



## Duty of Care: Some Essential Context

Torts  
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# Questions of Law vs. Issues of Fact

## Questions of Law vs. Issues of Fact

In litigation, there are two essential categories of things that have to be figured out: questions of law and issues of fact. Generally resolving a lawsuit means settling many questions of law and issues of fact (and sometimes things that are categorized as a “mixed question of law and fact”).

### Issues of Fact

**What to consider:** Put witnesses on the stand, get their testimony (which we call “evidence”).

**Who decides:** A jury, based on whom they believe. (Or a judge in a “bench trial.” Say “factfinder” to include both.)

**Examples:** Did the defendant intend to touch the plaintiff? Was the defendant in town on August 29th? Did the plaintiff know the defendant was lying?

## Questions of Law

**What to consider:** Past court opinions (precedent), statutes, treatises, law review articles.

**Who decides:** A judge. Or, on appeal, a panel of judges.

**Examples:** Can you use the harm-within-the-risk test to prove proximate causation in Nebraska? Does contributory negligence bar a plaintiff's recovery for negligence in Utah?

## Questions of Law vs. Issues of Fact

### **What's this?**

Does the tampering with or disabling of an aircraft lavatory smoke detector violate federal law?

Did Carrie put a plastic bag over the lavatory smoke detector?

Does the placing of a plastic bag over a lavatory smoke detector constitute "tampering" under federal law?

## Questions of Law vs. Issues of Fact

### What's this?

Does the tampering with or disabling of an aircraft lavatory smoke detector violate federal law? ← QoL

Did Carrie put a plastic bag over the lavatory smoke detector? ← IoF

Does the placing of a plastic bag over a lavatory smoke detector constitute “tampering” under federal law? ← QoL

## Questions of Law vs. Issues of Fact

### What do these generally help with?

Private investigator

Law librarian

Oral argument on a motion

Interviewing an eyewitness

Affidavit

Brief arguing a 12(b)(6) motion

Deposition

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Law librarian ← QoL

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Affidavit ← IoF

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## Questions of Law vs. Issues of Fact

What's the essence of their job?

Jury

Judge

## Questions of Law vs. Issues of Fact

What's the essence of their job?

Jury ← IoF

Judge ← QoL

**Let's look at some  
jury instructions**

**from Colorado Pattern Civil Jury Instructions**

[https://www.courts.state.co.us/Courts/Supreme\\_Court/Committees/Committee.cfm](https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm)

*[from “Introductory Note” at the beginning of the chapter providing jury instructions for negligence:]*

“To recover on a negligence claim, the plaintiff must establish the existence of a legal duty on the part of the defendant, a breach of that duty, causation, and damages.”

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*[FROM THE PATTERN JURY INSTRUCTIONS FOR NEGLIGENCE:]*

9:1 ELEMENTS OF LIABILITY ...

For the plaintiff, (name), to recover from the defendant, (name), on (his) (her) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim]). ...

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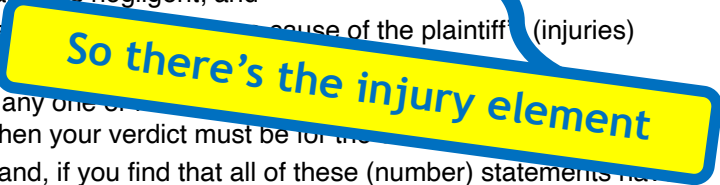
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**So there's the injury element**



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If you find that any one or more of the following have been proved, then your verdict must be for the plaintiff.

On the other hand, if you find that all of the following have been proved, (then your verdict must be for the defendant). You must consider the defendant's affirmative defense of (insert any other affirmative defense that would be a complete defense).

**What happened to duty, breach, and actual and proximate causation?**

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*[FROM THE PATTERN JURY INSTRUCTIONS FOR NEGLIGENCE:]*

**9:6 NEGLIGENCE — DEFINED ...**

Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect (oneself or) others from (bodily injury) (death) (property damage) (insert any other appropriate description ... )..

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So “negligent” in the 9.1 instructions means the breach element ...

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9:18 ...

The word “cause” as used in these instructions means an act or failure to act which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

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**So that includes the concepts  
of both actual and proximate  
causation ...**

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"Generally, a legal duty to use due care arises in response to a foreseeable and unreasonable risk of harm to others. In determining whether a person has a duty to act or refrain from acting to avoid injury to others, the nature of the inquiry is essentially whether recognizing a duty would comport with fairness under contemporary standards. To decide this, the court must consider several factors, including the feasibility and likelihood of injury and the possible extent of that injury, the magnitude of the burden placed on the defendant to guard against injury, and the consequences of placing that burden on the defendant. Ultimately, whether a duty exists depends on considerations of policy. ... The existence and scope of a legal duty are generally questions of law for the court to determine."  
(citations omitted)

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So that's why duty doesn't show up in the instructions for the jury ...