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MODEL JURY INSTRUCTIONS ON HOMICIDE

INTRODUCTION 1

THE ELEMENTS OF MURDER 4

FIRST DEGREE MURDER 6

I. DELIBERATE PREMEDITATION 7

II. EXTREME ATROCITY OR CRUELTY 11

III. FELONY MURDER (FIRST DEGREE) 15

SECOND DEGREE MURDER 20

FELONY MURDER (SECOND DEGREE) 23

For murder cases in which voluntary manslaughter is also covered. 27

THE ELEMENTS OF MANSLAUGHTER 31

VOLUNTARY MANSLAUGHTER 32

INVOLUNTARY MANSLAUGHTER 34

VEHICULAR HOMICIDE 39

Felony Vehicular Homicide 39

Misdemeanor Vehicular Homicide 47

LACK OF CRIMINAL RESPONSIBILITY 49

SELF-DEFENSE 54

SUPPLEMENTAL INSTRUCTIONS 59

MODEL JURY INSTRUCTIONS ON HOMICIDE

INTRODUCTION

The Supreme Judicial Court approves and recommends the use of these Model Jury Instructions on Homicide. Whenever the Model Instructions contain an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Model Instructions unless she or he finds that a different instruction would more accurately or clearly state the law. The Court will establish a Standing Committee to convene periodically to keep the Model Instructions up to date. The Model Instructions are not intended to be a comprehensive statement of the law but rather to provide guidance on those instructions that are frequently given in trials of homicide cases.

It may be helpful to provide jurors with a copy of the judge's charge. Although transcripts are not always available, it may be possible to give the jury a cassette recording. It is suggested that the trial judge in each case consider furnishing the jurors with a copy of the charge to aid in their deliberations; however, this matter is within the discretion of the judge.

The verdict slip provided to jurors should require the jurors to specify the theory(ies) of homicide on which they unanimously agree. If felony murder is at issue, the verdict slip should also require the jurors to specify the underlying

felony(ies) on which they unanimously agree.

The Model Instructions were proposed by the Committee on Model Jury Instructions on Homicide which was appointed by the Supreme Judicial Court and charged with recommending to the Court a fair and reasonably simplified set of jury instructions on the law of homicide and related issues. The Committee included representatives from the judiciary, prosecutors and the defense bar. The Committee formed three subcommittees: Subcommittee on Murder 1 and Murder 2; Subcommittee on Manslaughter; and Subcommittee on Criminal Responsibility and Self Defense. An initial set of draft Model Jury Instructions was published for comment and a substantial number of responses was received from judges, prosecutors and the defense bar. The Committee adopted numerous changes based on these comments.

The Model Jury Instructions include three sets of proposed jury instructions: 1) instructions on murder; 2) instructions on manslaughter, and 3) instructions on criminal responsibility and defenses. In addition, there is a set of Supplemental Instructions. There are notes containing citations and explanatory information at the end of the instructions.

INSTRUCTIONS ON INSTRUCTIONS

The instructions which follow use the following conventions. Standard print is used to indicate language that is part of the charge to be spoken by the judge. Parentheses () are used to indicate that the judge giving the charge should choose the

appropriate selection from the options listed in the parentheses. Brackets [] are used to indicate language that is not necessarily included in the charge but should be incorporated when appropriate. Underlining ____ , except in headings, is used to indicate instances where the judge should insert the relevant information, e.g. name of felony. Language in bold italics is not part of the charge but rather information for the judge.

THE ELEMENTS OF MURDER

I. MURDER IN THE FIRST DEGREE

Deliberately premeditated murder
or
Murder with extreme atrocity or cruelty
or
Felony murder in the first degree

MURDER IN THE FIRST DEGREE-DELIBERATE PREMEDITATION

A. an unlawful killing[1]
and
B. malice = an intent to cause death[2]
and
C. deliberate premeditation

MURDER IN THE FIRST DEGREE-EXTREME ATROCITY OR CRUELTY

A. an unlawful killing[3]
and
B. malice = 1. an intent to cause death
or
2. an intent to cause grievous bodily harm
or
3. an intentional act which, in circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood of death
and
C. extreme atrocity or cruelty

FELONY MURDER IN THE FIRST DEGREE[4]

A. commission or attempted commission of a felony with a maximum sentence of life imprisonment
and
B. killing occurred during the commission or attempted commission of the felony
and
C. either 1. the felony is inherently dangerous to human life
or
2. the defendant acted with conscious disregard for human life

II. MURDER IN THE SECOND DEGREE

MURDER IN THE SECOND DEGREE (NON-FELONY MURDER)

A. an unlawful killing[5]
and
B. malice = 1. an intent to cause death
or
2. an intent to cause grievous bodily harm
or
3. an intentional act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood of death

FELONY MURDER IN THE SECOND DEGREE

A. commission or attempted commission of a felony with a maximum sentence of less than life imprisonment
and
B. killing occurred during the commission or attempted commission of the felony
and
C. either 1. the felony is inherently dangerous to human life
or
2. the defendant acted with conscious disregard for human life

FIRST DEGREE MURDER

Introduction

Murder is the unlawful killing of a human being either with malice, or in the commission or attempted commission of certain felonies.

Murder committed with deliberate premeditation and malice is murder in the first degree.

Murder committed with extreme atrocity or cruelty and with malice is murder in the first degree.

Murder committed in the commission or attempted commission of a felony punishable by a maximum sentence of imprisonment for life is murder in the first degree.

Murder which does not appear to be murder in the first degree is murder in the second degree. The degree of murder shall be found by the jury.

To be used when Commonwealth is proceeding on more than one theory of first degree murder

[You will note that the Commonwealth may prove the defendant guilty of first-degree murder in one of (two) (three) ways. The Commonwealth may prove the defendant guilty of first degree murder by convincing you beyond a reasonable doubt that the defendant either, number one, committed murder with deliberate premeditation, or, number

two, committed murder with extreme atrocity or cruelty, or, number three, committed murder during the commission or attempted commission of a felony with a maximum sentence of imprisonment for life. Before you may find that the defendant is guilty of murder in the first degree, you must unanimously agree on the type of first degree murder proved by the Commonwealth.]

I. DELIBERATE PREMEDITATION

In order to find the defendant guilty of first degree murder with deliberate premeditation, the Commonwealth must prove three elements beyond a reasonable doubt:

Element Number One: that the defendant committed an unlawful killing;

Element Number Two: that the killing was committed with malice; and

Element Number Three: that the killing was committed with deliberate premeditation.

Now I shall further define each of these three elements:

Element Number One: an unlawful killing

The Commonwealth must prove to you beyond a reasonable doubt that the defendant committed an unlawful killing. For a killing to be murder, it must be unlawful. The word "killing" refers to causing of death. Death must occur as a result of the defendant's acts.

Supplemental Instruction 1 - Cause of Death p. 59

Supplemental Instruction 2 - Definition of Death p. 59

Supplemental Instruction 3 - Object of the Killing Must be A Human Being p. 59

An unlawful killing is a killing done without excuse. Not all killings are unlawful. A killing may be excused, for example, in the case of self-defense, defense of another, or, in some cases, accident. The evidence in this case (does) (does not) raise the issue of whether this killing was excused as a result of

(an accident)

(or) (the defendant's act(s) of self-defense)

(or) (defense of another)

The burden of proof is on the Commonwealth to prove beyond a reasonable doubt that the defendant unlawfully killed the deceased.

Supplemental Instruction 4 - Killing as a Result of Accident, Self-Defense or Defense of Another pp. 59-60

<u>Element Number Two: malice</u>

The second element the Commonwealth must prove beyond a reasonable doubt is that the killing was committed with malice. Malice, as it applies to deliberately premeditated murder, means an intent to cause death. The Commonwealth must prove that the defendant actually intended to cause the death of the deceased.

Supplemental Instruction 5 - Use of dangerous weapon p. 60

<u>Element Number Three: deliberate premeditation</u>

The third element the Commonwealth must prove beyond a

reasonable doubt is that the killing was committed with deliberate premeditation. For the Commonwealth to prove deliberate premeditation, the Commonwealth must prove that the defendant thought before he[6] acted; that is, the defendant decided to kill after deliberation. The element of deliberation, however, does not require an extended time span, nor does it mean that the deliberation must be accomplished slowly. Rather it refers to the purposeful character of the premeditation. Deliberation may be a matter of days, hours or even seconds. It is not so much a matter of time as of logical sequence. First, the deliberation and premeditation, then the decision to kill, and lastly, the killing in furtherance of the decision. All of this may occur within a few seconds. However, deliberate premeditation excludes action which is taken so quickly that there is no time to reflect on the action and then decide to do it. The Commonwealth must show that the defendant's resolution to kill was, at least for some short period of time, the product of reflection.

If, after considering all the evidence in this case, you conclude that the Commonwealth has proved beyond a reasonable doubt each of these three elements I have just defined, that is, (1) that the defendant committed an unlawful killing; (2) that the killing was committed with malice; and (3) that the killing was committed with deliberate premeditation, then you should find the defendant guilty of murder in the first degree committed with deliberate premeditation.

If, however, after your consideration of all the evidence, you find the Commonwealth has not proved any one of these three elements beyond a reasonable doubt, you must not convict the defendant of murder in the first degree on the theory of deliberate premeditation.

For cases in which a voluntary manslaughter instruction will be given see p. 27. The instruction beginning on p. 27 would ordinarily be given after the instruction on second degree murder.

II. EXTREME ATROCITY OR CRUELTY

To be used when Commonwealth is proceeding on more than one theory of first degree murder

[Now, as I mentioned earlier, there is a second theory by which the Commonwealth may prove the defendant guilty of first degree murder, namely, the theory that the defendant committed murder with extreme atrocity or cruelty.]

In order to prove the defendant guilty of first degree murder committed with extreme atrocity or cruelty, the Commonwealth must prove three elements beyond a reasonable doubt:

Element Number One: that the defendant committed an unlawful killing;

Element Number Two: that the killing was committed with malice; and

Element Number Three: that the killing was committed with extreme atrocity or cruelty.

Element Number One: an unlawful killing

The first element the Commonwealth must prove to you beyond a reasonable doubt is: (1) that the defendant committed an unlawful killing.

[I have already defined for you the element of an unlawful killing.]

