3</sup> "An attorney who has not held himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner." *Fishman v. Brooks*, 396 Mass. 643, 646 (1986) (citations omitted). Massachusetts appellate courts have not addressed whether a specialist owes a heightened standard of care. *Minkina v. Frankl*, 86 Mass. App. Ct. 282, 292 n.5 (2014). However, it may be argued that principles of medical malpractice should be applied to other professionals and that a professional holding herself out as a specialist should be held to the higher standard.

<sup>4</sup> No expert testimony on the standard of care is necessary "in 'exceptional cases,' . . . , where the malpractice 'is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence.'" *LeBlanc v. Logan Hilton J.V.*, 463 Mass. 316, 329 (2012) (citations omitted).

training, experience, and knowledge of the subject matter. Also, whenever I refer to "expert testimony," I am including both the parties' outside experts, as well as DFT's own testimony [and statements of other professionals [as well as the contents of any treatises that were admitted in evidence].

### **(c) Negligence / Falling Below Standard Of Professional Care**

The [second] third thing PLF must prove, more likely than not, is that DFT's [legal, accounting, engineering, insurance, etc.] services fell below the standard of professional care. If so, then DFT was negligent. Like the standard of professional care, you must determine whether DFT's actions or inaction fell below the standard of care based only on the testimony of the expert witnesses.<sup>5</sup>

An [attorney, accountant, architect, etc.] may exercise a reasonable range of professional judgment about how to meet the standard of professional care. If more than one option exists, you must decide whether DFT's services fell within the range of what the average skilled [attorney, accountant, architect, etc.] reasonably would have done in the circumstances. On the other hand, the fact that an [attorney, accountant, architect, etc.] used judgment, by itself, is not enough to satisfy the standard of care. If you find that DFT's judgment departed from the accepted standard of care owed to PLF, then you must find him/her/it negligent.

An [attorney, accountant, architect, etc.] was not necessarily negligent just because the services were unsuccessful, the result reached was not the best available, or he/she/it made an error that was reasonable under the circumstances. [Attorneys, accountants, architects, etc.] do not have to be perfect in their work and they do not guarantee a particular [result, plan,

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<sup>5</sup> No expert testimony on breach of the standard of care is necessary "where 'the claimed malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence,' or where an attorney disobeys the lawful instructions of his client and a loss ensues for which the attorney is responsible.'" *Kiribati Seafood Company, LLC v. Dechert LLP*, 478 Mass. 111, 117 (2017) (citation omitted).

etc.].<sup>6</sup> <sup>7</sup> Instead, DFT was expected to use the skill and judgment which can be reasonably expected from an average qualified [attorney, accountant, architect, etc.] under the circumstances.

Also, evidence that another [attorney, accountant, etc.] might have [undertaken a different course of representation] from that of DFT is not, by itself, evidence that DFT was negligent.

In the end, you may find DFT was negligent only if s/he/it failed to act as skillfully, knowledgeably, or carefully as an average qualified [attorney, accountant, architect, etc.] would have acted at the time in similar circumstances.

***< If plaintiff claims that defendant violated a rule, statute, or other standard, add the following:>***

You may consider whether DFT violated a professional rule or regulation in deciding if DFT's conduct was negligent. But, a violation alone is not automatically proof of negligence; rather, you may consider it as some evidence of negligence and give it whatever weight you determine to be appropriate.<sup>8</sup>

So, in this case, there is a [rule] that says: [summarize or quote the statute or rule]. If DFT violated this [rule], it does not automatically mean that DFT was negligent. Instead, you should ask two questions. First, "Did DFT violate this [rule]?" This decision is up to you, as a jury, and not [the regulatory agency].

If DFT violated the rule, then you should ask the second question: "Was the [rule] designed to prevent the harm PLF claims happened here?"

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<sup>6</sup> *LeBlanc v. Logan Hilton J.V.*, 463 Mass. 316, 329 (2012) (citations omitted).

<sup>7</sup> Alter the last portion if DFT agreed to provide a specific result.

<sup>8</sup> *Rubin v. Murray*, 79 Mass. App. Ct. 64, 70 n.8 (2011) (citing *Fishman v. Brooks*, 396 Mass. 643, 649-650 (1986)).

If you answer “yes” to both of these questions, then you may consider the violation as some evidence that DFT was negligent. The violation does not automatically prove DFT was negligent, because that decision is up to you. If you find that DFT violated a [rule] designed to prevent the harm that PLF claims happened to her/him/it, then you may consider that fact, together with all the other evidence, in determining whether DFT acted negligently. And, of course, you don’t need to find a violation of law in order to find DFT or PLF was negligent.

