**DRIVING WHILE ABILITY IMPAIRED BY ALCOHOL[[1]](#footnote-1)**

**Vehicle & Traffic Law 1192 (1)**

**(Committed on or after July 1, 2003)**

**(Revised January 2008 and December 2014)[[2]](#footnote-2)**

The (*specify*) count is Driving While Ability Impaired.

Under our law, no person shall operate a motor vehicle while the persons ability to operate such motor vehicle is impaired by the consumption of alcohol.

The following terms used in that definition have a special meaning:

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic]

 [parking lot] which is propelled by any power other than muscular power.[[3]](#footnote-3)

To OPERATE a motor vehicle means to drive it.

[*NOTE: Add the following if there is an issue as* *to operation:*

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.[[4]](#footnote-4)]

 A persons ability to operate a motor vehicle is IMPAIRED by the consumption of alcohol when that persons consumption of alcohol has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.[[5]](#footnote-5)

The law does not require any particular chemical or physical test to prove that a persons ability to operate a motor vehicle was impaired by the consumption of alcohol. To determine whether defendants ability to operate a motor vehicle was impaired, you may consider all the surrounding facts and circumstances, including, for example:

the defendants physical condition and appearance, balance and coordination, and manner of speech;

the presence or absence of an odor of alcohol;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendants sobriety];

[the circumstances of any accident];

[the results of any test of the content of alcohol in the defendants blood].

[*NOTE: If there is evidence of blood-alcohol content, add as applicable* [[6]](#footnote-6) *:*

In this case, the device used to measure blood alcohol content was  *(specify)* . That device is a generally accepted instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.]

[*Note: If alcohol content is claimed to be .05 or less, select appropriate paragraph. The first paragraph applies if such evidence is not by a chemical test, e.g. evidence is given by an expert. The second paragraph applies if such evidence is by a chemical test:[[7]](#footnote-7)*

 If you find from the evidence that there was .05 or less of one per centum by weight of alcohol in defendant's blood while [he/she] was operating the motor vehicle, you may, but are not required to, find that [his/her] ability to operate the motor vehicle was not impaired.

 Or,

 Evidence by a chemical test of breath, blood, urine, or saliva that there was .05 of one per centum or less by weight of alcohol in the defendants blood is prima facie evidence that the ability of the defendant to operate a motor vehicle was not impaired.[[8]](#footnote-8)]

*[Note: If alcohol content is claimed to be .07 or more but less than .08, add:*

 Evidence by a chemical test of breath, blood, urine, or saliva that there was .07 of one per centum or more but less than.08 of one per centum by weight of alcohol in the defendants blood is prima facie evidence that the ability of the defendant to operate a motor vehicle was impaired.[[9]](#footnote-9)]

In considering the accuracy of the results of any test given to determine the alcohol content of defendants blood you must consider:

the qualifications and reliability of the person who gave the test;

the lapse of time between the operation of the motor vehicle and the giving of the test;

whether the device used was in good working order at the time the test was administered; and

whether the test was properly given.[[10]](#footnote-10)

[Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.[[11]](#footnote-11)]

*[NOTE: If there was an improper refusal to submit to a test, add:*

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.[[12]](#footnote-12)]

In order for you to find the defendant guilty of this offense/crime, the People are required to prove, from all of the evidence in the case beyond a reasonable doubt, both of the following two elements:

1. That on or about  *(date)* , in the County of  *(County)*, the defendant, *(defendants name)*, operated a motor vehicle; and

2. That the defendant did so while his/her ability to operate the motor vehicle was impaired by the consumption of alcohol.

If you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this offense.

If you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this offense.

1. If the defendant has within the previous ten years been convicted two or more times of a violation of any subdivision of Vehicle and Traffic Law 1192, a conviction of driving while ability impaired is an unclassified misdemeanor. Vehicle and Traffic Law 1193 (1) (a). For the gradation of the offense for special vehicles see Vehicle and Traffic Law 1193 (1) (d). [↑](#footnote-ref-1)
2. The purpose of the 2008 revision was to provide a clearer definition of operates by removing the language for the purpose of placing it in operation and replacing such language with for the purpose of placing the vehicle in motion (*see People v Alamo*, 34 NY2d 453, 458 [1974]; *People v Marriott*, 37 AD2d 868 [3d Dept 1971]; *People v O'Connor,* 159 Misc 2d 1072, 1074-1075 [Suffolk Dist Ct 1994]; *see also* *People v Prescott*, 95 NY2d 655, 662 [2001]).

The 2014 revision was for the purpose of incorporating an instruction to accord with *People v Fratangelo*, 23 NY3d 506 (2014). *See* footnote 7. [↑](#footnote-ref-2)
3. The term motor vehicle is defined in Vehicle and Traffic Law 125. That definition contains exceptions which are not set forth in the text of the charge. The term public highway appearing in the definition of motor vehicle is itself separately defined in Vehicle and Traffic Law 134. Further, while the definition of motor vehicle is restricted to a vehicle operated or driven on a public highway, the provisions of Vehicle and Traffic Law 1192 expressly apply to public highways, private roads open to motor vehicle traffic and any other parking lot (Vehicle and Traffic Law 1192 [7]). The term parking lot is also specially defined by Vehicle and Traffic Law 1192 (7) (*see also People v Williams*, 66 NY2d 659 [1985]). The definition of motor vehicle has been modified to accord with its meaning as applied to Vehicle and Traffic Law 1192. [↑](#footnote-ref-3)
4. *See* cases cited in footnote 2. [↑](#footnote-ref-4)
5. *See People v Cruz*, 48 NY2d 419, 427 (1979). [↑](#footnote-ref-5)
6. This paragraph may be used only when the device employed is included on the Department of Health schedule (*see* 10 NYCRR 59.4 [b]) of those devices satisfying its criteria for reliability (*see* 10 NYCRR 59.4 [a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (*see People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]). [↑](#footnote-ref-6)
7. 7 *See People v Fratangelo*, 23 NY3d 506 (2014). [↑](#footnote-ref-7)
8. 8 Vehicle and Traffic Law 1195 (2) (a). [↑](#footnote-ref-8)
9. Vehicle and Traffic Law 1195 (2) (c). [↑](#footnote-ref-9)
10. *See People v Freeland*, 68 NY2d 699 (1986). [↑](#footnote-ref-10)
11. *See People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986). [↑](#footnote-ref-11)
12. *See People v Thomas*, 46 NY2d 100 (1978). [↑](#footnote-ref-12)