OPERATING UNDER THE INFLUENCE OF INTOXICATING LIQUOR

G.L. c. 90, § 24

The defendant is charged with operating a motor vehicle while under the influence of intoxicating liquor (in the same complaint that charges the defendant with operating a motor vehicle with a blood alcohol level of .08% or greater).

To prove the defendant guilty of this offense, the Commonwealth must prove the following 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 while operating the vehicle, the defendant was under the influence of intoxicating liquor.**

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 under the influence of intoxicating liquor (which follows), unless the defendant has stipulated to these elements. See instruction below regarding stipulations.

The third element which the Commonwealth must prove beyond a reasonable doubt is that the defendant was under the influence of

intoxicating liquor 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 alertness, judgment, 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 Commonwealth is not required to prove that the defendant actually drove in an unsafe or erratic manner, but it is required to prove that their *ability* to drive safely was diminished by alcohol. The amount of alcohol necessary to do this may vary from person to person. You may rely on your 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.

Limited use of breath test result of .08 or greater. **You may also consider whether a (breath) (blood) test showed that the defendant had consumed any alcohol. However, no matter what the reading is, the (breath) (blood) test is not sufficient by itself to prove that the defendant was under the influence of alcohol.**

A result of .08 or greater is not admissible on the issue of impairment without "expert testimony establishing a relationship between the rest results and intoxication as a foundational requirement of the admissibility of such results." *Commonwealth v. Colturi*, 448 Mass. 809, 818 (2007); *Commonwealth v. Hubert*, 71 Mass. App. Ct. 661, 663, aff'd, 453 Mass. 1109 (2009). The evidence of a breath test is admissible only on the issue of whether the defendant consumed alcohol.

If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for required finding 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 *Colturi*, *supra* ("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 result and intoxication as a foundational requirement of the admissibility of such tests" since otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the above insertion should be incorporated.

If there are stipulations. **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) (that the defendant was under the influence of intoxicating liquor), 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 while the defendant was operating the vehicle, they were under the influence of intoxicating liquor.**

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 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 intoxicating liquor.**

2. 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)**

[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).

(assessments), the circumstances under which they were given and performed, and all the other evidence in this case.

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

*4. 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 breathalyzer. You may not speculate or guess about it because there is no evidence of it. Do not consider that in any way. Do not mention it. And put it completely out of your mind.

5. If there is evidence the defendant was not offered a field sobriety test. **There is evidence that there were no (field sobriety tests) (roadside**

assessments). This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

First: Whether the omitted (tests) (assessments) were standard procedure or steps that would otherwise normally be taken under the circumstances;

Second: Whether the omitted (tests) (assessments) 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 and adequate explanation for the omission of the (tests) (assessments) 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 circumstances.

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 (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").

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).

6. 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 diminished 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 diminished capacity to operate a 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 diminished capacity 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).

7. 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 intoxicating liquor. 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 intoxicating liquor.

8. 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 all the 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).
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> See *Colturi*, 448 Mass. at 817, as to instructing the jury on these statutory inferences.

NOTES:

1. **"Under the influence" and "per se" theories.** 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. One or the other or both alternatives may be charged in the same complaint.

2. **Model instruction.** The model instruction is based on *Colturi, supra*; *Commonwealth v. Tynes*, 400 Mass. 369, 374-375 (1987); *Connolly*, *supra*; *Commonwealth v. Bernier*, 366 Mass. 717, 720 (1975); and *Commonwealth v. Lyseth*, 250 Mass. 555 (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. The Commonwealth need not prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely" (emphasis in original). *Connolly, supra*. A non-conforming charge is reversible error unless there is no objection and there is substantial evidence of unsafe operation. Contrast *Commonwealth v. Marley*, 396 Mass. 433 (1985) (reversible error); *Commonwealth v. Luiz,* 28 Mass. App. Ct. 973 (1990) (same); *Commonwealth v. Laurino*, 23 Mass. App. Ct. 983 (1987) (same); *Commonwealth v. Brochu*, 23 Mass. App. Ct. 937 (1986) (same), with *Commonwealth v. Bryer*, 398 Mass. 9 (1986) (harmless error); *Commonwealth v. Ranahan*, 23 Mass. App. Ct. 201 (1986) (same); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10 (1986) (same); *Commonwealth v. Riley*, 22 Mass. App. Ct. 698 (1986) (same).

