

OPERATING UNDER THE INFLUENCE OF DRUGS¹

G.L. c. 90, § 24

The defendant is charged with operating a motor vehicle under the influence of [marihuana] [narcotics drugs] [depressants] [stimulant substances]

If the alleged act was committed *before* April 13, 2018:

[the vapors of glue]

If the alleged act was committed *on or after* April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors].²

In order 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;**

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.”

² See Note 6, *infra*.

Second: That he (she) operated it (on a way) (or) (in a place where the public has 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, he (she) was under the influence of: [marihuana] [a narcotic drug, as I will define for you in a moment] [a depressant, as I will define for you in a moment] [a stimulant substance, as I will define for you in a moment]

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors that are smelled or inhaled for the purposes of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system].

At this point, the jury must be instructed on what the Commonwealth must prove to satisfy the first and second elements. Refer to the definitions of "Operation of a Motor Vehicle" (Instruction 3.22) and "Public Way" (Instruction 3.280).

In order to prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant was under the

influence of: [marihuana] [a narcotic drug] [a depressant] [a stimulant substance], namely: _____.

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors that are smelled or inhaled for the purposes of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system].

In determining whether the Commonwealth has done so, you may consider all the relevant evidence.

When the substance is alleged to be (narcotic drug) (depressant) (stimulant):

If the facts permit the taking of judicial notice that the particular substance meets the definition of narcotic drug, depressant or stimulant substance as provided by G.L. c. 94C, § 1:

I instruct as a matter of law that _____ is a [narcotic drug] [depressant] [stimulant].

If the facts do not permit the taking of judicial notice that the particular substance meets the definition of narcotic drug, depressant or stimulant substance as provided by G.L. c. 94C, § 1:

Section 1 of chapter 94C of our General Laws defines:

[Narcotic Drug] “Narcotic drug” as any of the following, whether produced directly or indirectly by extraction and chemical synthesis:

(a) Opium and opiate, and any salt, compound, derivative, or

preparation of opium or opiate; (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium; (c) Opium poppy and poppy straw; (d) coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine;

Depressant or stimulant substance

“Depressant or stimulant substance”

as a (a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designed as habit forming; or (b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect

on the central nervous system; or (c) lysergic acid diethylamide; or (d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

What does it mean to be “under the influence” of [marihuana] [narcotic drugs] [depressants] [stimulant substances]?

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors]?

Someone is “under the influence” of such a substance whenever he (she) has consumed enough of it to reduce his (her) ability to operate a motor vehicle safely by diminishing his (her) alertness, judgment, and ability to respond promptly.

**This would include anyone who has consumed enough
[marihuana] [narcotic drugs] [depressants] [stimulant substances]**

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

**[the fumes of any substance having the property of releasing toxic
vapors]**

**to reduce his (her) mental clarity, self-control and reflexes, and
thereby left him (her) 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 must prove that
the defendant had a diminished *capacity* or *ability* to drive safely.**

**You are to decide this from all the believable evidence in this
case, together with any reasonable inferences that you draw from the
evidence. You may consider evidence about the defendant's
appearance, condition, and behavior at the time, in order to determine
whether the defendant's ability to drive safely was impaired.**

**So there are three things the Commonwealth must prove beyond
a reasonable doubt: *First*, that the defendant operated a motor**

vehicle; *Second*, that he (she) operated it (on a way) (in a place where the public has a right of access) (in a place where members of the public have access as invitees or licensees); and *Third*, that he (she) operated it while under the influence of one of the drugs I have described to you.

If there are stipulations. **The parties have stipulated that (the defendant was operating a motor vehicle) (the vehicle was [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]) (was under the influence of _____). Therefore, you are to deliberate only as to whether the Commonwealth proved beyond a reasonable doubt that (the defendant was operating a motor vehicle) (the vehicle was [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]) (was under the influence of [marihuana] [narcotic drugs] [depressants] [stimulant substances]**

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors].

