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## **The Six Elements of Negligence**

In a successful negligence claim, you must show that each of the following six elements were present at the time of your accident or injury occurred:

(1) ***Duty of care*** owed by the defendant (person and/or entity who caused the injury) to the plaintiff (you) - the outcomes of some negligence cases depend on whether the defendant owed a duty to the plaintiff. Such a duty arises when the law recognizes a relationship between the defendant and the plaintiff, and due to this relationship, the defendant is obligated to act in a certain responsible manner toward the plaintiff. A judge, rather than a jury, ordinarily determines whether a defendant owed a duty of care to a plaintiff.

(2) ***Breach of that duty*** - a defendant is liable for negligence when they breached the duty that they owed to the plaintiff. A defendant breaches such a duty by failing to exercise reasonable care in fulfilling that duty. Unlike the question of whether a duty exists, the issue of whether a defendant breached a duty of care is decided by a jury as a question of fact.

a. ***Simple common law negligence.*** For example, in a case where a person is injured by slipping on ice on someone's property, the breach of a duty (that is, negligence) is proved by simply arguing the basic common law principles. A landowner owes a legal duty to take reasonable steps to protect others from foreseeable danger. Your attorney will argue that the landowner who failed to treat and clear the ice was negligent because he knew or should have known of the ice and it is reasonable to expect that someone might slip onto it and get hurt. There are no statutes or public safety regulations pertaining to icy conditions that can help a jury determine the scope of this legal duty and whether it was breached. There is no industry standard for landowners who do not remove snow and ice on their property. There is probably no evidence of a routine practice and procedure adhered to by that landowner. And an expert witness is not necessary (or permitted) to tell a jury something that makes common sense to a lay person: when there is ice you should treat and remove it. A jury will hear the evidence and the argument and determine for itself whether the landowner was negligent given all of the circumstances.

b. ***Violation of safety statute.*** In Massachusetts, the violation of a safety statute, regulation or local ordinance by a defendant that contributes to cause an injury or death is considered evidence of negligence, but it does not automatically constitute negligence as a matter of law. A jury will consider the violation among all of the other circumstances. For instance, if a general contractor fails to comply with the state building code by not

providing fall protection equipment to a bricklayer working on scaffolding, and the bricklayer falls to his death, the contractor's failure to comply with the state building code can be presented to a jury as evidence of negligence. There are literally thousands upon thousands of governmental safety regulations that relate to everything from riding a bicycle on a public roadway to security in a mental health facility to the delivery of electricity to the citizens of Boston. Depending on the nature of a given case, chances are that there is some regulation out there in play that will help define the scope of a defendant's duty and whether it was breached.

c. *Violation of industry standard.* A defendant's deviation from an industry standard of care may also be deemed evidence of negligence. The field of emergency medicine generally recognizes that in certain situations a more powerful CT scan is needed instead of an x-ray when looking for suspected spine fractures. This permits the entire spinal cord can be visualized in much greater detail and increases the chances of identifying a spine fracture. That industry standard can be used to show that a doctor's failure to follow the standard was negligent, and that the failure to do a CT scan resulted in a diagnosed spine fracture.

d. *Violation of internal standard, custom or usage.* Similarly, a deviation from an individual's or a business's customary practices and procedures may be deemed to be evidence of negligence.

e. *Expert witnesses.* Expert witnesses can be used to help establish negligence. An expert witness is one who through specialized education, training and experience has acquired a heightened skill that makes him better qualified than a layperson to opine on the subject in question. The subject of expert testimony can only be an area of knowledge beyond the general knowledge of the public. Usually lay witnesses are not permitted to offer their opinions as to whether or not a defendant conformed to or deviated from some standard of care. However, if qualified and permitted by the court, an expert witness can do just that. There are expert witnesses for virtually every type of litigated matter imaginable. The most common experts in personal injury cases are in the fields of accident reconstruction, medicine and surgery, product safety design, electrical engineering, fire cause and origin, chemistry and materials analysis and toxicology. Typically, the expert will review the relevant evidence and render an opinion as to what the standard of care was and whether in their view the defendant violated it and was therefore negligent.

f. *Res ipsa loquitur.* The doctrine of "res ipsa loquitur" can also be used to establish negligence. Latin for "the thing speaks for itself," the doctrine creates a rebuttable presumption that the defendant was negligent where a plaintiff can prove that (a) the instrumentality causing injury was in the defendant's exclusive control, and (b) the accident was one that ordinarily does not happen in the absence of negligence. Res ipsa loquitur permits the jury to draw an inference of negligence in the absence of a specific cause of the accident when the accident is the kind that does not ordinarily happen unless a defendant was negligent in some respect. The plaintiff must also eliminate all other responsible causes, including the plaintiff's own actions.

g. *Post-accident repairs.* The general rule in Massachusetts is that post-accident repairs or remedial measures to property may not be considered as evidence of negligence. This would apply to a premises liability claim where a hotel guest trips on the edge of loose carpeting on a stairway and falls down a flight of steps. The hotel's remedial action to repair or replace or remove the loose carpeting is to be encouraged for public safety. For this reason, Massachusetts law forbids using subsequent remedial measures to try to prove a defendant's consciousness of fault... and thus its negligence.

Evidence of post-accident remedies, however, can be admissible for other reasons. These would include: (1) to show the feasibility of making a safety improvement where the defendant argues that it lacked the means of preventing the incident; or, (2) to prove that the defendant controlled the premises if the defendant tries to suggest that it was not responsible for the property on which the accident occurred.

h. *Prior similar accidents.* The occurrences of prior similar incidents are admissible as evidence of negligence if there is substantial similarity with the circumstances of this instant case. The judge must also make sure that there is little danger of unfairness or confusion to the jury by the presentation at trial of such collateral issues.

(3) ***An actual causal*** connection between the defendant's conduct and the resulting injury or damage - under the traditional rules in negligence cases, a plaintiff must prove that the defendant's actions actually caused the plaintiff's injury. This is often referred to as "but-for" causation. In other words, but for the defendant's actions, the plaintiff's injury would not have occurred.

(4) ***Proximate or legal cause*** - proximate cause relates to the scope of a defendant's responsibility in a negligence case. A defendant in a negligence case is only responsible for those harms that the defendant could have foreseen through his or her actions. If a defendant has caused damages or injuries that are outside of the scope of the risks that the defendant could have foreseen, then the plaintiff cannot prove that the defendant's actions were the proximate cause of the plaintiff's damages.

(5) ***Superseding/intervening case*** - In some instances, the causal relationship between the defendant's negligence and the plaintiff's injury may be broken by the intervention of a superseding cause, such as some unforeseeable negligence or fault of another. In those instances, the chain of causation is deemed broken and there can be no liability even though the defendant may have acted negligently. Even if the defendant could not have foreseen the precise manner in which the injury occurred, where the negligent conduct of the defendant creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the defendant of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the defendant's conduct. Only unusual, extraordinary negligence of a third party will excuse an original tortfeasor's liability. In addition, the intervening cause must have been unforeseeable to the defendant at the time of its negligent act in order to relieve the defendant of liability.

(6) *Damages* - a plaintiff in a negligence case must prove a legally recognized harm, damage or injury. It is not enough that the defendant failed to exercise reasonable care. The failure to exercise reasonable care must result in actual damages to a person to whom the defendant owed a duty of care.

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