

## **NEGLIGENCE**

**Negligence is the failure to use that degree of care which a reasonably prudent person would use under the circumstances, either by doing something that a reasonably prudent person would *not* do, or by failing to do something that a reasonably prudent person *would* do under similar circumstances.**

**Before one can be negligent, one must owe a duty of reasonable care to another person. Motorists owe such a duty to other members of the public in the operation of their vehicles.**

"There is in Massachusetts at common law no such thing as criminal negligence." *Commonwealth v. Welansky*, 316 Mass. 383, 400, 55 N.E.2d 902, 911 (1944). The definition given is the traditional definition of civil negligence. *Altman v. Aronson*, 231 Mass. 588, 591, 121 N.E. 505, 506 (1919). See *Beaver v. Costin*, 352 Mass. 624, 626, 227 N.E.2d 344, 345-346 (1967); *Scott v. Thompson*, 5 Mass. App. Ct. 372, 374-375, 363 N.E.2d 295, 296 (1977). Proof of ordinary (civil) negligence is sufficient in prosecutions for driving negligently so as to endanger (G.L. c. 90, § 24[2][a]) or for vehicular homicide (G.L. c. 90, § 24G). *Commonwealth v. Berggren*, 398 Mass. 338, 340, 496 N.E.2d 660, 661 (1986); *Commonwealth v. Jones*, 382 Mass. 387, 389, 392, 416 N.E.2d 502, 504, 506 (1981); *Commonwealth v. Burke*, 6 Mass. App. Ct. 697, 700 & n.3, 383 N.E.2d 76, 79 & n.3 (1978).

A negligence instruction must make at least some reference to the reasonable person standard and to the attendant circumstances. *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 267, 493 N.E.2d 206, 210 (1986); *O'Leary v. Jacob Miller Co.*, 19 Mass. App. Ct. 947, 948, 473 N.E.2d 200, 201 (1985).

The language of the model instruction is drawn from the *Morgan* case and from *Manual of Model Jury Instructions for the Ninth Circuit* § 14.02(B) (1985 ed.).

SUPPLEMENTAL INSTRUCTIONS

**1. Reasonable care.** A person is negligent if, by doing something or not doing something, he or she fails to use reasonable care. Reasonable care means the level of attention and forethought that a reasonably careful person, a person of ordinary caution and prudence, would exercise in those particular circumstances to avoid harming others.

**2. Violation of safety regulation.** Violation of a safety regulation established by (statute) (ordinance) (by-law) (rule) (regulation) is some evidence of negligence. It is not, however, conclusive evidence of negligence. If it is proved that the defendant violated such a safety regulation, you may consider that fact, together with all the other circumstances, in determining whether the defendant acted negligently.

**3. Civil motor vehicle infraction.** You have heard some evidence suggesting that the defendant may have violated chapter \_\_\_\_\_, section \_\_\_\_\_ of our General Laws, which (requires) (prohibits) a

**motorist \_\_\_\_\_ . Any such violation is a traffic infraction that is civil rather than criminal in nature, and therefore no such charge against the defendant is before you for your resolution.**

**However, that statute was enacted for the safety of the public. As I have indicated, if it is proved that the defendant violated such a statute, you may consider that to be some evidence of whether the defendant was negligent.**

A violation of a safety statute, ordinance, by-law or regulation is evidence of negligence as to all consequences that the enactment was intended to prevent, but is not conclusive. In addition, such violation must be shown to be the proximate cause of the resulting injury. *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.5, 474 N.E.2d 1062, 1067 n.5 (1985) (violation of speed limit); *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 327, 431 N.E.2d 920, 923 (1985) (violation of dram shop law); *Michnik-Zilberman v. Gordon Liquors, Inc.*, 390 Mass. 6, 10, 453 N.E.2d 430, 433 (1983) (selling liquor to minor); *Morris v. Holt*, 380 Mass. 133, 135, 401 N.E.2d 851, 853 (1980) (state sanitary code violation); *Perry v. Medeiros*, 369 Mass. 836, 841, 343 N.E.2d 859, 862 (1976) (building code violation); *Leone v. Doran*, 363 Mass. 1, 8, 292 N.E.2d 19, 26 (1973) (permitting unlawful use of auto); *Kralik v. LeClair*, 315 Mass. 323, 326, 52 N.E.2d 562, 564 (1943) (violation of D.P.W. safety regulation); *Gaw v. Hew Constr. Co.*, 300 Mass. 250, 254, 15 N.E.2d 225, 227 (1938) (building permit violation); *Baggs v. Hirschfield*, 293 Mass. 1, 2, 199 N.E. 136, 137 (1935) (no tail lights); *Thurston v. Ballou*, 23 Mass. App. Ct. 737, 739-740, 505 N.E.2d 888, 890 (1987) (Federal highway safety regulations); *Petras v. Storm*, 18 Mass. App. Ct. 330, 333-334, 465 N.E.2d 283, 286 (1984) (O.U.I.).

The language of the supplemental instruction is adapted from *Florida Standard Jury Instructions in Civil Cases* § 4.11 (1980 ed.).

#### SELECTED RULES OF THE ROAD FROM G.L. c. 90, § 14

1. **Bicyclists.** "In approaching or passing a person on a bicycle the operator of a motor vehicle shall slow down and pass at a safe distance and at a reasonable and proper speed."
2. **Intersections.** "The person operating a motor vehicle on any way . . . upon approaching any junction of said way with an intersecting way shall, before entering the same, slow down and keep to the right of the center lane."
3. **Left turns.** "When approaching for a left turn on a two-way street, an operator shall do so in the lane

of traffic to the right of and nearest to the center line of the roadway and the left turn shall be made by passing to the right of the center line of the entering way where it enters the intersection from his left. When turning to the left within an intersection or into an alley, private road or driveway an operator shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard. When approaching for a left turn on a one-way street, an operator shall do so in the lane of traffic nearest to the left-hand side of the roadway and as close as practicable to the left-hand curb or edge of roadway."

4. **Obstructed view.** "The person operating a motor vehicle on any way or a curve or a corner in said way where his view is obstructed shall slow down and keep to the right . . ."

5. **Pedestrians.** "Upon approaching a pedestrian who is upon the traveled part of any way and not upon a sidewalk, every person operating a motor vehicle shall slow down."

6. **Right turns.** "When turning to the right, an operator shall do so in the lane of traffic nearest to the right-hand side of the roadway and as close as practicable to the right-hand curb or edge of roadway."