

OPERATING NEGLIGENTLY SO AS TO ENDANGER

The defendant is charged with operating a motor vehicle negligently in a manner that might endanger the public. Section 24(2)(a) of chapter 90 of our General Laws provides as follows:

“Whoever,
upon any way
or in any place to which the public has a right of access,
or [in] any place to which members of the public have
access as invitees or licensees,
operates a motor vehicle . . . negligently
so that the lives or safety of the public might be
endangered . . .
shall be punished”

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant operated a motor vehicle;

Second: That he (she) did so (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public

have access as invitees or licensees); and

Third: That he (she) did so in a negligent manner so that the lives or safety of the public might have been endangered.

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280).

The third thing the Commonwealth must prove beyond a reasonable doubt is that the defendant drove negligently in a manner that might have endangered the lives or safety of other people.

A person acts negligently when he fails to use due care, that is, when he acts in a way that a reasonable person would not act. This can happen either by doing something that a reasonably prudent person would not do under those circumstances, or by failing to do something that a reasonably prudent person would do. The defendant acted negligently if he (she) drove in a way that a reasonable person would not have, and by doing so created an unnecessary danger to other people, a danger that he (she) could have avoided by driving more carefully.

A. *If there was no accident.* A person can be found to have driven negligently even if no accident resulted, and even if there was no one else actually on the road to be put in danger. A person is negligent if he drives in a way that has the potential to cause an accident or to endanger anyone who might be on the road.

B. *If there was an accident.* The fact that an accident occurred is not by itself evidence that the defendant was negligent. You must examine all the evidence about how the accident happened in order to determine whether any negligence was involved, and if so, whether that negligence was the defendant's.

In determining whether the defendant drove negligently in a manner that might have endangered the public, you should take into account all the facts of the situation: the defendant's rate of speed and manner of operation, the defendant's physical condition and how well he (she) could see and could control his (her) vehicle, the condition of the defendant's vehicle, what kind of a road it was and who else was on the road, what the time of day, the weather and the condition of the road were, what any other vehicles or pedestrians were doing, and any other factors that you think are

relevant.

If you find that the defendant acted negligently, the defendant's intent is not relevant. You are not required to find that the defendant intended to act negligently or unlawfully. This is in that category of situations where public safety requires each driver to determine and to adhere to an objective standard of reasonable behavior. Therefore the defendant's subjective intent is irrelevant; the issue is whether or not he (she) drove as a reasonable person would have under the circumstances.

See also Instruction 3.180 (Negligence). For a supplemental instruction on violation of the law as evidence of negligence, see the supplemental instructions to Instruction 3.180. If the violation is speeding, see the supplemental instructions to Instruction 5.640 (Road Racing).

Commonwealth v. Burno, 396 Mass. 622, 624, 487 N.E.2d 1366, 1368 (1986) (potential danger to public is relevant factor for jury consideration); *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.5 & 87, 474 N.E.2d 1062, 1067 n.5 & 1069 (1985) (speeding not negligence per se but can be considered with other evidence in determining negligence; victim's contributory negligence is not defense); *Commonwealth v. Jones*, 382 Mass. 387, 389-392, 416 N.E.2d 502, 504-506 (1981) (negligence to be determined by same standard as in tort law for purposes of vehicular homicide statute [G.L. c. 90, § 24G], which was taken almost verbatim from driving so as to endanger statute); *Commonwealth v. Charland*, 338 Mass. 742, 744, 157 N.E.2d 538, 539 (1959) (speed is relevant factor); *Commonwealth v. Gurney*, 261 Mass. 309, 312, 158 N.E. 832, 833 (1927) (relevant jury factors); *Commonwealth v. Vartanian*, 251 Mass. 355, 358, 146 N.E. 682, 683 (1925) (same); *Commonwealth v. Horsfall*, 213 Mass. 232, 235, 100 N.E. 362, 363 (1913) (reckless operation can occur even on deserted street); *Commonwealth v. Ferreira*, 70 Mass. App. Ct. 32, 872 N.E.2d 808 (2007) (conviction supported where defendant backed out of parking space in shopping center parking lot and then accelerated forward at about 20 m.p.h., causing the wheels to spin and the back end to fishtail, while the vehicle made a screeching noise); *Commonwealth v. Duffy*, 62 Mass. App. Ct. 921, 922 n.2, 818 N.E.2d 176, 179 n.2 (2004) (negligence to be determined by same standard as in tort law; speeding not negligence per se but can be considered with other evidence in determining negligence); *Commonwealth v. Gordon*, 15 Mass. App. Ct. 901, 443 N.E.2d 119 (1982), aff'd, 389 Mass. 351, 450 N.E.2d 572 (1983) (negligent inattention to driving plus glassy eyes and slurred speech will support conviction); *Commonwealth v. A Juvenile (No. 1)*, 383 Mass. 877, 878, 420 N.E.2d 312, 313 (1981) (offense is one for which juvenile may be transferred for trial as adult).

Prior to St. 1928, c. 281, this was a strict liability offense that did not include any requirement of negligence. That should be kept in mind when reviewing early decisions involving the former statute.

SUPPLEMENTAL INSTRUCTIONS

1. *Negligence or intoxication of other driver.* You have heard testimony

suggesting that the driver of the other vehicle involved in this matter, _____ *[name]* _____, was (negligent) (or) (intoxicated). It is up to you to decide whether or not to accept that testimony as accurate.

If you *do* conclude that the other driver was (negligent) (or) (intoxicated), then you must determine what role that driver's (negligence) (or) (intoxication) played in this matter.

The other driver's driving is irrelevant to the defendant's guilt or innocence on this charge unless the other driver was the sole cause of what happened. The defendant is not excused merely because the other driver was (negligent) (or) (intoxicated), if the defendant's negligence was the direct cause of what happened, and the other driver's (negligence) (or) (intoxication) merely aggravated the result. On the other hand, if the other driver's (negligence) (or) (intoxication) was the sole cause of what happened and the defendant was not negligent, then the defendant must be found not guilty.

Commonwealth v. Galluzzo, 25 Mass. App. Ct. 568, 520 N.E.2d 1338 (1988) (judge must allow evidence of other driver's negligence if it would warrant a finding that the sole negligence was that of the other driver, but careful instructions are required to make clear that contributory negligence is not a defense). If additional language on supplemental and superseding causes is appropriate, the supplemental instruction to Instruction 5.160 (Homicide by a Motor Vehicle [Misdemeanor]) may be appropriately adapted.

2. *Emergency situation.*

In determining whether the defendant's conduct was negligent, you may consider whether there was a sudden emergency which required rapid decision. If there was, you must determine whether the defendant acted as a reasonable person would under similar emergency circumstances.

Newman v. Redstone, 354 Mass. 379, 383, 237 N.E.2d 666, 669 (1968).

NOTE:

Victim's injuries. The alleged victim of a defendant charged with operating so as to endanger may be permitted to testify as to physical injuries sustained in the accident, since the nature and extent of such injuries are relevant to the issue of negligence. The judge must determine whether their prejudice outweighs their relevance. *Commonwealth v. Cohen*, 27 Mass. App. Ct. 1210, 1211, 545 N.E.2d 50, 51 (1989).