

VEHICULAR ASSAULT IN THE FIRST DEGREE
(Vessel)
Penal Law § 120.04(7)
(Committed on or after June 14, 2023)

The (specify) count is Vehicular Assault in the First Degree.

Under our law, a person who is sixteen (16) years of age or older is guilty of Vehicular Assault in the First Degree when that person¹ operates a vessel,²

Select appropriate alternative(s):

while he or she has .08 of one per centum or more by weight of alcohol in his or her blood as shown by chemical analysis of his or her blood, breath, urine or saliva;³

or while he or she is in an intoxicated condition;⁴

or while his or her ability to operate such a vessel is impaired by the use of a drug⁵

and as a result of such intoxication [or impairment by the use of a drug⁶], operates such vessel in a manner that causes serious

¹ At this point, Vehicular Assault in the First Degree states: “commits the crime of vehicular assault in the second degree as defined in section 120.03 of this article of this article and” This charge omits the statutory language and sets forth the elements and alternatives for the underlying offense.

² At this point, Vehicular Assault in the First Degree [subd. (7)] states: “in violation of paragraph (e-1) of subdivision two of section forty-nine-a of the navigation law.” Paragraph (e-1) reads: “No person sixteen years of age or older shall operate a vessel in violation of paragraph (b), (d) or (e) of this subdivision while a child who is fifteen years of age or less is a passenger in such vessel.”

³ Navigation Law § 49-a(2)(b). At this point, the statute continues: “as determined by the chemical test made pursuant to the provisions of subdivision seven of this section.” This provision [i.e. subdivision (2)(b)] does not apply to the operation of a “public vessel.”

⁴ Navigation Law § 49-a(2)(d).

⁵ Navigation Law § 49-a(2)(e). At this point, the statute continues with “as defined by section one hundred fourteen-a of the vehicle and traffic law.”

⁶ Omitted here is the portion of the Vehicular Assault statute that reads: “or by the

physical injury to a passenger in the vessel who is fifteen (15) years of age or less.

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

A VESSEL shall be every description of watercraft or other artificial contrivance propelled in whole or in part by mechanical power and, which is used or capable of being used as a means of transportation over water, and which is underway and not at anchor or made fast to the shore or ground.⁷

A vessel is being OPERATED only when such vessel is underway and is being propelled in whole or in part by mechanical power.⁸

SERIOUS PHYSICAL INJURY means impairment of a person's physical condition which creates a substantial risk of

combined influence of drugs or of alcohol and any drug or drugs.” That provision parallels a provision in Vehicular & Traffic Law § 1192(4-a) that does not exist in Navigation Law § 49-a.

⁷ Navigation Law § 49-1(1)(a).

Note: The last sentence of the definition of “vessel” states: “The term ‘vessel’ shall include a ‘public vessel’ as defined herein unless otherwise specified.” Navigation Law § 49-a(2)(b) does “otherwise specify” in that it states that the provision relating to a reading of .08 or more applies only to a “vessel other than a public vessel.”

Navigation Law § 49-a(2)(c) applies to the operation of a “public vessel” and reads: “No such person shall operate a public vessel while he has .04 of one per centum or more by weight of alcohol in his blood, breath, urine, or saliva, as determined by the chemical test made pursuant to the provisions of subdivision seven of this section.” By Navigation Law § 49-a(1)(b), the term “public vessel” “shall mean and include every vessel which is propelled in whole or in part by mechanical power and is used or operated for commercial purposes on the navigable waters of the state; that is either carrying passengers, carrying freight, towing, or for any other use, for which a compensation is received, either directly or where provided as an accommodation, advantage, facility or privilege at any place of public accommodation, resort or amusement.” While a separate instruction for Navigation Law § (2)(c) is not provided, this instruction may be adapted for that accusation.

