

OPERATING A BOAT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR

G.L. c. 90B, § 8(a)(1)

The defendant is charged with operating a (boat) (vessel) while under the influence of intoxicating liquor.

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant operated a (boat)(vessel);

Second: That the defendant did so on the waters of the Commonwealth; and

Third: That while operating the (boat)(vessel), the defendant was under the influence of intoxicating liquor.

To prove the first element, the Commonwealth must prove the defendant operated a (boat)(vessel). A person operates a (boat)(vessel) when he (she) navigates, pilots, drives or otherwise controls the movement of it.

(The statutory definition for operation in 90B, § 1, is to “navigate or otherwise use a motorboat or vessel.”)

If necessary, instruct on whichever definition below applies:

Boat

A boat, also referred to as a motorboat, is a watercraft propelled by machinery, whether or not such machinery is the principal source of propulsion.

G.L. c. 90B, § 1

Vessel

A vessel is a craft for traveling on water. It includes watercraft of every description, (except a seaplane) used or capable of being used as a means of transportation on the water. Ships, boats, and jet skis are examples of vessels.

G.L. c. 90B, § 1

To prove the second element of the offense, the Commonwealth must prove that the (boat)(vessel) was operated on the waters of the Commonwealth.

Instruct on whichever definition below applies:

Inland Waters

The waters of the Commonwealth include all inland waters except ponds that are less than ten acres in area, owned by one person, and not open to the public.

Coastal Waters

The waters of the Commonwealth include all coastal waters within the rise and fall of the tide *and* the marine limits of the jurisdiction of the Commonwealth.

G.L. c. 90B, § 1

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 (boat) (vessel). What does it mean to be “under the influence” of alcohol? Someone does not have to be drunk to be under the influence of alcohol. A person is under the influence of alcohol if he has consumed enough alcohol to reduce his (her) ability to operate a (boat) (vessel) safely, by decreasing his alertness, judgment, and ability to respond promptly. It means that a person has consumed enough

alcohol to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to operate safely.

The Commonwealth is not required to prove that the defendant actually operated in an unsafe or erratic manner, but is required to prove that his (her) ability to operate 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 at the time.

If there are stipulations

Because the parties have stipulated (that the defendant was operating a (boat) (vessel) (and) (that the location was the waters of the Commonwealth) (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 [element(s)]. 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 (boat)(vessel);**

***Second:* That the defendant did so on the waters of the Commonwealth; and**

***Third:* That while operating the (boat)(vessel), the defendant was 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.

[If the per se offense is charged, add language from model Instruction 5.700.]

SUPPLEMENTAL INSTRUCTIONS

1. *If there is evidence both of alcohol and drug usage.*

The defendant may be found guilty of this offense if his (her) ability to operate a (boat) (vessel) safely was diminished, and alcohol was one contributing cause of that diminished ability. It is not necessary that alcohol was the only or exclusive cause.

If the defendant's ability to operate safely was diminished by alcohol, then he (she) has violated the statute even if some other factor tended to magnify the effect of the alcohol or contributed to his (her) diminished capacity to operate safely. 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 to operate safely.

If alcohol was not one of the causes of the defendant's diminished capacity to operate safely, the defendant must be found not guilty.

Commonwealth v. Stathopoulos, 401 Mass. 453, 457 (1988).

2. *Waters within the jurisdiction of the Commonwealth*

The waters of the commonwealth extend to the outer limits of the territorial sea of the United States. The territorial sea of the United States extends 12 nautical miles from the baseline shore. The baseline shore is

defined by the low water mark.

NOTES:

1. **Boats vs. vessels.** Boats are a subset of vessels. G.L. c. 90B, § 1.

2. **Statute now bifurcated.** Statute 2003, c. 28, § 28 (effective June 30, 2003) amended G.L. c. 90B, § 8 so that it now punishes anyone who operates a vessel “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), 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.

3. **Model instruction.** 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). *Commonwealth v. Tynes*, 400 Mass. 369, 374-75 (2007). “The Commonwealth must prove beyond a reasonable doubt that the defendant’s consumption of alcohol diminished the defendant’s ability to operate a [vessel] 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.” *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985).

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, 465 (2000).

4. **Absence 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).

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) (“You are not to mention or consider in anyway whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind.”).

5. **Breath test in non per-se case.** If the Commonwealth proceeds only on a theory of impaired operation and offers breath test results, it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such results. *Commonwealth v. Colturi*, 448 Mass. 809, 818 (2007).

6. **Impairment.** “Evidence that the defendant drove his motorboat in a clockwise direction, which contravened the customary counterclockwise traffic pattern on the lake; that the boat ‘kept coming, kept going’ after the collision and ‘continu[ed] on [its] route’; and that one witness perceived ‘a very distinct and clear smell of alcohol’ upon loading the victim onto the boat. In addition to the fact of the collision, which is corroborative of the other evidence of driving while intoxicated, this evidence tended to show that the defendant’s earlier consumption of alcohol and marijuana diminished his capacity to operate the vessel safely.” *Commonwealth v. Morse*, 468 Mass. 360, 378 (2014).

7. **Statutory definition of waters of the commonwealth.** The waters of the commonwealth are defined in G.L. c. 1, § 3, as extending to the outer limits of the territorial sea of the United States. Those outer limits are defined in 43 U.S.C. 1331(e) which references Presidential Proclamation No. 5298 dated December 27, 1988 and the 1982 United Nations Convention of the Law of the Sea. The extent of the waters of the Commonwealth may be limited by boundaries established between the commonwealth and adjacent coastal states. G.L. c. 1, § 3.

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.