

MOTOR VEHICLE HOMICIDE (MISDEMEANOR - NEGLIGENCE)

G.L. c. 90, § 24G(b)

The defendant is charged with motor vehicle homicide. To prove the defendant guilty of this offense, the Commonwealth must prove four 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 did so in a negligent manner so that the lives or safety of the public might be endangered; and**

***Fourth:* 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 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 fourth 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 four 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 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).

NOTES:

1. **Misdemeanor and felony branches.** In 2018, the statute was amended into three subsections: 1) misdemeanor vehicular homicide (§ 24G[b]), caused *either* by operation under the influence, *or* negligent operation, 2) felony vehicular homicide (§ 24G[a]), caused by operation under the influence *coupled with* either reckless or negligent operation, and 3) felony vehicular homicide (§ 24G[c]) caused by reckless operation. Before the amendment, misdemeanor vehicular homicide could be proven by evidence of either negligent or reckless driving. See *Commonwealth v. Geisler*, 14 Mass. App. Ct. 268, 276 (1982); *Commonwealth v. Burke*, 6 Mass. App. Ct. 697, 699 (1978). The new statute created subsection § 24G[c], designating reckless operation as a form of felony vehicular homicide.

The District Court has final jurisdiction over both the misdemeanor and felony forms of vehicular homicide. G.L. c. 218, § 26. The complaint must be scrutinized in advance so that the instruction may be appropriately tailored. The statutory branches for vehicular homicide are disjunctive, independent grounds for conviction. *Commonwealth v. Jones*, 382 Mass. 387, 389 (1981).

2. **Lesser Included Offenses.** Negligent operation under G. L. c. 90, § 24 (2)(a) is a lesser included offense of negligent or reckless motor vehicle homicide under G. L. c. 90, § 24G(b). See *Commonwealth v. Buckley*, 76 Mass. App. Ct. 123, 128 & n.3 (2010), abrogated on other grounds by *Commonwealth v. Negron*, 462 Mass. 102, 105 (2012). See also *Commonwealth v. Constantino*, 443 Mass. 521, 526 (2005) and *Commonwealth v. Williams*, 73 Mass. App. Ct. 833, 838-839 (2009); *Commonwealth v. Labelle*, 67 Mass. App. Ct. 698, 699 (2006) (“A juror finding the defendant’s operation of his motor vehicle to be reckless implicitly must also have found his operation to be negligent so as to endanger the lives or safety of the public, because only a finding of ordinary negligence is required under the statute.”)

3. **Multiple counts but single death.** Where a defendant is convicted both of one count of vehicular homicide while operating under the influence of intoxicating liquor and a second count of vehicular homicide while operating to endanger, both referring to the same victim, the judge must dismiss one of the counts as duplicative. *Commonwealth v. Riley*, 22 Mass. App. Ct. 698, 704 (1986).

4. **Multiple deaths.** Multiple deaths caused in a single accident may each be charged and punished as separate offenses. *Commonwealth v. Meehan*, 14 Mass. App. Ct. 1028, 1029 (1982).

5. **Causation (factual and legal).** The standard of causation to be applied in a motor vehicle homicide under G. L. c. 90, § 24G in the Commonwealth is the same as that used in tort law. See *Commonwealth v. Angelo Todesca Corp.*, 446 Mass. 128, 139-140 (2006); *Commonwealth v. Berggren*, 398 Mass. 338, 340 (1986); *Commonwealth v. Jones*, 382 Mass. 387, 389 (1981). Since Section 24G is a criminal offense, the heightened burden of proof of beyond a reasonable doubt applies. See *Angelo Todesca Corp.*, 446 Mass. at 140 n. 15.

“It is a bedrock principle of negligence law that a defendant cannot and should not be held liable for a harm unless the defendant caused the harm.” *Doull v. Foster*, 487 Mass. 1, 6-7 (2021). Causation involves two inquiries: whether the defendant was the factual cause of the harm and whether the defendant was the legal, or proximate, cause of the harm. *Id* at 982-983.

Factual Cause. In *Doull*, 487 Mass. at 10-17, the Supreme Judicial Court held that, in the majority of negligence cases in the Commonwealth, whether one-cause or multiple-cause cases, the standard to apply for the *factual* causation element is the “but for” standard, as opposed to the “substantial contributing factor” standard.

The defendant is the factual cause of a harm if the harm would not have occurred “but for” the defendant’s negligent conduct. See *id* at 7. The but-for standard “ensures that defendants will only be liable for harms that are actually caused by their negligence and not somehow indirectly related to it.” *Id*. “Another way to think about the but-for causation standard is as one of necessity; the question is whether the defendant’s conduct was necessary to bring about the [death].” *Id* at 8.

Legal Cause. In addition to being the factual cause of the harm to the victim, the defendant must also be the legal or proximate cause. See *id* at 7; *Kent v. Commonwealth*, 437 Mass. 312, 320 (2002). A defendant is the legal cause of the harm if the harm is “within the scope of the foreseeable risk arising from the negligent conduct”. *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 45 (2009); Restatement (Third) of Torts § 29 (2010). The definition of legal or proximate cause is “based on considerations of policy and pragmatic judgment.” *Kent, supra* at 320-321. The question for the jury is whether the harm was a reasonably foreseeable consequence of the negligent conduct. See *Poskus v. Lombardo’s of Randolph*, 423 Mass. 637, 640 (1996).