In the end, you may find DFT was negligent only if s/he/it failed to act as skillfully, knowledgeably, or carefully as an average qualified [attorney, accountant, architect, etc.] would have acted at the time in similar circumstances.

#### **(d) Causation**

*< Insert causation instruction from General Negligence instruction.>*

#### **(e) Suffering Of Harm**

##### **(1) Non-Attorney Negligence**

[Fourth] Fifth, PLF must prove that s/he/it suffered harm. Harm simply means that s/he/it suffered a loss.

##### **(2) Attorney Negligence in Representing Criminal Defendant**

[Fourth] Fifth, PLF must prove that s/he/it suffered harm. Harm simply means that s/he/it suffered a loss.

To do this, PLF must prove that s/he/it was actually innocent of the crimes for which s/he/it was charged. So, PLF must prove s/he/it was more likely than not innocent of the crimes for which s/he/it was charged in the underlying criminal case against her/him/it.<sup>9</sup>

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<sup>9</sup> *Correia v. Fagan*, 452 Mass. 120, 127 (2008); *Glenn v. Aiken*, 409 Mass. 699, 704 (1991). If the plaintiff pled guilty in the underlying criminal case, she must show that her guilty plea

### **(3) Attorney Negligence in Representing Plaintiff in a Civil Trial**

[Fourth] Fifth, PLF must prove that s/he/it suffered harm. Harm simply means that s/he/it suffered a loss.

In order to prove she suffered harm, PLF must prove two things are more likely true than not true.

- PLF must prove s/he/it would have obtained a larger judgment in [the underlying civil trial] had DFT met the standard of professional care; and,
- PLF must prove s/he/it would have been able to collect on the judgment s/he/it would have obtained in [the underlying trial].<sup>10</sup>

### **(4) Attorney Negligence in Settling an Underlying Claim**

[Fourth] Fifth, PLF must prove that s/he/it suffered harm. Harm simply means that s/he/it suffered a loss.

In order to prove she suffered harm, PLF must prove four things are more likely true than not true.

- PLF must prove she would have obtained a better settlement result in [the underlying dispute] had DFT met the standard of professional care;
- PLF must prove the opposing party in [the underlying dispute] actually made a firm settlement offer;
- PLF must prove a settlement agreement on those terms would have occurred in [the underlying civil case]; and
- PLF must prove that s/he/it could have collected on the settlement that would have occurred in [the underlying civil case].<sup>11</sup>

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was vacated (for any reason) and she was factually innocent of the charges. *Labovitz v. Feinberg*, 47 Mass. App. Ct. 306, 313 (1999) (citation omitted); see also

<sup>10</sup> *Poly v. Moylan*, 423 Mass. 141, 148 (1996) (citations omitted); *Shimer v. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 313 (2003) (citations omitted).

<sup>11</sup> *Poly v. Moylan*, 423 Mass. 141, 148 (1996) (citations omitted); *Shimer v. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 311 (2003) (citation omitted).



**(5) Attorney Negligence in Representing Defendant in a Civil Case**

[Fourth] Fifth, PLF must prove that s/he/it suffered harm. Harm simply means that s/he/it suffered a loss.

To do this, PLF must prove s/he/it would have obtained a better result in [the underlying civil case] had DFT met the standard of professional care.<sup>12</sup>

**(6) Attorney Negligence in Representation During a Transaction**

[Fourth] Fifth, PLF must prove that s/he/it suffered harm. Harm simply means that s/he/it suffered a loss.

To do this, PLF must prove s/he/it would have obtained a better result in [the underlying transaction] had DFT not been negligent and that the result [would have been collectible].

**(f) Vicarious Liability<sup>13</sup>**

There are two defendants in this case, [Peter Accountant] and his employer, [Smith & Jones, LLC, LLP, PC], [a limited liability company, a limited liability partnership, a professional corporation].

*< If there is no dispute about vicarious liability, instruct as follows:>*

In this case, the parties agree [Smith & Jones, LLC, LLP, PC] is automatically liable if you find that [Peter Accountant] was negligent. Otherwise, [Smith & Jones, LLC, LLP, PC] is not liable.

*< If there is a dispute about vicarious liability, instruct as follows:>*

A limited liability company, limited liability partnership, professional corporation], such as [Smith & Jones, LLC, LLP, PC], is legally responsible for

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<sup>12</sup> In a case where [PFL] was a defendant in the underlying civil matter, "the defendant attorney can prevail by proving by a preponderance of the evidence that, even though he may have been negligent, the plaintiff, his former client, would have lost the underlying case anyway." *Glenn v. Aiken*, 409 Mass. 699, 706 (1991) (citations omitted).

