

DRIVING WHILE ABILITY IMPAIRED BY ALCOHOL¹
Vehicle & Traffic Law 1192 (1)
(Committed on or after July 1, 2003)
(Updated Jan 2008 & Dec 2014)²

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).

² The purpose of the 2008 update 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, 458-459 (1974) where the Court addressed the definition of operate as follows:

“An established line of authority in New York and elsewhere holds that for purposes of offenses for driving while intoxicated under the Vehicle and Traffic Law, operation of the vehicle is established on proof that the defendant was merely behind the wheel with the engine running without need for proof that defendant was observed driving the car, i.e., operating it so as to put it in motion. (*People v. Marriott*, 37 A D 2d 868; *Matter of Tomasello v. Tofany*, 32 A D 2d 962. . . ; *Matter of Prudhomme v. Hults*, 27 A D 2d 234 . . . ; *People v. Ceschini*, 63 Misc 2d 15 ...). Quoted with approval in *Prudhomme* was the language from *People v. Domagala* (123 Misc. 757, 758) that an individual ‘began to violate the law [against operating while intoxicated] the instant he began to manipulate the machinery of the motor for the purpose of putting the automobile into motion’, even though he did not succeed in moving it. (27 A D 2d, at p. 236.) Also quoted approvingly was this language from *Commonwealth v. Uski* (263 Mass. 22, 24): ‘A person operates a motor vehicle within the meaning of [the statute] when, in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle.’ (27 A D 2d, at p. 237.)”

Alamo cited with approval *People v Marriott*, 37 AD2d 868 [3d Dept 1971], where the Court held that: “‘Operates’ is a broader concept [than driving]. (*Matter of Prudhomme v. Hults*, 27 A D 2d 234, 236.) The trial court correctly charged the jury that a person operates a motor vehicle when he begins to use the mechanism of the automobile for the purpose of putting the automobile in motion even though he does not move it”. See also *People v Prescott*, 95 NY2d 655, 662 [2001] [“Our courts have long recognized that the definition of operation is broader than that of driving and that “ [a] person operates a motor vehicle within the meaning of [the statute] when, in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle’ ” (*People v Alamo*, 34 NY2d 453, 459, quoting *Matter of Prudhomme v Hults*, 27 AD2d 234, 237; see also, *People v O’Connor*, 159 Misc 2d 1072, 1074-1075).”

The 2014 update was for the purpose of incorporating an instruction to accord with *People v Fratangelo*, 23 NY3d 506 (2014). See footnote 7.

The (specify) count is Driving While Ability Impaired.

Under our law, no person shall operate a motor vehicle while the person's 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

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]

A person's ability to operate a motor vehicle is IMPAIRED by the consumption of alcohol when that person's consumption

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.

⁴See cases cited in footnote 2.

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

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

the defendant's 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 defendant's sobriety];

[the circumstances of any accident];

[the results of any test of the content of alcohol in the defendant's blood].

[NOTE: If there is evidence of blood-alcohol content, add as applicable ⁶ :

In this case, the device used to measure blood alcohol content was (specify). That device is a generally accepted instrument for determining blood

⁵ See *People v Cruz*, 48 NY2d 419, 427 (1979).

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]).

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

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 defendant's blood is prima facie evidence that the ability of the defendant to operate a motor vehicle was not impaired.^{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 defendant's blood is prima facie evidence that the ability of the defendant to operate a motor vehicle was impaired.^{9]}

⁷ See *People v Fratangelo*, 23 NY3d 506 (2014).

⁸ Vehicle and Traffic Law § 1195 (2) (a).

⁹ Vehicle and Traffic Law § 1195 (2) (c).

In considering the accuracy of the results of any test given to determine the alcohol content of defendant's 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

[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]

[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]

¹⁰ See *People v Freeland*, 68 NY2d 699 (1986).

¹¹ See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

¹² See *People v Thomas*, 46 NY2d 100 (1978).

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, (defendant's 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.