

OPERATING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR WITH A BLOOD ALCOHOL LEVEL OF .08% OR GREATER

I. If the jury is to consider both the impaired-ability and per-se portions of the statute	1
II. If the jury is to consider only the impaired-ability portion of the statute	6
III. If the jury is to consider only the per-se portion of the statute	10
IV. Supplemental Instructions	13
1. If a breath test result is considered under the impaired-ability portion of the statute	13
2. If the breath samples differ	14
3. If the defendant is permitted to introduce additional test samples	15
4. If the simulator reading is not .15% (optional)	16
5. If there is a challenge whether the breath test was properly administered	16
6. If there is a challenge to the scientific accuracy of the breath test	18
7. If there was expert testimony about the breath test	18
8. If there is evidence of field sobriety tests (optional)	19
9. If the defendant was not offered a field sobriety test (on request)	20
10. If there is opinion evidence about the defendant's sobriety (optional)	21
11. If there is evidence both of alcohol and drug usage	22
Notes	23

**I. IF THE JURY IS TO CONSIDER BOTH THE
IMPAIRED-ABILITY AND PER-SE PORTIONS OF THE STATUTE**

The defendant is charged with operating a motor vehicle in violation of chapter 90, section 24, of our General Laws.

A person may violate the statute in two different ways:

- **either** by operating a motor vehicle while under the influence of intoxicating liquor,
- **or** by operating a motor vehicle while having a blood alcohol level of .08 percent or greater.

In order to prove the defendant guilty of this offense, the Commonwealth must prove that the defendant violated the statute

in at least one of those two ways.

Specifically, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant operated a motor vehicle;

Second: That the defendant did so (on a public 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 while operating the vehicle,

- ***either*** the defendant was under the influence of intoxicating liquor,
- ***or*** the percent of alcohol in his (her) blood was eight one-hundredths or greater, by weight.

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) unless these are stipulated.

If any elements are stipulated.

Because the parties have stipulated

(that the defendant was operating a motor vehicle) (and) (that the location was a public way) (that the location was one to which the public had a right of access), your deliberations will

focus on the remaining issue(s): *[specify remaining elements]* .

What does it mean to be “under the influence” of alcohol? Someone does not have to be drunk to be under the influence of alcohol. A person is under the influence of alcohol if he (she) has consumed enough alcohol to reduce his (her) ability to operate a motor vehicle safely, by decreasing his (her) alertness, judgment and ability to respond promptly. It means that a person has consumed enough alcohol to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to drive safely.

The Commonwealth is not required to show that the defendant actually drove in an unsafe or erratic manner, but it is required to prove that his (her) *ability* to drive safely was diminished by alcohol. The amount of alcohol necessary to do this may vary from person to person. You may rely on your experience and common sense about the effects of alcohol. You should consider any believable evidence about the defendant’s alleged consumption of alcohol, as well as the defendant’s appearance, condition and behavior at the time.

Now instead of proving that the defendant was “under the influence” of alcohol, the Commonwealth may seek to prove that the defendant is guilty of this offense by showing beyond a reasonable doubt that at the

time of operation, the defendant had a blood alcohol level of .08 percent or greater by weight.

The use you may make of the defendant's (breath) (blood) test will differ depending upon whether you are considering evidence that he (she) operated a motor vehicle with a blood alcohol level of .08 percent or greater, or operated while under the influence of alcohol.

In deciding whether the Commonwealth has proved that the defendant had a blood alcohol level of .08 percent or greater, at the time of operating the vehicle, you may consider evidence of a (breath) (blood) test of .08 or greater if you believe that evidence is reliable.

In deciding whether the Commonwealth has proved that the defendant was under the influence of alcohol at the time of operating the vehicle, you may consider whether a (breath) (blood) test showed that the defendant had consumed any alcohol. However, evidence of a positive (breath) (blood) test is not sufficient by itself to prove that the defendant was under the influence of alcohol.

The judge may consider giving Supplemental Instruction 1 at this point. See Commonwealth v. Colturi, 448 Mass. 809, 817, 864 N.E.2d 498, 504 (2007).

If there is a challenge whether the breath test was properly administered, see Supplemental Instruction 4. If there is a challenge to the scientific accuracy of the breath test, see Supplemental Instruction 5.

