

MOTOR VEHICLE HOMICIDE (FELONY – OUI DRUGS *and* NEGLIGENCE)

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 the defendant was operating the vehicle, the defendant was under the influence of [marihuana] [a narcotic drug] [a depressant] [a stimulant] [*if the alleged act was committed before April 13, 2018 - the vapors of glue*] [*if the alleged act was committed on or after April 13, 2018 - the fumes of any substance having the property of releasing toxic vapors that are smelled or inhaled for the purposes of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system*];

Fourth: That while operating a motor vehicle, the defendant did so negligently 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 [marihuana] [a narcotic drug, namely: _____] [a depressant, namely: _____] [a stimulant, namely: _____] [if the alleged act was committed before April 13, 2018 - the vapors of glue] [if the alleged act was committed on or after April 13, 2018 - the fumes of any substance having the property of releasing toxic vapors that are smelled or inhaled for the purposes of causing a condition of

intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system]. In determining whether the Commonwealth has done so, you may consider all the relevant evidence.

When the substance is alleged to be (narcotic drug) (depressant) (stimulant), and if the facts permit the taking of judicial notice that the particular substance meets the definition of narcotic drug, depressant or stimulant substance as provided by G.L. c. 94C, § 1:

I instruct as a matter of law that _____ is a [narcotic drug] [depressant] [stimulant].

If the facts do not permit the taking of judicial notice that the particular substance meets the definition of narcotic drug, or depressant or stimulant substance as provided by G.L. c. 94C, § 1:

Section 1 of chapter 94C of our General Laws defines:

Narcotic Drug “narcotic drug” as any of the following substances, whether produced directly or indirectly by extraction or substances of vegetable origin, or independently by chemical synthesis, or by a combination of extraction and chemical analysis: (a) opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate; (b) any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium; (c) opium poppy and poppy straw;

(d) coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of those substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine;

Depressant or stimulant substance “depressant or stimulant substance” as (a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designed as habit forming; or (b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect on the central nervous system; or (c) lysergic acid diethylamide; or (d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its

depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

What does it mean to be “under the influence” of [marihuana] [narcotic drugs] [depressants] [stimulants] *[if the alleged act was committed before April 13, 2018 - the vapors of glue] [if the alleged act was committed on or after April 13, 2018 - the fumes of any substance having the property of releasing toxic vapors]*? A person is under the influence of such a substance if they have consumed enough of it 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. This would include anyone who has consumed enough [marihuana] [narcotic drugs] [depressants] [stimulant substances] *[if the alleged act was committed before April 13, 2018 - the vapors of glue] [if the alleged act was committed on or after April 13, 2018 - the fumes of any substance having the property of releasing toxic vapors]* to reduce their mental clarity, self-control and reflexes, and thereby left them with a reduced ability to drive safely.

You are to decide this from all the believable evidence in this case, together with any reasonable inferences that you draw from the

evidence. You may consider evidence about the defendant's appearance, condition, and behavior, in order to determine whether the defendant's ability to drive safely was impaired.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant drove negligently in a manner that might have endangered the lives or safety of other people. A person acts negligently when they fail to use due care, that is, when they act in a way that a reasonable person would not act. This can happen either by doing something that a reasonable person would not do under the circumstances, or by failing to do something that a reasonable person would do. The defendant acted negligently if they drove in a way that a reasonable person would not have, and by doing so created an unnecessary danger to other people, a danger that they could have avoided by driving more carefully.

The defendant's intent is not relevant in determining negligence. The Commonwealth is not required to prove that the defendant intended to act negligently. The issue here is whether or not the

defendant drove as a reasonable person would have under the circumstances.

In determining whether the defendant drove negligently 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.

See also Instruction 3.180 (Negligence). For a supplemental instruction on violation of the law as evidence of negligence, see the supplemental instructions to Instruction 3.180. If the violation is speeding, see the supplemental instructions to Instruction 5.640 (Road Racing).

Negligence lacks the element of intent. See *Commonwealth v. Guaman*, 90 Mass. App. Ct. 36, 46 (2016), quoting *Commonwealth v. Diaz*, 19 Mass. App. Ct. 29, 36-37 (1984) ("The essence of the offense of vehicular homicide is negligence, i.e., an unintended act"). See *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.5, 6 & 87 (1985) (speeding not negligence *per se* but can be considered with other evidence in determining negligence; evidence of intoxication admissible on the issue of negligence as well as on the issue of operating under the influence; victim's contributory negligence is not defense); *Commonwealth v. Charland*, 338 Mass. 742, 744 (1959) (speed is relevant factor); *Commonwealth v. Gurney*, 261 Mass. 309, 312 (1927) (relevant jury factors).

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 negligent. You must examine all the evidence about how the accident happened in order**

to determine whether any negligence was involved, and if so, whether that negligence 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 negligent, you may consider whether there was a sudden emergency which required a rapid decision. The defendant is not guilty if 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. Roadside Assessments. **You heard testimony in this case that the defendant, at the request of a police officer, performed or attempted to perform various roadside assessments, such as *[here, outline the nature of the evidence, e.g., walking a straight line, balancing on one foot]*. These roadside assessments are not scientific tests of impairment by [name of drug] use. A person may have difficulty performing these tasks for many reasons unrelated to the consumption of [name of drug].**

It is for you to decide if the defendant's performance on these roadside assessments indicates that their ability to operate a motor

vehicle safely was impaired by [marihuana] [narcotic drugs] [depressants] [stimulants] [if the alleged act was committed before April 13, 2018 - the vapors of glue] [if the alleged act was committed on or after April 13, 2018 - the fumes of any substance having the property of releasing toxic vapors]. You may consider this evidence solely as it relates to the defendant's balance, coordination, mental clarity, ability to retain and follow directions, ability to perform tasks requiring divided attention, and other skills you may find are relevant to the safe operation of a motor vehicle.

It is for you to determine how much, if any, weight to give the roadside assessments. In making your determination, you may consider what the officer asked the defendant to do, the circumstances under which the assessments were given and performed, and all of the other evidence in this case.

Finally, evidence of how a defendant performed in roadside assessments, standing alone, is never enough to convict a defendant of operating under the influence of [name of drug].

See Commonwealth v. Gerhardt, 477 Mass. 775, 776, 785 and Appendix (2017).

4. If there is evidence of drugs and other substances. **If the**

Commonwealth has proved beyond a reasonable doubt that the defendant's ability to operate a motor vehicle safely was reduced by [name of substance], then they have violated the law even if some other factor tended to magnify the effect of the [name of substance] or contributed to their reduced ability to operate safely. [Name of substance] need not be the only cause. It is not a defense that there was a second contributing cause so long as the [name of substance] was one of the causes of the defendant's diminished capacity 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).

NOTES:

(See the citations and notes for Instructions 5.400 (OUI-Drugs) and 5.160 (Motor Vehicle Homicide and Negligence.)