

OPERATION OF A MOTOR VEHICLE

A person “operates” a motor vehicle not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act which directly tends to set the vehicle in motion. The law is that a person is “operating” a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle — like the gear shift or the ignition — which, alone or in sequence, will set the vehicle in motion.

Commonwealth v. Ginnetti, 400 Mass. 181, 184, 508 N.E.2d 603, 605 (1987); *Commonwealth v. Uski*, 263 Mass. 22, 24, 160 N.E. 305, 306 (1928).

An intoxicated defendant found asleep behind the wheel of a vehicle parked on a public way, with the key in the ignition and the engine on, may be found to have “operated” the vehicle; the Commonwealth need not prove that the vehicle was driven before being parked nor prove the defendant’s intention after occupying the driver’s seat. *Commonwealth v. Sudderth*, 37 Mass. App. Ct. 317, 319-320, 640 N.E.2d 481, 482-483 (1994). However, the judge may not charge that such circumstances constitute operation as a matter of law. *Commonwealth v. Plowman*, 28 Mass. App. Ct. 230, 233-234, 548 N.E.2d 1278, 1280 (1990). See *Commonwealth v. Platt*, 57 Mass. App. Ct. 264, 267 nn. 5 & 6, 782 N.E.2d 542, 544 n.5 & 545 n.6 (2003) (collecting cases with sufficient and insufficient circumstantial evidence of operation).

SUPPLEMENTAL INSTRUCTIONS

1. “Motor vehicle.”

The law defines what a “motor vehicle” is as follows: “all vehicles constructed and designed for propulsion by power other than muscular power,” with certain

exceptions that are not relevant here.

G.L. c. 90, § 1. The jury may be given more of the statutory definition where appropriate to indicate that the term “motor vehicle” includes vehicles being pulled or towed, but excludes railroad, railway, trolley and other vehicles on tracks, highway construction and maintenance equipment incapable of more than 12 m.p.h., invalid wheelchairs, vehicles operated or guided by pedestrians, and mopeds. Trackless trolleys are included in the statutory definition, but only for certain purposes.

2. Stopped engine.

To “operate” a motor vehicle within the meaning of the law, it is not necessary that the engine be running. A driver continues to operate his or her motor vehicle when it is stopped in the ordinary course of its operation for some reason that is fairly incidental to the vehicle’s operation. A person is also considered to be “operating” a stationary vehicle when he or she manipulates some part of it, like the gear shift, so that it moves forward of its own weight.

Commonwealth v. McGillivray, 78 Mass. App. Ct. 644, 940 N.E.2d 506 (2011), rev. denied 459 Mass. 1107, 944 N.E.2d 1043 (2011); *Commonwealth v. Clarke*, 254 Mass. 566, 568, 150 N.E. 829, 830 (1926); *Commonwealth v. Henry*, 229 Mass. 19, 22, 118 N.E. 224, 225 (1918); *Commonwealth v. Cavallaro*, 25 Mass. App. Ct. 605, 607-611, 521 N.E.2d 420, 421-424 (1988).

3. Circumstantial evidence.

You may find that the defendant was the operator of the motor vehicle even if no witness saw him (her) driving the vehicle, if there is enough circumstantial

evidence to prove to you beyond a reasonable doubt that the vehicle was operated and that the defendant, and no one else, was the operator of that vehicle.

Here instruct on Direct and Circumstantial Evidence (Instruction 2.06).

Commonwealth v. Otmishi, 398 Mass. 69, 70-71, 494 N.E.2d 1350, 1351-1352 (1986); *Commonwealth v. Hilton*, 398 Mass. 63, 66-68, 494 N.E.2d 1347, 1349-1350 (1986); *Commonwealth v. Smith*, 368 Mass. 126, 330 N.E.2d 197 (1975); *Commonwealth v. Rand*, 363 Mass. 554, 561-563, 296 N.E.2d 200, 205-206 (1973); *Commonwealth v. Wood*, 261 Mass. 458, 459, 158 N.E.2d 834, 834 (1927); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010-1011, 505 N.E.2d 218, 220-221 (1987); *Commonwealth v. Balestra*, 18 Mass. App. Ct. 969, 969-970, 469 N.E.2d 1299, 1300 (1984); *Commonwealth v. Geisler*, 14 Mass. App. Ct. 268, 272-273, 438 N.E.2d 375, 378-379 (1982); *Commonwealth v. Doyle*, 12 Mass. App. Ct. 786, 787-789, 429 N.E.2d 346, 347-348 (1981). For cases where the circumstantial evidence was held insufficient, see *Commonwealth v. Shea*, 324 Mass. 710, 712-714, 88 N.E.2d 645, 646-647 (1949); *Commonwealth v. Mullen*, 3 Mass. App. Ct. 25, 322 N.E.2d 195 (1975).

NOTE:

Uncorroborated confession insufficient. A defendant cannot be convicted solely on his or her uncorroborated confession that he or she was the operator of the motor vehicle, *Commonwealth v. Leonard*, 401 Mass. 470, 517 N.E.2d 157 (1988) (circumstantial evidence pointed equally to defendant and his wife as probable operator), but such corroboration can be furnished by circumstantial evidence, *Commonwealth v. McNelley*, 28 Mass. App. Ct. 985, 987, 554 N.E.2d 37, 39-40 (1990).