

Publication Date: July 12, 2021

Negligence on Premises, Resulting in Personal Injury

PLF claims that DFT was negligent in [*explain conduct at issue*]. To prove negligence, PLF must show that the following [three] [four] 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;
 2. That DFT's failure to use reasonable care was a cause of PLF's injury or harm; and
 3. The extent of the alleged 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 items in more detail.

(a) Premises Liability – Duty < Only If Disputed >

First, PLF must prove that DFT owed him/her a responsibility¹ to be reasonably careful to avoid any predictable² injuries. To do this, PLF must prove, more likely true than not, that DFT owned [or controlled] the property [where the incident occurred] [at location].³ Because the parties disagree about this, you, the jury, will need to decide whether [DFT] [owned or controlled] the property at the time of the incident. If so, then DFT owed all [lawful visitors] [occupants] [customers] [patrons] a duty to use reasonable care.

< *Insert case-specific instructions re duty if relevant, as follows.* >

¹ 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) of 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.

² To facilitate jury understanding, this instruction uses the word “predictable” in place of the legal term “foreseeable” (see n.1, above), but the judge may substitute the word “foreseeable” if desired.

³ If a specific fact pattern raises legal questions about who controls the premises, the judge may wish to instruct on real property or landlord/tenant law principles. For instance, where the tenant has the exclusive right use part or all of the property, it is the tenant—and not the landlord—that has the duty to keep those leased premises reasonably safe. See *Crowell v. McCaffrey*, 377 Mass. 443, 447 (1979); *Barrett v. Wood Realty Inc.*, 334 Mass. 370, 375 (1956). Though a landlord may retain the right to inspect leased premises, or to repair or maintain them, that does not put the landlord in control of the leased premises or impose on the landlord any duty to keep them in a reasonably safe condition. See *DuBay v. Cambridge Housing Auth.*, 352 Mass. 770 (1967) (rescript); *Stone v. Sullivan*, 300 Mass. 450, 454 (1938). But where the landlord has retained control over part of a building or property—including common areas shared by multiple tenants, and not leased to any particular tenant—then the landlord has the duty to keep those areas in a reasonably safe condition. *Crowell*, 377 Mass. at 447-450 (1979); *King v. G & M Realty Corp.*, 373 Mass. 658, 660–662 (1977).

[< ***Landlord's statutory duty after notice.***> A landlord must use reasonable care to correct any unsafe condition at the property within a reasonable time after receiving notice of that condition from the tenant [local board of health] [local code enforcement board].⁴]

[< ***Child Trespasser instruction.***> A landowner must use reasonable care to protect children from injury in certain circumstances even if the child was trespassing. DFT had a responsibility to use reasonable care if PLF proves four things:

- DFT maintained a dangerous condition on the property at a location where DFT knew or had reason to know that children were likely to trespass;
- DFT realized or should have realized that the condition involved an unreasonable risk of death or serious bodily harm to children;
- because of their youth, children would not discover or understand the risk of the dangerous condition; and
- the benefit of maintaining the condition and the burden of eliminating the danger were slight compared with the risk to children.⁵]

[< ***Trespasser in Peril instruction.***> If PLF was trespassing at the time, PLF must show that he/she was helplessly trapped on the premises and that DFT had discovered that PLF was in peril. If so, then, from the time DFT discovered PLF was in peril, DFT had a responsibility to use reasonable care in the circumstances including, if necessary, to take reasonable action to avoid injuring PLF.⁶]

⁴ This duty is statutory and applies to all commercial and residential landlords, "except an owner-occupied two or three-family dwelling." G.L. c. 186, § 19; *Bishop v. TES Realty Trust*, 459 Mass. 9 (2011). See also *Goreham v. Martins*, 485 Mass. 54 (2020) (discussing warranty of habitability under G.L. c. 186, § 14).

⁵ G.L. c. 231, § 85Q; *Soule v. Mass. Elec. Co.*, 378 Mass. 177 (1979).

⁶ *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 707 (1974).

(b) Failure to Use Reasonable Care⁷

First [second], PLF must prove, more likely than not, that DFT failed to use reasonable care in 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 instance, 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?
- [Was there any emergency, not created by DFT, which required immediate action and therefore may not have allowed for the usual amount of care?]
- How much [would it have cost] [of a burden would it have been] to avoid the risk of injury?

