MOTOR VEHICLE HOMICIDE
(FELONY – OUI LIQUOR *and* RECKLESSNESS)

G.L. c. 90, § 24G(a)

The defendant is charged with motor vehicle homicide. To prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

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

***Second*: That the defendant did so (on a public 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*: That while operating a motor vehicle, the defendant was under the influence of intoxicating liquor;**

***Fourth*: That while operating a motor vehicle, the defendant did so recklessly so that the lives or safety of the public might be endangered; and**

***Fifth*: That the defendant's act(s) caused the death of another person.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant was operating a motor vehicle. A person "operates" a motor vehicle while doing all of the well-known things that drivers do as they travel on a street or highway, and also when doing any act which directly tends to set the vehicle in motion. A person is "operating" a motor vehicle whenever they are in the vehicle and intentionally manipulate 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.

Additional instructions on "operation" may be found in Instruction 3.200 (Revised January 2013). Additional instruction on what constitutes a "motor vehicle" may be found in Instruction 3.210 (Revised May 2017).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle on a public way. Any street or highway that is open to the public and is controlled and maintained by some level of government is a "public way." This would include, for example, interstate and state highways as well as municipal streets and roads. In determining whether any particular street or road is a public way, you may consider evidence, if any, about whether it has some of the usual indications of a public way — for example, whether it is paved,

whether it has streetlights, street signs, curbing and fire hydrants, whether there are buildings along the street, whether it has any crossroads intersecting it, and whether it is publicly maintained.

Public way is an element of the vehicular homicide statute. See *Commonwealth v. Angelo Todesca Corp.,* 446 Mass. 128, 142-143 (2006). Additional instructions on "public way", including language related to a public "right of access" or access as "invitees or licensees", may be found in Instruction 3.280 (Revised 2009).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor, that is, alcohol, while operating a motor vehicle. What does it mean to be "under the influence" of alcohol? It is not illegal to drive after consuming alcohol as long as the operator is not under the influence of alcohol. However, neither does someone have to be drunk to be under the influence of alcohol. A person is under the influence of alcohol if they have consumed enough alcohol to reduce their ability to operate a motor vehicle safely, by decreasing their judgment, alertness, and ability to respond promptly and effectively to unexpected emergencies. It means that a person has consumed enough alcohol to reduce their mental clarity, self-control and reflexes, and thereby left them with a reduced ability to drive safely. The amount of alcohol necessary to do this may vary from person to person. You may rely on your own experience and

common sense about the effects of alcohol. You should consider any believable evidence about the defendant's alleged consumption of alcohol, as well as the defendant's appearance, condition, and behavior.

See *Commonwealth v. Tynes*, 400 Mass. 369, 374-375 (1987); *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985); *Commonwealth v. Lyseth*, 250 Mass. 555, 558 (1925).

It is correct to charge that a person need not be drunk to be under the influence of liquor, but it is error to instruct that the defendant need only be "influenced in some perceptible degree" by liquor, *Connolly, supra*, since "a conviction may rest only on proof that alcohol affected him in a *particular* way, i.e., by diminishing his capacity to drive safely" (emphasis in original). *Tynes, supra*. "[T]he Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a motor vehicle safely. *Connolly, supra.* The model instruction appropriately uses the phrase "mental clarity, self-control, and reflexes" as examples or factors that the jury may use in determining whether the defendant's capacity to operate safely was impaired. See *Commonwealth v. Riley,* 48 Mass. App. Ct. 463, 465 (2000). The Commonwealth must prove such impairment beyond a reasonable doubt, but is not required to prove any of those particular three factors. *Id.*

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant drove recklessly in a manner that might have endangered the lives or safety of other people. A person drives recklessly when they ignore the fact that their manner of driving is very likely to result in death or serious injury to someone, or they are indifferent to whether someone may be killed or seriously injured.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a

reasonably careful person would not. Rather, it must be shown that the defendant's actions went beyond negligence and amounted to recklessness. The defendant was reckless if they knew, or should have known, that such actions would pose a grave danger of death or serious injury to others, but they chose, nevertheless, to run the risk and drive in the manner that they did.