So there are three things that the Commonwealth must prove beyond a reasonable doubt:

***First:* That the defendant operated a motor vehicle;**

***Second:* That the defendant did so (on a public 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 while the defendant was operating the vehicle,**

- ***either* he (she) was under the influence of intoxicating liquor,**
- ***or* the percent of alcohol in his (her) blood was eight one-hundredths or greater, by weight.**

If all three things have been proved beyond a reasonable doubt, then you should return a verdict that the defendant is guilty of this offense. If any one of those three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.

Your verdict must be unanimous as to whether the defendant is guilty or not guilty of operating under the influence of alcohol. Your verdict must also be unanimous as to whether the defendant is guilty or not guilty of operating with a blood alcohol level of .08 percent or greater.

**II. IF THE JURY IS TO CONSIDER ONLY
THE IMPAIRED-ABILITY PORTION OF THE STATUTE**

This instruction will most often be used where no breath test was administered. It may also be used in three situations where there was a breath test:

- *If the test result was .06 or .07, Supplemental Instruction 1 should be incorporated at the point indicated.*
- *If the Commonwealth proceeds only under the impaired-ability portion of the statute, a breath test result of .08 or greater is admissible only with “expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such results.” Commonwealth v. Colturi, 448 Mass. 809, 818, 864 N.E.2d 498, 505 (2007); Commonwealth v. Hubert, 71 Mass. App. Ct. 661, 885 N.E.2d 164, further appellate review granted, 451 Mass. 1108, 889 N.E.2d 434 (2008).*
- *If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for directed verdict on the per-se portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. See Colturi, supra (“if the per se and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, it must present expert testimony establishing a relationship between the test result and intoxication as a foundational requirement of the admissibility of such tests” since otherwise “the jury would be left to guess at its meaning”). If the breath test results are allowed to remain in evidence, the paragraph from page 4 beginning “In deciding whether the Commonwealth has proved that the defendant was under the influence of alcohol . . .” should be incorporated at the point indicated.*

The defendant is charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of chapter 90, section 24, of our General Laws.

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 the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of

has decreased his (her) alertness, judgment and ability to respond promptly. It means that a person has consumed enough alcohol to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to drive safely. To show that a person was “under the influence” of alcohol, the Commonwealth is not required to show that the defendant actually drove in an unsafe or erratic manner, but it is required to prove that his (her) *ability* to drive safely was diminished by alcohol. The amount of alcohol necessary to do this may vary from person to person.

You are to decide this from all the believable evidence in this case, together with any reasonable inferences that you draw from the evidence. You may rely on your experience and common sense about the effects of alcohol. You should evaluate any believable evidence about the defendant’s alleged consumption of alcohol, and the defendant’s appearance, condition and behavior at the time.

If appropriate, insert here Supplemental Instruction 9 (opinion evidence on sobriety) or the paragraph from p. 4 beginning “In deciding whether the Commonwealth has proved that the defendant was under the influence of alcohol”

So there are three things that the Commonwealth must prove beyond a reasonable doubt:

***First*, that the defendant operated a motor vehicle;**

***Second*, that the defendant did so (on a public 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) operated it while under the influence of alcohol.**

If all three things have been proved beyond a reasonable doubt, then you should return a verdict of guilty for operating a motor vehicle under the influence of alcohol. If any one of those three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.

III. WHERE THE JURY IS TO CONSIDER ONLY
THE PER-SE PORTION OF THE STATUTE

The defendant is charged with operating a motor vehicle while having a blood alcohol level of .08 percent or greater, in violation of chapter 90, section 24, of our General Laws.

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 the defendant did so (on a public 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 at the time of operation, the percent of alcohol in the defendant's blood was eight one-hundredths or greater, by weight.

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) unless these are stipulated.

If any elements are stipulated.

Because the parties have stipulated (that the defendant was operating a motor vehicle) (and) (that the location was a public way) (that the location was one to

which the public had a right of access), your deliberations will

focus on the remaining issue(s): _____ *[specify remaining elements]* _____ .

The third element that the Commonwealth must prove beyond a reasonable doubt is that at the time of operation the defendant had a blood alcohol level of .08 percent or greater by weight.

You may consider the evidence that is before you about the (breath) (blood) test that was administered to the defendant, in determining whether he (she) had a blood alcohol level of .08 percent or more, at the time the vehicle was operated.

If there is a challenge whether the breath test was properly administered, see Supplemental Instruction 4. If there is a challenge to the scientific accuracy of the breath test, see Supplemental Instruction 5.