Incorporate definition of Unlawful Killing as it appears in

the Deliberate Premeditation Charge if the deliberate premeditation charge has not been given. p. 7

Element Number Two: malice

The second element the Commonwealth must prove to you beyond a reasonable doubt in order to prove murder with extreme atrocity or cruelty is the element of malice. Malice, in the context of murder by extreme atrocity or cruelty, may be proved in any one of three ways. Malice, in this context, includes: 1) an intent to cause death, or 2) an intent to cause grievous bodily harm. With respect to these two ways, the Commonwealth must prove that the defendant actually intended to cause the death of the deceased or intended to cause the deceased grievous bodily harm.

Malice, for purposes of this theory of murder also includes: 3) an intent to do an act, which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow. Under this third meaning of malice, you must determine whether, based on what the defendant actually knew at the time he acted, a reasonable person would have recognized that his conduct created a plain and strong likelihood that death would result. In determining whether the Commonwealth has proved this third meaning of malice, you must consider the defendant's actual knowledge of the circumstances at the time he acted.

See Supplemental Instruction 5 - Use of dangerous weapon p. 60

Element Number Three: extreme atrocity or cruelty

The third element the Commonwealth must prove beyond a reasonable doubt is that the killing was committed with extreme atrocity or cruelty. Extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life. Extreme atrocity means an act that is extremely wicked or brutal; appalling, horrifying, or utterly revolting. You must determine whether the method or mode of a killing is so shocking as to amount to murder by extreme atrocity or cruelty. The inquiry focuses on the defendant's action in terms of the manner and means of inflicting death, and on the resulting effect on the victim.[7]

In deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant caused the death of the deceased with extreme atrocity or cruelty, you must consider the presence and degree of the following factors:

One: whether the defendant was indifferent to or took pleasure in the suffering of the deceased;

Two: the consciousness and degree of suffering of the deceased;

Three: the extent of the injuries to the deceased;

Four: the number of blows delivered;

Five: the manner, degree and severity of the force used;

Six: the nature of the weapon, instrument or method used; and

Seven: the disproportion between the means needed to cause death and those employed. This seventh factor refers to whether

the means used were excessive and out of proportion to what would be needed to kill a person.

You cannot make a finding of extreme atrocity or cruelty unless it is based on one or more of the factors I have just listed. You, the jury, should determine, based upon the factors previously stated, whether the crime was committed with extreme atrocity or cruelty.

If, after considering all the evidence in this case, you find that the Commonwealth has proved beyond a reasonable doubt each of the three elements I have just defined, that is: (1) that the defendant committed an unlawful killing, (2) that the killing was committed with malice, and (3) that the killing was committed with extreme atrocity or cruelty, then you should find the defendant guilty of murder in the first degree committed with extreme atrocity or cruelty.

If, however, after your consideration of all the evidence, you find the Commonwealth has not proved any one of these three elements beyond a reasonable doubt, you must not find the defendant guilty of murder in the first degree under the theory of extreme atrocity or cruelty.

For cases in which a voluntary manslaughter instruction will be given see p. 27. The instruction beginning on p. 27 would ordinarily be given after the instruction on second degree murder.

III. FELONY MURDER (FIRST DEGREE)

To be used when the Commonwealth proceeds on more than one theory of first degree murder.

[Now, as I mentioned earlier, there is a (second) (third) theory of law by which the Commonwealth may prove the defendant guilty of first degree murder, namely, the theory that a killing occurred during the defendant's commission or attempted commission of a crime with a maximum sentence of imprisonment for life.]

The defendant is guilty of first degree murder if the Commonwealth has proved beyond a reasonable doubt that the deceased was unlawfully killed during the defendant's commission or attempted commission of a felony with a maximum sentence of life imprisonment. This principle of law is known as the felony murder rule.

In order to prove the defendant guilty of first degree felony murder, the Commonwealth must prove the following three elements beyond a reasonable doubt:[8]

Element Number One: that the defendant committed or attempted to commit a felony with a maximum sentence of life imprisonment;

Element Number Two: that a killing occurred during the commission or attempted commission of that felony;

Element Number Three: that

(the felony was inherently dangerous)

(or) (the defendant acted with a conscious disregard for human life).

Element Number One: commission or attempted commission of a felony

The first element the Commonwealth must prove beyond a reasonable doubt is that the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life. The Commonwealth alleges that the defendant committed name of crime. I instruct you that this crime is a felony with a maximum sentence of life imprisonment.

Now in order for you to decide whether a name of the crime actually occurred in this case, I must instruct you on all elements of this offense. ***Define all the elements of the substantive felony alleged. In appropriate cases, a definition of "attempt" must be included.***

I instruct you that this crime is a felony with a maximum sentence of life imprisonment.

Element Number Two: killing committed during the commission or attempted commission of the felony

The second element the Commonwealth must prove beyond a reasonable doubt is that a killing occurred while the defendant was committing or attempting to commit the felony. The Commonwealth must prove beyond a reasonable doubt that the killing occurred in connection with the felony and at substantially the same time and place. [A killing may be deemed to be connected with the felony if the killing occurred as part

of the defendant's effort to escape responsibility for the felony.][9] ***If accident is an issue in the case, the jury must be instructed that accident is not a defense to felony murder.***

If the Commonwealth has proved beyond a reasonable doubt that the defendant committed name of crime or attempted to commit name of crime and that an unlawful killing occurred in the course of this felony or attempted felony, then the first two elements of felony murder in the first degree have been satisfied.

For cases in which more than one felony is alleged, the jurors must be instructed that they must be unanimous with regard to the underlying felony in order to return a verdict of guilty of felony murder in the first degree.

Element Number Three: the felony (was inherently dangerous) (or) (was committed with a conscious disregard of the risk to human life)

The third element the Commonwealth must prove beyond a reasonable doubt is that: ***Give one of the following two alternative instructions***

(the underlying felony is inherently dangerous to human life. I instruct you that, as a matter of law, name of crime is inherently dangerous to human life)

(or) (in the circumstances of this case, the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life. The felony must have occurred in a way known by the defendant to be dangerous to

life or likely to cause death. The first degree felony-murder rule is applicable only if you find from the circumstances of the felony that the defendant consciously disregarded the risk to human life. If the Commonwealth has proved beyond a reasonable doubt that the defendant committed or attempted to commit the felony of name of crime, then you must also determine whether or not the Commonwealth has proved beyond a reasonable doubt that the defendant committed or attempted to commit the felony of name of crime with a conscious disregard for the risk to human life.)

In cases in which a malice instruction has been given, the jury may be instructed that the intent to commit the felony substitutes for malice.

Supplemental Instruction 8 - Joint Venture and Knowledge of a Weapon p. 63

If, after considering all of the evidence, the Commonwealth has proved beyond a reasonable doubt each and every one of the elements I have defined, namely: (1) the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life, (2) a killing occurred while the defendant was in the course of committing or attempting to commit the felony, (3)

(the felony was inherently dangerous to human life)

(or) (that in the circumstances of this case the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life)

then you should find the defendant guilty of felony murder in the first degree. If, however, after your consideration of all of the evidence, you find that the Commonwealth has not proved any one of these elements beyond a reasonable doubt, you must not find the defendant guilty of felony murder in the first degree.

The law requires me to tell you that if the evidence allows you to find the defendant guilty of murder in the first degree, you may return a verdict of guilty of murder in the second degree. You have an obligation to return a verdict of the highest degree of murder that the Commonwealth has proved beyond a reasonable doubt.

In these circumstances, the judge should instruct the jury on the elements of second degree murder.[10]

For cases in which a voluntary manslaughter instruction will be given see p. 27. The instruction beginning on p. 27 would ordinarily be given after the instruction on second degree murder.

SECOND DEGREE MURDER

Now I shall define murder in the second degree.

To be used when Commonwealth is proceeding on a theory of first degree murder

[If, after your consideration of the evidence, the Commonwealth has not proved beyond a reasonable doubt all the elements necessary to prove the defendant guilty of murder in the first degree, you should then consider whether the Commonwealth has proved murder in the second degree.]

In order to prove the defendant guilty of murder in the second degree, the Commonwealth must prove two elements beyond a reasonable doubt:

Element Number One: that the defendant committed an unlawful killing;

Element Number Two: that the killing was committed with malice.

For felony murder in the second degree, see pp. 23 and following.

Element Number One: an unlawful killing

Give the definition of Unlawful Killing as it is set forth in the First Degree Murder Deliberate Premeditation Instruction. p. 7

Element Number Two: malice

The second element the Commonwealth must prove beyond a reasonable doubt is malice. For purposes of murder in the second

degree, malice may be proved in any one of three ways. Malice, in this context, includes: (1) an intent to cause death or (2) an intent to cause grievous bodily harm. The Commonwealth must prove that the defendant actually intended to cause the death of the deceased or intended to cause the deceased grievous bodily harm.

Malice, for purposes of murder in the second degree, also includes (3) an intent to do an act, which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death will result. Under this third meaning of malice, you must decide whether, based on what the defendant actually knew at the time he acted, a reasonable person would have recognized that his conduct created a plain and strong likelihood that death would result. In determining whether the Commonwealth has proved this third meaning of malice, you must consider the defendant's actual knowledge of the circumstances at the time he acted.

See Supplemental Instruction 5 - Use of a dangerous weapon p. 60.

For cases in which voluntary manslaughter is not included in the charge.

In order to prove murder in the second degree, the Commonwealth is required to prove beyond a reasonable doubt that the defendant unlawfully killed the deceased with malice. If, after your consideration of the evidence, the Commonwealth has proved beyond a reasonable doubt both elements of murder in the

second degree, then you should find the defendant guilty of murder in the second degree. If, however, after your consideration of all of the evidence, you find the Commonwealth has not proved beyond a reasonable doubt either one of the two elements of murder in the second degree, you must not convict the defendant of murder in the second degree.

For cases in which a voluntary manslaugher instruction will be given see p. 27. The instruction beginning on p. 27 would ordinarily be given after the instruction on second degree murder.

FELONY MURDER (SECOND DEGREE)

The defendant is [also] charged with having committed murder in the commission or attempted commission of a felony with a maximum sentence of less than imprisonment for life. The defendant is guilty of murder in the second degree if the Commonwealth proves beyond a reasonable doubt that a killing occurred during the defendant's commission or attempted commission of a felony which is punishable by a maximum sentence of less than life imprisonment.