In determining whether the defendant drove recklessly in a manner that might have endangered the lives or safety of other people, you should take into account evidence, if any, about: the defendant's rate of speed and manner of operation; the defendant's physical condition and how well they could see and control their vehicle; the condition of the defendant's vehicle; the kind of a road it was and who else was on the road; the time of day, the weather, and the road conditions; what any other vehicles or pedestrians were doing; and any other factors that you think are relevant.

The defendant must have intended their acts, in the sense that the acts were not accidental. But it is not necessary that the defendant intended or foresaw the consequences of those acts, as long as a reasonable person would know that the acts were so

dangerous that death or serious injury to other people would probably result.

See *Commonwealth v. Catalina,* 407 Mass. 779, 789 (1990) (subjective awareness of reckless nature of conduct unnecessary; conduct which a reasonable person in similar circumstances would recognize as reckless suffices); *Commonwealth v. Olivo,* 369 Mass. 62, 67 (1975) (recklessness depends on facts of case); *Commonwealth v. Horsfall,* 213 Mass. 232, 235 (1913) (reckless operation can occur even on deserted street); *Commonwealth v. Welansky,* 316 Mass. 383, 396-401 (1944) (definition of recklessness); *Commonwealth v. Sullivan,* 29 Mass. App. Ct. 93, 96 (1990) (same); *Commonwealth v. Papadinis,* 23 Mass. App. Ct. 570, 574-575 (1987), aff'd, 402 Mass. 73 (1988) (same).

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant's act(s) caused the death of another person. This requires the Commonwealth to prove two things. First, the Commonwealth must prove beyond a reasonable doubt that the death would not have occurred but for the defendant's act(s). The Commonwealth must prove that the defendant's conduct was necessary to bring about the death. If the death would have occurred without the defendant's act(s), the defendant is not responsible for that death.

Second, the Commonwealth must also prove beyond a reasonable doubt that a reasonable person in the defendant's position would have foreseen that their conduct could result in serious injury or death to a person. The Commonwealth does not have to establish that the defendant foresaw, or should have

foreseen, the exact manner in which the injury occurred; but the Commonwealth must establish that the death was a natural and probable consequence of the defendant's act(s).

"The appropriate standard of causation to be applied in a negligent vehicular homicide case under § 24G is that employed in tort law." *Commonwealth* v. *Angelo Todesca Corp.*, 446 Mass. 128, 141 (2006), quoting *Commonwealth v. Berggren*, 398 Mass. 338, 340 (1986). See also *Doull v. Foste*r, 487 Mass. 1, 17-20 (2021).

Note: principles of comparative or contributory negligence do not apply, and are not a defense, to the crime of motor vehicle homicide. See end note #6.
In the rare circumstance where there are multiple sufficient simultaneous causes of death, the jury should be instructed as follows:

It may be that there are two or more events that occur at the same time and each is sufficient to have caused a person's death. By way of example:

Two people were independently camping in a heavily forested campground. Each one had a campfire, and each failed to ensure that they put the fire out before going to bed. Due to unusually dry forest conditions and a strong wind, both campfires escaped their sites and began a forest fire. The two fires, burning out of control, joined together and burned down a hunting lodge. Either fire alone would have destroyed the lodge. Each person's act is a factual cause of the destruction of the hunting lodge.

A defendant whose act was fully capable of causing a person's death should not be acquitted simply because of another sufficient cause, like the second fire, operating at the same time. The causation requirement is satisfied when there are two or more competing causes like the twin fires, each of which is sufficient without the other to cause the death and each of which is in operation at the time a person's death occurs.

In such a case, the Commonwealth does not have to prove that the death would not have occurred but for the defendant's act(s). Instead, it must prove that the defendant's conduct was capable of causing a person's death. In other words, if the Commonwealth proves that – without the other cause – the defendant's act was necessary to bring about the death, then the Commonwealth has met its burden of proof.

