

## GENERAL NEGLIGENCE AND CAUSATION

### Negligence Resulting In Personal Injury

PLF claims that DFT was negligent in [explain conduct at issue]. The fact that PLF has filed this lawsuit is not evidence that DFT was negligent or caused any injuries. To prove negligence, PLF must show that the following [two] [three] things are more likely true than not true:

[< *only if disputed*.> 1. That DFT owed PLF a duty of care;]

1. That DFT failed to use reasonable care under all of the circumstances; and
2. That DFT's failure to use reasonable care was a cause of PLF's injury or harm; and

If PLF proves these things, then s/he/it must also prove the extent of the resulting injury or harm, which we call "damages."

[< *if agency/respondeat superior is uncontested*.> If DFT was negligent, then you must find that his employer, DFT #2, was negligent as well. Likewise, if DFT was not negligent, you must find that DFT #2 was not negligent. For that reason, the verdict slip does not include any questions that specifically refer to DFT #2.]

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

**(a) Duty < Only If Disputed >**

First, PLF must prove that DFT owed him/her a responsibility<sup>1</sup> to be reasonably careful to avoid any predictable<sup>2</sup> injuries. To do this, PLF must prove that the following things are more likely true than not true:

**< insert case-specific facts needed to prove that DFT owed PLF a duty >.<sup>3</sup>**

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<sup>1</sup> Massachusetts courts "have recognized that '[a]s a general principle of tort law, every actor ... has a duty to exercise reasonable care to avoid physical harm to others.'" *Jupin v. Kask*, 447 Mass. 141, 147 (2006), quoting *Remy v. MacDonald*, 440 Mass. 675, 677 (2004), citing Restatement (Second) Torts § 302 comment a (1965). See also *Creatini v. McHugh*, 99 Mass. App. Ct. 126, 129-131 (2021). To enhance jury understanding, this model instruction uses the more familiar concept of "responsibility" in place of the legal term "duty." A judge who prefers the legal term, may choose to refer to "duty" where the word "responsibility" appears in this instruction. See generally *Lev v. Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234, 240-247 (2010); *Jupin*, 447 Mass. at 148-156.

<sup>2</sup> To facilitate jury understanding, this instruction uses the word "predictable" in place of the legal term, "foreseeable" (see FN 1, above), but the judge may substitute the word "foreseeable" if desired.

<sup>3</sup> Such facts may include, e.g.:

- A contract required defendant to maintain the [product/personal property/ premises].
- Defendant had control [or joint control] over the work at the construction site. [see separate instruction for determining control]. See *Corsetti v. Stone Co.*, 396 Mass. 1, 9-10 (1985); *Dilaveris v. W.T. Rich Co., Inc.*, 424 Mass. 9, 11 (1996) (The existence of a duty depends heavily upon "the critical factor whether the general contractor had any meaningful control, however minimal, over the subcontractor ... "). See also Restatement (Second) of Torts § 414.
- Defendant owned the property [or was in control of the property] when the injury occurred. See *Davis v. Westwood Group*, 420 Mass. 739, 743 (1995); *Dubucque v. Cumberland Farms, Inc.*, 93 Mass. App. Ct. 332, 349-350 (2017). [Separate instructions may apply for premises liability or negligent security cases].
- Defendant operated/was the registered owner of the vehicle at the time of the collision. *Covell v. Olsen*, 65 Mass. App. Ct. 359, 362-363 (2006) [Separate instructions may apply for MV cases].
- A special relationship existed. See *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 40-42 (2009). A special relationship exists in the following, non-exclusive instances:
  - Schools: *Nguyen v. Mass. Inst. of Tech.*, 479 Mass. 436, 453 (2018) (university and its students); *Murray v. Hudson*, 472 Mass. 376, 381-382 (2015) (school and students); *Mullins v. Pine Manor College*, 389 Mass. 47, 51-52 (1983) (same).
  - Innkeepers and common carriers: *Worcester Ins. Co. v. Fells Acre Day School, Inc.*, 408 Mass. 393, 405-406 (1990) ("the standard to which common carriers are held is

If PLF proves this fact [these facts], then DFT had a responsibility to use reasonable care to avoid predictable injury to PLF.

### (b) Failure To Use Reasonable Care

First [Second], PLF must prove that DFT more likely than not failed to use reasonable care under the circumstances. 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 [person] [company] would have done.

You should consider what DFT did or failed to do. 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 DFT?
- [*< 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 [company] [person] to use reasonable care to avoid predictable [injuries to people] [damage to property].<sup>4</sup> We ask you, the jury, to consider what a reasonable and careful

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the very highest, approaching that of an insurer."); *Glennen v. Boston Elevated Ry. Co.*, 207 Mass. 497, 498 (1911).

