HOMICIDE BY A MOTOR VEHICLE (MISDEMEANOR)

The defendant is charged with homicide by a motor vehicle. Section 24G(b) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

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

***or* upon any way or in any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle

with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater,

or while under the influence of intoxicating liquor

or [certain] drugs] . . .

***or* . . . operates a motor vehicle recklessly**

***or* [operates a motor vehicle] negligently so that the lives or safety of the public might be endangered**

***and* by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle. . . ."**

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

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

Second: **That he (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees;**

Third:

Based on the complaint, use only one *of the following, unless they are charged in the alternative:*

A. *OUI*. **That while the defendant was operating the vehicle, he (she) (had a percentage, by weight, of alcohol in his [her] blood of .08% or greater) (or) (was under the influence of intoxicating liquor) (was under the influence of [marihuana] [narcotic drugs] [depressants] [stimulant substances], as I will define them for you in a moment) (was under the influence of vapors of glue).**

B. *Reckless operation*. **That the defendant operated the vehicle in a manner which is considered "reckless" under the laws of our Commonwealth.**

C. *Negligent operation*. **That the defendant operated the vehicle in a negligent manner so that the lives and safety of the public might have been endangered.**

and *Fourth:* That the defendant's actions caused the death of another person. The defendant caused the death if his (her) actions directly and substantially set in motion the entire chain of events that produced the death. The defendant is the cause of the death if his (her) actions produced it in a natural and continuous sequence, and the death would not have occurred without the defendant's actions.

At this point, the jury must be instructed on the definitions of "Operation of a motor vehicle" (Instruction 3.200) and "Public way" (Instruction 3.280). In addition, the jury must be instructed on the two appropriate predicate offenses: (1) either OUI-Liquor or with .08% Blood Alcohol (Instruction 5.300) or OUI-Drugs (Instruction 5.400), plus (2) either "Operating negligently so as to endanger" (Instruction 5.240) or "Operating recklessly" (Instruction 5.260).

Commonwealth v. Geisler, 14 Mass. App. Ct. 268, 276, 438 N.E.2d 375, 380 (1982); *Commonwealth v. Burke*, 6 Mass. App. Ct. 697, 699, 383 N.E.2d 76, 78 (1978). The statutory branches (operating under the influence, negligently, recklessly [, or with .08% blood alcohol]) are disjunctive, independent grounds for conviction of misdemeanor vehicular homicide. *Commonwealth v. Jones*, 382 Mass. 387, 389, 416 N.E.2d 502, 504 (1981). The "negligence" standard to be utilized is that of civil tort law. *Id.*; *Burke*, 6 Mass. App. Ct. at 700-701, 383 N.E.2d at 79. Evidence of intoxication may be admissible on the issue of negligence as well as on the issue of operating under the influence. *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.6, 474 N.E.2d 1062, 1067 n.6 (1985). As to whether "public way" is an element of the "reckless or negligent" branch of the statute, see *Commonwealth v. Callahan,* 405 Mass. 200, 201 n.1, 539 N.E.2d 533, 534 n.1 (1989). See the note *infra* on the definition of causality.

SUPPLEMENTAL INSTRUCTION

Intervening and superseding causes. **There may be more than one cause of a person's death. The Commonwealth is not required to prove that the defendant was the *only* cause of the victim's death, but it *is* required to prove beyond a reasonable doubt that the defendant caused the death in the sense that he (she) directly and substantially set in motion a chain of events that produced the death in natural and continuous sequence.**

If the defendant's actions would not have brought about the death all by themselves, without the intervention of some other person or event, the defendant is still held responsible as the cause of the death if two conditions are met:

First: **The defendant's actions directly and substantially set in motion a natural and continuous sequence of events that caused the death; and**

Second: **A reasonable person in the defendant's position would have foreseen that his (her) actions could easily result in serious injury or death to someone like the victim.**

If both of these two conditions are proved beyond a reasonable doubt, then the defendant is responsible as the cause of the death, even if there were other causes which contributed to some degree in producing the fatal result — for example, if the victim was also negligent or intoxicated, or if rescue personnel or medical personnel later were also negligent.

On the other hand, the law does *not* consider the defendant to be the cause of the death, and therefore must be acquitted, if some other person or event was the direct and substantial cause of the death, and the defendant's actions were only a minor and remote link in the chain of events leading to the death. The defendant must also be acquitted if the death would not have occurred without the intervention of some other person or event, and a reasonable person in the same circumstances would not have foreseen the likely possibility of such a result.