So there are three things that the Commonwealth must prove beyond a reasonable doubt:

***First:* That the defendant operated a motor vehicle;**

***Second:* That the defendant did so (on a public 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 at the time the defendant was operating the vehicle, the percent of alcohol in the defendant's blood was eight one-hundredths or greater, by weight.

If all three things have been proved beyond a reasonable doubt, then you should return a verdict that the defendant is guilty of this offense. If any one of those three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of this offense.

IV. SUPPLEMENTAL INSTRUCTIONS

1. If a breath test result is considered under the impaired-ability portion of the statute.

You may consider whether the (breath) (blood) test result has any value for determining whether the defendant was under the influence of intoxicating liquor. There are two rules that apply to such results that may be of assistance to you.

[Breath test result of .05 or less.] **If the percentage of alcohol by weight in the defendant's blood was .05 percent or less, that is evidence from which you may infer that the defendant was *not* under the influence of intoxicating liquor. You are not required to reach that conclusion. You may consider the test result along with all the other evidence in the case to determine whether the Commonwealth has met its burden of proving beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor.**

[Breath test result of .06 or .07.] **If the percentage of alcohol by weight in the defendant's blood was .06 percent or .07 percent, that is evidence which you may consider in determining whether**

the defendant had consumed any alcohol. However, from those results you may not draw any inference either way as to whether or not the defendant was under the influence of alcohol. To determine that issue, you must look to all the evidence in the case.

“In any prosecution for a violation of [G.L. c. 90, § 24(a)], evidence of the percentage, by weight, of alcohol in the defendant’s blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor [;] if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference.” G.L. c. 90, § 24(1)(e).

See *Colturi*, 448 Mass. at 817, 864 N.E.2d at 504, as to instructing the jury on these statutory inferences.

2. *If the breath samples differ.*

(You have heard testimony) (A

document has been introduced in evidence reporting) that the defendant gave more than one breath sample, and that the results were [results of each sample] . The law requires that you disregard the higher number and consider the lower number as the test result. It is for you to decide if that result establishes that the defendant’s alcohol level was .08 percent or greater by weight at the time of operation.

This instruction should be given if the judge determines (1) that there were “two adequate breath samples” that differ but are within 0.02 of each other, and (2) that the judge will allow before the jury evidence of both of those samples and not just the lower one.

“The breath test shall consist of a multipart procedure, involving at a minimum, the following sequence: (a) one adequate breath sample analysis, (b) one calibration standard analysis, and (c) a second adequate breath sample analysis.” 501 Code Mass. Regs. § 2.56(3). “An individual under arrest may be asked to supply more than two breath samples to obtain two adequate breath samples. If the individual under arrest fails to supply two adequate breath samples upon request it shall be deemed a refusal under 501 CMR 2.51.” § 2.56(4). To be valid and admissible, the “two adequate subject breath samples [must] agree within 0.02 blood alcohol content units,” § 2.56(6)(a), as “recorded in the two decimal mode. Any third or subsequent decimal place is to be truncated prior to the comparison of the results.” § 2.56(5). “If the two adequate breath samples, expressed in the two decimal mode, differ within 0.02 blood alcohol content units, the lower of the two adequate breath samples shall be taken as the individual under arrest’s blood alcohol level.” § 2.57.

Opinions differ as to whether the phrase “two adequate breath samples” means the first two breath samples that are capable of analysis by the testing device or merely the first two breath samples that are within 0.02 of each other. If the judge adopts the latter view, the jury may sometimes need to be instructed on how to select among the results of three or more samples, only two of which are within 0.02 of each other. If the judge adopts the former view, there will never be more than two samples in evidence, since the first two samples capable of analysis will be excluded from evidence if they are not within 0.02 of each other. Supplemental instruction 3 provides additional wording for use in cases of three or more samples if the judge adopts the second view.

3. *If the defendant is permitted to introduce additional test samples.*

(You have heard testimony) (A document has been introduced in evidence reporting) that the defendant gave more than one breath sample, and that the results were [results of each sample] . By regulation, the result of the defendant’s test is . You may consider the additional sample(s) only on the issue of whether the test result was accurate.

Note: The Commonwealth may not introduce more than one test result. *Commonwealth v. Steele*, 455 Mass. 209, 213, 914 N.E.2d 886, 890 (2009). See

| detailed note, *infra*. |

4. *If the simulator reading is not .15% (optional).*

Test results are

admissible if the machine reports a simulator solution reading of either .14%, .15% or .16%. It is for you to determine whether the Commonwealth established the accuracy of the defendant's test results.