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. **If any one of those three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.**

SUPPLEMENTAL INSTRUCTIONS

1. Roadside Assessments.

You heard testimony in this case that the defendant, at the request of a police officer, performed or attempted to perform various roadside assessments, such as [Here, outline the nature of the evidence, e.g., walking a straight line, balancing on one foot.]. These roadside assessments

are not scientific tests of impairment by [name of drug] use. A person may have difficulty performing these tasks for many reasons unrelated to the consumption of [name of drug].

It is for you to decide if the defendant's performance on these roadside assessments indicate that his (her) ability to operate a motor vehicle safely was impaired by [marihuana] [narcotic drugs] [depressants] [stimulant substances]

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors].

You may consider this evidence solely as it relates to the defendant's balance, coordination, mental clarity, ability to retain and follow directions, ability to perform tasks requiring divided attention, and other skills you may find are relevant to the safe operation of a motor vehicle.

It is for you to determine how much, if any, weight to give the roadside assessments. In making your determination, you may consider what the officer asked the defendant to do, the

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

Finally, evidence of how a defendant performed in roadside assessments, standing alone, is never enough to convict a defendant of operating under the influence of [name of drug].

2. If there is evidence of drugs and other substances.

If the Commonwealth has proved beyond a reasonable doubt that the defendant's ability to operate safely was diminished by [name of drug], then he (she) has violated the law even if some other factor tended to magnify the effect of the [name of drug] or contributed to his (her) diminished capacity to operate safely. [Name of drug] need not be the only or exclusive cause. It is not a defense that there was a second contributing cause so long as the [name of drug] was *one* of the causes of the defendant's diminished capacity to operate safely.

See *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70, 74-75 (2010).

NOTES (See also the citations and notes for Instructions 5.300 and 5.310 (OUI-Liquor or .08% Blood Alcohol)):

1. **DPH, State Police or U. Mass. Medical School certificate of analysis.** . Although G.L. c. 94C, § 47A, provides for the introduction of a certificate of analysis to prove "the composition and quality of such controlled substances or narcotic drugs," it is only admissible in conjunction with live testimony from the analyst who performed the underlying analysis. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (admission of certificate of drug analysis violates Sixth Amendment confrontation rights as such evidence is testimonial).

"Proof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v. Dawson*, 399 Mass. 465, 467 (1987) (acknowledging that witness such as an experienced drug-user or experienced police officer may be

qualified to give an opinion as to what drug a particular substance was but noted it “would be a rare case in which a witness’s statement that a particular substance looked like a controlled substance alone would be sufficient to support a conviction”). See also *Commonwealth v. MacDonald*, 459 Mass. 148, 156-57 (2011) (permissible for experienced law enforcement officer to testify to opinion that substance was marijuana).

Similarly, proof that a particular drug impaired the defendant’s ability to drive can be made out by circumstantial evidence. e.g., *Commonwealth v. Johnson*, 59 Mass. App. Ct. 164, 172 (2003) (defendant’s erratic behavior and appearance, the facts surrounding the accident itself, and the discovery of cocaine and other controlled substances inside the vehicle permitted the inference that the defendant’s capacity to operate was impaired by a narcotic drug). An expert opinion that a person’s symptoms are the result of a particular drug, however, must rest on the requisite foundation. See *Commonwealth v. Bouley*, 93 Mass. App. Ct. 709, 714-15 (2018) (emergency medical technician qualified to provide expert opinion that defendant was overdosing on narcotics at the scene of the accident).

2. **Proving that heroin, codeine or cocaine are narcotic drugs.** The definition of “narcotic drug” in G.L. c. 94C, § 1 includes “opium and opiate” and “coca leaves” and refers generally to their derivatives, but does not expressly list heroin, codeine or cocaine. The Commonwealth may prove that heroin or codeine are derivatives of opium, or that cocaine is a derivative of coca leaves, either: (1) by presenting expert testimony, or (2) by asking the trial judge to take judicial notice of the fact. If the Commonwealth fails to do either, the defendant must be acquitted. *Commonwealth v. Green*, 408 Mass. 48, 50 (1990) (codeine); *Commonwealth v. Finegan*, 45 Mass. App. Ct. 921, 923 (1998) (heroin). See *Commonwealth v. Thomas G. Hickey*, 48 Mass. App. Ct. 1112 (No. 98-P-2154, Dec. 20, 1999) (unpublished) (cocaine).