NOTES:

1. **Bicyclists and pedestrians**. "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 . . . . 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." G.L. c. 90, § 14. The mere happening of an accident between a vehicle and a pedestrian is not, standing alone, sufficient to prove negligence by the vehicle's operator. *Aucella v. Commonwealth,* 406 Mass. 415, 418, 548 N.E.2d 193, 195 (1990).

2. **Companion traffic violations**. For the effect of a prior acquittal of companion traffic violations, see *Commonwealth v. Kline*, 19 Mass. App. Ct. 715, 717-719, 477 N.E.2d 193, 194-196 (1985).

3. **Constitutionality**. Section 24G is not unconstitutionally vague, *Burke*, 6 Mass. App. Ct. at 698-700, 383 N.E.2d at 78-79, its penalty range is not unconstitutional for criminally punishing ordinary negligence, *Commonwealth v. Jones*, 9 Mass. App. Ct. 103, 120-121, 399 N.E.2d 1087, 1099-1100 (1980), aff'd, 382 Mass. 387, 416 N.E.2d 502 (1981), and its one-year mandatory minimum sentence for a felony violation is neither cruel and unusual punishment, a due process violation, or an art. 30 separation of powers violation, *Commonwealth v. Therriault*, 401 Mass. 237, 515 N.E.2d 1198 (1987).

4. **Continuance without a finding impermissible.** The prohibition in G.L. c. 90, § 24G(a) on filing or continuing without a finding a vehicular homicide charge governs all prosecutions "commenced under this section" and therefore applies both to felony vehicular homicide under § 24G(a) and misdemeanor vehicular homicide under § 24G(b). *Commonwealth v. Millican*, 449 Mass. 298, 867 N.E.2d 725 (2007).

5. **Misdemeanor and felony branches**. Statute 1982, c. 373 divided G.L. c. 90, § 24G into two subsections: misdemeanor vehicular homicide (§ 24G[b]), caused *either* by operation under the influence, *or* reckless operation, *or* negligent operation, and felony vehicular homicide (§ 24G[a]), caused by operation under the influence *coupled with* either reckless or negligent operation. *Campbell*, 394 Mass. at 86-87, 474 N.E.2d at 1068-1069. The District Court has final jurisdiction over both the misdemeanor and felony forms of vehicular homicide. G.L. c. 218, § 26. The complaint must be scrutinized in advance so that the instruction may be appropriately tailored. See Instruction 5.140 for an instruction covering felony vehicular homicide.

6. **Multiple counts where single death**. Where a defendant is convicted both of one count of vehicular homicide while operating under the influence of intoxicating liquor and a second count of vehicular homicide while operating to endanger, both referring to the same victim, the judge must dismiss one of the counts. *Commonwealth v. Riley*, 22 Mass. App. Ct. 698, 703-704, 497 N.E.2d 651, 655 (1986).

7. **Multiple victims**. Multiple deaths caused in a single accident may each be charged and punished as separate offenses. *Commonwealth v. Meehan*, 14 Mass. App. Ct. 1028, 442 N.E.2d 43 (1982).

8. **Proximate cause**. See *Commonwealth v. Carlson*, 447 Mass. 79, 83, 84, 849 N.E.2d 790, 794 (2006), affirming this instruction's wording as to proximate and intervening causes. "'Proximate cause' defines a point beyond which the law will not recognize a contributing factor as a cause giving rise to liability. 'The term "proximate" is used in contrast to the term "remote"'" (citation omitted). *Commonwealth v. McLeod*, 394 Mass. 727, 735, 477 N.E.2d 972, 979 (1985). "[W]e use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts . . . . Accordingly, among the many shapes this concept took at common law . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 112 S.Ct. 1311 (1992).

