

Recklessness.¹

In this case, [in addition to claims for negligence/gross negligence, if applicable], PLF claims that DFT was reckless in causing PLF's [injuries/death]. Like negligence, reckless conduct may arise from an act or a failure to act.²

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

1. DFT intended the reckless conduct. If DFT intended to engage in the conduct itself, it does not matter whether s/he/it also intended the resulting harm;³
2. DFT's conduct made it highly likely that someone would suffer serious injury or die.

¹ This heading follows the Supreme Judicial Court's practice "to refer to reckless conduct as constituting the conduct that produces liability for what the court has traditionally called wilful, wanton, or reckless conduct[.]" *Sandler v. Commonwealth*, 419 Mass. 334, 335 (1995).

This jury instruction on recklessness may be appropriate in the following types of cases:

- Wrongful death cases. See G.L. c. 229, § 2, which allows for punitive damages in the case of gross negligence and/or recklessness.
- Recreational Use Statute. See G.L. c. 21, § 17C, which limits liability for landowner who makes land open to public for recreational use free of charge not liable for personal injuries absent recklessness.
- Cases against landowners by adult trespassers. *Schofield v. Merrill*, 386 Mass. 244 (1982). See *Manning v. Nobile*, 411 Mass. 382, 387 (1991).
- Cases involving sporting events. See, e.g., *Gauvin v. Clark*, 404 Mass. 450, 454 (1989); *Kavanagh v. Trustees of Boston Univ.*, 440 Mass. 195, 204–205 (2003); *Borella v. Renfro*, 96 Mass. App. Ct. 617, 624 (2019), further rev. denied, 493 Mass. 1108 (2020).
- Railroads causing death of trespasser. See G. L. c. 229, § 2.
- Cases against a brand-name manufacturer that controls the contents of the label on a generic drug. See *Rafferty v. Merck & Co., Inc.*, 479 Mass. 141, 156–157 (2018).
- Suit by an intoxicated person against a business or licensee for serving alcohol. See G. L. c. 231, Section 85T.

² *Manning v. Nobile*, 411 Mass. 382, 387 (1991).

³ *Rafferty v. Merck & Co., Inc.*, 479 Mass. 141, 157 (2018) (citations omitted).

3. DFT knew, or had reason to know, the facts that created that risk.⁴ This means that DFT either knew of the risk of grave injury or death *or* that risk must have been obvious to a reasonable [person/company].
4. DFT intentionally or unreasonably disregarded that risk.⁵
5. PLF's [injuries or death] probably resulted from DFT's decision to engage in the conduct.⁶

[< *Insert For Contact Sports Cases*> To prove that DFT was reckless in playing [sport], PLF must prove that DFT engaged in extreme misconduct outside the range of the ordinary activity expected as part of [the sport]. It is not enough just to show a violation of the rules of [sport], if the conduct was also a fundamental and inevitable part of the sport. So you must consider the nature of [sport] itself. Intentionally injuring someone is not part of [sport] and is enough to prove liability. If DFT did not intend to cause injury, PLF must show that DFT committed extreme misconduct that was not an ordinary part of [sport].⁷]

< *where applicable, insert other case-specific instruction here*>

There is an important distinction between negligence [and gross negligence], on the one hand, and reckless conduct on the other.⁸ The difference between recklessness and negligence is not only a difference in degree but also a difference in kind.⁹ Recklessness differs from negligence in two key ways.¹⁰

⁴ *Boyd v. National Railroad Passenger Corporation*, 446 Mass. 540, 546–547 (2006).

⁵ *Rafferty v. Merck & Co., Inc.*, 479 Mass. 141, 158 (2018); *Sandler*, 419 Mass. at 336.

⁶ *Ali v. Boston*, 441 Mass. 233, 238-239 (2004), quoting *Sandler*, 419 Mass. at 336.

⁷ *Borella v. Renfro*, 96 Mass. App. Ct. 617, 624 (2019), further rev. denied, 493 Mass. 1108 (2020).

⁸ *Boyd*, 446 Mass. at 548.

⁹ *Rafferty*, 479 Mass. at 157.

¹⁰ *Rafferty*, 479 Mass. at 158.

First, while negligence may result from inadvertence, incompetence, or carelessness, recklessness means consciously choosing a course of action, when DFT knew or should have known of the serious danger to others.

Second, reckless conduct must involve a significantly greater risk than is required for ordinary negligence. Also, DFT must have known, or have had reason to know, the facts that created the risk.¹¹

If PLF has proven, more likely than not, that DFT was reckless, then you will answer question number ___ on the verdict slip "yes." Otherwise, you will answer number ___ on the verdict slip "no."

¹¹ *Boyd*, 446 Mass. at 547.