Office of Alcohol Testing regulations require approved breath testing devices to be "capable of analyzing a reference sample of alcohol within 0.01 blood alcohol content units of the known sample." 501 Code Mass. Regs. § 2.38(2). Breath tests are valid and admissible only if the calibration standard analysis that is run after changing the 0.15% simulator solution and in the course of each breath test reads 0.14%, 0.15%, or 0.16%. 501 Code Mass. Regs. §§ 2.41(2) and 2.56(6)(b).

5. *If there is a challenge whether the breath test was properly administered.*

In

deciding whether the test given to the defendant to measure the alcohol level in his (her) blood is reliable evidence, you may consider a number of factors, including:

- **when the test was given;**
- **the qualifications of the person who gave the test, and your assessment of his (her) credibility;**
- **the pre-test procedures that were employed;**
- **whether the testing device was in good working order at**

the time the test was administered;

- **whether the test was administered properly;**
- **and any other factors that you believe are relevant.**

If the Commonwealth has failed to prove that the (breath) (blood) test that was given to the defendant is reliable, then you may not consider the test result in determining whether the defendant is guilty or not guilty.

"The breath test shall consist of a multipart sequence consisting of: (a) one adequate breath sample analysis, (b) one calibration standard analysis, and (c) a second adequate breath sample analysis." 501 Code Mass. Regs. §2.14(3) (as amended effective April 30, 2010). "If the sequence described in 501 CMR 2.14(3) does not result in breath samples that are within \pm 0.02 blood alcohol content units, a new breath test sequence shall begin." § 2.14(4). "The breath test shall be valid and the results admissible in a court of law if it complies with 501 CMR 2.14." § 2.13(4).

A. If the Commonwealth is proceeding under the "under the influence" portion of the statute:

(You then must determine whether the defendant was under the influence of alcohol based solely on the other evidence in this case.)

B. If the Commonwealth is proceeding under the "per se" portion of the statute:

(Additionally,) (You then must conclude that the Commonwealth has failed to prove that the defendant's blood alcohol level was .08 percent or greater, because there is no

other evidence on that issue before you.)

6. *If there is a challenge to the scientific accuracy of the breath test.* **If the**

Commonwealth has failed to prove that the (breath) (blood) test that was given to the defendant is scientifically accurate, then you may not consider the test result in determining whether the defendant is guilty or not guilty.

A. If the Commonwealth is proceeding under the “under the influence” portion of the statute:

(You then must determine whether the defendant was under the influence of alcohol based solely on the other evidence in this case.)

B. If the Commonwealth is proceeding under the “per se” portion of the statute:

(Additionally,) (You then must conclude that the Commonwealth has failed to prove that the defendant’s blood alcohol level was .08 percent or greater, because there is no other evidence on that issue before you.)

7. *If there was expert testimony about the breath test.* **It is for you to**

decide — based on the evidence — what degree of importance

to attach to any evidence that was presented as to a (breath) (blood) test reading. In deciding what importance to attach to such evidence, you may consider any expert testimony which you have heard on that subject.

Here the jury should be instructed on "Expert Witness" (Instruction 3.640).

8. If there is evidence of field sobriety tests (optional).

You have heard

evidence in this case that the defendant was administered "field sobriety tests." It is for you to decide whether those tests are a reliable indicator of whether the defendant's ability to operate a motor vehicle safely was diminished. As with any other evidence, it is for you to determine whether to rely on this evidence. You may accept it or reject it and you may give it such weight as you think it deserves. In making your assessment you may consider the nature of the tests, the circumstances under which they were given and performed, and all of the other evidence in this case.

9. *If the defendant was not offered a field sobriety test (on request).*

You have heard some reference to the absence of any field sobriety tests. Such tests — for example, asking a person to touch his nose or to walk a straight line — are sometimes used by police as part of observing the physical coordination or lack of coordination of a person who is suspected of being under the influence of alcohol.

There is no rule of law that requires a police officer to give a field sobriety test. Police are permitted to charge a person whenever their observations of that person — with or without a field sobriety test — provide them with probable cause to believe that the person was operating under the influence of alcohol.