In a murder context, the Supreme Judicial Court has approved a definition of proximate cause as "a cause, which, in the natural and continuous sequence, produces the death, and without which the death would not have occurred." *Id.*, 394 Mass. at 735-736, 477 N.E.2d at 980; *Commonwealth v. Rhoades*, 379 Mass. 810, 825, 401 N.E.2d 342, 351 (1980). While a defendant accused of murder or manslaughter need not be the sole cause of the death, *Id.*, 379 Mass. at 823 n.12, 401 N.E.2d at 350 n.12, he or she must be the "efficient cause, the cause that necessarily set[ ] in operation the factors which caused the death," *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 421, 467 N.E.2d 214, 217 (1984). If the defendant proximally caused the death, he or she is liable for it even if there are other contributing causes, such as simultaneous assault by another, *Commonwealth v. Flynn,* 37 Mass. App. Ct. 550, 554-555, 640 N.E.2d 1128, 1130-1131 (1994); *Joyce, supra*, or subsequent assault by another, *McLeod*, 394 Mass. at 744-745, 477 N.E.2d at 984-985, or subsequent negligent medical treatment, *Commonwealth v. Williams*, 399 Mass. 60, 64-65, 503 N.E.2d 1, 4 (1987); *Commonwealth v. Fernette*, 398 Mass. 658, 667-668, 500 N.E.2d 1290, 1296 (1986); *Commonwealth v. Golston*, 373 Mass. 249, 256-257, 366 N.E.2d 744, 749-750 (1977), cert. denied, 434 U.S. 1039 (1979). The jury must be satisfied that the defendant's "negligence was the efficient cause or the cause that necessarily set in operation all of the factors which ultimately caused the death . . . . It would not be sufficient to convict . . . if the jurors were to find that the defendant's negligence was only a link, no matter how remote, in the chain

of events . . . leading to [the] death." This definition of proximate cause in homicide cases "entail[s] a closer relationship between the result and the intended conduct than proximate causation in tort law." *Commonwealth v. Diaz*, 19 Mass. App. Ct. 29, 36-37, 471 N.E.2d 741, 746 (1984). See *Commonwealth v. Bianco*, 388 Mass. 358, 362-364, 446 N.E.2d 1041, 1045 (1985).

By contrast, *Commonwealth v. Berggren*, 398 Mass. 338, 496 N.E.2d 660 (1986), established that the broader tort standard of proximate causation is to be applied in vehicular homicide cases. Despite the presence of intervening persons or events, the defendant's negligence is the proximate cause if the death results from a natural and continuous sequence of events caused by the defendant's actions and if, in the circumstances, the likelihood of serious injury to someone like the victim was foreseeable. *Id.*, 398 Mass. at 341, 496 N.E.2d at 661-662; *Commonwealth v. Carlson*, 447 Mass. 79, 83, 84, 849 N.E.2d 790, 794 (2006).

In tort law, a defendant is the proximate cause of an injury if he or she is a substantial (as opposed to a remote) factor in bringing it about. *Johnson v. Summers,* 411 Mass. 82, 88, 577 N.E.2d 301, 305 (1991); Restatement (Second) of Torts § 431(a) (1965). See *Commonwealth v. Matos,* 36 Mass. App. Ct. 958, 961, 634 N.E.2d 138, 141-142 (1994) (judge not required to use exact words "substantial cause" in instructing jury). An intervening cause does not amount to a superseding cause that will excuse the defendant from liability if the defendant should have realized that his or her acts might cause harm to another in substantially the manner in which it happened. *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 193, 435 N.E.2d 628, 632 (1982), citing Restatement (Second) of Torts § 435(2), Comment b (1965); *Jesionek v. Massachusetts Port Auth.*, 376 Mass. 101, 105-106, 378 N.E.2d 995, 997 (1978); *Marshall v. Carter*, 301 Mass. 372, 377-378, 17 N.E.2d 205, 208 (1938); *Ogden v. Aspinwall*, 220 Mass. 100, 103, 107 N.E. 448, 449 (1915); *Lawrence v. Kamco, Inc.*, 8 Mass. App. Ct. 854, 857-859, 397 N.E.2d 1157, 1159-1160 (1979). See J.R. Nolan, *Tort Law* § 204 (1979). This foreseeability test has been applied whether the intervening cause was the non-negligent conduct of another, *Carlson*, 447 Mass. at 85, 849 N.E.2d at 795; *Wilborg v. Denzell*, 359 Mass. 279, 285, 268 N.E.2d 855, 859 (1971), the negligence of another, *Tritsch v. Boston Edison Co.*, 363 Mass. 179, 182, 293 N.E.2d 264, 266-267 (1973); *Smith v. Eagle Cornice & Skylight Works*, 341 Mass. 139, 141-142, 167 N.E.2d 637, 638-639 (1960); *Delicata v. Bourlesses*, 9 Mass. App. Ct. 713, 720, 404 N.E.2d 667, 671-672 (1980); *E.H. Hall Co. v. U.S. Plastics Corp.*, 2 Mass. App. Ct. 169, 173, 309 N.E.2d 533, 536 (1974), the intentional tort of another, *Mullins v. Pine Manor College*, 389 Mass. 47, 58-62, 449 N.E.2d 331, 338-341 (1983); *Gidwani v. Wasserman*, 373 Mass. 162, 166-167, 365 N.E.2d 827, 830-831 (1977); *O'Malley v. Putnam Safe Deposit Vaults, Inc.*, 17 Mass. App. Ct. 332, 342-343, 458 N.E.2d 752, 760 (1984); *Lawrence, supra*, or a natural "act of God," *L.G. Balfour Co. v. Ablondi & Boynton Corp.*, 3 Mass. App. Ct. 658, 661, 338 N.E.2d 841, 844 (1975). A defendant "is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable." *Zompanti v. Ferguson*, 336 Mass. 167, 169, 142 N.E.2d 903, 904 (1957), quoting *Falk v. Finkelman*, 268 Mass. 524, 527, 168 N.E. 89, 90 (1929).

