

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 DFT should have done;
2. that DFT’s medical treatment **fell below that standard of care** - in other words, that DFT was negligent;¹
3. that DFT’s negligence was a **cause** of PLF’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 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

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

radiologist interpreted my x-ray in the medical records, then a doctor-patient relationship existed, even if I never met or spoke with that doctor.² 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 will 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.³ 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.⁴

(b) Standard of Care

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

DFT owed a duty to treat PLF according to the "standard of care." "Standard of care" means the degree of skill and care of the average doctor [provider]

² 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."

³ *Santos v. Kim*, 429 Mass. 130 (1999).

⁴ *Id.*

⁵ *Palandjian v. Foster*, 446 Mass. 100, 104 (2006).

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].⁶ This standard of care required DFT to use the degree and 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.⁷ But a doctor [provider] must have and exercise the skill and expertise ordinarily possessed by other doctors [providers] in the same specialty.

PLF 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 DFT 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.⁸

You must determine this standard of care from the testimony presented by medical experts during the trial of this case.⁹ [*< 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 PLF's medical treatment.

⁶ *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).

⁷ *Palandjian v. Foster*, 446 Mass. 100, 105 (2006).

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

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

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.¹⁰ That may include testimony by the parties' outside experts, as well as the testimony and statements of the defendant[s] [and other treating physicians].¹¹ An expert must be familiar with the standard of care through education, training, experience and familiarity with the subject matter,¹² but does not have to be a specialist in DFT's area of practice.¹³ Similarly, an expert does not have to practice in the same state or geographic area.¹⁴

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 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 PLF.

(c) Falling Below the Standard of Care

Second [Next], PLF must prove that, more likely than not, DFT 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

¹⁰ *Palandjian v. Foster*, 446 Mass. 100, 106 (2006).

¹¹ 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."

¹² *Letch v. Daniels*, 401 Mass. 65, 68 (1987).

¹³ *Letch v. Daniels*, 401 Mass. 65, 68 (1987).

¹⁴ *Brune v. Belinkoff*, 354 Mass. at 108.

something inconsistent with the standard of care, or failing to do something required by the standard of care.

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

Even if DFT 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.¹⁵ They do not guarantee that treatment will improve the patient's condition, or that the

¹⁵ This paragraph may not be appropriate in certain cases of informed consent or res ipsa loquitor.

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 PLF. 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 PLF's injuries. If you find that DFT made these statements and that DFT admitted that his/her actions or inactions caused PLF's injuries in these statements, then you may determine that DFT caused the injuries without any other expert medical opinion.

(4) Verdict Slip—Negligence

On the verdict slip, the first question is "Was DFT negligent in his/her treatment of PLF." 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 PLF's injuries

[caused PLF's injuries to get worse].¹⁶ ¹⁷ 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 injuries¹⁸ and the same harm would have happened anyway, then DFT did not cause the injuries.¹⁹

Often, an injury has more than one cause.²⁰ If DFT's negligence was one of those causes, that is enough. PLF does not have to show that DFT's

¹⁶ *Palandjian v. Foster*, 446 Mass. 100, 104 (2006).

¹⁷ 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.

¹⁸ *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.").

¹⁹ *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.").

²⁰ "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

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.

Here, again PLF must prove causation by expert medical evidence.²¹ This evidence may be in the form of testimony or in the form of medical records.

[< *if foreseeable risk ("legal cause") is at issue* ²²> In addition, PLF must prove that his/her injury was, more likely than not, a predictable²³ 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 should answer "Yes." Otherwise, answer "No."

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.

²¹ *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").

²² 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).

²³ 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 himself/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.

(1) Reasonable Care—for Comparative Negligence

Under the law, PLF 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 person would have done.

You should consider what PLF 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 PLF?
- [*< 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.²⁴ 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 the circumstances of this case. A person should take greater precautions as the risk of harm increases. You should also ask yourself: "Did PLF actually know about any risks?" And, if not: "Should s/he have known about them?"

On the verdict slip, 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 __.

(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 __.

²⁴ 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.

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

Finally, PLF must prove, more likely than not, the amount of damages caused by DFT's negligence. In this case, the parties agree that PLF is seeking damages that relate to [clarify as necessary, *such as 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: < ***See general instruction on personal injury or wrongful death damages.***>

< ***instruction on pre-existing condition, if relevant:***> Sometimes a doctor is accused of negligently doing something that makes a patient's preexisting condition or disease worse, or of negligently failing to do something that would have kept the preexisting 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 preexisting condition or disease that DFT did not cause, but (b) he/she 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 PLF had been perfectly healthy and had not been suffering from the preexisting condition.²⁵

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.

PLF must prove through expert testimony by medical professional(s) that, more likely than not, the injuries for which PLF seeks compensation were caused or made worse by DFT's negligence.²⁶ 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 PLF.

< *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 PLF 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.

< *Note: in medical malpractice cases, G.L. c. 231, § 60F requires that the verdict slip itemize the damages.* >

²⁵ *Wallace v. Ludwig*, 229 Mass. 251, 254-256 (1935); *Higgins v. Delta Elevator Service, Corp.*, 45 Mass. App. Ct. 643, 649 (1998).

²⁶ *Weinberg v. Massachusetts Bay Transp. Auth.*, 348 Mass. 669, 670-671 (1965).