

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence which you may use to determine the facts of a case: direct evidence and circumstantial evidence. You have direct evidence where a witness testifies directly about the fact that is to be proved, based on what he claims to have seen or heard or felt with his own senses, and the only question is whether you believe the witness. You have circumstantial evidence where the witness cannot testify directly about the fact that is to be proved, but you are presented with evidence of other facts and you are then asked to draw reasonable inferences from them about the fact which is to be proved.

Optional example: Let me give you an example. Your daughter might tell you one morning that she sees the mailman at your mailbox. That is *direct* evidence that the mailman has been to your house. On the other hand, she might tell you only that she sees mail in the mailbox. That is *circumstantial* evidence that the mailman has been there; no one has seen him, but you can reasonably infer that he has been there since there is mail in the box.

The law allows either type of proof in a criminal trial. There are two things to keep in mind about circumstantial evidence:

The first one is that you may draw inferences and conclusions only from facts that have been proved to you.

The second rule is that any inferences or conclusions which you draw must be reasonable and natural, based on your common sense and experience of life. In a chain of circumstantial evidence, it is not required that every one of your inferences and conclusions be inevitable, but it is required that each of them be reasonable, that they all be consistent with one another, and that together they establish the defendant's guilt beyond a reasonable doubt.

If the Commonwealth's case is based solely on circumstantial evidence, you may find the defendant guilty only if those circumstances are conclusive enough to leave you with a moral certainty, a clear and settled belief, that the defendant is guilty and that there is no other reasonable explanation of the facts as proven. The evidence must not only be consistent with the defendant's guilt, it must be inconsistent with his (her) innocence.

Whether the evidence is direct or circumstantial, the Commonwealth must prove the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

There is no difference in probative value between direct and circumstantial evidence. *Commonwealth v. Corriveau*, 396 Mass. 319, 339, 486 N.E.2d 29, 43 (1986). Circumstantial evidence is competent to establish guilt beyond a reasonable doubt. *Commonwealth v. Nadworny*, 396 Mass. 342, 354, 486 N.E.2d 675, 682 (1985); *Commonwealth v. Anderson*, 396 Mass. 306, 311, 486 N.E.2d 19, 22 (1985); *Commonwealth v. McGahee*, 393 Mass. 743, 750, 473 N.E.2d 1077, 1082 (1985). Physical evidence may be valid circumstantial evidence if it is authenticated. *Commonwealth v. Drayton*, 386 Mass. 39, 48, 434 N.E.2d 997, 1005 (1982).

The language of the model instruction defining direct and circumstantial evidence and requiring inferences to be consistent with each other is a paraphrase of the charges in *Commonwealth v. Tucker*, 189 Mass. 457, 461 (1905), and *Commonwealth v. Webster*, 5 Cush. 295, 310-320 (1878). The language that "any inferences or conclusions which you draw must be reasonable and natural, based on your common sense and experience of life" was affirmed in *Commonwealth v. Cordle*, 412 Mass. 172, 178, 587 N.E.2d 1372, 1376 (1992). The language that individual inferences in a circumstantial web need not be necessary ones is based on *Commonwealth v. Best*, 381 Mass. 472, 473, 411 N.E.2d 442, 449 (1980), and *Commonwealth v. Walter*, 10 Mass. App. Ct. 255, 257, 406 N.E.2d 1304, 1306 (1980), and *Commonwealth v. Mezzanotti*, 25 Mass. App. Ct. 522, 525-526, 529 N.E.2d 1351, 1354 (1988). The first sentence of the penultimate paragraph of the model instruction is a paraphrase of *Commonwealth v. Russ*, 232 Mass. 58, 68, 122 N.E. 176, 180 (1919). See also *Commonwealth v. Helfant*, 398 Mass. 214, 226 n.9, 496 N.E.2d 433, 442 n.9 (1986), and *Commonwealth v. Hicks*, 377 Mass. 1, 8-9, 384 N.E.2d 1206, 1211-1212 (1979). For another example illustrating circumstantial evidence, see *Commonwealth v. Shea*, 398 Mass. 264, 270 n.3, 496 N.E.2d 631, 635 n.3 (1986). See generally *Commonwealth v. Medeiros*, 354 Mass. 193, 197, 235 N.E.2d 642, 644 (1968), cert. denied sub nom. *Bernier v. Mass.*, 393 U.S. 1058 (1969); *Commonwealth v. Croft*, 345 Mass. 143, 144-145, 186 N.E.2d 468, 468-469 (1962); *Commonwealth v. Shea*, 324 Mass. 710, 713, 88 N.E.2d 645, 647 (1949).

See also Instruction 3.100 (Inferences).

SUPPLEMENTAL INSTRUCTION

Advantages and disadvantages of each.

Each type of evidence has certain advantages and disadvantages:

The advantage of direct evidence is that, if it is accurate, it deals directly and specifically with the fact to be proved. Its disadvantage is that its value depends entirely on whether that witness is truthful and accurate or whether that item of physical evidence is authentic.

Circumstantial evidence — whether it is in the form of testimony or physical evidence — may have an advantage because it comes from several different sources, which can be used as a check on each other. Its disadvantage is that it is indirect: you must piece it all together and then determine whether or not it leads to a reasonable conclusion about the fact which is to be proved.

Webster, 5 Cush. at 311-312.

NOTES:

1. **Subsidiary facts need not be proved beyond reasonable doubt.** The defendant is not entitled to an instruction that the jury may draw an inference only if the Commonwealth has proved beyond a reasonable doubt the subsidiary facts on which it rests. *Commonwealth v. Lawrence*, 404 Mass. 378, 394, 536 N.E.2d 571, 581 (1989).

2. **Subsidiary inferences need not be proved beyond reasonable doubt.** There is no requirement that every inference must be proved beyond a reasonable doubt. *Commonwealth v. Ruggerio*, 32 Mass. App. Ct. 964, 966, 592 N.E.2d 753, 755 (1992); *Commonwealth v. Azar*, 32 Mass. App. Ct. 290, 309, 588 N.E.2d 1352, 1364 (1992). It appears that *Commonwealth v. Niziolek*, 380 Mass. 513, 522, 404 N.E.2d 643, 648 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982), entitles the defense to an instruction that the jury may not draw an inference unless they are persuaded of the truth of the inference beyond a reasonable doubt only in the case of an inference that directly establishes an element of the crime, and not to subsidiary inferences in the chain of reasoning.

3. **“Two possible inferences.”** If the judge correctly charges on reasonable doubt and the burden of proof, the judge is not required to charge on request that if the evidence is susceptible of two reasonable interpretations, the jury must adopt that favoring the defendant. *Commonwealth v. Rhoades*, 379 Mass. 810, 822, 401 N.E.2d 342, 349-350 (1980). Such a charge might be open to objection that it suggests that the Commonwealth could prevail on a standard less than proof beyond a reasonable doubt. See *Id.*, 379 Mass. at 822 n.11, 401 N.E.2d at 350 n.11. Where the judge correctly charges on reasonable doubt, the judge is not required to charge on request that if the evidence sustains either of two inconsistent propositions, neither has been established. *Commonwealth v. Basch*, 386 Mass. 620, 625-626, 437 N.E.2d 200, 205 (1982).