In order to prove the defendant guilty of second degree felony murder, the Commonwealth must prove the following three elements beyond a reasonable doubt:[11]

Element Number One: that the defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life;

Element Number Two: that a killing occurred during the commission or attempted commission of that felony;

Element Number Three: that

(the felony was inherently dangerous)

(or) (the defendant acted with a conscious disregard for human life)

Element Number One: commission or attempted commission of a felony

The first element the Commonwealth must prove to you beyond a reasonable doubt is that the defendant committed or attempted

to commit a felony with a maximum sentence of less than imprisonment for life. The Commonwealth alleges that the defendant committed name of crime. Name of crime is a lesser included offense of name of crime. I instruct you that this crime is a felony with a maximum sentence of less than life imprisonment.

Now in order for you to decide whether a name of crime actually occurred in this case, I must instruct you on all elements of this offense.

Define all the elements of the substantive felony alleged.

In appropriate cases, attempt should be defined.

I instruct you that this crime is a felony with a maximum sentence of less than life imprisonment.

Element Number Two: killing committed during the commission or attempted commission of the felony

The second element the Commonwealth must prove to you beyond a reasonable doubt is that a killing occurred while the defendant was committing or attempting to commit the felony. The Commonwealth must prove beyond a reasonable doubt that the killing occurred in connection with the felony and at substantially the same time and place. [A killing may be deemed to be connected with the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony.]

If accident is an issue in the case, the jury must be instructed that accident is not a defense to felony murder.

If the Commonwealth has proved beyond a reasonable doubt that the defendant committed name of crime or attempted to commit name of crime and that an unlawful killing occurred in the course of this felony or attempted felony, then the first two elements of felony murder in the second degree have been satisfied.

For cases in which more than one felony is alleged, the jurors must be instructed that they must be unanimous with regard to at least one of the underlying felonies in order to return a verdict of guilty of felony murder in the second degree.

Element Number Three: the felony (was inherently dangerous) (or) (was committed with a conscious disregard of the risk to human life)

The third element the Commonwealth must prove beyond a reasonable doubt is that:

Give one of the following two alternative instructions

(the underlying felony is inherently dangerous to human life. I instruct you that, as a matter of law, name of crime is inherently dangerous to human life)

(or) (in the circumstances of this case, the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life. The felony must have occurred in a way known by the defendant to be dangerous to life or likely to cause death. The second degree felony-murder rule is applicable only if you find from the

circumstances of the felony that the defendant consciously disregarded the risk to human life. If you find that the Commonwealth has proved beyond a reasonable doubt that the defendant committed or attempted to commit the felony of name of crime, then you must also determine whether or not the Commonwealth has proved beyond a reasonable doubt that the defendant committed or attempted to commit the felony of name of crime with a conscious disregard for the risk to human life.)

In cases in which a malice instruction has been given, the jury may be instructed that the intent to commit the felony substitutes for malice.

Supplemental Instruction 8 - Joint Venture and Knowledge of a Weapon p. 63

If, after considering all of the evidence, you find that the Commonwealth has proved beyond a reasonable doubt each and every one of the elements I have defined, namely: (1) the defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life, (2) a killing occurred while the defendant was in the course of committing or attempting to commit the felony, (3)

(the felony was inherently dangerous to human life) (or) (that under the circumstances of this case the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life)

then you should find the defendant guilty of felony murder in the

second degree. If, however, after your consideration of all of the evidence, you find that the Commonwealth has not proved any one of these elements beyond a reasonable doubt, you must not find the defendant guilty of felony murder in the second degree.

Supplemental Instruction 9 - Unanimity Instruction pp. 63-64

The degree of murder is to be determined by you the jury.

For murder cases in which voluntary manslaughter is also covered.

In order to prove that the defendant acted with malice, the Commonwealth must prove beyond a reasonable doubt the absence of certain mitigating circumstances. Mitigating circumstances are circumstances which lessen a defendant's culpability for an act. Both the crimes of murder and voluntary manslaughter require proof of an unlawful killing, but the killing may be the crime of voluntary manslaughter if it occurred under mitigating circumstances so that the Commonwealth cannot prove beyond a reasonable doubt that the defendant acted with malice. In order to obtain a conviction of murder, the Commonwealth must prove beyond a reasonable doubt the absence of this/these mitigating circumstance[s]. Based on the evidence in this case, the mitigating circumstance[s] that you must consider is/are:

(1. heat of passion upon a reasonable provocation;)

(2. heat of passion induced by sudden combat;)

(3. excessive use of force in self defense or in defense of another)

Let me explain (this) (these) mitigating circumstance(s).

1. Heat of Passion Upon Reasonable Provocation

Heat of passion includes the states of mind of passion, anger, fear, fright and nervous excitement.

Reasonable provocation is provocation of the type which would be likely to produce in a reasonable person such a state of passion, anger, fear, fright or nervous excitement as would overcome his capacity for reflection or restraint and did actually produce such a state of mind in the defendant. The provocation must be such that a reasonable person would have become sufficiently provoked and would not have cooled off by the time of the killing, and that the defendant was so provoked and did not cool off at the time of the killing. In addition, there must be a causal connection between the provocation, the state of heat of passion and the killing. The killing must follow the provocation before there is sufficient time for the emotion to cool and must be the result of the state of mind induced by the provocation rather than a preexisting intent to kill or injure.

Mere words, no matter how insulting or abusive, standing alone do not constitute reasonable provocation.

For appropriate cases

[However, the existence of sufficient provocation is not foreclosed because a defendant learns of a fact from a statement rather than from personal observation. If the information conveyed is of the nature to cause a reasonable person to lose his self-control and did actually cause the defendant to do so, then a statement is sufficient.]

Physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection. The heat of passion must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions.

If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion upon reasonable provocation, the Commonwealth has not proved malice.

2. Heat Of Passion Induced By Sudden Combat

Sudden combat involves a mutual and sudden assault by both the deceased and the defendant. In sudden combat, physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection. The heat of passion induced by sudden combat must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion without cooling off at the time of the killing. If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion induced by sudden combat, the Commonwealth has not proved malice.

In summary then, in order to prove murder, the Commonwealth is required to prove beyond a reasonable doubt that the defendant committed an unlawful killing with malice. If after your consideration of all the evidence you find that the Commonwealth has proved beyond reasonable doubt the elements of murder, except that the Commonwealth has not proved beyond a reasonable doubt the absence of (heat of passion upon reasonable provocation) (or) (heat of passion induced by sudden combat) then you must not find the defendant guilty of murder and you would be justified in finding the defendant guilty of voluntary manslaughter.

3. Excessive Use of Force in Self Defense or Defense of Another

See instructions on self-defense, pp. 54-58

The Commonwealth has the burden of proving beyond a reasonable doubt the absence of self-defense. If the Commonwealth fails to prove beyond a reasonable doubt the absence of self-defense, your verdict must be not guilty with respect to the crimes of murder or voluntary manslaughter. If, however, the Commonwealth does prove excessive force in an effort to defend oneself, you would be justified in finding the defendant guilty of voluntary manslaughter.

For cases in which involuntary manslaughter is at issue, see pp. 34-36

THE ELEMENTS OF MANSLAUGHTER

VOLUNTARY MANSLAUGHTER

A. Voluntary Manslaughter

1. An intentional infliction of injury likely to cause death which causes death
2. The defendant acted unlawfully

B. Voluntary Manslaughter - Excessive Force in Self-Defense

1. An intentional, unlawful killing
2. Caused by excessive force in self-defense.

INVOLUNTARY MANSLAUGHTER

A. Wanton or Reckless Conduct

1. An unintentional, unlawful killing
2. During the commission of wanton or reckless conduct
3. Creating a high degree of likelihood that substantial harm will result to another.

B. Battery

1. An unintentional, unlawful killing
2. During the commission of a battery
3. Which the defendant knew or should have known endangered human life.

VOLUNTARY MANSLAUGHTER (in the absence of a murder charge)

Voluntary manslaughter includes the intentional unlawful killing of the deceased by the defendant.

To prove this crime, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. That the defendant intentionally inflicted an injury or injuries likely to cause death upon the deceased which caused his death.

2. That the defendant acted unlawfully.

An unlawful killing is a killing done without excuse. Not all killings are unlawful. A killing may be excusable, for example, in the case of self-defense, defense of another, or accident.

Supplemental Instruction 4 - Killing as a Result of Accident, Self-Defense or Defense of Another p. 59

If the Commonwealth proves each of those elements beyond a reasonable doubt, then you should return a verdict of voluntary manslaughter. If the Commonwealth fails to prove each of those elements beyond a reasonable doubt, you must not convict the defendant of voluntary manslaughter.[12]

VOLUNTARY MANSLAUGHTER

Excessive Force in Self Defense

Voluntary manslaughter includes the intentional and unlawful killing of another human being as a result of the use of excessive force in self-defense. In this case, you must consider whether the Commonwealth has proved beyond a reasonable doubt that the defendant used excessive force in defending himself [or another]. ***See instructions on self-defense, pp. 54-58***

If the Commonwealth proves beyond a reasonable doubt that the defendant used excessive force in defense of himself [or another][13] which caused the death of the deceased[14], then you should return a verdict of guilty of voluntary manslaughter.

If the Commonwealth fails to prove that the defendant used excessive force in rightfully defending himself [or another], then you must not return a verdict of guilty of voluntary manslaughter through the use of excessive force in self-defense.

INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is an unlawful killing unintentionally caused by wanton or reckless conduct creating a high degree of likelihood that substantial harm will result to another. It is also an unlawful killing caused by the commission of a battery in circumstances which the person committing the battery knows or reasonably should know endanger human life.

Wanton or Reckless Conduct

To prove involuntary manslaughter, the Commonwealth must prove beyond a reasonable doubt:

1. That the defendant committed an unintentional and unlawful killing of the deceased.[15] To satisfy this element the Commonwealth must prove that the killing was unlawful and that the defendant intended the conduct that caused the death but the Commonwealth need not prove that the defendant intended the death which resulted from the conduct.

