



Canadian Judicial Council

Criminal Negligence

(Last revised – July 2012)

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CRIMINAL NEGLIGENCE

Offence 220

Criminal Negligence Causing Death (Manslaughter by Criminal Negligence)

(ss. 219, 220, 222 (5)(b), 234)

(Last revised – July 2012)

[1] *NOA* is charged with criminal negligence causing death (manslaughter by criminal negligence). The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of criminal negligence causing death (manslaughter by criminal negligence) unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment¹. Specifically, the Crown must prove each of the following essential elements beyond reasonable doubt:

1. that *NOA* (*specify alleged act or omission*)²;
2. that *in* (*specify alleged act or omission*) *NOA* showed wanton or reckless disregard for the lives or safety of others; and
3. that *NOA*'s conduct caused *NOC*'s death.³

¹ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

² Where the Crown relies on an omission, this element should end with the words "...that it was his/her legal duty to do".

³ If there is an issue about whether *NOC* is dead, further instructions will be required.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of criminal negligence causing death (manslaughter by criminal negligence).

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁴ after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of criminal negligence causing death.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did *NOA* (*specify alleged act or omission*)?**

Where the Crown relies on both an act and an omission:

The Crown must prove beyond a reasonable doubt either of the following:

1. that *NOA* (*specify alleged act*); or,
2. that *NOA* failed to (*specify alleged omission*), which s/he had a legal duty to do.

The Crown does not have to prove both. Nor do you all have to agree on the same act or omission as long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

The law imposes a duty on (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*) or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must find *NOA* not guilty. Your deliberations would be over.

⁴ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

If you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*), or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must go on to the next question.

Where the Crown relies only on an act:

The Crown must prove beyond a reasonable doubt that *NOA* (*specify alleged act*). It is for you to say, based on all the evidence, whether *NOA* (*specify alleged act*).

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must go on to the next question.

Where the Crown relies only on an omission:

The Crown must prove beyond a reasonable doubt that *NOA* had a legal duty to (*specify*), and that *NOA* failed to perform it.

The law imposes a duty on (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt both that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must go on to the next question.

[5] **Second – Did NOA show a wanton or reckless disregard for the lives or safety of others?**

To prove that *NOA* showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to establish that *NOA* meant to kill or seriously harm *NOC*, or anybody else. Rather, the Crown must prove beyond a reasonable doubt:

1. that *NOA*'s conduct showed a marked and substantial departure from the conduct of a reasonable person in the circumstances;⁵ and
2. that a reasonable person in the same circumstances would have foreseen that this conduct posed a risk of bodily harm. "Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than brief or minor.

In deciding what a reasonable person would have done or foreseen, you must not take into account *NOA*'s individual characteristics or experiences.⁶

(review relevant evidence, especially any explanation for NOA's conduct, and relate to issue)

Unless you are satisfied beyond a reasonable doubt that what *NOA* did or failed to do showed a wanton or reckless disregard for the lives or safety of others, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* showed a wanton or reckless disregard for the lives or safety of others, you must go on to the next question.

⁵ The phrase "marked and substantial" to explain the phrase "wanton and reckless disregard" was approved by the Supreme Court of Canada in *R. v. J.F.*, [2008] 3 S.C.R. 215. Other negligence-based criminal offences require proof of a "marked departure" from the standard of a reasonable person: *R. v. Beatty*, [2008] 1 S.C.R. 49.

⁶ This instruction may have to be modified where there is evidence that the accused did not have either the capacity to appreciate the nature and quality of his or her "intentional" act or the capacity to appreciate the risk that the alleged act or omission entailed. See: *R. v. Naglik*, [1993] 3 S.C.R. 122; 83 C.C.C. (3d) 526, at 546.

[6] **Third – Did *NOA*'s conduct cause *NOC*'s death?**

To prove that *NOA* caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.⁷ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,⁸ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused *NOC*'s death, you must find *NOA* not guilty of criminal negligence causing death (manslaughter by criminal negligence).

Insert instructions on any included offences.⁹

If you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused *NOC*'s death,

⁷ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court's decision in *R. v. Maybin*, 2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements: "There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*'s conduct no longer being a contributing cause of *NOC*'s death. If you find that *NOA*'s conduct contributed significantly to *NOC*'s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*'s life. Nor does it matter that what *NOA* did only accelerated *NOC*'s death from some existing disease or condition." You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.)

⁸ Delete the reference to expert evidence if none has been given.

⁹ Note that in driving cases consideration should be given to *Criminal Code*, s. 662(5) which incorporates included offences that are defined in s. 249 and s. 249.1(3). Other included offences may arise from the wording of the indictment.

you must find *NOA* guilty of criminal negligence causing death (manslaughter by criminal negligence).