See *Doull,* 487 Mass. at 18 & n. 23.

If the Commonwealth has proven all five elements of this offense beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove any one or more of the

elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. Evidence of an accident. **The fact that an accident occurred is not by itself evidence that the defendant was reckless. You must examine all the evidence about how the accident happened in order to determine whether recklessness was involved, and if so, whether the recklessness was the defendant's.**

See *Anderson v. Peter Pan Bus Lines, Inc.,* 56 Mass. App. Ct. 919, 921 (2002) (affirmed instruction to jury that "[t]he mere happening of an accident is not proof of negligence.")

2. Emergency situation. **In determining whether the defendant's conduct was reckless, you may consider whether there was a sudden emergency which required rapid decision. The defendant is not guilty if the defendant acted as a reasonable person would under similar emergency circumstances.**

See *Newman v. Redstone*, 354 Mass. 379, 383 (1968) ("[T]he emergency condition is a factor in determining the reasonable character of the defendant's choice of action.") See also *Hallett v. Wrentham*, 398 Mass. 550, 559 (1986).

3. If there is opinion evidence about the defendant's sobriety (optional). **You have heard testimony of (an opinion) (opinions) about the defendant's sobriety. Ultimately, it is for you as the jury to determine**

whether the defendant was under the influence of alcohol according to the definition I have provided. You may consider any opinion you have heard and accept it or reject it. In the end, you and you alone must decide whether the defendant was under the influence of alcohol.

4. If there is evidence of field sobriety tests or roadside assessments.[1] **You have heard evidence in this case that the defendant performed (field sobriety tests) (roadside assessments). You may accept or reject a police officer's testimony (opinion) about a person's performance on (field sobriety tests) (roadside assessments). It is for you to decide if those (tests) (assessments) assist you in determining whether the defendant's ability to operate a motor vehicle safely was diminished. You may give it such weight as you think it deserves. In evaluating the evidence, you may consider the nature of the (tests) (assessments), the circumstances under which they were given and performed, and all the other evidence in this case.**

5. If the Commonwealth portrays a police officer as an "expert": **A police officer's opinion about a driver's [sobriety] [performance on (field**

[1] If the Commonwealth intends to proceed both upon a charge of OUI-alcohol and OUI-drugs, the Court should order that sobriety tests be referred to in both cases as roadside assessments. See *Commonwealth v. Gerhardt*, 477 Mass. 775, 785 (2017).

sobriety tests) (assessments)] like that testified to in this case is not an expert opinion based on scientific, technical, or other specialized knowledge but, rather, testimony based on the officer's experience, which you may accept or reject.

See *Commonwealth v. Canty*, 466 Mass. 535, 543-544 (2013); *Commonwealth v. Moreno*, 102 Mass. App. Ct. 321, 324-325 (2023) (use of term "sobriety test" did not transform police sergeant's testimony into expert opinion, even coupled with testimony about his training and experience in OUI cases); *Commonwealth v. Dow*, 101 Mass. App. Ct. 1113 (2022) (unpublished) (admission of officers' opinions that defendant was "intoxicated" and "clearly drunk" not error, and, while improper for Commonwealth to suggest that officers' training made them more qualified to assess intoxication than a layperson, error did not create substantial risk of a miscarriage of justice).

6. Absence of breathalyzer ("Downs") instruction only where requested by the defendant. **You are not to consider in anyway whatsoever, either for or against either side, that there is no evidence of a breath or blood test in this case. You may not speculate or guess about why there is no evidence of it. Do not consider that in any way. Do not mention it during your deliberations. Put it completely out of your mind.**

Commonwealth v. Wolfe, 478 Mass. 142, 149-150 (2017) ("defendant should be able to elect whether the jury are instructed about the absence of alcohol-test evidence"; error to give instruction over defendant's objection); *Commonwealth v. Downs*, 53 Mass. App. Ct. 195, 198 (2001). It is error to give it over the defendant's objection. See *Wolfe, supra.* It likewise should not be given even when a jury inquires about a missing breath test unless assented to by the defendant. *Id.* The judge may instruct only that the jury must not speculate about matters about which there is no evidence. *Id* at 150, n. 13. See also *Commonwealth v. Moreno*, 102 Mass. App. Ct. 321, 327-328 (2023) (giving *Downs* instruction in response to jury question about lack of breathalyzer evidence not error where judge consulted defense counsel, who agreed to instruction, and jury affirmatively requested explanation; better practice is to simply instruct jury not to speculate about facts not in evidence).