Where murder instruction has been given

[I have already defined for you the element of an unlawful killing]

Where murder instruction has not been given

[An unlawful killing is a killing done without excuse. Not all killings are unlawful. A killing may be excusable, for example, in the case of self-defense, defense of another, or, in some

cases, accident.]

Supplemental Instruction 4 - Killing as a Result of Accident, Self Defense or Defense of Another pp. 59-60

2. The killing was caused by wanton or reckless conduct. Wanton or reckless conduct is an act or failure to act, when there is a duty to act, creating a high degree of likelihood that substantial harm will result to another.[16] Wanton or reckless conduct is conduct involving a grave risk of harm to another which a person undertakes in indifference to or disregard of the consequences of such conduct. [17] Wanton or reckless conduct depends either on what the defendant knew or on how a reasonable person would have acted knowing those facts. [18] If the defendant realized the grave danger, his subsequent act, or failure to act when there was a duty to act, amounts to wanton or reckless conduct whether or not an ordinary person would have realized the gravity of the danger. Even if the defendant did not realize the grave danger of harm to another, but a reasonable person in like circumstances would have realized the risk of grave danger, the act or omission to act would constitute wanton or reckless conduct. The essence of wanton or reckless conduct is intentional conduct which either the defendant knew or a reasonable person would have known involved a high degree of likelihood that substantial harm would result to another even though the harm itself may not have been intended.

3. The wanton or reckless conduct caused the death of the

deceased. The cause of death is an act, which in a natural and continuous sequence results in death, and without which death would not have occurred.[19]

If the Commonwealth proved each of those elements beyond a reasonable doubt, you should return a verdict of guilty of involuntary manslaughter as a result of wanton or reckless conduct. If the Commonwealth fails to prove one or more of those elements, you must not return a verdict of guilty of involuntary manslaughter as a result of wanton or reckless conduct.

Battery

In order to prove the crime of involuntary manslaughter based on an unintentional, unlawful killing as a result of a battery which the defendant knew or should have known endangered human life,[20] the Commonwealth must prove beyond a reasonable doubt the following elements:

1. The defendant committed an unintentional, unlawful killing of the deceased. To satisfy this element, the Commonwealth must prove that the killing was unlawful and that the defendant intended to commit the battery, but the Commonwealth need not prove that the defendant intended the death which resulted from the battery.

Where Murder Instruction has been given

[I have already defined for you the element of an unlawful killing]

Where Murder Instruction has not been given

[An unlawful killing is a killing done without excuse. Not all killings are unlawful. A killing may be excused, for example, in the case of self-defense, defense of another, or, in some cases, accident.]

Supplemental Instruction 4 - Killing as a Result of Accident, Self-Defense or Defense of Another pp. 59-60

2. The defendant committed a battery upon the decedent which under the circumstances, the defendant knew, or reasonably should

have known, endangered human life.[21] A battery is the intentional and unjustified use of force upon the person of another. The battery must have been one which the defendant knew or should have known endangered human life. In determining whether the defendant reasonably should have known that the battery he was committing endangered human life, you must consider the nature and extent of the defendant's knowledge at the time he acted, and whether in the circumstances known by the defendant, a reasonable person would have recognized that the battery endangered human life.

3. The battery caused the death of the deceased. In order to prove that the defendant caused the deceased's death, the Commonwealth must prove beyond a reasonable doubt that the defendant's conduct was the cause of the deceased's death. The cause of death is an act, which in a natural and continuous sequence results in death, and without which death would not have occurred.

If the Commonwealth proves each of those elements beyond a reasonable doubt, then you should return a verdict of guilty of involuntary manslaughter as a result of battery. If the Commonwealth fails to prove any of those elements beyond a reasonable doubt, you must not return a verdict of guilty of involuntary manslaughter as a result of battery.

VEHICULAR HOMICIDE

G. L. c. 90, § 24G(a)

Felony Vehicular Homicide

The defendant is charged with homicide by motor vehicle. General Laws c. 90, 24G(a),[22] defines felony vehicular homicide as follows:

"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 (intoxicating liquor) (or) [. . .] and so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes the death of another person, shall be guilty of homicide by a motor vehicle while under the influence of an intoxicating substance . . ."

In order to prove the defendant guilty of felony vehicular homicide, the Commonwealth must prove five elements beyond a reasonable doubt.

First: that the defendant operated a motor vehicle;

Second: that such operation occurred on a way or in a place to which the public has a right of access, or on a way or in a

place to which the public has access as invitees or licensees;

Third: that while the defendant was operating the motor vehicle, he was under the influence of an intoxicating substance, in this case, (liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue);[23]

Fourth: that the motor vehicle was operated in a [reckless or] negligent manner so that the lives or safety of the public might have been endangered; and

Fifth: that such operation caused the death of another person.

Those elements are further defined as follows:[24]

First, the Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle.[25] The expression "operation of a motor vehicle" includes not only all the well known and easily recognized things drivers do as they travel on a street or highway, but also any act which tends to set the vehicle in motion.[26] To operate a motor vehicle, it is not necessary that the engine be running.[27] A person operates a motor vehicle within the meaning of the statute when that person is in the vehicle and intentionally does any act or makes use of any mechanical or electrical component which alone or in sequence will set in motion the power of that vehicle.[28] Furthermore, a driver continues to operate a motor vehicle when it is stopped in the ordinary course of its operation,[29] or even when it is stopped due to some mechanical reason, such as a stalled engine or lack of gasoline.[30]

Second, the Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle on a way or in a place to which the public has a right of access, or on a way or in a place to which the public has access as invitees or licensees. This portion of the statute is worded in the alternative, and if the Commonwealth proves one of the four alternatives beyond a reasonable doubt, then this element of the crime is proved.

A *"way"* includes not only interstate, state or municipal highways, but also streets, roads or other places to which the public has access as invitees or licensees. An invitee is one who is at a place, usually a business establishment, at the request or invitation of the owner and for the benefit of both the invited person and the owner. A licensee, on the other hand, is a person who is at a place with only the passive permission of the owner and usually for the licensee's benefit. Examples of locations where the public has access as invitees or licensees include some shopping centers, some roadside fuel stops, some school parking areas, some municipal parking areas, some parking areas of public buildings or some restaurant parking lots.[31] The Commonwealth may sustain its burden of proof

Choose one of the following two alternatives

(by evidence of a certificate of a city or town clerk, or Secretary of the State Public Works Commission or Secretary of the M.D.C. that the same is a public way)[32]

(or) (by proof that the physical circumstances of the way

are such that members of the public may reasonably conclude that it is open for travel to invitees or licensees.[33] Some of the physical circumstances you may consider in determining whether the way is open to the public are whether the way is paved, has curbing, crossroads, traffic signs or signals, street lights, fire hydrants, abutting houses or businesses and the absence of signs prohibiting public access.)[34]

Once again, this portion of the statute is worded in the alternative and, if you find beyond a reasonable doubt that the defendant operated a motor vehicle in any of these types of areas, this element of the crime has been satisfied.

Third, the Commonwealth must prove beyond a reasonable doubt that the defendant operated the motor vehicle under the influence of an intoxicating substance, in this case name of substance.[35] To be under the influence of name of substance, a person does not have to be [drunk or] completely unconscious as a result of the intake of the name of substance.[36] Being under the influence means that, at the time of the incident, the defendant's intake of name of substance diminished the defendant's ability to operate a motor vehicle safely.[37] This definition would include someone who is drunk and anyone who has consumed enough of an intoxicating substance to reduce his mental clarity, self-control, and reflexes, leaving that person with a reduced ability to drive safely. The Commonwealth must prove to you beyond a reasonable doubt that the defendant had a diminished capacity to operate the

motor vehicle safely.[38]

Use in cases where there is issue of contributing cause of death.

[If the defendant's ability to operate the motor vehicle safely was diminished by name of substance, the defendant has violated this portion of the statute even though some other cause, also operating on the defendant while he was driving, may have tended to magnify or increase the effect of the name of substance, or may have contributed in causing the defendant's diminished capacity to operate safely. It is no defense under the statute to show the existence of such concurring cause, so long as the influence of the name of substance remained as one of the causes of the defendant's diminished capacity.[39]]

Fourth, the Commonwealth must prove beyond a reasonable doubt that the defendant operated the motor vehicle in a [reckless or] negligent manner so that the lives or safety of the public might have been endangered.[40]

Eliminate charge on reckless conduct when it is not an issue.

Reckless conduct may consist of intentional failure to take necessary care in disregard of the probable harmful consequences.[41] What must be intended is the conduct, however, not the resulting harm.[42] The defendant must have intended the reckless conduct. Reckless conduct can be described as "indifference to or disregard of probable consequences."[43] The essence of wanton or reckless conduct is intentional conduct

which either the defendant knew or a reasonable person would have known involved a high degree of likelihood that substantial harm would result to another even though the harm itself may not have been intended. If the Commonwealth has proved beyond a reasonable doubt that the defendant operated the motor vehicle in a reckless manner, then this element of the crime of vehicular homicide is satisfied.

In the alternative, even if you are not convinced beyond a reasonable doubt that the defendant operated the motor vehicle in a reckless manner, you may consider whether the defendant operated the vehicle negligently so that the lives or safety of the public might have been endangered.[44] In order to prove negligence, the Commonwealth must prove beyond a reasonable doubt that the defendant failed to exercise that degree of care, diligence, and safety that an ordinarily prudent person would have exercised under similar circumstances.[45]

In addition, the Commonwealth must prove that the defendant's negligence, that is his failure to exercise due care, might have endangered the lives or safety of the public.[46] In considering whether the defendant was negligent and whether that negligence might have endangered the lives and safety of the public, you may consider the rate of speed of the vehicle,[47] the presence of other vehicles and people on the road, the defendant's manner of operating the vehicle, the defendant's physical condition, the condition of the vehicle, the type and condition or the road, the weather, and all of the other facts

surrounding the accident.[48]

Fifth. Finally, the Commonwealth must prove beyond a reasonable doubt that the defendant's operation of the motor vehicle caused[49] the death of another person.[50] The law defines a cause, for the purpose of this statute, as that which in a natural and continuous sequence produced the death and without which the death would not have occurred.[51] In other words, *but for* the defendant's conduct, the death would not have occurred.[52] The defendant's conduct need not be the sole cause of death, but you must be satisfied that it was the cause which necessarily set in operation all of the factors which ultimately caused the death of the victim.[53]

Use in cases where there is an issue of intervening cause.