3. **Proving non-barbiturate depressants and non-amphetamine stimulants.** The definition of this offense in G.L. c. 90, § 24 prohibits operation of a vehicle “while under the influence of . . . marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue.” The definition of “depressant” in G.L. c. 94C, § 1 includes barbiturates as well as drugs “which contain[] . . . any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming.” The definition of “stimulant substance” in § 1 includes amphetamines and also drugs “which contain[] . . . any substance which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming because of its stimulant effect on the central nervous system or its hallucinogenic effect.”

When a prosecution rests on ingestion of a non-barbiturate depressant or a non-amphetamine stimulant, the Commonwealth must prove that it contains a substance that has been so designated by the U.S. Attorney General. The Commonwealth may do this by offering expert testimony to that effect, offering the regulations in evidence, or asking the judge to take judicial notice of the regulations and to submit them to the jury. *Commonwealth v. Ferola*, 72 Mass. App. Ct. 170, 174 (2008).

4. **Voluntary intoxication by both illegal drugs and alcohol.** Supplemental Instruction 2, *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).

5. **Involuntary intoxication by legal medication.** The OUI statute punishes only “the voluntary consumption of alcohol or drugs whose consequences are known or should be known to the user,” although “[i]n the case of alcohol . . . the effects of liquor upon the mind and actions . . . are well known to everybody . . . The same assumption applies where there is a voluntary consumption (usually illicit) of statutorily defined drugs obtained other than through a physician’s prescription.” *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 360-61 & n.7 (1982).

A defendant is entitled to be acquitted if his or her intoxication was caused by involuntary intoxication by legal prescription medication. This requires that the defendant had not received warnings as to its use, had no reason to anticipate the intoxicating effects of the medication, and had no reason to

inquire of his or her physician concerning the possible effects of the medication. *Id.*, 14 Mass. App. Ct. at 365 & n.15. See also *Bishop*, 78 Mass. App. Ct. 70. Evidence of voluntary consumption of legal drugs should be admitted only after it is established on voir dire that the medication could in fact have so affected the vehicle's operation and that the *Wallace* standards are satisfied. *Commonwealth v. Williams*, 19 Mass. App. Ct. 915, 916 (1984). If, however, illegal drugs 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 illegal drugs. *Bishop*, 78 Mass. App. Ct. at 74-75. It is not clear whether the same rule applies to legal but non-prescription drugs; the *Williams* case does not indicate whether prescription medicine was involved and there have been no subsequent decisions involving non-prescription drugs.

Dispensing pharmacists are required to label prescription medications with any directions for use or cautions contained in the prescription or in the current United States Pharmacopeia or other accepted authoritative source. G.L. c. 94C, § 21; 247 Code Mass. Regs. § 7.00(20).

For an instruction on the effect of illegal 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).

6. **“Field sobriety tests” must be referred to as “roadside assessments.”** In a prosecution for operating under the influence, an officer may testify to a defendant's performance on “field sobriety tests,” but must refer to them only as “roadside assessments.” The officer may not testify that the defendant passed or failed nor offer an opinion as to whether the driver was under the influence of a drug. *Commonwealth v. Gerhardt*, 477 Mass 775 (2017).

7. **2018 Amendment to G.L. c. 90, § 24.** On April 13, 2018, G.L. c. 90, § 24 was amended by St. 2018 c. 69, § 32, so as to replace “vapors of glue” with “smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270.” G.L. c. 270, § 18, defines substances having property of releasing toxic vapors as “any substance having the property of releasing toxic vapors, [which are intentionally smelled or inhaled] for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system”. See *Commonwealth v. Sousa*, 88 Mass. App. Ct. 47, 48-51 (2015), interpreting “vapors of glue” prior to the 2018 amendment.