Then you make a judgment by asking: "Did DFT exercise reasonable care in the circumstances?" The law requires a property owner to use reasonable care to avoid predictable injuries to all lawful [visitors] [occupants] [customers] [patrons]. We ask you, the jury, to consider what a reasonably careful [business] [person] would have done in similar circumstances. You do not decide how the most careful or the least careful [company/person/supermarket, etc.] would have acted. 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

⁷ If plaintiff was an adult trespasser, use the instruction below. (Search on "adult trespasser.") If strict liability of a building owner for a code violation applies, use the instruction below. (Search on "strict liability.")

yourself: "Did DFT actually know about any risks?" And, if not: "Should s/he/it have known about them?"

< *Insert following case-specific instructions from below, if relevant* >

(1) *Reasonable Time to Discover Hazard*

(2) *Duty to Warn*

(3) *Open and Obvious Danger*

(4) *Snow and Ice*

(5) *Foreign Substance*

(6) *Prior Similar Incidents*

(7) *Violation of a Statute of Regulation*

(8) *Care Owed to an Adult Trespasser*

(9) *Strict Liability for Violation of State Building Code in Public and Commercial Structures*

Finally, the fact that an injury occurred during an 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** permit you to decide whether DFT was negligent.

If you decide that DFT, more likely than not, failed to use reasonable care, then you answer "Yes" to Question __, which asks: "Was DFT negligent?" Otherwise, you answer "No." [*< If applicable:>* Please note that this question includes the first two items of the negligence claim, namely duty and failure to use reasonable care.⁸]

< *List of potential case-specific instructions to insert above:>*

(1) Reasonable Time to Discover Hazard

Sometimes, other people [customers] [visitors] create a hazardous condition. The law gives [supermarkets/property owners/people in control of property] a reasonable amount of time to discover and fix a hazardous

⁸ Instead of combining the issues of duty and reasonable care, the first question on the verdict slip could be: "Did DFT have a duty of care?"

condition created by others [customers] [visitors]. You should decide how much time was reasonable for DFT to discover and remove that hazard [to warn others about the hazard] in the circumstances of this case.

(2) Duty to Warn

DFT has a responsibility to warn people about any unreasonable dangers on the property if s/he/it knew or should have known of the danger.⁹ [If DFT gave a warning, it is up to you to decide whether the warning alone was enough to meet the duty of reasonable care and, if so, whether DFT gave a sufficient warning.]

The law presumes that PLF would have heeded any warning about the conditions at the [*describe premises*].

(3) Open and Obvious Danger

A [landowner] [person controlling a property] generally does not have to warn about dangerous conditions that are open or obvious to people of average intelligence.¹⁰

But DFT must warn its lawful visitors [tenants] [customers] if it has reason to expect lawful visitors [tenants] [customers] to encounter the danger, despite its being open or obvious. That may occur for a variety of reasons, such as when a reasonable [landowner / person controlling the property] would expect the [visitors / tenants / customers] [to be distracted; not to appreciate the danger; etc.].¹¹ In that situation, DFT must warn of the danger.

⁹ *Quinn v. Morganelli*, 73 Mass. App. Ct. 50, 52 (2008).

¹⁰ While *Dos Santos v. Coleta*, 465 Mass. 148, 152–153 (2013), can be read to eliminate any duty to warn of open and obvious dangers, it quotes the Restatement (Second) of Torts § 343A(1), at 220 (1965) for the proposition that “this duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.” *Id.* 46 Mass. at 151 n. 8.

¹¹ Depending on the facts of the case, the judge may wish to give examples, such as those set forth in Restatement (Second) of Torts § 343A(1) Comment f, at 220 (1965) and quoted in *Dos*

DFT claims that it was not negligent because the condition at issue was open or obvious to people of average intelligence. You may consider whether the condition was open and obvious and, if so, whether a reasonably careful person would have believed [that no additional actions were necessary] [that a warning was enough]. However, [with or without a warning,] DFT must remedy an unreasonably dangerous condition when a reasonable [landowner] [person controlling the property] would expect [visitors] [tenants] [customers] to encounter the danger even though the condition was open and obvious. For instance, the [visitors] [tenants] [customers] may [be distracted; not appreciate the danger; etc.].¹² In that situation, DFT must act reasonably to [warn of the danger] [remedy the danger] [or both].

