

**MOTOR VEHICLE HOMICIDE
(FELONY – \geq .08 BAC *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 percent of alcohol in the defendant's blood was .08 or greater;**

***Fourth:* That while operating a motor vehicle, the defendant did so recklessly such 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, at the time of operation, the percent of alcohol in the defendant’s (breath) (blood) was .08 or greater. The Commonwealth may prove a person’s blood alcohol level by a chemical test or analysis of their breath or blood. In deciding whether the Commonwealth has proved the defendant’s blood alcohol level beyond a reasonable doubt, you may consider evidence, if any, about:

- whether the test was administered within a reasonable time of operation of the motor vehicle;**
- whether the person who administered the test was properly certified;**
- whether and how the pre-test procedures were followed and employed;**
- whether the testing device was working properly at the time the test was administered; and**

- **whether the test was administered properly.**

You may also consider any other evidence pertaining to the test or the test results.

If there is a challenge whether the breath test was administered within a reasonable time, see Supplemental Instruction 3.

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.

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. Foster*, 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 of the elements of the offense beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant 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 any 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 an issue regarding any delay in testing. A breathalyzer test result obtained within three hours of a person's operation of a motor vehicle is considered reasonable unless the evidence convinces you otherwise. Ultimately it is up to you to decide what, if any, to weight to give the test result.

4. If the defendant is permitted to introduce additional test samples. (You have heard testimony) (A document has been introduced in evidence

reporting) that the defendant gave more than one breath sample, and that the results were [results of each reading].

By law, the result of the defendant's test is the lower reading.

You may consider the additional reading(s) only on the issue of whether the lower reading was accurate. If it was not accurate, it must be disregarded.

NOTES:

See the citations and notes for Instructions 5.300 (OUI - \geq .08 BAC) and 5.160 (Motor Vehicle Homicide and Negligence).