Use of the term “proximate cause” is disfavored and its use in instruction should be avoided. See *Commonwealth v. Carlson*, 447 Mass. 79, 83 n. 5 (2006); *Commonwealth v. Shine*, 25 Mass. App. Ct. 613, 617 n.6 (1988); Restatement (Third) of Torts § 29 (2010).

Multiple Causes. A but-for standard is the appropriate standard for factual causation in cases involving multiple alleged causes of harm. See *Doull, supra* at 16-17. In the rare cases involving multiple “sufficient” causes, the jury should be instructed in accordance with the Restatement of Torts (Third) § 27. See *Doull, supra* at 17-18. See Supplemental Instruction above, p. 7.

No Contributory or Comparative Negligence/ Susceptible Victim: Neither contributory negligence nor comparative negligence, see G. L. c. 231, § 85, apply to the motor vehicle homicide statute because they are not a defense to the crime. See *Commonwealth v. Campbell*, 394 Mass. 77, 87 (1985); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 14-15 (1985). The defendant is not excused by the contributory negligence of the victim unless it rises to the level of sole cause. *Campbell*, 394 Mass. at 87; *Commonwealth v. Mandell*, 29 Mass. App. Ct. 504, 506 n.5 (1990); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 14-15 (1986); *O’Malley v. Putnam Safe Deposit Vaults, Inc.*, 17 Mass. App. Ct. 332, 343 n.10 (1983); *Geisler*, 14 Mass. App. Ct. at 278-280. Nor is the defendant excused from liability for aggravated injuries suffered by a susceptible victim. *Carlson*, 447 Mass. at 83, 84 (preexisting condition; victim’s decision to forgo invasive life support); *Webber v. Old Colony St. Ry. Co.*, 210 Mass. 432, 442 (1912) (preexisting condition); *Wallace v. Ludwig*, 292 Mass. 251, 256-259 (1935) (consequently contracted disease).

6. Evidence of negligence; bicyclists and pedestrians. “In approaching or passing a person on a bicycle the operator of a motor vehicle shall slow down and pass at a safe distance and at a reasonable and proper speed... Upon approaching a pedestrian who is upon the traveled part of any way and not upon a sidewalk, every person operating a motor vehicle shall slow down.” G.L. c. 90, § 14. The mere happening of an accident between a vehicle and a pedestrian is not, standing alone, sufficient to prove negligence by the vehicle’s operator. *Aucella v. Commonwealth*, 406 Mass. 415, 418 (1990).

7. Viable fetus. After August 16, 1984, prenatal injuries to a viable fetus resulting in its death, before or after birth, will support a vehicular homicide charge. *Commonwealth v. Cass*, 392 Mass. 799, 807-808 (1984). See *Commonwealth v. Lawrence*, 404 Mass. 378, 383-384 (1989).

8. Videotapes. Videotapes are admissible if they are relevant, they provide a fair representation of what they purport to depict, and they are not otherwise barred by an exclusionary rule. A videotape of the defendant being booked in an open area of a station house does not offend the Fourth Amendment (because no “search” is involved), does not violate the Sixth Amendment (where the right to counsel has

not attached at the time of arrest), and its video portion does not violate the Fifth Amendment (since the defendant's condition and actions are not "testimonial"). With respect to the audio portion, the defendant's responses to standard booking questions do not require a valid *Miranda* waiver to be admissible since they do not involve "custodial interrogation," but any answers to questions about the defendant's drinking must be excised from the videotape unless there was a valid *Miranda* waiver. *Commonwealth v. Mahoney*, 400 Mass. 524, 527-529 (1987); *Commonwealth v. Carey*, 26 Mass. App. Ct. 339, 341-342 (1988). See *Commonwealth v. Harvey*, 397 Mass. 351, 357-359 (1986) (videotape of protective custody); *Commonwealth v. Cameron*, 25 Mass. App. Ct. 538, 545-549 (1988) (lost police videotape).

9. **Companion traffic violations.** For the effect of a prior acquittal of companion traffic violations, see *Commonwealth v. Kline*, 19 Mass. App. Ct. 715, 717-719 (1985) (collateral estoppel did not bar the Commonwealth from introducing the defendant's statement that the traffic signal was red at a subsequent motor vehicle homicide jury trial after the defendant was acquitted of failing to conform to the directions of a traffic signal).

10. **Continuance without a finding impermissible.** The prohibition in G.L. c. 90, § 24G(a) on filing or continuing without a finding a vehicular homicide charge governs all prosecutions "commenced under this section" and therefore applies to all of the subsections of § 24G, including the misdemeanor offense in subsection (b). *Commonwealth v. Millican*, 449 Mass. 298, 300-303 (2007) (the prohibition against "continuances without a finding" and the placement of cases "on file" is not limited to subsection (a), but applies to all prosecutions under section 24G).

11. **Section 24O notice.** Although the requirement of G.L. c. 90, § 24O that defendants convicted of motor vehicle offenses should be given a written statement of the statutory provisions applicable to any subsequent violation "should be observed by the District Courts," failure to give a defendant such notice is not a defense against a subsequent charge as a second offender. *Commonwealth v. Dowler*, 414 Mass. 212, 215-217 (1993).