<sup>13</sup> See also model instruction for Vicarious Liability.

its employee's negligence if the negligence happened within the scope of the employee's employment.

To prove his/her/its case against [Smith & Jones, LLC, LLP, PC], PLF must prove, more likely than not, that [Peter Accountant] was acting within the scope of his employment at the time s/he/it provided the [legal services, accounting services, engineering services, etc.] at issue.

To decide whether [Peter Accountant] was acting within the scope of his/her/its employment with [Smith & Jones, LLC, LLP, PC], you may consider the following questions:<sup>14</sup>

- Was [Peter Accountant] doing the kind of work that [the firm] hired him to perform?
- Did [Peter Accountant] do his work mostly during the hours when [and at the location where] [the firm] hired him to work?
- Did [Peter Accountant] do the work, at least in part, for the purpose of serving [the Firm]?

## **(g) Damages**

### **(1) Overview Of Damages**

If you find that DFT was negligent and that DFT's negligence caused harm to PLF, then you must decide what amount, if any, of damages, that is, compensation, to award her/him/it for the actual financial loss s/he/it suffered. Of course, the fact that I am instructing you on damages does not suggest you should find DFT was negligent or that you should award damages.

An [attorney, accountant, etc.] who acts negligently is liable to the client [third party] for any reasonably foreseeable loss or expense caused by his/her/its negligence.

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<sup>14</sup> *Lev v. Beverly Enterprises-Massachusetts*, 457 Mass. 234, 238 (2010) (citation omitted).

The purpose of your damages award is to compensate PLF for the harm he/she/it suffered because of DFT's negligence. You must not use your damages award to reward PLF, or to punish DFT.

The law gives you no special formula to calculate PLF's damages.<sup>15</sup> So, working together as a jury, you must use your wisdom, judgment, and sense of basic justice to translate into dollars an amount that will fairly and reasonably compensate PLF for the particular harm you find he/she/it incurred.

PLF must show, more likely than not, what his/her/its damages are. However, the law does not require any witness to express an opinion about the amount of such damage. PLF may prove damages by direct evidence, indirect evidence, or both.

[Interest and Taxes] You must not consider any interest on your damages award. The court will calculate interest on any award. And, you may not consider the impact, if any, of federal or state income taxes because any damages in this case may or may not be subject to taxation. Someone else will have to address any tax considerations, depending upon what you decide. In other words, just follow my instructions on what issues to consider in awarding damages.

Now, let me turn to the specific types of damages that you should consider.

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<sup>15</sup> Remove this sentence in cases involving a claim against a CPA in which the fraud of PLF or a third party contributed to [PLF's] harm. The damages are capped by G.L. c. 112, § 87A<sup>3</sup>/<sub>4</sub>, in such cases. See n. 24 below.

## (2) Damages for Attorney Representing Plaintiff in a Civil Case

In this case, PLF claims DFT was negligent in [failing to adequately settle / litigate the underlying civil case]. Please remember that PLF's damages are limited to the amount PLF shows she/he/it would have been able to actually collect from the opposing party in the underlying case.<sup>16</sup>

## (3) Damages for Accountant Negligence in Tax Preparation

### < if claim is for Overpayment of Taxes >

In this case, PLF claims DFT's negligence in preparing her/his/its tax returns resulted in her/him/it paying more taxes than s/he/it should have. In such a case, the amount of damages PLF is entitled to is the amount of taxes PLF paid because of the accountant's negligence, less the amount of taxes PLF would have paid without DFT's negligence, plus related expenses such as the cost to PLF in amending and correcting the tax return.<sup>17</sup>

### < if claim is for Tax Deficiency Incurred or Assessed >

In this case, PLF claims DFT's negligence in preparing her/his/its tax returns resulted in he/she/it owing additional taxes to the Internal Revenue Service or Department of Revenue. We call this a tax deficiency. In such a case, the amount of a tax deficiency is not necessarily the amount of damages you should award.<sup>18</sup> Instead, the amount of damages PLF is entitled to is:

- The amount of taxes PLF paid because of the accountant's negligence;
- **Minus** the amount of taxes PLF would have paid without DFT's negligence;

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<sup>16</sup> "It is that portion of the judgment that can actually be collected 'that determines the financial liability and responsibility of the legal malpractice defendant, assuming professional negligence has been determined.'" *Shimerv. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 313 (2003) (internal and external citations omitted).