Under some circumstances, the fact that the police could have conducted such a test and did not may be relevant to your overall assessment of the strength of the evidence against the defendant. In some cases, the result could be important and therefore the absence of such a test significant; in other cases there may be enough other evidence that the absence of such a

test is irrelevant. Whether the absence of a field sobriety test is relevant in this case, and if so, how important the absence of the result of such a test is, is for you to determine in the context of all the evidence.

A motorist's *refusal* to perform field sobriety tests when requested to do so by the police may not be admitted in evidence, since such evidence violates the privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights. *Commonwealth v. McGrail*, 419 Mass. 774, 647 N.E.2d 712 (1995).

This supplemental instruction is available in the different situation where the police did *not* offer the defendant an opportunity to perform field sobriety tests, and the defense argues to the jury that this deprived the defendant of an opportunity to generate exculpatory evidence. See *Commonwealth v. Ames*, 410 Mass. 603, 609, 574 N.E.2d 986, 989-990 (1991). The judge may also wish to consider leaving the matter to the parties to argue, see *Commonwealth v. Ly*, 19 Mass. App. Ct. 901, 901-902, 471 N.E.2d 383, 384-385 (1984), unless an instruction is necessary to correct a suggestion that such tests are legally required.

In instructing that such tests are not legally mandatory, the judge must avoid negating the defendant's right to build a defense on the grounds that available, probative testing was not performed by police. See *Commonwealth v. Gilmore*, 399 Mass. 741, 745, 506 N.E.2d 883, 886 (1987); *Commonwealth v. Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482, 491 (1980); *Commonwealth v. Rodriguez*, 378 Mass. 296, 308, 391 N.E.2d 889, 896 (1979); *Commonwealth v. Jackson*, 23 Mass. App. Ct. 975, 975-976, 503 N.E.2d 980, 981-982 (1987); *Commonwealth v. Flanagan*, 20 Mass. App. Ct. 472, 475-477 & n.2, 481 N.E.2d 205, 207-209 & n.2 (1985).

10. *If there is opinion evidence about the defendant's sobriety (optional).*

You

have heard testimony of (an opinion) (opinions) about the defendant's sobriety. Ultimately it is for you as the jury to determine whether the defendant was under the influence of alcohol according to the definition I have provided. You may

consider any opinion you have heard and accept it or reject it.

But in the end, you and you alone must decide whether the defendant was under the influence of intoxicating liquor.

11. *If there is evidence both of alcohol and drug usage.* The defendant may

be found guilty of this offense if his (her) ability to operate a vehicle safely was diminished, and alcohol was one contributing cause of that diminished ability. It is not necessary that alcohol was the only or exclusive cause.

If the defendant's ability to operate safely was diminished by alcohol, then he (she) has violated the statute even if some other cause was also operating on the defendant while he (she) was driving, which tended to magnify the effect of the alcohol or contributed to his (her) diminished capacity to operate safely. It is not a defense that there was a second contributing cause so long as alcohol was *one* of the causes of the defendant's diminished capacity to operate safely.

If alcohol was not one of the causes of the defendant's diminished capacity to operate safely, the defendant must be

found not guilty.

NOTES:

1. **Statute now bifurcated.** Statute 2003, c. 28, § 1 (effective June 30, 2003 at 5:36 P.M.) amended G.L. c. 90, § 24(1) so that it now punishes anyone who “operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor” or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi*, 448 Mass. 809, 864 N.E.2d 498 (2007). The “operating under the influence” alternative requires proof of operation “with a diminished *capacity* to operate safely,” *Commonwealth v. Connolly*, 394 Mass. 160, 173, 474 N.E.2d 1106, 1109 (1985), but not proof of any specific blood alcohol level, while the “per se” alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity.

2. **Model instruction.** The model instruction is based on *Commonwealth v. Colturi*, 448 Mass. 809, 864 N.E.2d 498 (2007); *Commonwealth v. Tynes*, 400 Mass. 369, 374-375, 510 N.E.2d 244, 247-248 (1987); *Commonwealth v. Connolly*, 394 Mass. 169, 474 N.E.2d 1106 (1985); *Commonwealth v. Bernier*, 366 Mass. 717, 720, 322 N.E.2d 414, 417 (1975); and *Commonwealth v. Lyseth*, 250 Mass. 555, 146 N.E. 18 (1925).