- Custodians and persons in their custody: *Slaven v. Salem*, 386 Mass. 885, 888 (1982).
- Residential landlord and tenants: *Whittaker v. Saraceno*, 418 Mass. 196, 198-199 (1994). But see *Creatini v. McHugh*, 99 Mass. App. Ct. 126, 129-131 (2021) (landlord owes no duty of care to passers-by injured by tenant's dog).

<sup>4</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*,

[company] [person] would have done under these circumstances. What you consider reasonable may vary depending on the circumstances of this case. A person should take greater precautions as the risk of harm increases. You should also ask yourself: "Did DFT actually know about any risks?" And, if not: "Should s/he/it have known about them?"

[< ***Child's Standard of Care—If Applicable***> Bear in mind that DFT was a child at the time of the events. Therefore, you must not judge his/her negligence as though s/he were an adult. DFT had a duty to use the degree of care that you, as the jury, would reasonably expect from a child of his/her age, intelligence and experience. So, when you answer Question \_\_, you should ask how you would expect a child of similar age, intelligence and experience to act in the same circumstances.<sup>5]</sup>

[< ***if there is evidence of prior similar incidents***> PLF presented evidence about earlier incidents that s/he claims were similar to the events in this case. You may consider this evidence only to decide whether DFT knew - or should have known - about any dangers or risks that existed in **this** case. And you may consider this evidence only if PLF has proved that the other incident(s) was (were) substantially similar to the incident in this case. The circumstances don't have to be identical, but they must be substantially similar.<sup>6</sup> If you find that the earlier incident(s) was (were) substantially similar, then you may consider it/them, along with all the other evidence, to determine whether DFT knew or should have known about the risks that PLF claims in this case.]

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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.

<sup>5</sup> See *Blake v. Springfield Street Railway Co.*, 9 Mass. App. Ct. 912, 913 (1980).

<sup>6</sup> *Dubuque v. Cumberland Farms, Inc.*, 93 Mass App. Ct. 332, 345 (2017), citing *Santos v. Chrysler Corp.*, 430 Mass. 198, 203 (1999).

[<*if plaintiff has evidence triggering Res Ipsa Loquitur*> PLF claims that this incident would not have happened without DFT's negligence. PLF is asking you to conclude that DFT was negligent simply because the incident occurred. In order for you to draw that conclusion, PLF must prove that three things are more likely true than not true:<sup>7</sup>

- This kind of incident typically does not occur unless someone is negligent;
- The evidence rules out other causes for the incident, including PLF's conduct and acts of people other than DFT; and
- DFT was acting (or failing to act) within the scope of his/her responsibility to PLF.

If PLF has proven each of these three things, you may conclude from your own common knowledge [or expert evidence] that the mere happening of the incident in this case shows that DFT's negligence caused PLF's injuries or harm.<sup>8</sup> However, you do not have to draw that conclusion. As always, the law allows you to draw reasonable conclusions from the evidence, but doesn't require you to draw any particular conclusions.<sup>9</sup>

<*Insert If Applicable— Violation of a Statute or Regulation*>

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<sup>7</sup> *Enrich v. Windmere Corp.*, 416 Mass. 83, 88-89 (1993) (fire); *Evangelio v. Metro. Bottling Co.*, 339 Mass. 177, 181 (1959) (products liability); *Coyne v. John S. Tilley Co.*, 368 Mass. 230, 235 (1975) (ladder accident); *Woronka v. Sewall*, 320 Mass. 362, 365 (1946) (medical malpractice); *Roscigno v. Colonial Beacon Oil Co.*, 294 Mass. 234, 235 (1936) (gas tank explosion); *Edwards v. Boland*, 41 Mass. App. Ct. 375, 379-380 (1996) (medical malpractice). See also *Tillson v. Odyssey Cruises*, C.A. No. 08-10997-DPW, 2011 WL 309660, at \*5 (D. Mass. Jan. 27, 2011) (res ipsa loquitur is not dispositive of question of negligence; it merely permits trier of fact to draw an inference of negligence when certain conditions are met); *Pritchard v. Stanley Access Techs., LLC*, C.A. No. 08-11762-DPW, 2011 WL 309662, at \*2 (D. Mass. Jan. 27, 2011).

<sup>8</sup> *Edwards v. Boland*, 41 Mass. App. Ct. 375, 378-379 (1996).

<sup>9</sup> If an example of res ipsa loquitur is helpful, the judge may instruct: "For example, if a surgeon leaves a surgical sponge inside a patient after the operation is done, a jury may conclude that the surgeon was negligent if the jury finds that that kind of event does not occur in the absence of negligence, the evidence eliminates other causes for the injury and the surgeon was responsible for ensuring that all surgical sponges were removed." See generally *Saunders v. Ready*, 68 Mass. App. Ct. 403, 405 (2007) and cases cited.