<sup>17</sup> See *O'Bryan v. Ashland*, 717 N.W.2d 632, 638 (S.D. 2006) (citation omitted).

<sup>18</sup> *Miller v. Volk*, 63 Mass. App. Ct. 303, 305–306 (2005).

- **Plus** the interest and penalties PLF actually paid on the portion of the tax deficiency caused by DFT's negligence;
- **Plus** expenses paid by PLF because of DFT's negligence, such as the cost to PLF in amending and correcting the tax return.<sup>19, 20</sup>

#### **(4) Damages for Accountant Negligence –If Evidence of Fraud by Plaintiff or Third Party<sup>21</sup>**

As part of its defense, DFT claims that PLF [or third party] committed fraud, which caused or worsened PLF's damages. A licensed public accountant, such as DFT, is liable only for the amount that is due solely to the accountant's fault. This means that you must use the following method to calculate PLF's damages:

First, you must calculate the amount of damages PLF has proved and enter that amount on the verdict form in response to Question No. \_\_.

Second, after doing that, you must decide whether DFT, not PLF, proved the following two things are more likely true than not true:

- That PLF's [or third party's] fraud caused or worsened PLF's harm or damages; and,
- That DFT's own conduct was **not** knowing and willful.

Knowing and willful conduct is intentional conduct.<sup>22</sup>

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<sup>19</sup> *O'Bryan v. Ashland*, 717 N.W.2d 632, 638 (S.D. 2006) (citation omitted).

<sup>20</sup> The plaintiff may also be entitled to the interest and penalties paid on the portion of the tax deficiency attributed to the defendant's negligence and consequential damages. *See Miller v. Volk*, 63 Mass. App. Ct. 303, 305-306 (2005); *O'Bryan v. Ashland*, 717 N.W.2d 632, 638 (S.D. 2006).

<sup>21</sup> *See* G.L. c. 112, § 87A<sup>3/4</sup>. "By enacting this statute, the Legislature appears to have replaced the common-law doctrine of in pari delicto in cases where an accounting firm is sued for its failure to detect fraud by a client's employee, with a statutory allocation of damages akin to, but different from, comparative negligence." *Merrimack College v. KPMG LLP*, 480 Mass. 614, 631 (2018).

<sup>22</sup> The modern definition of willful conduct means intentional conduct (as opposed to accidental), without any reference to any improper motive. *Commonwealth v. Adams*, 482 Mass. 514, 526 (2019) (citing *Commonwealth v. Luna*, 418 Mass. 749, 753 (1994)).

If DFT failed to prove either of these two things, then PLF is entitled to the full amount of damages you entered on Question No. \_\_ on the verdict form and you don't need to decide anything else about PLF's [third party's] alleged fraud.<sup>23</sup>

If DFT proved both of these things, then you must compare DFT's fault to PLF's [or third party's] fault.<sup>24</sup> You do this by determining the percentage of fault attributable to PLF's [or third party's] fraud in causing PLF's harm, and the percentage of fault attributable to DFT's negligence in causing PLF's harm. You express this in percentages of fault that, when added together, equal 100%. This is Question No. \_\_ on the verdict form.

### **(5) Legal Fees As Element Of Damages**

PLF is entitled to recover the reasonable amount of legal fees and costs s/he/it paid because s/he/it had to hire [a/another] lawyer to fix the problem caused by DFT's negligence.<sup>25</sup> You may consider the legal bills in evidence to decide the amount, if any, to award PLF for the legal fees and costs s/he/it paid.

### **(6) Property Damage As Element Of Damages**

PLF is entitled to recover the loss in value of her/his/its property caused by PLF's negligence.<sup>26</sup> You will calculate this loss, if any, by comparing the

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<sup>23</sup> If G.L. c. 112, § 87A<sup>3</sup>/<sub>4</sub>, does not apply because DFT failed to prove the two required elements, comparative negligence may apply. *See Merrimack College v. KPMG LLP*, 480 Mass. 614, 624, 631 n.12 (2018).

<sup>24</sup> If G.L. c. 112, § 87A<sup>3</sup>/<sub>4</sub>, applies, comparative negligence likely does not apply. *See Merrimack College v. KPMG LLP*, 480 Mass. 614, 624 (2018) ("[T]he comparative negligence statute does not apply where the plaintiff has engaged in intentional wrongdoing; it applies only where the plaintiff and defendant are both found to be negligent.").

<sup>25</sup> *Shimer v. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 314-315 (2003).