Offence 221

Criminal Negligence Causing Bodily Harm

(s. 221) (Last revised – December 2009)

[1] *NOA* is charged with criminal negligence causing bodily harm. The charge reads:

(read relevant part of indictment or count)

[2] You must find *NOA* not guilty of criminal negligence causing bodily harm unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.¹⁰ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* (*specify alleged act or omission*)¹¹;
2. that, in (*specify alleged act or omission*), *NOA* showed wanton or reckless disregard for the lives or safety of others; and
3. that *NOA*'s conduct caused bodily harm to *NOC*.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of criminal negligence causing bodily harm.

¹⁰ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

¹¹ Where the Crown relies on an omission, this element should end with the words, "that it was his/her duty to do".

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt¹² after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of criminal negligence causing bodily harm.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did *NOA* (*specify alleged act or omission*)?**

Where the Crown relies on both an act and an omission:

This essential element requires the Crown to prove beyond a reasonable doubt either of the following:

1. that *NOA* (*specify alleged act*); or,
2. that *NOA* failed to (*specify alleged omission*), which s/he had a legal duty to do.

The Crown does not have to prove both. Nor do you all have to agree on the same act or omission as long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

The law imposes a duty on (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*) or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must find *NOA* not guilty. Your deliberations would be over.

¹² This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

If you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*) or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must go on to the next question.

Where the Crown relies only on an act:

The Crown must prove beyond a reasonable doubt that *NOA* (*specify alleged act*). It is for you to say, based on all the evidence, whether *NOA* (*specify alleged act*).

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must go on to the next question.

Where the Crown relies only on an omission:

The Crown must prove beyond a reasonable doubt that *NOA* had a legal duty to (*specify*), and that *NOA* failed to perform it.

The law imposes a duty upon (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must go on to the next question.

[5] **Second – Did *NOA* show a wanton or reckless disregard for the lives or safety of others?**

To prove that *NOA* showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to prove that *NOA* meant to kill or seriously harm *NOC*, or anybody else. Rather, the Crown must prove beyond a reasonable doubt:

1. that *NOA*'s conduct showed a marked and substantial departure from the conduct of a reasonable person in the circumstances;¹³ and
2. that a reasonable person in the same circumstances would have foreseen that this conduct posed a risk of bodily harm. "Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than brief or minor.

In deciding what a reasonable person would have done or foreseen, you must not take into account *NOA*'s individual characteristics or experiences.¹⁴

(review relevant evidence, especially any explanation for NOA's conduct, and relate to issue)

¹³ The phrase "marked and substantial" to explain the phrase "wanton and reckless disregard" was approved by the Supreme Court of Canada in *R. v. J.F.*, [2008] 3 S.C.R. 215. Other negligence-based criminal offences require proof of a "marked departure" from the standard of a reasonable person: *R. v. Beatty*, [2008] 1 S.C.R. 49.

¹⁴ This instruction may have to be modified where there is evidence that the accused did not have either the capacity to appreciate the nature and quality of his or her "intentional" act or the capacity to appreciate the risk that the alleged act or omission entailed. See: *R. v. Naglik*, [1993] 3 S.C.R. 122; 83 C.C.C. (3d) 526, at 546.

Unless you are satisfied beyond a reasonable doubt that what *NOA* did (*or*, failed to do) showed a wanton or reckless disregard for the lives or safety of others, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that what *NOA* did (*or*, failed to do) showed a wanton or reckless disregard for the lives or safety of others, you must go on to the next question.

[6] **Third – Did *NOA*'s conduct cause *NOC* bodily harm?**

To prove that *NOA* caused bodily harm to *NOC* the Crown must prove beyond a reasonable doubt that *NOC* suffered bodily harm and that *NOA*'s conduct contributed significantly to it.¹⁵

“Bodily harm” is any hurt or injury that interferes with a person’s health or comfort and is more than just brief or minor.

A person’s conduct may contribute significantly to another person’s bodily harm even though that conduct is not its sole or main cause. You must consider all the evidence concerning the cause of bodily harm to *NOC*, including the expert evidence of *NOW*,¹⁶ in determining whether the Crown has proved that *NOC* suffered bodily harm and that *NOA*'s conduct contributed significantly to it. It is for you to decide.

(review relevant evidence and relate to issue)

¹⁵ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court’s decision in *R. v. Maybin*, 2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

¹⁶ Delete the reference to expert evidence if none has been given.

Unless you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused bodily harm to *NOC*, you must find *NOA* not guilty of criminal negligence causing bodily harm.

If you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused bodily harm to *NOC*, you must find *NOA* guilty of criminal negligence causing bodily harm.

Insert instructions on any included offences.¹⁷

¹⁷ Note that in driving cases consideration should be given to *Criminal Code*, s. 662(5) which incorporates included offences that are defined in s. 249 and s. 249.1(3). Other included offences may arise from the wording of the indictment.