[If the evidence satisfies you that independent cause, or any other independent cause, intervened or got in the way after the original alleged negligence of the defendant, and that the independent cause, or any other independent cause, could not have been foreseen by the defendant, and that the independent cause, or any other independent cause, caused the victim's death, then the defendant cannot be held criminally responsible for the death of the victim.[54]]

Use in cases where there is issue of contributing vs. sole cause.

[If the evidence satisfies you that the victim was negligent and that his negligence only contributed to the accident, then

you are not to consider the victim's negligence in determining the defendant's guilt or innocence. On the other hand, if the evidence satisfies you that the victim's negligence was the sole cause of the accident, or the only reason that the accident occurred, then the defendant is not guilty.][55]

Use in cases involving multiple deaths.

[Each death arising from the accident constitutes a separate offense under the statute. The Commonwealth must prove beyond a reasonable doubt each element of the crime for each death arising out of the accident[56]].

If the Commonwealth has proved all five elements beyond a reasonable doubt, that is: the defendant operated a motor vehicle; that such operation occurred on a way or in a place to which the public has right of access, or on a way or in a place to which the public has access as invitees or licensees; that while the defendant was operating the motor vehicle, he was under the influence of an intoxicating substance, in this case, <u>name of substance</u>; that the motor vehicle was operated in a reckless or negligent manner so that the lives or safety of the public might have been endangered; and that such operation caused the death of another person, then you should find the defendant guilty of felony vehicular homicide. If the Commonwealth has failed to prove to you beyond a reasonable doubt any one element as I have defined them to you, you must not find the defendant guilty.

LESSER INCLUDED OFFENSE

Misdemeanor Vehicular Homicide[57]

Three of the elements of misdemeanor vehicular homicide are the same as three of felony vehicular homicide. Like the felony, the misdemeanor offense requires that the Commonwealth prove beyond a reasonable doubt that the defendant operated a motor vehicle, that such operation occurred on a way or in a place to which the public has a right of access, or on a way or in a place to which the public has access as invitees or licensees, and that such operation caused the death of another. The fourth element requires that the Commonwealth prove beyond a reasonable doubt that the defendant operated the motor vehicle either while under the influence of name of substance or, in the alternative, that the defendant operated the motor vehicle recklessly or negligently so that the lives or safety of the public might have been endangered. Thus, the difference between the felony and the misdemeanor offense of vehicular homicide is that the felony requires proof beyond a reasonable doubt of both operating under the influence of name of substance and operating recklessly or negligently so that the lives or safety of the public might have been endangered, but the misdemeanor requires proof beyond a reasonable doubt of one of these.

Therefore, if the Commonwealth has proved all four elements

of the misdemeanor offense beyond a reasonable doubt, then you should find the defendant guilty of misdemeanor vehicular homicide.

If, however, after your consideration of all of the evidence, the Commonwealth has not proved any one of the four elements of misdemeanor vehicular homicide beyond a reasonable doubt, you must not find the defendant guilty.

It may be helpful to repeat the four elements.

LACK OF CRIMINAL RESPONSIBILITY[58]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime(s), you must decide whether the Commonwealth has met an additional burden.[59] The Commonwealth also must prove that the defendant was criminally responsible when he committed the crime(s).[60] And the Commonwealth must prove that the defendant was criminally responsible beyond a reasonable doubt.[61]

The burden is not on the defendant to prove a lack of criminal responsibility. The burden is on the Commonwealth to prove criminal responsibility beyond a reasonable doubt. Under the law, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant committed the crime(s) with which he is charged and also that the defendant is criminally responsible for his conduct.[62]

Criminal responsibility is a legal term. A person is not criminally responsible for his conduct if he has a mental disease or defect, and as a result of that mental disease or defect he lacks substantial capacity either to appreciate the criminality or wrongfulness of his conduct, or to conform his conduct to the requirements of law.[63]

Now to go back over that definition. The issue of criminal

responsibility arises only if the Commonwealth has proved beyond a reasonable doubt that the defendant committed the crime(s) charged.

The phrase "mental disease or defect" is a legal and not a medical term. It is for you to determine in light of all of the evidence whether the defendant had a mental disease or defect. In considering whether or not the defendant was sane (that is, criminally responsible), if you feel it appropriate you may take into account that the great majority of people are sane and that there is a resulting likelihood that any particular person is sane.[64]

In some cases the following sentence may not be appropriate. [The phrase "mental disease or defect" does not include an abnormality manifested only by repeated criminal conduct.[65]] If the Commonwealth persuades you beyond a reasonable doubt that the defendant committed the crime(s) and did not have a mental disease or defect when he committed the crime(s), then it has proved that the defendant was criminally responsible, and you need go no further.[66]

If, however, you have a reasonable doubt whether the defendant had a mental disease or defect, then, in order to prove him criminally responsible, the Commonwealth must prove beyond a reasonable doubt that, despite any mental disease or defect, the defendant nevertheless possessed substantial capacity, both to

appreciate the criminality or wrongfulness, of his conduct and to conform his conduct to the law.[67]

The word "appreciate" means to understand, rather than to merely know. The Commonwealth must prove that the defendant knew and understood that his conduct was illegal or that it was wrong.[68] In order to establish that the defendant had substantial capacity to appreciate the criminality or wrongfulness of his conduct, it is not enough to show that he merely had knowledge or an intellectual awareness that his conduct was wrong; rather, the Commonwealth must prove beyond a reasonable doubt that a mental disease or defect did not deprive the defendant of a meaningful understanding and intelligent comprehension of the legal or moral import of his conduct.[69] "Criminality" means the legal import of conduct, and "wrongfulness" means the moral import.

In order to establish that the defendant had substantial capacity to conform his conduct to the requirements of the law, the Commonwealth must prove beyond a reasonable doubt that any mental disease or defect that may have existed did not deprive the defendant of his substantial ability to behave as the law requires; that is, to obey the law.

For use in appropriate cases

[Lack of criminal responsibility is not present when a defendant with a mental disease or defect knows, or, in the circumstances

has reason to know, that his consumption of a substance will cause him to be substantially incapable of either appreciating the wrongfulness of his conduct or conforming his conduct to the requirement of the law (or both). In deciding what the defendant had reason to know about the consequences of his consumption of a substance, you should consider the question solely from the defendant's point of view, including his mental capacity.][70]

For use in response to a question from the jury on the meaning of "substantial capacity."

[Whether a defendant is to be called criminally responsible or not criminally responsible cannot depend on any certain measurement.[71] By employing the words "substantial capacity" to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, the test emphasizes that the degree of incapacity must be substantial, but total incapacity is also not required.[72]]

Because the Commonwealth must prove both that the defendant possessed substantial capacity to appreciate the criminality or wrongfulness of his conduct, and also that the defendant possessed substantial capacity to conform his conduct to the requirements of the law, you must return a verdict of not guilty by reason of a lack of criminal responsibility if you have a reasonable doubt as to either part of this test.[73]

It is the Commonwealth's burden to prove, beyond a reasonable doubt, that at the time of this alleged conduct the defendant did not have a mental disease or defect. If you have a doubt whether the defendant had a mental disease or defect, then the Commonwealth must prove beyond a reasonable doubt that the defendant had substantial capacity to appreciate the criminality or wrongfulness of his conduct, and that he had substantial capacity to conform his conduct to the requirements of the law.[74]

In considering whether the Commonwealth has met its burden of proof, you may consider all the evidence which has been presented at this trial. You may consider the opinions of any experts who testified. You may give the evidence whatever weight you see fit as factfinder.[75]

Once again I remind you that it is not up to the defendant to prove that he was not criminally responsible at the time of the crime(s). Remember that the burden of proof is on the Commonwealth to prove beyond a reasonable doubt that the defendant was criminally responsible.[76]

Finally, I direct your attention to the fact that if the Commonwealth has proved all the elements of the indictment(s) against the defendant beyond a reasonable doubt, but the Commonwealth has not proved the defendant's criminal responsibility, then you must find that the defendant is not guilty by reason of a lack of criminal responsibility.

SELF-DEFENSE

A homicide is excused and is therefore not a crime if it results from the proper exercise of self-defense. The Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in self-defense, then you must find the defendant not guilty. In other words, if you have a reasonable doubt whether the defendant acted in self-defense, your verdict must be not guilty.

As the next instruction uses the term deadly force, I will define it for you.

For instructions on use of non-deadly force, see p. 58.

Deadly force is force that is intended or likely to cause death or great bodily harm.[77] In order to defend oneself with a dangerous weapon likely to cause serious injury or death (or to use deadly force), the person using the weapon (or deadly force) must have a reasonable apprehension of great bodily harm or death and a reasonable belief that no other means would suffice to prevent such harm. Put another way, the proper exercise of self-defense means that a person in the defendant's circumstances would reasonably believe that he was about to be attacked and that he was in immediate danger of being killed or seriously injured, and that there was no other way to avoid the attack. A person using a dangerous weapon (or deadly force) in self-defense

must also have actually believed that he was in imminent danger of serious harm or death. A person may not use force in self-defense until he has availed himself of all proper means to avoid physical combat.

For retreat in a dwelling house

[A person who is lawfully occupying a house, an apartment or some other dwelling is not required to retreat or use other means of avoiding combat before using reasonable force against an unlawful intruder, if the occupant reasonably believes that the intruder is about to kill or seriously injure him or another occupant, and also reasonably believes that such force is necessary to protect himself or another occupant.[78]]

For use when there is issue of mistaken use of self-defense.

[A person who reasonably, but mistakenly, believes that he is in imminent danger of serious bodily harm or death, and that he has used all proper means to avoid the use of force, may still use deadly force to defend himself.][79]

In considering the issue of the reasonableness of a defendant's belief and whether a defendant actually believed that he was in imminent danger of serious bodily harm or death, you may consider the circumstances bearing on the issue of a defendant's state of mind. Furthermore, in considering the issue of whether a defendant is reasonably in fear of death or serious

bodily harm, you may consider evidence of the deceased person's reputation as a violent or quarrelsome person if that reputation was known to the defendant. You may also consider evidence of recent acts of violence committed by the deceased if the defendant knew of such acts. You may, finally, consider evidence of threats of violence made by the deceased against the defendant if the defendant was aware of such threats.[80]

A person may use no more force than is reasonably necessary in all of the circumstances to defend himself. In considering the issue of the reasonableness of any force used by the defendant, you may consider evidence of the relative physical capabilities of combatants -- how many persons were involved on each side, the characteristics of any weapons used, the availability of room to maneuver, or any other factors you deem relevant to the reasonableness of the defendant's conduct under the circumstances.