7. If there is evidence the defendant was not offered field sobriety tests. **There is evidence that there were no (field sobriety tests) (roadside assessments) in this case. This is a factor you may consider in evaluating the evidence presented. With respect to this factor, you should consider three questions:**

First: Whether the omitted tests were standard procedure or steps that would otherwise normally be expected under the circumstances;

Second: Whether the omitted tests could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and

Third: Whether the evidence provides a reasonable or adequate explanation for the omission of the tests or other actions.

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the Commonwealth.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the evidence.

A motorist's refusal to perform sobriety tests when requested to do so by the police may not be admitted in evidence, since such evidence violates the privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights. *Commonwealth v. McGrail*, 419 Mass. 774, 778-780 (1995).

This supplemental instruction is available in the different situation where the police did not offer the defendant an opportunity to perform field sobriety tests, and the defendant argues to the jury that this deprived the defendant of an opportunity to generate exculpatory evidence. See *Commonwealth v. Ames*, 410 Mass. 603, 609 (1991). The judge may also wish to consider leaving the matter to the parties to argue, see *Commonwealth v. Ly*, 19 Mass. App. Ct. 901, 901-02 (1984), unless an instruction is necessary to correct a suggestion that such tests are legally required. This instruction is based upon Instruction 3.740 (Omissions in Police Investigation, Revised 2009)).

In instructing that such tests are not legally mandatory, the judge must avoid negating the defendant's right to build a defense on the grounds that available, probative testing was not performed by police. See *Commonwealth v. Bowden*, 379 Mass. 472, 485-86 (1980).

8. If there is evidence both of alcohol and drug use. **If the Commonwealth has proved beyond a reasonable doubt that the defendant's ability to operate safely was reduced by alcohol, then they have violated the law even if some other factor tended to magnify the effect of the alcohol or contributed to their reduced ability to operate a motor vehicle safely. Alcohol need not be the only exclusive cause. It is not a defense that there was a second contributing cause so long as alcohol was one of the causes of the defendant's reduced ability to operate safely.**

Commonwealth v. Stathopoulos, 401 Mass. 453, 456-457 & n.4 (1988) ("It is enough if the defendant's capacity to operate a motor vehicle is diminished because of alcohol, even though other, concurrent causes contribute to that diminished capacity."); *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70, 74-75 (2010).

9. If breath test result of .05 or less is in evidence. **If the percentage of alcohol by weight in the defendant's blood was .05 percent or less,**

that is evidence from which you may infer that the defendant was not under the influence of alcohol. You are not required to reach that conclusion. You may consider the test result along with all the other evidence in the case to determine whether the Commonwealth has met its burden of proving beyond a reasonable doubt that the defendant was under the influence of alcohol.

10. If breath test result of .06 or .07 is in evidence. **If the percentage of alcohol by weight in the defendant's blood was .06 percent or .07 percent, that is evidence which you may consider in determining whether the defendant had consumed any alcohol. However, you may not draw any inference from those results as to whether or not the defendant was under the influence of alcohol. To determine that issue, you must look to the other evidence in the case.**

> "In any prosecution for a violation of [G.L. c. 90, § 24(a)], evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor . . . . If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor .. . . [;] if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference." G.L. c. 90, § 24(1)(e). See *Commonwealth v. Colturi*, 448 Mass. 809, 817-818 (2007), as to instructing the jury on these statutory inferences.

NOTES:
(See the citations and notes for Instructions 5.310 (OUI-Liquor) and 5.160 (Motor Vehicle Homicide and Negligence.)