⁸ Navigation Law § 49-a(6)(b).

death, or which causes death, or serious and protracted disfigurement, or protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁹

[The term DRUG includes *(specify)*.¹⁰]

[NOTE: If the corresponding crime set forth in Navigation Law § 49-a (2) (b), (d), or (e) has been separately charged to the jury, cross-reference the applicability of those provisions to this crime. Otherwise, select and incorporate here the appropriate provisions set forth in the APPENDIX to this charge.]

Under our law, if the People prove beyond a reasonable doubt that the defendant was operating a vessel while unlawfully intoxicated [or impaired by the use of a drug¹¹] and while doing so caused serious physical injury to a child who was fifteen (15) years of age or less and was a passenger in such vessel, then you may, but are not required to, infer that, as a result of such intoxication [or impairment by the use of a drug], the defendant operated the vessel in a manner that caused such serious physical injury.¹²

⁹ Penal Law § 10.00(10).

¹⁰ Navigation Law § 49-a(2)(e) defines drug by a cross-reference to that term in Vehicle and Traffic Law § 114-a, which states that a “drug” “means and includes any substance listed in section thirty-three hundred six of the public health law and cannabis and concentrated cannabis as defined in section 222.00 of the penal law.”

¹¹ This paragraph reproduces the "rebuttable presumption" (*i.e.*, a permissible inference) set forth in Penal Law § 120.03(last paragraph). To accord with the Navigation Law, the words in brackets in this provision, namely, “[or impaired by the use of a drug],” have been adapted from the Vehicular Assault statute that reads “or impaired by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs.”

¹² Penal Law § 120.03 (last paragraph).

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

1. That on or about (date), in the County of (County), the defendant, (defendant's name), was sixteen (16) years of age or older, and operated a vessel

Select appropriate alternative(s):

while the defendant had .08 of one per centum or more by weight of alcohol in his/her blood as shown by chemical analysis of his/her blood, breath, urine or saliva;

or while the defendant was in an intoxicated condition;

or while the defendant's ability to operate such a vessel was impaired by the use of a drug;

2. That as a result of such intoxication [or impairment by the use of a drug], the defendant operated the vessel in a manner that caused¹³ serious physical injury to a passenger in the vessel; and

3. That the passenger was fifteen (15) years of age or less.

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

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

¹³ If in issue, an expanded definition of "causation" is set forth in the instructions on General Applicability.

APPENDIX

Table of Contents

READING OF .08 OR MORE [Navigation Law § 49-a(2)(b)]

INTOXICATED CONDITION [Navigation Law § 49-a(2)(d)]

IMPAIRED BY A DRUG [Navigation Law § 49-a(e)]

READING OF .08 OR MORE [Navigation Law § 49-a(2)(b)]

To determine whether the defendant had .08 of one per centum or more by weight of alcohol in his blood, you may consider the results of any test given to determine the alcohol content of defendant's blood.

A finding that the defendant operated a vessel, and that thereafter the defendant had .08 of one per centum or more by weight of alcohol in his or her blood, permits, but does not require, the inference that, at the time of the operation of the vessel, the defendant had .08 of one per centum or more by weight of alcohol in his or her blood.¹⁴

In deciding whether to draw that inference you may consider the results of any test given to determine the alcohol content of defendant's blood.

[NOTE: Add if applicable:

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

¹⁴ See Navigation Law § 49-a(7) [Chemical Tests]. *People v Mertz*, 68 NY2d 136 (1986) (the test for alcohol was taken within two hours of defendant's arrest); *People v McGrath*, 73 NY2d 826 (1988) (the Court held that chemical tests performed pursuant to a court order issued in compliance with Vehicle and Traffic Law § 1194-a are not subject to the two-hour limitation). The time for administering a court-ordered chemical test is limited only by considerations of due process.

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.^{15]}

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 vessel 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.¹⁶

[NOTE: Add if applicable:

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.^{17]}

¹⁵ 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]).

¹⁶ See *People v Freeland*, 68 NY2d 699 (1986).