The law does not permit retaliation or revenge. The proper exercise of self-defense arises from necessity and ends when the necessity ends. An individual may use only sufficient force to prevent occurrence or reoccurrence of the attack. The question of how far a party may properly go in self-defense, however, is to be considered by the jury with due regard for human impulses and passions, and not to be judged too strictly.[81]

To reiterate, where there is evidence that the defendant may

have acted in self-defense, then the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in self-defense, then you must find the defendant not guilty.

For cases involving defense of another

[A homicide is also excused and is therefore not a crime, if it results from the proper exercise of the defense of a third person. A person may lawfully use a dangerous weapon (or deadly force) in defense of a third person when a reasonable person in the actor's position would believe that such intervention was necessary for the protection of the third person, and in the circumstances as that reasonable person would believe them to be, the third person would have been justified in using a dangerous weapon (or deadly force) to protect himself.

The defense of another instruction should mirror the self defense instruction.

The Commonwealth must prove beyond a reasonable doubt that the defendant did not act in defense of a third person. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in defense of a third person, then you must find the defendant not guilty. In other words, if you have a reasonable doubt about whether the defendant acted in defense of a third person, then your verdict must be not guilty.]

Where the evidence would permit the jury to find that the force used by the defendant was either deadly or nondeadly force, the defendant is entitled to instructions on the use of both deadly and nondeadly force in self defense and the jury shall decide on the type of force used.[82]

Nondeadly Force: Nondeadly force is force that is not intended or likely to cause death or great bodily harm.[83] If the defendant had reasonable grounds to believe that he was in imminent danger of harm from which he could save himself only by using nondeadly force, and had availed himself of all proper means to avoid physical combat before resorting to nondeadly force, then the defendant had the right to use whatever nondeadly means were reasonably necessary to avert the threatened harm, but he could use no more force than was reasonable and proper under the circumstances.[84]

SUPPLEMENTAL INSTRUCTIONS

1. Cause of Death

An act which in a natural and continuous sequence results in death, and without which death would not have occurred, is the cause of death.

2. Definition of Death

Death occurs when the heart has stopped long enough to result in complete and permanent loss of brain function. This complete and permanent loss of brain function occurs when, in the opinion of a licensed physician based on ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.

3. Object of Killing Must Be a Human Being

A killing is not murder unless a human being has been killed.

4. Killing as a Result of Accident, Self-defense, or Defense of Another

The Commonwealth must prove to you beyond a reasonable doubt that the killing was not the result of (an accident) (or) (the defendant's acts of self-defense or defense of another.) The defendant does not bear the burden of proving the excuse.

Failure of the Commonwealth to prove beyond a reasonable doubt that the killing was (not accidental) (or) (not in self-defense or in defense of another), requires you to return a verdict of not guilty. I will instruct you later in more detail concerning the law governing accident, self-defense and defense of another.

5. Use of Dangerous Weapon

As a general rule, you are permitted to infer that a person who intentionally uses a dangerous weapon on another person is acting with malice. [A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you as a matter of law that _____ is a dangerous weapon.]

6. Mental Impairment and Intoxication as It Applies to Proof of Knowledge or Intent

This supplemental instruction 6 need be given only once.

Whenever the defendant's knowledge or intent must be proved, the defendant's culpability rests upon proof of such knowledge or intent. The Commonwealth must prove the requisite knowledge or intent beyond a reasonable doubt in order to prove that the defendant committed the crime.

Whenever the Commonwealth must prove the defendant's intention to do something, you should consider any credible evidence of [mental impairment] [the effect on the defendant of his consumption of (alcohol) (drugs) (alcohol and other drugs)] in determining whether the Commonwealth has met its burden of

proof. Likewise, whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances, you should consider any credible evidence of [mental impairment] [the effect on the defendant of his consumption of (alcohol) (drugs) (alcohol and other drugs)] in determining whether the Commonwealth has met its burden of proof.

More particularly, you may consider any credible evidence of the defendant's [mental impairment] [consumption of (alcohol) (drugs) (alcohol and other drugs)] in determining:

[Whether the defendant deliberately premeditated the killing of the deceased, that is, whether the defendant thought before he acted and whether the defendant reached the decision to kill after reflection at least for a short period of time]

[Whether the defendant intended to kill (or to cause grievous bodily harm) to the deceased (or was aware that his conduct created a plain and strong likelihood that death would result)]

[Whether the defendant acted in a cruel or atrocious manner in causing the death of the deceased]

[Whether the defendant intended to commit <u>the felony which is a predicate for the felony murder charge</u>]

[Whether the defendant reasonably believed that he was in imminent danger of serious bodily harm or death, whether he availed himself of all proper means to avoid combat, and whether the force used in self-defense was no more than was reasonably necessary under the circumstances].

I reiterate, whenever the Commonwealth must prove that the defendant intended to do something, or had knowledge of certain facts or circumstances, in order to prove the crime, you may consider any credible evidence of [mental impairment] [intoxication] in determining whether the Commonwealth has met its burden of proving the defendant's intent or knowledge.

7. Supplemental Instruction on Consequences of Verdict of Not Guilty by Reason of Lack of Criminal Responsibility

In the event that the defendant is found not guilty by reason of lack of criminal responsibility, the district attorney or other appropriate authority may petition this Court under our statutes for his commitment to a facility for the care and treatment of mentally ill persons, or commitment to Bridgewater State Hospital for care and treatment. If upon such petition the Court finds that the defendant is mentally ill at the present time, and that his discharge would create a likelihood of serious harm to himself or others, then the defendant would be committed to a facility, or to strict custody in Bridgewater State Hospital

in appropriate cases. The order of commitment is thereafter periodically reviewed by the courts of the Commonwealth." [85]

8. Joint Venture and Knowledge of a Weapon

The Commonwealth has proceeded against the defendant on a theory of joint venture for the crime of felony murder and underlying felony. This underlying felony has as one of its elements the (use) (possession) of a weapon. The Commonwealth must prove beyond a reasonable doubt that the defendant knew that name of accomplice had a weapon. However, mere knowledge, in and of itself, that name of accomplice was armed is not sufficient to hold the defendant liable for the acts of name of accomplice. It must be proved that the defendant intentionally assisted name of accomplice in the commission of underlying felony, and that the defendant did so while possessing the mental state required for underlying felony. If the Commonwealth has not proved beyond a reasonable doubt that the defendant knew that name of accomplice had a weapon and that the defendant shared the mental state for the underlying felony, then you must find the defendant not guilty of felony murder and not guilty of underlying felony.

9. Unanimity Instruction

Your verdicts must be unanimous as to any charges, whether the verdicts be guilty or not guilty.

You will note on the verdict slip that there are (two) (three) possible theories as to murder in the first degree.

Before you may convict the defendant of murder in the first degree, you must be unanimous as to the theory under which you are finding him guilty. You may convict the defendant under more than one theory, but you must be unanimous, that is, all twelve of you must agree as to each theory under which you find him guilty. Check the appropriate block or blocks as to each theory on which you agree unanimously.

10. Questions from Jury

a. Before supplemental instructions

Members of the jury, I am about to give you some additional instructions. [In response to your question,] I am going to try to further clarify some areas of the law for you. These new instructions are no more or less important than those I gave you originally. When you (begin) (resume) deliberations, you are to consider all of my instructions together, as a whole.

b. After supplemental instructions

Remember, in your deliberations you are to consider all of my instructions together as a whole -- those I gave you before and those I have just given you.

11. Jurors' Obligation on Guilt or Innocence.

This supplemental instruction 11 need be given only once.

If the evidence convinces you beyond a reasonable doubt that the defendant is guilty of a criminal offense, you have a duty to find the defendant guilty of the most serious offense that the

Commonwealth has proved beyond a reasonable doubt. If the evidence does not prove beyond a reasonable doubt that the defendant is guilty of any offense charged, you must find him not guilty.

ENDNOTES

1. In cases in which a defense of accident, self-defense or defense of another has been offered, or in cases in which a voluntary manslaughter instruction will be given, this element should probably be set forth with greater specificity, e.g., "an unlawful killing which was not accidental" or "an unlawful killing which was not committed by the excessive use of force in self-defense."

2. The proposed instructions on first degree murder with deliberate premeditation eliminate the element of second prong malice. This instruction states that malice for purposes of deliberately premeditated murder means an intent to cause death. *Commonwealth* v. *Judge*, 420 Mass. 433, 441 (1995), states that third prong malice cannot be a basis for a finding of deliberately premeditated murder. It is clear from recent cases, however, that the second prong of malice, i.e., an intent to do grievous bodily harm, is also insufficient, since deliberately premeditated murder requires proof that the defendant formed a plan to kill after deliberating. *Commonwealth* v. *Jenks*, 426 Mass. 582, 585 (1998). *Commonwealth* v. *Diaz*, 426 Mass. 548, 553 (1998).

3. See endnote 1.

4. *Commonwealth v. Ortiz*, 408 Mass. 463, 466-467 (1990); *Commonwealth v. Chase*, 42 Mass. App. Ct. 749, 754 n.2 (1997).

5. See endnote 1.

6. In appropriate cases, the female pronoun should be substituted for the masculine pronoun used in the model instructions.

7. See *Commonwealth v. Barros*, 425 Mass. 572, 581 (1997); *Commonwealth v. Hunter*, 416 Mass. 831, 837 (1994).

8. Language in a number of cases indicates that in certain circumstances proof of felony murder requires proof that a homicide was the natural and probable consequence of the defendant's act. See *Commonwealth v. Nichypor*, 419 Mass. 209, 215 (1994); *Commonwealth v. Ortiz,* 408 Mass. 463, 469 (1990); *Commonwealth v. Matchett*, 386 Mass. 492, 505 (1982). The court has concluded that this language should not be included as a fourth element in felony murder cases. The language appears to be a superfluous addition to the third element of felony murder.