(4) Snow and Ice

In this case, PLF must prove that DFT knew or reasonably should have known about a dangerous accumulation of snow or ice on DFT's property. If so, DFT must make reasonable efforts to protect lawful visitors [occupants]

Santos, 465 Mass. at 151 n.8. If the court poses a special jury verdict question about the open and obvious nature of the danger, it should also pose a question effectively asking: "whether the defendants reasonably could and should have anticipated that lawful entrants would [encounter the danger] despite the open and obvious danger of doing so." *Id.*, 465 Mass. at 163.

The following adaptation of Restatement Comment f may provide a useful guide for additional instructions:

[DFT may expect that an obvious condition remains dangerous], where it has reason to expect that the visitor's "attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.]"

[DFT may expect that an obvious condition remains dangerous], if it has reason to expect that the visitor "will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk."

It may also be useful, in the contributory negligence instruction, to point out that, if the jury finds that DFT should have expected harm from an obvious condition, it may consider the obviousness of the danger in deciding whether PLF was negligent.

¹² *LaForce v. Dyckman*, 96 Mass. App. Ct. 42, 46-47 (2019). See f.n. 11 for possible additional instructions that may address the specifics of certain types of cases.

against the snow or ice hazard.¹³ To decide what snow and ice removal efforts are reasonable, you should consider the expense those efforts impose on the landowner and the probability and seriousness of the foreseeable harm to others. This will depend on, for instance, the amount of expected foot traffic on the property, the size of the risk, and the burden and expense of snow and ice removal. What counts as reasonable snow removal may, or may not, be the same for an owner of a business or an apartment house as for the owner of a single-family home.

[< *if a lease placed snow removal obligations on a tenant*> You may consider provisions of the lease between the tenant and the defendant as one factor in deciding whether DFT made reasonable efforts to remove the snow [ice]. But while lease provisions may be one factor, it does not automatically establish whether or not DFT's efforts were reasonable. It is up to you to decide, in light of all of the evidence, what snow and ice removal efforts were reasonable.]

(5) Foreign Substance

If a foreign substance, like [water, etc.] plays a role in an incident, PLF may prove negligence in any one of [four] [three] [two] ways. PLF does not have to prove that DFT was negligent in all of these ways.

< ***NOTE TO JUDGE: INSTRUCT ON EACH THEORY ONLY IF SUFFICIENT RECORD EVIDENCE SUPPORTS A VERDICT ON THAT THEORY***>

< *D's negligence*> First, PLF may show that DFT or its employee negligently caused the substance to be there.

< *D's actual knowledge*> Second, PLF may show that DFT or its employee actually knew that the substance was there but failed to use reasonable care to remove it or make the area reasonably safe.

¹³ *Goreham v. Martins*, 485 Mass 54, 58-59 (2020); *Papadopoulos v. Target Corp.*, 457 Mass. 368, 370-371 (2010).

< *D should have known* > Third, PLF may show that the substance was present on the floor [location] for such a length of time that DFT should have known about it and taken steps to make the area reasonably safe. DFT had a responsibility to use reasonable care to discover and remedy any unsafe condition on its property within a reasonable amount of time if its [customers] [visitors] created that condition. You should decide how much time was reasonable for DFT to discover and remove that hazard [to warn others about the hazard] in the circumstances of this case.

You should consider what opportunity DFT or DFT's employees had to discover the condition. You may ask:

- What was the substance's condition, size, and location?
- Does any evidence help you estimate how long the substance had been there before the incident? For instance, does the substance's condition or description lead you to any conclusions about that approximate time period?
- How many employees did DFT have?
- How close were those employees to the substance's location — that is, was it in a place where they should have seen it while doing their jobs?
- How likely was it that DFT's employees would become aware of the condition while performing their usual duties?

< *Mode of Operation* > Fourth, PLF may show that DFT chose to operate his/her/its [store] [supermarket] [business] in a way that made a dangerous condition reasonably foreseeable. DFT had a duty to use all reasonable precautions necessary to protect customers or others who were authorized to be in the [supermarket] [store]. In this case, DFT chose to operate its [supermarket] [store] as a [self-service store] [other].¹⁴

¹⁴ The parties rarely contest what mode of operation the defendant chose. If there is a dispute, then the judge should rephrase this sentence to put the issue to the jury: "In this case, you will need to decide whether DFT chose to operate as a [self-service store] [other]."

A customer has a right to expect that the store owner [supermarket] [business] will make greater efforts for its patrons' safety than a homeowner would make for visitors.¹⁵ You should consider whether DFT failed to take reasonable measures to prevent injury to its customers in light of the risks involved with its [self-service] [other] mode of operation.¹⁶ In light of those risks and of DFT's [self-service] [other] mode of operation, you should ask whether DFT could reasonably foresee that a dangerous condition existed and, if so, whether s/he/it failed to use reasonable care to prevent injury.