¹⁷ See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

As indicated, a person operates a vessel while having .08 of one per centum or more by weight of alcohol in his or her blood as shown by a chemical analysis of the person's blood, breath, urine or saliva. It is not an element of this crime that the person's driving was actually affected by alcohol consumption or that he or she exhibited characteristics usually associated with intoxication.

Nevertheless, in evaluating the evidence offered to prove that the defendant did operate a vessel while having a blood alcohol content of .08 of one per centum or more, you may consider, in addition to evidence of the results of the chemical test and the circumstances under which it was administered, any evidence that, at times relevant to this charge, the defendant exhibited, or did not exhibit, signs of alcohol consumption.¹⁸ Thus you may consider evidence of:

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 vessel;

[opinion testimony regarding the defendant's sobriety;]

[the circumstances surrounding any accident].

INTOXICATED CONDITION [Navigation Law § 49-a(2)(d)]

A person is in an INTOXICATED condition when such person has consumed alcohol to the extent that he or she is incapable, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vessel as a reasonable and prudent driver.¹⁹

¹⁸ See *People v Mertz*, 68 NY2d 136, 146 (1986).

¹⁹ See *People v Ardila*, 85 NY2d 846 (1995); *People v Cruz*, 48 NY2d

The law does not require any particular chemical or physical test to prove that a person was in an intoxicated condition. To determine whether the defendant was intoxicated 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 vessel;
- * [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 ²⁰ :

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.

419, 428 (1979).

²⁰ 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]).

[Note: If alcohol content is claimed to be less than .08, 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.²¹

If you find from the evidence that there was less than .08 of one per centum by weight of alcohol in defendant's blood while [he/she] was operating the vessel, you may, but are not required to, find that [he/she] was not in an intoxicated condition.

Or,

Evidence by a chemical test of breath, blood, urine, or saliva that there was less than .08 of one per centum by weight of alcohol in the defendant's blood is *prima facie* evidence that the defendant was not in an intoxicated condition.]²²

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 vessel 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.²³

²⁰ *People v Fratangelo*, 23 NY3d 506 (2014).

²² See Navigation Law § 49-a(10) (b).

²³ *People v Freeland*, 68 NY2d 699 (1986).

[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.]²⁴

[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.^{25]}

IMPAIRED BY A DRUG [Navigation Law § 49-a(e)]

A person's ability to operate a vessel is IMPAIRED by the use of a drug when that person's use of a drug has rendered that person incapable of employing the physical and mental abilities which that person is expected to possess in order to operate a vessel as a reasonable and prudent driver.²⁶

The law does not require any particular chemical or physical test to prove that a person's ability to operate a vessel was impaired by the use of a drug. To determine whether the

²⁴ See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

²⁵ See *People v Thomas*, 46 NY2d 100 (1978), appeal dismissed for want of a substantial federal question, 444 US 891 (1979).

²⁶ See *People v. Caden N*, 189 A.D.3d 84 (3d Dept 2020) and "Explanatory Note On Definition Of Impairment" at the beginning of the instruction for Vehicular and Traffic Law §1192(4), Driving While Ability Impaired By Drugs.

defendant's ability to operate a vessel 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 a drug;

the manner in which the defendant operated the vessel;

[opinion testimony regarding the defendant's being under the influence of a drug];

[the circumstances of any accident];

[the results of any test for the presence of drugs in the defendant's blood].

[NOTE: If there is evidence of drugs in the defendant's blood, add, as appropriate, the following paragraphs:

In considering the results of any test given to determine the content of the 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 vessel 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.²⁷

(Evidence that the test was administered by a person

²⁷ *People v. Freeland*, 68 N.Y.2d 699 (1986).

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.)^{28]}

[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 a drug in violation of law.^{29]}

²⁸ See *People v. Freeland*, 68 N.Y.2d 699, 701 (1986); *People v. Mertz*, 68 N.Y.2d 136, 148 (1986).

²⁹ See *Navigation Law § 49-a(7)(f)*. *People v. Thomas*, 46 N.Y.2d 100 (1978), appeal dismissed for want of a substantial federal question, 444 U.S. 891 (1979).