See *Commonwealth v. Baez*, 427 Mass. 630, 633 n.3 (1998). Also, the term "probable consequence" is misleading because in the vast majority of felonies, including armed robbery, the most common form of inherently dangerous felony, no one is killed. Accordingly, death is not a "probable" outcome, although it is an inherent risk.

In addition, the Court has concluded that there is no need to include in the instructions as an element of felony murder the following: - "The felony must have been independent of the homicide". See *Commonwealth v. Roberio*, 428 Mass. 278 (1998); *Commonwealth v. Wade*, 428 Mass. 147, 150 n.3 (1998); *Commonwealth v. Gunter*, 427 Mass. 259 (1998). In virtually all cases, this is not an issue for the jury; it is an issue of law to be decided by the judge subject, of course, to appellate review.

9. *Commonwealth v. Gordon*, 422 Mass. 816, 850 (1996).

10. *Commonwealth v. Brown*, 392 Mass. 632, 645 (1984). *Commonwealth v. Dickerson*, 372 Mass. 783 (1977).

11. See endnote 8.

12. It is clear from recent cases that for voluntary manslaughter, heat of passion is not an element to be proved by the Commonwealth. See *Commonwealth v. Niemic*, 427 Mass. 718, 721 (1988); *Commonwealth v. Acevedo*, 427 Mass. 714, 716-717 (1998); *Commonwealth v. Torres*, 420 Mass. 479, 488-489 (1995). See also *United States v. Holmes*, 632 F.2d 167, 170 (1st Cir. 1980); *United States v. Alexander*, 471 F.2d 923, 942-944 (D.C. Cir. 1973).

13. Include if an instruction on "defense of another" is given. *Commonwealth v. Martin,* 369 Mass. 640, 644 (1976).

14. *Commonwealth v. Torres*, 420 Mass. at 491-492.

15. *Commonwealth v. Sneed*, 413 Mass. 387, 393 n.4 (1992).

16. *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944).

17. *Id*. at 398.

18. *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4 (1987); *Commonwealth* v. Godin, 374 Mass. 120, 129-130 (1977).

19. *Commonwealth v. Rhoades*, 379 Mass. 810, 825 (1980). See Supplemental Instruction 1.

20. *Commonwealth v. Sneed*, 413 Mass. 387, 394 (1992).

21. *Commonwealth v. Sires*, 413 Mass. 292, 302 n.10 (1992). *Commonwealth v. Fitzmeyer*, 414 Mass. 540, 547 (1993). *Commonwealth* v. *Fryar*, 425 Mass. 237, 248-249 (1997).

22. The legislative history of the statute indicates that the statute was enacted to provide a middle ground between the felony of involuntary manslaughter and the misdemeanor of driving to endanger. *Commonwealth v. Jones*, 382 Mass. 387, 390-391 (1981). However, the enactment of G. L. c. 90, § 24G (*a*), does not impliedly repeal the common law crime of involuntary manslaughter. *Id*. at 392. Vehicular homicide is not a lesser included offence of manslaughter by reckless driving in public; the less serious motor vehicle offenses of vehicular homicide and operating to endanger are so closely related as to preclude multiple punishments. *Id*. at 394. If guilty verdicts are returned on more than one of these motor vehicle offenses, the proper approach is to dismiss the less serious charge(s) and to enter a judgment of conviction with a sentence on the most serious crime. *Id*. at 394-395. Motor vehicle homicide convictions are duplicative of manslaughter convictions. *Commonwealth v. Davidson*, 27 Mass. App. Ct. 846, 850, review denied, 406 Mass. 1103 (1989).

23. Use whichever intoxicating substance with which the defendant is charged. If the defendant is indicted for being under the influence of more than one intoxicating substance, the charge should be worded alternatively, i.e. [or in the alternative, (second intoxicating substance)], because the statute is worded alternatively. See *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456-457 (1988). If the defendant's indictment for vehicular homicide charges the defendant with being under the influence of only one intoxicating substance, but there was evidence presented at trial that the defendant was under the influence of more than one substance, then use only the intoxicating substance with which the defendant is charged. *Id.* However, note that when this is the situation, the charge on **Contributing Cause of Death**, found at pp. 45-46, *supra*, should be given.

24. If the parties have stipulated to any one or more of the five elements, insert them into a supplemental instruction of **Stipulation of Fact** instruction and omit any further discussion of that element from the charge. A **Stipulation of Fact** instruction follows: [*The Commonwealth and the defendant have agreed, or stipulated, as to (name applicable element[s] of crime). This stipulation is signed by the assistant district attorney for the Commonwealth and counsel for the defendant and is marked as an exhibit. A stipulation of fact leaves those facts no longer at issue, and must be accepted by you the jury. Commonwealth v. Triplett*, 398 Mass. 561, 570 (1986) (stipulation of testimony leaves the trier of fact its role of determining the facts based on the agreed evidence).]

25. *Motor vehicle includes motorized bicycles or "mopeds" as to those portions of G. L. c. 90 concerned with operation of a motor vehicle.* Circumstantial evidence may be enough to establish beyond a reasonable doubt that the defendant was the driver of the vehicle. *Commonwealth v. Geisler,* 14 Mass. App. Ct. 268, 273 (1982), *rev. denied,* 387 Mass. 1102 (1982). Cf. *Commonwealth v. Leonard*, 401 Mass. 470, 472, 473 (1988) (defendant's uncorroborated confession that he operated the vehicle was insufficient for conviction); *Commonwealth v. Griswold*, 17 Mass. App. Ct. 461, 462 (1984), *rev. denied*, 391 Mass. 1104 (1984).

26. *Commonwealth v. Uski*, 263 Mass. 22, 24 (1928). See *Commonwealth v. Ginnetti*, 400 Mass. 181, 184 (1987) (vehicle with functioning engine is not inoperable and does not lose its character as a vehicle merely because it is immovable due to road or other conditions not involving the vehicle itself).

27. *Commonwealth v. Clarke*, 254 Mass. 566, 568 (1926). But *cf. Commonwealth v. Plowman*, 28 Mass. App. Ct. 230, 234 (1990) (evidence that intoxicated person was observed sleeping in driver's seat of parked vehicle with keys in ignition and engine running, <u>by itself</u>, does not mandate finding of "operation").

28. *Commonwealth v. Uski*, 263 Mass. at 24.

29. *Commonwealth v. Henry*, 229 Mass. 19, 22 (1917).

30. *Crofoot v. Rozewski,* 310 Mass. 824, 825 (1941).

31. The phrase "or upon any way or in a place to which members of the public have access" was added by amendment in 1961. Courts have held that this amendment (G. L. c. 90, § 24G [*a*] and [*b*], include this phrase) has superseded the holding of *Commonwealth v. Paccia*, 338 Mass. 4, 6 (1958), which held the statute did not apply to privately owned places not subject to any general public easement as of right and it would now be sufficient to prove operation in any place to which the public had a right of access as invitees or licensees, such as chain store parking lots, school yards, etc., as well as a public way. *Commonwealth v. Callahan*, 405 Mass. 200, 202-205 (1989). *Commonwealth v. Endicott*, 17 Mass. App. Ct. 1025 (1984) (Court declined to answer a reported question as to whether a beach is a public way as defined by G. L. c. 90, § 24G, stating that it would be preferable to have a completed trial record. However, Justice Brown, in a concurring opinion, indicated that it was clear that the statute included incidents occurring on that particular beach property, but the Commonwealth must prove each element beyond a reasonable doubt). *Cf. Commonwealth v. George*, 406 Mass. 635, 638-640 (1990) (center field of public school baseball field not public way or place to which public had access by motor vehicle as of right or as invitees or licensees).

In *Commonwealth v. Callahan*, *supra*, the court found that privately owned sand pits were not places to which members of the public had access as invitees or licensees, and thus, a defendant, who drove a pickup truck which struck an eleven year old boy operating a go-cart on the sand pits, could not be charged under G. L. c. 90, § 24G (*b*). In this case, although members of the public regularly rode recreational vehicles on the property, the owners had at one time placed "No Trespassing" signs there and had notified police who said they would patrol the area. The trial court found, however, that the owners took no affirmative steps to exclude the public from the sand lots. Nevertheless, the court concluded that the public had access to the property only as trespassers, who enter the land without a privilege "created by the possessor's consent or otherwise." *Id.* at 204.

32. G. L. c. 233, § 79F. Other official documents, while not prima facie evidence, are admissible as evidence tending to show that a particular road is a public way. *Commonwealth v. Hazelton,* 11 Mass. App. Ct. 899, 900 (1980) (conveying deed, certificate of municipal acceptance, certificate of municipal road directory).

33. *Commonwealth v. Smithson*, 41 Mass. App. Ct. 545, 549 (1996).

34. *Id.* at 549-550. See *Commonwealth v. Muise*, 28 Mass. App. Ct. 964, 965 (1990) (usual indicia of public way include paved roads, absence of signs prohibiting access, street lights, curbing, abutting houses or businesses, crossroads, traffic signs, signals, lighting, and fire hydrants); *Commonwealth v. Hart*, 26 Mass. App. Ct. 235, 238 (1988); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010 (1987); *Commonwealth v. Hazelton,* 11 Mass. App. Ct. at 899-900 (other evidence to be considered is whether road was regularly patrolled by police, whether town plowed and maintained road and whether town owned land where road was located or had accepted road).

35. *Commonwealth v. Tynes*, 400 Mass. 369, 374 n.2 (1987). See *Commonwealth v. Drew*, 11 Mass. App. Ct. 517, 520, *rev. denied*, 383 Mass. 892 (1981).

36. *Commonwealth v. Tynes*, 400 Mass. at 374 n.2. See *Commonwealth v. Lyseth*, 250 Mass. 555, 558 (1925).

37. *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985). *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 13 (1986), *rev. denied*, 400 Mass. 1104 (1987). See *Commonwealth v. Luiz*, 28 Mass. App. Ct. 973, 974 (1990) (conviction under G. L. c. 90, § 24G, reversed where judge failed to instruct jury in accordance with *Connolly*.

38. *Commonwealth v. Connolly*, 394 Mass. at 173.