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. The Commonwealth must prove such impairment beyond a reasonable doubt, but is not required to prove any of those particular three factors. *Commonwealth v. Riley,* 48 Mass. App. Ct. 463 (2000).

3. **Absence of breath test.** Where there has been no breath test, a judge may give the instruction approved in *Commonwealth v. Downs*, 53 Mass. App. Ct. 195, 198 (2001), **if and only if** the defendant requests the instruction (or if there is "some rare set of facts that specifically directs the jury's attention to the absence of alcohol-test evidence"). *Commonwealth v. Wolfe*,478 Mass. 142, 149-50 (2017). It should not be given even when a jury inquires about a missing breath test unless assented to by the defendant. The judge may instruct only that the jury must not speculate about matters about which there is no evidence.

4. **Refusal of breath test**. "Evidence that the defendant failed or refused to consent to [a blood alcohol] test shall not be admissible against him in a civil or criminal proceeding . . . ." G.L. c. 90, § 24(1)(e). Admission of such evidence would violate the privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights. *Opinion of the Justices,* 412 Mass. 1201 (1992). The jury instruction that was formerly required by § 24(1)(e) whenever there is no evidence of blood alcohol level "tend[ed] to have the same effect as the admission of refusal evidence," and violated art. 12. *Commonwealth v. Zevitas*, 418 Mass. 677 (1994). That statutory requirement has now been repealed. See St. 2003, c. 28 (effective June 30, 2003).

5. **Breath tests: statutory inferences.** In charging the jury as to the significance of blood or alcohol tests for the "under the influence" alternative, note that the third part of the former statutory inference in G.L. c. 90, § 24(1)(e) ("and if such evidence is that such percentage was eight one-hundredths or more, there shall be a permissible inference that such defendant was under the influence of intoxicating liquor") has been deleted. Therefore, the jury may no longer be instructed in such terms. On the other hand, § 24(1)(e) continues to provide that "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."

6. **Testimony about actions of defendant who agreed to a breath test.** Once a defendant consents to a breath test, testimony about the defendant's performance or non-performance is admissible without a preliminary ruling of admissibility by the court. *Commonwealth* v. *Adonsoto*, 475 Mass. 497 (2016).

7. **Drugs as a contributing cause.** Supplemental Instruction 5, *supra,* is closely modeled on the language of, and the recommended instruction in, *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456-457 & n.4 (1988) and *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70 (2010). This situation, where both alcohol and illegal or prescription drugs are concurrent causes of the defendant's intoxication, must be distinguished from that where a defendant's intoxication was caused solely by prescription medication taken as prescribed. In cases in which there is evidence that the defendant's impairment was caused solely by prescription medication, "the jury should be instructed that a defendant is entitled to an acquittal if [the defendant's] intoxication was caused solely by [the defendant's] prescription medication, taken as prescribed, and [that the defendant] did not know or have 'reason to know of the possible effects of the drug on [the defendant's] driving abilities.'" *Bishop*, 78 Mass. App. Ct. at 75 (emphasis in original) (quoting *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 365 (1982)). If, however, alcohol contributed to a defendant's diminished ability to operate a motor vehicle safely, the defendant is not entitled to an instruction that she should be acquitted if she did not know of the potential effects of mixing her medication with alcohol. *Bishop*, 78 Mass. App. Ct. at 74-75. No reported case has yet discussed whether the same rule applies to involuntary intoxication from legal but non-prescription drugs.

For an instruction on the effect of alcohol or prescription medication on a defendant's criminal responsibility, see *Commonwealth v. Darch*, 54 Mass. App. Ct. 713, 715-16 (2002) (discussing interaction of prescription medication and alcohol on a person with a mental disease or defect).

8. **Subsequent offenses.** See Instruction 2.540 ("Subsequent Offenses"). To be convicted of a second offense OUI, the first conviction must have preceded the date of the second offense (and not merely the date of the second conviction). *Commonwealth v. Hernandez*, 60 Mass. App. Ct. 416 (2004).

9. **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, 526-30 (1987); *Commonwealth v. Carey*, 26 Mass. App. Ct. 339, 340-42 (1988). See *Commonwealth v. Harvey*, 397 Mass. 351, 357-59 (1986) (videotape of protective custody); *Commonwealth v. Cameron*, 25 Mass. App. Ct. 538 (1988) (lost police videotape).

10. **§ 24O notice**. While 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 (1993).