Finally, the fact that an injury occurred during the incident is not, by itself, evidence that anyone was negligent. However, you may consider **how** the incident happened. In some cases, the facts surrounding the incident **may allow** you to decide whether DFT was negligent.

On the verdict slip, Question \_\_, asks: "Was DFT negligent?" If you decide that DFT more likely than not failed to use reasonable care, then you answer "Yes." Otherwise, you answer "No." [*< If duty is contested >* Please note that this question includes the first two items of the negligence claim, responsibility and failure to use reasonable care]

### (c) Employer's/Principal's liability

*< if agency/ respondeat superior is contested >* If DFT was negligent, then you must decide whether his/her employer [insert other status], DFT #2, is also liable. As an employer, DFT #2 is liable if DFT's negligence occurred within the scope of his/her employment at the time. To decide whether DFT's negligence occurred within the scope of his/her employment, you should consider the following questions:

1. Was [DFT] doing the kind of work that [DFT #2] hired him/her to perform?
2. Did [DFT]'s conduct occur during the hours when [and at the location where] [DFT #2] hired him/her to work?
3. Did [DFT] act, at least in part, for the purpose of serving [DFT #2]? <sup>10</sup>

Question \_\_ asks you to decide whether DFT's negligence occurred within the scope of his/her employment for DFT#2. You should answer "Yes" or "No," depending on what you decide.

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<sup>10</sup> *Dias v. Brigham Medical Associates, Inc.*, 438 Mass. 317, 320-322 (2002); *Worcester Ins. Co. v. Fells Acres Day School, Inc.*, 408 Mass. 393, 404 (1990); *Swasey's Case*, 8 Mass. App. Ct. 489, 494 (1979).

#### (d) Causation<sup>11</sup>

As I mentioned earlier, the second thing that PLF must prove is that, more likely than not, DFT's negligence caused PLF's injuries [caused PLF's injuries to get worse].<sup>12</sup> You must ask: "Would the same harm have happened without DFT's negligence?" In other words, did the negligence make a difference? If DFT's negligence had an impact on PLF's injuries, then it caused those injuries. But if the negligence had no impact on PLF's injuries<sup>13</sup> and the same harm would have happened anyway, then DFT did not cause the injuries.<sup>14</sup>

Often, an injury has more than one cause.<sup>15</sup> If DFT's negligence was one of those causes, that is enough. PLF does not have to show that DFT's

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<sup>11</sup> This "But For" instruction covers the factual causation issue for the vast majority of negligence cases. See *Doull v. Foster*, 487 Mass. 1, 17 (2021). For the exceptional cases, involving multiple sufficient causes, toxic tort liability, or superseding cause, see Negligence – Special Issues.

<sup>12</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>13</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>14</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>15</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.

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

[< *if foreseeable risk ("legal cause") is at issue*<sup>16</sup>> In addition, PLF must prove that his/her injury was, more likely than not, a predictable<sup>17</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 PLF's injuries?" If you find that DFT's negligence was a cause of PLF's injuries [and that the injuries were a predictable result of that negligence], then you answer "Yes." Otherwise, you answer "No."

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*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.

<sup>16</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>17</sup> As noted above, n.2, this instruction uses the word "predictable" but the judge may decide to use the more technical term "foreseeable."



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

As part of his/her/its defense, DFT claims that PLF was him/herself negligent, and that PLF's own negligence caused his/her injuries. 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 PLF's injuries.

Please note that these two questions are exceptions to my previous instructions, in which I told you that PLF had the burden of proof. On Questions \_\_ and \_\_, DFT has the burden of proof. PLF has no burden to prove anything on these questions.

[< ***Child's Standard of Care—If Applicable*** > Bear in mind that PLF was a child at the time of the events. Therefore, you must not judge his/her negligence as though s/he were an adult. PLF had a duty to use the degree of care that you, as the jury, would reasonably expect from a child of his/her age, intelligence and experience. So, when you answer Questions \_\_ and \_\_, you should ask how you would expect a child of similar age, intelligence and experience to act in the same circumstances.<sup>18</sup>]

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

Under the law, PLF must use 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. To decide whether PLF was negligent, please follow the same instructions I gave you earlier to define negligence.

Question \_\_ asks "Was PLF negligent?" If you decide that PLF 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 \_\_.

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<sup>18</sup> See *Blake v. Springfield Street Railway Co.*, 9 Mass. App. Ct. 912, 913 (1980).

## **(2) Causation—for Comparative Negligence**

DFT must also prove that PLF'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 PLF 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 \_\_.

PLF may recover against DFT only if you find that PLF's own negligence was less than or equal to DFT's negligence. But if you find that PLF was more negligent than DFT, then PLF cannot recover anything in this case.

Please note that I am asking you to determine the negligence, if any, of each side only so that the clerk can calculate damages based upon your decision. If you find that PLF 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.

### **(f) Compensation for Damages**

See separate instruction: Personal Injury Damages.