

OPERATING WITH A BLOOD ALCOHOL LEVEL OF .08% OR GREATER

The defendant is charged with operating a motor vehicle while having a blood alcohol level of .08 percent or greater (and with operating a motor vehicle while under the influence of alcohol).

In order to prove the defendant guilty of operating a motor vehicle while having a blood alcohol level of .08 percent or greater, the Commonwealth must prove three 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); and**

***Third:* That at the time of operation, the percent of alcohol in the defendant's blood was .08 or greater.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200), "Public Way" (Instruction 3.280), and percentage of alcohol in the defendant's blood (which follows), unless these are stipulated. See instruction below regarding stipulations.

The third element that the Commonwealth must prove beyond a reasonable doubt is that at the time of operation the percent of alcohol in the defendant's (breath) (blood) was .08 or greater. The law allows a

defendant's blood alcohol level to be shown by a chemical test or analysis of (his) (her) 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;**
- **whether the person who gave the test was properly certified, and your assessment of (his) (her) credibility;**
- **the pre-test procedures that were employed;**
- **whether the testing device was in good working order at the time the test was administered;**
- **whether the test was administered properly;**
- **and any other evidence pertaining to the administration of the test.**

If there is a challenge whether the breath test was administered within a reasonable time, see Supplemental Instruction 1.

If any elements are stipulated.

Because the parties have stipulated (that the defendant was operating a motor vehicle) (and) (that

the location was a public way) (that the location was one to which the public had a right of access) (and) (that the percent of alcohol in the defendant's blood was .08 or greater), the only element(s) the Commonwealth must prove beyond a reasonable doubt (is) (are) that the defendant (elements) . If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.

If there are no stipulations.

So there are three things that the Commonwealth must prove 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); and

Third: That at the time (he) (she) operated the vehicle, the percent of alcohol in the defendant's blood was .08 or greater.

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. *If there is an issue regarding any delay in testing.*

A passage of up to

three hours between testing and the time of operation may be reasonable, however the facts and circumstances of the case may suggest that a greater or lesser time period might apply. Ultimately it is up to you to decide what is reasonable.

2. *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 sample] .

By regulation, the result of the defendant's test is the lower reading. You may consider the additional sample(s) only on the issue of whether the test result was accurate.

The Commonwealth may not introduce more than one test result.
Commonwealth v. Steele, 455 Mass. 209, 213-14 (2009); see 501 C.M.R.
§ 2.15(2)(b).

NOTES:

1. **Statute now bifurcated.** Statute 2003, c. 28, § 1 (effective June 30, 2003) amended G.L. c. 90, § 24(1) so that it now punishes anyone who “operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor” or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi*, 448 Mass. 809, 810 (2007). The “operating under the influence” alternative requires proof of operation “with a diminished capacity to operate safely,” *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985) (emphasis in the original), but not proof of any specific blood alcohol level, while the “per se” alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity. Consequently, evidence pertaining to impairment is not relevant to the offense of operating a motor vehicle with a blood alcohol level of .08 or greater.

2. **Model instruction.** The model instruction is based on *Commonwealth v. Colturi*, 448 Mass. 809, 816-17 (2007), and *Commonwealth v. Zeininger*, 459 Mass. 775, 778-81, *cert. denied*, 132 S. Ct. 462 (2011).

3. **Evidence in a per se case.** If the Commonwealth proceeds only on the per se offense, evidence about the defendant’s behavior and appearance may not be relevant. The legislature has defined the crime in terms of the alcohol content of one’s blood.

4. **Breath tests: challenges to particular test result.** Before the result of a breath test may be admitted, the Commonwealth must establish the existence of and compliance with the requirements of a periodic testing program for breath testing machines in accordance with G.L. c. 90, § 24K and regulations promulgated thereunder. *Commonwealth v. Barbeau*, 411 Mass. 782, 784-86 (1992). Those requirements of § 24K are met by the provisions of 501 C.M.R. § 2.00 *et seq.*

A breath test result is admissible only if the Commonwealth has introduced evidence that the machine was working properly. *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 264 (1988). Beyond that minimum level, generally any delay in administering a blood alcohol test, *Commonwealth v. Marley*, 396 Mass. 433, 438-39 (1985), any weaknesses in the test operator’s knowledge and skill, *Commonwealth v. Shea*, 356 Mass. 358, 361 (1969), or any procedural weaknesses in the administration of a particular test, *Commonwealth v. Malloy*, 15 Mass. App. Ct. 958, 958, *rev. denied*, 389 Mass. 1101 (1983); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900 (1980), are matters of weight for the jury and do not affect the admissibility of the test result.

The requirement that the breath test operator “shall observe the arrestee for no less than 15 minutes immediately prior to the administration of the breath test,” 501 C.M.R. § 2.13(3), does not require that such observation be done at the testing location or room. If the arresting officer is also the breathalyzer operator, the requirement could be satisfied by the officer’s being continuously with the arrestee from the traffic stop until the test provided there is actual observation consistent with the regulation. Normally, compliance issues go to weight rather than admissibility, but if the prosecution fails to make a sufficient showing of compliance with the letter and purpose of the regulation, the test results must be suppressed. *Commonwealth v. Pierre*, 72 Mass. App. Ct. 230, 232-35 (2008).

5. **Breath tests: expert testimony.** The Commonwealth may introduce a breath or blood test result to establish the level of alcohol in the defendant’s blood at the time of operation without offering expert testimony to provide “retrograde extrapolation” (calculating what the defendant’s blood alcohol level must have been at the time of the offense based on his or her subsequent blood alcohol level), provided the test was taken within a “reasonable time” after operation. This is usually up to three hours, although particular facts and circumstances may establish that a greater or lesser time period should be applied by the judge in his or her discretion. *Commonwealth v. Colturi*, 448 Mass. 809, 816-17 (2007). If expert testimony on retrograde extrapolation is proffered, it should be evaluated by the

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usual criteria of whether its methodology is scientifically valid, in general, and in the particular instance. *Commonwealth v. Senior*, 433 Mass. 453, 458-62 (2001); *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 662-64 (1993), *rev. denied*, 416 Mass. 1111 (1994).

The defendant has the right to present a qualified expert to challenge the accuracy of the breath test result in the defendant's particular case. *Commonwealth v. Connolly*, 394 Mass. 169, 175 (1985); *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 351-55 (1987). If there is expert testimony, see Instruction 3.640 ("Expert Witness").

6. **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, 216 (1993).

7. **Admissibility of breathalyzer records.** Certified copies of breathalyzer records are admissible under the business records exception to the hearsay rule. *Commonwealth v. Zeininger*, 459 Mass. 775, 781-89, *cert. denied*, 132 S. Ct. 462 (2011).

8. **Possible effect on breath test results of a required finding.** If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for directed verdict on the per-se portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. See *Commonwealth v. Colturi*, 448 Mass. 809, 817 (2007) ("if the per se and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, . . . it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such tests" as otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the box entitled "Limited use of a breath test result of .08 or greater" in Instruction 5.310 ("Operating Under the Influence of Intoxicating Liquor") should be incorporated at the point indicated.