It is correct to charge that a person need not be drunk to be under the influence of liquor, but it is error to instruct that the defendant need only be “influenced in some perceptible degree” by liquor, *Connolly, supra*, since “a conviction may rest only on proof that alcohol affected him in a *particular way, i.e.* by diminishing his capacity to drive safely” (emphasis in original), *Tynes, supra*. “[T]he Commonwealth must prove beyond a reasonable doubt that the defendant’s consumption of alcohol diminished the defendant’s ability to operate a motor vehicle safely. The Commonwealth need not prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely” (emphasis in original). *Connolly, supra*. A non-conforming charge is reversible error unless there is no objection and there is substantial evidence of unsafe operation. Contrast *Commonwealth v. Marley*, 396 Mass. 433, 486 N.E.2d 715 (1985) (reversible error); *Commonwealth v. Luiz*, 28 Mass. App. Ct. 973, 552 N.E.2d 577 (1990) (same); *Commonwealth v. Laurino*, 23 Mass. App. Ct. 983, 503 N.E.2d 1340 (1987) (same); *Commonwealth v. Brochu*, 23 Mass. App. Ct. 937, 501 N.E.2d 532 (1986) (same), with *Commonwealth v. Bryer*, 398 Mass. 9, 494 N.E.2d 1335 (1986) (harmless error); *Commonwealth v. Ranahan*, 23 Mass. App. Ct. 201, 500 N.E.2d 1349 (1986) (same); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 498 N.E.2d 1063 (1986) (same); *Commonwealth v. Riley*, 22 Mass. App. Ct. 698, 497 N.E.2d 651 (1986) (same).

The model instruction appropriately uses the phrase “mental clarity, self-control, and reflexes” as examples or factors that the jury may use in determining whether the defendant’s capacity to operate safely was impaired. The Commonwealth must prove such impairment beyond a reasonable doubt, but is not required to prove any of those particular three factors. *Commonwealth v. Riley*, 48 Mass. App. Ct. 463, 722 N.E.2d 40 (2000).

3. **Absence of breath test.** “Evidence that the defendant failed or refused to consent to [a blood alcohol] test shall not be admissible against him in a civil or criminal proceeding” G.L. c. 90, § 24(1)(e). Admission of such evidence would violate the privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights. *Opinion of the Justices*, 412 Mass. 1201, 591 N.E.2d 1073 (1992). The jury instruction that was formerly required by § 24(1)(e) whenever there is no evidence of blood alcohol level “tend[ed] to have the same effect as the admission of refusal evidence,” and violated art. 12. *Commonwealth v. Zevitas*, 418 Mass. 677, 639 N.E.2d 1076 (1994). That statutory requirement has now been repealed. See St. 2003, c. 28 (effective June 30, 2003).

Where there has been no breath test, a judge may give the instruction approved in *Commonwealth v. Downs*, 53 Mass. App. Ct. 195, 198, 758 N.E.2d 11062, 1064-1065 (2001) (“You are not to mention or consider in anyway whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind”).

4. **Breath tests: statutory inferences.** “In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant’s blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence

of intoxicating liquor If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor [;] if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference.” G.L. c. 90, § 24(1)(e), as amended by St. 2003, c. 28, § 4 (effective June 30, 2003 at 5:36 P.M.).

In charging the jury as to the significance of such tests for the “under the influence” alternative, note that the third part of the former statutory inference in G.L. c. 90, § 24(1)(e) (“and if such evidence is that such percentage was eight one-hundredths or more, there shall be a permissible inference that such defendant was under the influence of intoxicating liquor”) has been deleted. Therefore the jury may no longer be instructed in such terms. On the other hand, § 24(1)(e) continues to provide that “evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor.”

5. Breath tests: challenges to particular test result. Before the result of a breath test may be admitted, the Commonwealth must establish the existence of and compliance with the requirements of a periodic testing program for breath testing machines in accordance with G.L. c. 90, § 24K and regulations promulgated thereunder. *Commonwealth v. Barbeau*, 411 Mass. 782, 784-786, 585 N.E.2d 1392, 1394-1395 (1992). Those requirements of § 24K are met by the provision of 501 Code Mass. Regs. § 2.41 (as amended February 13, 1992) delegating responsibility for calibration standard analyses to breath test operators. *Morris v. Commonwealth*, 412 Mass. 861, 593 N.E.2d 241 (1992).