<sup>26</sup> *See Wyman v. Ayer Properties, LLC*, 469 Mass. 64, 72 (2014) ("The general rule for determining property damage is diminution in market value. . . . However, '[r]eplacement or restoration costs have also been allowed as a measure of damages in other contexts where diminution in market value is unavailable or unsatisfactory as a measure of damages.'") (citations omitted).

market value of the property before DFT's negligence occurred with the market value of the property after DFT's negligence.

### **(7) Mitigation Of Damages**

PLF was required to take all reasonable steps to lessen the harm s/he/it suffered because of DFT's negligence. PLF cannot recover for harm that s/he/it could have reasonably prevented.

On this issue, DFT - not the PLF - has the burden to prove that, more likely than not, PLF could have lessened or prevented some of the damages by taking reasonable steps.

If you find that DFT has proved more likely than not PLF failed to mitigate the damages, then you should reduce any damage award by the amount of damages that PLF could have avoided.

### **(h) Defenses**

#### **(1) Comparative Negligence<sup>27, 28</sup>**

As part of the defense, DFT claims that PLF was himself/herself/itself negligent, and that his/her/its own negligence caused his/her/its injuries. You will reach this defense only if you find that DFT was negligent and that its negligence was a cause of PLF's injuries.

For this defense, DFT, not PLF, has the burden of proving, more likely than not, that PLF was negligent and contributed to cause his/her/its own harm.

Under the law, PLF must use reasonable care in the circumstances to prevent harm to himself/herself/itself. If she failed to do so, s/he/it was negligent.

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<sup>27</sup> See generally *Lawrence Sav. Bank v. Levenson*, 59 Mass. App. Ct. 699, 704 (2003) (comparative negligence applies to a claim of legal malpractice).

<sup>28</sup> "[T]he comparative negligence statute does not apply where the plaintiff has engaged in intentional wrongdoing [i.e., where the defendant asserts the defense of in pari delicto]; it applies only where the plaintiff and defendant are both found to be negligent." *Merrimack College v. KPMG LLP*, 480 Mass. 614, 624 (2018) (citation omitted).

DFT must also prove that, more likely than not, PLF's own negligence was a cause of his/her/its harm. In determining whether PLF's own negligence was a cause of his/her/its harm, you must apply the same definition of causation I gave you above.

If you decide DFT proved that PLF was negligent and was a cause of her/his/its own harm, then you must compare DFT's negligence to PLF's negligence. You do this by determining the degree of negligence of each party. You express that in percentages of negligence that, when added together, equal 100%.

PLF can only recover against DFT if you find that her/his/its own negligence was equal to or less than DFT's negligence. If you find that PLF's percentage of negligence exceeds DFT's percentage of DFT's negligence, then PLF cannot recover anything in this case. If, on the other hand, you find that PLF was negligent by some percentage equal to or less than that of DFT, you must NOT reduce the amount of damages you find on Question No. \_\_. Any such reduction is the job of the clerk, not the jury.

**(2) In Pari Delicto (Plaintiff is at Equal Fault)<sup>29, 30</sup>**

As part of the defense, DFT claims that PLF engaged in intentional wrongdoing by [perjuring herself, etc.] and that the wrongdoing was at least equally to blame as DFT's negligence in causing PLF's damages.

Even if PLF proves that DFT was negligent, an [accountant, attorney, etc.] is not responsible to pay any damages to PLF if PLF's intentional wrongdoing was at least equally to blame for causing her/his/its damages.

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<sup>29</sup> G.L. c. 112, §87A<sup>3</sup>/<sub>4</sub>, rather than the common law doctrine of in pari delicto applies in actions against licensed public accountants. *Chelsea Housing Authority v. McLaughlin*, 482 Mass. 579, 580 (2019).

<sup>30</sup> If relevant, this instruction may be given before the instruction on damages, and the damages and comparative negligence instructions may be modified to point out that the jury need not address these issues if DFT proves its *in pari delicto* defense.



In applying this defense, you must answer two questions (which are on the verdict form):

- “Did DFT prove more likely than not that PLF [members of PLF’s senior management team]<sup>31</sup> engaged in intentional wrongdoing by [stealing, perjuring herself]?”
- “Did DFT prove that PLF’s wrongdoing was at least [50%] equally to blame for causing PLF’s harm or damages as was DFT’s negligence?”

If you answer “Yes” to both questions, then PLF is not entitled to recover anything from DFT.

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<sup>31</sup> Where the plaintiff is a corporation, the conduct of “senior management — that is, the officers primarily responsible for managing the corporation, the directors, and the controlling shareholders, if any[,]” are imputed to the plaintiff when applying the doctrine of in pari delicto. *Merrimack College v. KPMG LLP*, 480 Mass. 614, 628 (2018).