39. *Commonwealth v. Stathopoulos*, 401 Mass. at 456-457 & n.4. This instruction should be given when the indictment charges the defendant with being only under the influence of one intoxicating substance, but there was evidence presented at trial that the defendant was under the influence of more than one substance. The situation where both alcohol and illicit drugs are concurrent causes of the defendant's voluntary intoxication, however, must be distinguished from that discussed in *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358 (1982), where a legally prescribed drug may have been the sole cause of the defendant's involuntary intoxication.

40. *Commonwealth v. Campbell*, 394 Mass. 77, 85-86 (1985).

41. *Commonwealth v. Welansky*, 316 Mass. at 397.

42. *Id. at 398.*

43. *Id.* at 399.

44. *Commonwealth v. Jones*, 382 Mass. at 389; *Commonwealth v. Kline*, 19 Mass. App. Ct. 715, 720 (1985).

45. *Commonwealth v. Kline*, 19 Mass. App. Ct. at 720, quoting *Goldstein v. Gontarz*, 364 Mass. 800, 805 (1974). Ordinary negligence is sufficient to establish a violation of this statute. *Commonwealth v. Jones*, 382 Mass. at 389.

46. Mere negligence is not enough. The Commonwealth must show negligence which endangers lives and safety of the public. *Commonwealth v. Campbell*, 394 Mass. at 85. Additionally, the instruction must clearly state that the Commonwealth must prove that the public might be endangered, and the proof of such negligence must be in addition to proof that the defendant operated under the influence of an intoxicating substance. In other words, the charge *should not* leave the jury with the impression that negligence may be inferred solely from the finding that the defendant had operated his vehicle under the influence of an intoxicating substance. *Id.* at 86.

47. *Commonwealth v. Campbell*, 394 Mass. at 83. *Commonwealth v. Charland*, 338 Mass. 742, 744 (1959). Evidence of a violation of a statute, such as the one governing the speed limit, is not negligence *per se*, but is evidence of negligence, which may be considered in combination with other evidence in determining negligence. *Campbell*, 394 Mass. at 83 n.5.

48. *Id*. at 83. *Commonwealth v. Kline*, 19 Mass. App. Ct. at 720. Cf. *Aucella v. Commonwealth*, 406 Mass. 415, 418-420 (1990) (essential element of crime missing where no evidence presented on how automobile was operated before it struck victims).

49. The proper standard of causation under the statute is the standard of proximate causation in tort law. *Commonwealth v. Berggren*, 398 Mass. 338, 342 (1986). *Commonwealth v. Diaz*, 19 Mass. App. Ct. 29, 36-37 (1984), *rev. denied*, 393 Mass. 1106 (1985). See *Commonwealth v. Shine,* 25 Mass. App. Ct. 613, 617 n.6, *rev. denied*, 402 Mass. 1103 (1988) (noting that although instructions in *Diaz* may have been more favorable to defendant than is necessary, they avoid the risks inherent in the use of the term "proximate cause").

50. A viable fetus is a "person" for the purposes of this statute. *Commonwealth v. Cass*, 392 Mass. 799, 808 (1984). This decision applies prospectively to homicides occurring after August 16, 1984. The Supreme Judicial Court left open the question of whether a nonviable fetus is a person within the meaning of this statute. *Id.* at 807 n.8.

51. *Commonwealth v. Diaz*, 19 Mass. App. Ct. at 37. *Commonwealth v. Rhoades*, 379 Mass. at 825.

52. *Commonwealth v. Diaz*, 19 Mass. App. Ct. at 37.

53. *Id.*

54. *Commonwealth v. Golston*, 373 Mass. 249, 256 (1977), cert. denied, 434 U.S. 1039 (1978). This charge need be given only if evidence has been presented on the issue of an intervening cause.

55. *Commonwealth v. Campbell*, 394 Mass. at 87. In criminal cases, as opposed to civil negligence suits, a victim's contributory negligence, even if it constitutes a substantial part of proximate cause (but not the sole cause) does not excuse a defendant whose conduct also causes the death of another. This charge should only be given where evidence was presented at trial tending to show that the victim's negligence was the sole cause of death. *Commonwealth v. Haley*, 23 Mass. App. Ct. at 15.

56. *Commonwealth v. Meehan*, 14 Mass. App. Ct. 1028, 1028-1029 (1982). *Cf. Commonwealth v. Riley*, 22 Mass. App. Ct. 698, 704 (1986) (Where only one death resulted, but the defendant was convicted of two counts of homicide, the Appeals Court set aside the verdict of homicide while operating a motor vehicle so as to endanger, and dismissed the corresponding complaint. The court affirmed the conviction of vehicular homicide while operating a motor vehicle while under the influence of intoxicating liquor). See *Fadden v. Commonwealth*, 376 Mass. 604, 609-611 (1978), cert. denied, 440 U.S. 961 (1979) (defendant could be charged with alternative theories of G. L. c. 90, § 24G).

57. G. L. c. 90. § 24G (*b*).

58. This has been modified from the jury charge recommended by the Massachusetts Supreme Judicial Court in *Commonwealth v. Goudreau*, 422 Mass. 731 (1996).

59. *See Commonwealth v. Johnston*, 422 Mass. 420, 424-425 (1996) (a jury instruction regarding lack of criminal responsibility must be given if requested and if supported by the evidence); *Commonwealth v. Kappler*, 416 Mass. 574, 578 (1993)("[w]hen a defendant claims that he is not criminally responsible for his acts, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant is sane"); *Commonwealth v. Kostka*, 370 Mass. 516, 526-527 (1976) (when the defense of a lack of criminal responsibility has been raised, the Commonwealth must prove that the defendant is criminally responsible beyond a reasonable doubt); *Commonwealth v. Johnson*, 188 Mass. 382, 388 (1905) (the burden of proof is on the Commonwealth to satisfy the jury beyond a reasonable doubt that the defendant is legally responsible).

60. *See Commonwealth v. Roman*, 414 Mass. 235, 240 (1993) ("[o]ur law requires jurors to determine criminal responsibility of the person at the time of the commission of the crime"); *Commonwealth v. Smith*, 357 Mass. 168, 177-180 (1970) ("[t]he Commonwealth had the burden of proving that the defendant was sane at the time of the crime alleged against him").

61. *See supra* n.2.

62. *See supra* nn.2 & 3.

63. *Commonwealth v. McHoul*, 352 Mass. 544, 546-547 (1967).

64. *Commonwealth v. Keita*, 429 Mass. 843 (1999).

65. American Law Institute, Model Penal Code, Proposed Official Draft (1962) § 4.01(2). *See Commonwealth v. Chester*, 337 Mass. 702, 712 n.4 (1958) (quoting American Law Institute, Model Penal Code, Report of Judicial Council for 1957, § 4.01, pp. 56-69).

66. The Supreme Judicial Court has never defined the words "mental disease or defect for purposes of the *McHoul* rule." *Commonwealth v. Mills*, 400 Mass. 626, 635 (1987) (O'Connor, Nolan, & Lynch, JJ., dissenting). "[T]he subject is so complex and obscure that any general explanatory formula is likely to mislead and confuse." *Commonwealth v. Fuller*, 421 Mass. 400, 411 (1995).

67. *Commonwealth v. Goudreau*, 422 Mass. at 735. *Commonwealth v. McHoul*, 352 Mass. at 546-547.

68. *Commonwealth v. Robbins*, 422 Mass. 305, 312 n.3 (1996) (no error in the statement "the words to appreciate . . . is to understand rather than to merely know. . . . So the defendant must not only have an understanding, he must have an appreciation of the criminality of his conduct in that instance").

69. *See supra* n.8.

70. See *Commonwealth v. Ruddock,* 428 Mass. 288, 290-291 (1998).

71. *Commonwealth v. McHoul*, 352 Mass. at 551-552 (1967).

72. *Commonwealth v. McHoul*, 352 Mass. at 550 n.5.

73. *Commonwealth v. Goudreau*, 422 Mass. at 735 ("the Commonwealth's burden is to prove both the defendant's substantial capacity to appreciate the wrongfulness of his conduct *and* his substantial capacity to conform his conduct to the requirements of the law").

74. *Id*.

75. The jury is not required to accept the uncontroverted testimony of experts. *Commonwealth v. Kappler*, 416 Mass. at 579. *Commonwealth v. Shelley*, 381 Mass. 340, 347 (1980). "[J]urors are the ultimate judges of expert testimony . . . and such testimony is not conclusive . . . ." *Commonwealth v. Kostka*, 370 Mass. at 536. Additionally, the Commonwealth need not present expert evidence to prove that a defendant is criminally responsible beyond a reasonable doubt, *Commonwealth v. Brennan*, 399 Mass. 358, 364 (1987), and the factfinder may infer criminal responsibility from the facts underlying the crime and evidence of the defendant's actions before and after the crime. *Kappler*, 416 Mass. at 579. *Commonwealth v. Cullen*, 395 Mass. 225, 229 (1985).

76. *Commonwealth v. Smith*, 357 Mass. at 177-180 (the Commonwealth had the burden of proving that the defendant was criminally responsible at the time of the crime).

77. *Commonwealth v. Cataldo*, 423 Mass. 318, 321 (1996).

78. General Laws c. 278, § 8A.

79. *Commonwealth v. Glass*, 401 Mass. 799, 808 (1988) ("[A] defendant might have a reasonable but erroneous belief that a

victim had assaulted or threatened him. Such a defendant would be entitled to a self-defense instruction [assuming all other self-defense conditions were open on the evidence"]).

80. General Laws c. 233, § 23F, expands the types of evidence deemed relevant to self-defense in the context of victims of physical, sexual, or psychological harm or abuse. These draft instructions do not address the special circumstances referred to in the statute.

81. See *Commonwealth v. Kendrick*, 351 Mass. 203, 211 (1966) ("Ordinarily, the question how far a party may properly go in self defense is a question for the jury, not to be judged of very nicely, but with due regard to the infirmity of human impulses and passions").

82. *Commonwealth v. Baseler*, 419 Mass. 500, 503 (1995).

83. *Commonwealth v. Cataldo,* 423 Mass. at 325.

84. See *Commonwealth* v. *Cataldo*, 423 Mass. at 321, 326-327; *Commonwealth* v. *Baseler*, 419 Mass. at 503-504; *Commonwealth v. Bastarache*, 382 Mass. 86, 105 (1980).

85. *Commonwealth v. Mutina*, 366 Mass. 810, 811 n.1 (1975).