Under this broader rule, the defendant is not excused by the contributory negligence of the victim unless it rises to the level of sole cause. *Campbell*, 394 Mass. at 87, 474 N.E.2d at 1069; *Commonwealth v. Mandell,* 29 Mass. App. Ct. 504, 506 n.5, 562 N.E.2d 111, 112 n.5 (1990); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 14-15, 498 N.E.2d 1063, 1067-1068 (1986); *O'Malley*, 17 Mass. App. Ct. at 343 n.10, 458 N.E.2d at 760 n.10; *Geisler*, 14 Mass. App. Ct. at 278-280, 438 N.E.2d at 381-382. See *Commonwealth v. Molari,* 31 Mass. App. Ct. 941, 942-943, 579 N.E.2d 1372, 1374 (1991) (undisclosed evidence of victim's prior ingestion of alcohol was not exculpatory, absent evidence of causal connection to accident). Nor is the defendant excused from liability for aggravated injuries suffered by a susceptible victim. *Carlson*, 447 Mass. at 83, 84, 849 N.E.2d at 793-794 (preexisting condition; victim's decision to forgo invasive life support); *Webber v. Old Colony St. Ry. Co.*, 210 Mass. 432, 442, 97 N.E. 74, 75 (1912) (preexisting condition); *Wallace v. Ludwig*, 292 Mass. 251, 256-259, 198 N.E. 159, 162-163 (1935) (consequently contracted disease).

While acknowledging the *Berggren* decision, the Appeals Court nevertheless recommends that judges in their vehicular homicide instructions continue to explain proximate cause in language drawn from murder cases, although this is concededly more favorable to the defendant than he or she is entitled to. *Commonwealth v. Shine*, 25 Mass. App. Ct. 613, 617 n.6, 521 N.E.2d 749, 751 n.6 (1988); *Diaz*, 19 Mass. App. Ct. at 37, 471 N.E.2d at 746-747. The model instruction *supra* follows that recommendation by closely paraphrasing the language expressly endorsed by the Appeals Court: that the defendant's acts must "in the natural and continuous sequence [have] produced the death and without which the death would not have occurred" and must have "necessarily set in operation all of the factors which ultimately caused the death." *Shine, supra.* The supplemental instruction, however, also adds language drawn from *Berggren* and omits the "without which the death would not have occurred" phrase from *Shine*, since "but for"

definitions of proximate cause are not helpful where simultaneous causes are involved. See *O'Malley, supra; Nolan, supra,* § 202 at 311-312.

In empirical experiments, the term "proximate cause" is often misunderstood by jurors as "approximate cause." See Harrow & Harrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Colum. L. Rev. 1306, 1353 (1979). The Restatement (Second) of Torts § 430 (1965) prefers the term "legal cause." The model instruction simply uses the term "cause," accompanied by a definition. If it is used, the term "proximate cause" should be used only in the singular voice and with the definite article, since "there cannot be more than one 'proximate cause' . . . . [although] there can be more than one cause which in the natural and continued sequence produces the death and without which the death would not have occurred." *Shine*, 25 Mass. App. Ct. at 616 n.5, 521 N.E.2d at 751 n.5. But see *Flynn, supra.* See also *Commonwealth v. Askew,* 404 Mass. 532, 535, 536 N.E.2d 341, 343 (1989) (words such as "dependent" or "independent" intervening cause and "superseding" cause, "although perhaps helpful categories for legal analysis and discussion, do not help a jury to understand the concept of proximate cause.")

9. **Viable fetus**. After August 16, 1984, prenatal injuries to a viable fetus resulting in its death, before or after birth, will support a vehicular homicide charge. *Commonwealth v. Caso*, 392 Mass. 799, 467 N.E.2d 1324 (1984). See *Commonwealth v. Lawrence*, 404 Mass. 378, 383-384, 536 N.E.2d 571, 575-576 (1989).