A breath test result is admissible only if the Commonwealth has introduced evidence that the machine was working properly. *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 264, 517 N.E.2d 498, 501 (1988). Beyond that minimum level, generally any delay in administering a blood alcohol test, *Marley*, 396 Mass. at 438-439, 486 N.E.2d at 718-719, any weaknesses in the test operator's knowledge and skill, *Commonwealth v. Shea*, 356 Mass. 358, 361, 252 N.E.2d 336, 338 (1969), or any procedural weaknesses in the administration of a particular test, *Commonwealth v. Malloy*, 15 Mass. App. Ct. 958, 446 N.E.2d 126 (1983); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900, 413 N.E.2d 1144, 1145 (1980), are matters of weight for the jury and do not affect the admissibility of the test result. A defendant is not entitled to a jury instruction that delay may adversely affect the result of a blood alcohol test absent expert testimony to support the request. *Marley, supra*.

The requirement that an arrestee “should be observed by the breath testing operator for at least 15 minutes prior to the administration of the test” (501 Code Mass. Regs. § 2.55) does not require that such observation be done at the testing location or room. If the arresting officer is also the breathalyzer operator, the requirement could be satisfied by the officer's being continuously with the arrestee from the traffic stop until the test. Normally compliance issues go to weight rather than admissibility, but if the prosecution completely fails to meet its burden of showing compliance with the regulations, the test results must be suppressed. *Commonwealth v. Pierre*, 72 Mass. App. Ct. 230, 890 N.E.2d 152 (2008).

6. Breath tests: admission of more than one result. As a result of the decision in *Commonwealth v. Steele*, 455 Mass. 209, 213, 914 N.E.2d 886, 890 (2009), the Commonwealth may not introduce more than one test result. The Court held, in part, “We are unpersuaded by the Commonwealth's claim that the higher breath sample result is probative evidence that corroborates a defendant's designated blood alcohol level and, therefore, must always be admissible. The imposition of a two-part procedure to obtain a defendant's blood alcohol level essentially pertains to the validity of the breathalyzer test and does not speak of evidentiary value To . . . permit introduction of a marginally higher breath sample result only invites jurors to do what the regulatory framework prohibits, namely, to infer, or conclude, that the lower breath sample result is not accurate and that the defendant's blood alcohol level has been underreported.” If a defendant were permitted to introduce additional test samples, see supplemental instruction 3.

7. Breath tests: challenges to scientific acceptance. Breathalyzers and similar instruments are generally deemed to satisfy the “general acceptance” standard for admissibility of scientific evidence. *Commonwealth v. Neal*, 392 Mass. 1, 18, 461 N.E.2d 1356, 1367 (1984) (breathalyzer); *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 349-351, 502 N.E.2d 162, 164-166 (1987) (intoxilyzer). However, when the defendant presents evidence to rebut the commonly accepted opinion that an instrument is reliable, then the burden is on the Commonwealth to establish the admissibility of the result. *Marley*, 396 Mass. at 439, 486 N.E.2d at 719; *Neal*, 392 Mass. at 20 n.20, 464 N.E.2d at

1368 n.20.

8. Breath tests: expert testimony. The Commonwealth may introduce a breath or blood test result to establish the level of alcohol in the defendant's blood at the time of operation without offering expert testimony to provide "retrograde extrapolation" (calculating what the defendant's blood alcohol level must have been at the time of the offense based on his or her subsequent blood alcohol level), provided the test was taken within a "reasonable time" after operation. This is usually up to three hours, although particular facts and circumstances may establish that a greater or lesser time period should be applied by the judge in his or her discretion. *Commonwealth v. Colturi*, 448 Mass. 809, 816-817, 864 N.E.2d 498, 503-504 (2007). If expert testimony on retrograde extrapolation is proffered, it should be evaluated on the usual criteria of whether its methodology is scientifically valid, in general and in the particular instance. *Commonwealth v. Senior*, 433 Mass. 453, 458-462, 744 N.E.2d 614, 618-621 (2001); *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 662-664, 624 N.E.2d 604, 608-609 (1993).

If the Commonwealth proceeds *only* on the "under the influence" alternative, it must "present expert testimony establishing a relationship between the test result and intoxication as a foundational requirement of the admissibility of such tests" since otherwise "the jury would be left to guess at its meaning." *Colturi*, 448 Mass. at 817-818, 864 N.E.2d at 504-505.

The defendant has the right to present a qualified expert: (1) to challenge the accuracy of the breath test result in the defendant's particular case, or (2) to explain the probable effect on the defendant's driving ability of consuming a specified amount of alcohol in a specified time period. *Connolly*, 394 Mass. at 175, 474 N.E.2d at 1110-1111; *Commonwealth v. Marley*, 396 Mass. 433, 486 N.E.2d 715 (1985); *Smythe*, 23 Mass. App. Ct. at 351-355, 502 N.E.2d at 164-166.

