

## OPERATING UNDER THE INFLUENCE OF DRUGS

The defendant is charged with operating a motor vehicle while under the influence of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue). Section 24 of chapter 90 of our General Laws provides that:

“Whoever,

upon any way

or in any place to which the public has a right of access,

or upon any way or in any place to which members of the

public have access as invitees or licensees,

operates a motor vehicle

while under the influence of . . . (marihuana) (narcotic drugs)

([certain] depressants) ([certain] stimulant substances)

(the vapors of glue)

. . . 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) operated it (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 while the defendant was operating the vehicle, he (she) was under the influence of (marihuana) (a narcotic drug, as I will define it for you in a moment) (a depressant, as I will define it for you in a moment) (a stimulant substance, as I will define it for your in a moment) (the vapors of glue).

*At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200), "Public Way" (Instruction 3.280), and the relevant drug, see G.L. c. 90C, § 1 ("Marihuana," "Narcotic Drug," "Depressant or Stimulant Substance").*

**What does it mean to be "under the influence" of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue)?**

**A person does not have to be unconscious to be "under the influence."**

**Someone is "under the influence" of such a drug whenever he has consumed enough of it to reduce his ability to operate a motor vehicle safely.**

**The purpose of the statute is to protect the public from any driver whose alertness, judgment, and ability to respond promptly have been**

diminished by such drugs. This would include anyone who has taken enough (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue) to reduce his mental clarity, self-control and reflexes, and thereby left him with a reduced ability to drive safely.

The Commonwealth is not required to prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove that the defendant had a diminished *capacity* or *ability* to drive safely.

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 in evaluating the evidence about the defendant's appearance, condition and behavior at the time, in order to determine whether the defendant's ability to drive safely was impaired.

So there are three things the Commonwealth must prove beyond a reasonable doubt: *First*, that the defendant operated a motor vehicle; *Second*, that he (she) operated it (on a way) (in a place where the public has a right of access) (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 (marihuana) (narcotic drugs) (depressants) (stimulant

**substances) (the vapors of glue).**

**If all three things have been proved beyond a reasonable doubt, then you should return a verdict of guilty. If any of these three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.**

*See the citations and notes under Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol).*

NOTES:

1. **Proving that heroin, codeine or cocaine are narcotic drugs.** The definition of “narcotic drug” in G.L. c. 94C, § 1 includes “opium and opiate” and “coca leaves” and refers generally to their derivatives, but does not expressly list heroin, codeine or cocaine. The Commonwealth may prove that heroin or codeine are derivatives of opium, or that cocaine is a derivative of coca leaves, either: (1) by presenting expert testimony, or (2) by asking the trial judge to take judicial notice of the fact. If the Commonwealth fails to do either, the defendant must be acquitted. *Commonwealth v. Green*, 408 Mass. 48, 50, 556 N.E.2d 387, 389 (1990) (codeine); *Commonwealth v. Finegan*, 45 Mass. App. Ct. 921, 923, 699 N.E.2d 1228, 1229 (1998) (heroin). See *Commonwealth v. Thomas G. Hickey*, 48 Mass. App. Ct. 1112, 721 N.E.2d 15 (No. 98-P-2154, December 20, 1999) (unpublished opinion under Appeals Court Rule 1:28) (cocaine).

2. **Proving non-barbiturate depressants and non-amphetamine stimulants.** The definition of this offense in G.L. c. 90, § 24 prohibits operation of a vehicle “while under the influence of . . . marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue.” The definition of “depressant” in G.L. c. 94C, § 1 includes barbiturates as well as drugs “which contain[ ] . . . any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming.” The definition of “stimulant substance” in § 1 includes amphetamines and also drugs “which contain[ ] . . . any substance which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming because of its stimulant effect on the central nervous system or its hallucinogenic effect.”

When a prosecution rests on ingestion of a non-barbiturate depressant or a non-amphetamine stimulant, the Commonwealth must prove that it contains a substance that has been so designated by the U.S. Attorney General. The Commonwealth may do this by offering expert testimony to that effect, offering the regulations in evidence, or asking the judge to take judicial notice of the regulations and to submit them to the jury. *Commonwealth v. Ferola*, 72 Mass. App. Ct. 170, 889 N.E.2d 436 (2008).

3. **Voluntary intoxication by both liquor and illegal drugs.** Where the defendant has ingested both alcohol and illegal drugs, see Supplemental Instruction 11 to Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol), which is based on 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 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 (see note 4, *infra*). “[Where 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.2d1096, 1098-1099 (2002).

4. **Involuntary intoxication by legal medication.** The OUI statute punishes only "the voluntary consumption of alcohol or drugs whose consequences are known or should be known to the user," although "[i]n the case of alcohol . . . the effects of liquor upon the mind and actions . . . are well known to everybody . . . The same assumption applies where there is a voluntary consumption (usually illicit) of statutorily defined drugs obtained other than through a physician's prescription." *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 360-361 & n.7, 439 N.E.2d 848, 850-851 & n.7 (1982).

A defendant is entitled to be acquitted if his or her intoxication was caused by involuntary intoxication by licit prescription medication. This requires that the defendant had not received warnings as to its use, had no reason to anticipate the intoxicating effects of the medication, and had no reason to inquire of his or her physician concerning the possible effects of the medication. *Id.*, 14 Mass. App. Ct. at 365 & n.15, 439 N.E.2d at 852-853 & n.15. Evidence of voluntary consumption of licit drugs should be admitted only after it is established on voir dire that the medication could in fact have so affected the vehicle's operation and that the *Wallace* standards are satisfied. *Commonwealth v. Williams*, 19 Mass. App. Ct. 915, 916, 471 N.E.2d 394, 395 (1984). It is not clear whether the same rule applies to licit but non-prescription drugs; the *Williams* case does not indicate whether prescription medicine was involved and there have been no subsequent decisions involving non-prescription drugs.

Dispensing pharmacists are required to label prescription medications with any directions for use or cautions contained in the prescription or in the current United States Pharmacopeia or other accepted authoritative source. G.L. c. 94C, § 21; 247 Code Mass. Regs. § 7.00(20).