As I said, PLF may prove negligence in any one or more of these ways and does not have to prove all of them.

(6) 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. 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.

(7) Violation of a Statute or Regulation

You may also consider whether DFT [or PLF] violated any safety statute or regulation that applied to him/her. There is a statute/rule that says:

< *summarize or quote the statute or rule* >

¹⁵ *Sheehan v. Roche Brothers Supermarkets, Inc.*, 448 Mass. 780, 788 (2007), quoting Restatement (Second) of Torts § 343 (1965).

¹⁶ *Id.* at 787.

This statute [rule] does not automatically determine whether DFT or PLF was negligent. Instead, you should ask two questions. First, “Did DFT or PLF violate this statute [rule]?” Since this decision is up to you, as the jury, it does not matter whether any public official issued a citation to DFT or PLF or found anyone responsible for a violation.

If a violation occurred, then you ask the second question: “Was the statute or regulation designed to prevent events like the incident in this case?” If you answer “Yes” to both of these questions then you may consider the violation as some evidence that the violator was negligent. Of course, if you answer “No” to at least one of these questions, the statute or rule is not relevant to your decision on negligence.

The violation does not automatically prove negligence, because that decision is up to you. If you find that DFT failed to comply with a legal rule designed to prevent incidents like this one, then you may consider that fact, together with all the other evidence, in determining whether one or both parties acted negligently. And, of course, you need not find a violation of law in order to hold DFT or PLF negligent.

(8) Care Owed to an Adult Trespasser

DFT claims that PLF was a trespasser, meaning that PLF went on to DFT’s property without permission and without excuse. < *insert instructions from “Trespass”, if appropriate* >

If PLF was a trespasser, then s/he must prove that, more likely than not, DFT intentionally engaged in conduct that made substantial injury highly likely. For this purpose, conduct includes both action and inaction. It is not enough to show that DFT failed to use reasonable care. Rather, PLF must prove DFT’s intent in at least one of two ways. First, PLF may prove that DFT engaged in the conduct even though DFT actually realized the grave risk of harm. Second, PLF may prove that a reasonable person in the DFT’s shoes, knowing what DFT knew, would realize that the conduct posed a high risk

of substantial injury.¹⁷ You must consider all the evidence and then make a judgment about whether DFT's intentional conduct made it highly likely that substantial injury would occur.

(9) Strict Liability for Violation of State Building Code in Public and Commercial Structures

[< *If the nature of the building is NOT contested*:> The owner [or person in control] of a building such as [address/description of premises at issue] is liable to any person injured by a condition at the building that violates the state building code. PLF does not have to prove that DFT knew or should have known of the violation or failed to use care to eliminate it. But PLF does have to show that the building code violation caused the injury, which is the next topic I will address.¹⁸]

[< *If the nature of the building IS contested*:> The owner [or person in control] of certain types of buildings is liable to any person injured by a condition at the building that violates the state building code. This rule applies to buildings in which a large number of people gather for occupational, entertainment, [or other¹⁹] purposes. If you find that a large number of people gathered for occupational, entertainment, [or other²⁰] purposes at [address/description of property], then DFT is liable for injuries that PLF suffered because of a condition at the building that violates the state building code.]

¹⁷ *Schofield v. Merrill*, 386 Mass. 244 (1982). See *Manning v. Nobile*, 411 Mass. 382, 387 (1991) ("Wilful, wanton, or reckless conduct has been defined as 'intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.'"), quoting *Commonwealth v. Catalina*, 407 Mass. 779, 789 (1990).

¹⁸ G.L. c. 143, § 51. See *Sheehan v. Weaver*, 467 Mass. 734, 743 (2014) (statute applies to "places in which a large number of people gather for occupational, entertainment, or other purposes" but not to small-scale residential structures; the court left further refinement of the statute's scope for future cases).

¹⁹ *Id.*

²⁰ *Id.*

PLF does not have to prove that DFT knew or should have known of the violation or failed to use care to eliminate it. But PLF does have to show that the building code violation caused the injury, which is the next topic I will address.

(c) Premises Liability – Causation

[Same as General Negligence and Causation]

(d) Premises Liability – Comparative Negligence

[Same as General Negligence and Causation]

(e) Compensation for Damages

[See separate instruction: Personal Injury Damages.]