

**OPERATING UNDER THE INFLUENCE OF LIQUOR / .08
CAUSING SERIOUS INJURY**

I. FELONY BRANCH - G. L.c. 90, § 24L(1)

The defendant is charged with causing serious bodily injury by operating a motor vehicle [under the influence of intoxicating liquor] [with a blood alcohol level of .08 percent or greater] and by operating it [recklessly] [negligently so that the lives or safety of the public might be endangered].

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 operated it (on a 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 the vehicle, the defendant [was under the influence of intoxicating liquor] [had a blood alcohol level of .08 percent or greater];**

Fourth:

Based on the complaint, use only one of the following, unless they are both alleged in the alternative.

- A. Reckless operation. That the defendant operated the vehicle
recklessly;
- B. Negligent operation. That the defendant operated the vehicle
negligently;

and *Fifth*: That the defendant's actions caused serious bodily injury to 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 not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act which directly tends to set the vehicle in motion. The law is that 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. Additional instruction on what constitutes a “motor vehicle” may be found in Instruction 3.210.

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.

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.

To prove the third element, the Commonwealth must prove that, when operating the vehicle, the defendant [was under the influence of intoxicating liquor] [had a blood alcohol level of .08 percent or greater].

Under the Influence

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, a person does not 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 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.

Percent of alcohol .08 or greater

The law allows the Commonwealth to prove a

person's blood alcohol level by a chemical test or analysis of the defendant's 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 their 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.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant operated the vehicle [recklessly] [negligently].

Recklessly. 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 is 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. It must be shown that the defendant's actions went beyond mere 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 go ahead.

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.

Negligently. 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.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant's actions caused serious bodily injury to another person. This requires the Commonwealth to prove two things. First, the Commonwealth must

prove that the defendant caused the injury. Second, the Commonwealth must prove that the injury was serious.

To prove that the defendant’s act(s) caused the injury, the Commonwealth must prove beyond a reasonable doubt that the injury 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 injury. If the injury would have occurred without the defendant’s act(s), the defendant is not responsible for that injury.

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 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 injury was a natural and probable consequence of the defendant’s act(s).

Second, the Commonwealth must prove that the injury was serious. A bodily injury is “serious” if it had any one of the following four characteristics: (1) it created a substantial risk of death; (2) it

involved total disability; (3) it involved the loss of any bodily function for a substantial period of time; or (4) it involved substantial impairment of any bodily function for a substantial period of time.

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

SUPPLEMENTAL INSTRUCTION

Possible verdicts involving lesser included offenses. **There are four possible verdicts that you may render in this case. Depending on your evaluation of what has been proved, you will find the defendant either guilty as charged, or not guilty of all charges, or guilty only of one or the other of two lesser included offenses. The first possibility is returning a verdict of guilty of the offense as charged if you find that the Commonwealth has proved all five elements of this offense beyond a reasonable doubt.**

The second possibility is, if the Commonwealth has failed to prove that the defendant drove (recklessly)

(negligently so that the lives and safety of the public might have been endangered), but has proved the other four elements beyond a reasonable doubt — that the defendant operated a motor vehicle (on a public way) (*[substitute for public way]*) [while under the influence of intoxicating liquor] [with a blood alcohol level of .08 percent or greater], and thereby caused another person serious bodily injury — then you should return a verdict that the defendant is guilty of that lesser offense, as indicated on the verdict slip.

The third possibility is that the Commonwealth has not proved that the defendant caused serious bodily injury to anyone but has proved beyond a reasonable doubt that the defendant operated a motor vehicle (on a public way) (*[substitute for public way]*) [while under the influence of intoxicating liquor] [with a blood alcohol level of .08 percent or greater]. In that case, you should return a verdict that the defendant is guilty of the lesser offense of operating a motor vehicle [under the influence of intoxicating liquor] [with a blood alcohol level of .08

percent or greater].

Finally, if the Commonwealth has not proved all of the following things beyond a reasonable doubt — that the defendant operated a motor vehicle (on a public way) (*[substitute for public way]*) [while under the influence of intoxicating liquor] [with a blood alcohol level of .08 percent or greater] — then you must find the defendant not guilty.

Where both lesser included offenses are instructed on, see the appendix to this instruction for a sample jury verdict slip.

If the Commonwealth has not separately charged the defendant with negligent or reckless operation, the judge may also instruct the jury that these are lesser included offenses, subject to the objections of the parties.

I. MISDEMEANOR BRANCH – G. L. c. 90, § 24L(2)

The defendant is charged with causing serious bodily injury by operating a motor vehicle [while under the influence of intoxicating liquor] [with a blood alcohol level of .08 percent or greater]. 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 operated it (on a 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 the vehicle, the defendant [was under the influence of intoxicating liquor] [had a blood alcohol level of .08 percent or greater]; and

Fourth: That the defendant's actions caused serious bodily injury to another person.

The judge should further instruct the jury about elements 1, 2, 3 and 5 of the instructions above.

NOTES

See the supplemental instructions, citations and notes under Instruction 5.300 (Operating with a Blood Alcohol Level of .08% or Greater) and Instruction 5.310 (Operating Under the Influence of Intoxicating Liquor). See also Instruction 3.640 (Expert Witness) if applicable.

1. **Unit of prosecution.** The proper unit of prosecution is the number of victims seriously injured as a result of the defendant's conduct. See *Commonwealth v. Flanagan*, 76 Mass. App. Ct. 456, 461 (2010).