Where there was no breath or blood test, an expert may opine on the probable effect that the consumption of a specified amount of alcohol in a specified time period would have on the defendant's ability to operate safely, but may not attempt to reap the benefits of the statutory inferences in § 24(1)(e). *Connolly, supra*.

9. Drugs as a contributing cause. Supplemental Instruction 10, *supra*, is closely modeled on the language of, and the recommended instruction in, *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456-457 & n.4, 517 N.E.2d 450, 452-453 & n.4 (1988). This situation, where both alcohol and illegal drugs are concurrent causes of the defendant's *voluntary* intoxication, must be distinguished from that where a legally prescribed drug may have been the cause of the defendant's *involuntary* intoxication. "[W]here a defendant suffers intoxicating effects from prescription medication used as instructed . . . , if the defendant had reason to know that her use of alcohol might combine with her prescription medications to impair her mental faculties, and such a combined effect was in fact the cause of her diminished abilities, she would be deemed criminally responsible for her actions. If, on the other hand, she had no such foreknowledge, or if her mental defect existed wholly apart from any use of alcohol, the defense [of involuntary intoxication] would be available [T]he Commonwealth bears the burden of proving that the defendant's intoxication was voluntary." *Commonwealth v. Darch*, 54 Mass. App. Ct. 713, 715-716, 767 N.E.2d 1096, 1098-1099 (2002). See *Commonwealth v. Williams*, 19 Mass. App. Ct. 915, 916, 471 N.E.2d 394, 395 (1984); *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 439 N.E.2d 848 (1982); and note 4 to Instruction 5.400 (OUI-Drugs). No reported case has yet discussed whether the same rule applies to involuntary intoxication from licit but non-prescription drugs. If alcohol contributed to a defendant's diminished ability to operate a motor vehicle safely, the defendant is not entitled to an instruction that she should be acquitted if she did not know of the potential effects of mixing her medication with alcohol. *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70, 935 N.E.2d 361 (2010).

10. Subsequent offenses. See Instruction 2.540 (Subsequent Offenses). To be convicted of a second offense OUI, the first conviction must have preceded the date of the second offense (and not merely the date of the second conviction). *Commonwealth v. Hernandez*, 60 Mass. App. Ct. 416, 802 N.E.2d 1059 (2004).

11. Videotapes. Videotapes are admissible if they are relevant, they provide a fair representation of what they purport to depict, and they are not otherwise barred by an exclusionary rule. A videotape of the defendant being booked in an open area of a stationhouse does not offend the Fourth Amendment (because no "search" is involved), does not violate the Sixth Amendment (where the right to counsel has not attached at the time of arrest), and its video portion does not violate the Fifth Amendment (since the defendant's condition and actions are not "testimonial"). With respect to the audio portion, the defendant's responses to standard booking questions do not require a valid *Miranda* waiver to be admissible, since they do not involve "custodial interrogation," but any answers to questions about the defendant's drinking must be excised from the videotape unless there was a valid *Miranda* waiver. *Commonwealth*

v. Mahoney, 400 Mass. 524, 526-530, 510 N.E.2d 759, 761-763 (1987); *Commonwealth v. Carey*, 26 Mass. App. Ct. 339, 340-342, 526 N.E.2d 1329, 1331-1332 (1988). See *Commonwealth v. Harvey*, 397 Mass. 351, 357-359, 491 N.E.2d 607, 611-612 (1986) (videotape of protective custody); *Commonwealth v. Cameron*, 25 Mass. App. Ct. 538, 520 N.E.2d 1326 (1988) (lost police videotape).

12. **§ 24O notice.** While the requirement of G.L. c. 90, § 24O that defendants convicted of motor vehicle offenses should be given a written statement of the statutory provisions applicable to any subsequent violation “should be observed by the District Courts,” failure to give a defendant such notice is not a defense against a subsequent charge as a second offender. *Commonwealth v. Dowler*, 414 Mass. 212, 606 N.E.2d 1320 (1993).

13. **Admissibility of Breathalyzer records.** Certified copies of Breathalyzer records are admissible under the business records exception to the hearsay rule. *Commonwealth v. Zeininger*, ___ Mass. ___, ___ N.E.2d ___ (May 24, 2011).