

**SENATE . . . . . No. 2218**

Senate, November 22, 2017 -- Message from His Excellency the Governor recommending legislation relative to the admissibility of evidence in a prosecution for operating under the influence

**The Commonwealth of Massachusetts**



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LIEUTENANT GOVERNOR

November 21, 2017

To the Honorable Senate and House of Representatives,

I am pleased to submit for your consideration “An Act Relative to the Admissibility of Evidence in a Prosecution for Operating Under the Influence.” This legislation sets statewide standards for the admissibility and use of a nationally recognized standardized field sobriety test in prosecutions for operating under the influence. The horizontal gaze nystagmus test—or HGN test—has been used for decades by law enforcement across the country to evaluate whether drivers are intoxicated in violation of the law. Like their counterparts across the country, police in Massachusetts have been using this test on the sides of our roads for years. Unlike in most other states, however, police rarely testify about the results of a HGN test in a Massachusetts courtroom. The reason for this discrepancy is not rooted in science: it is the state of our law. In the absence of statewide legislation like we have long had concerning the admissibility of breath tests, caselaw requires prosecutors in Massachusetts to establish the scientific validity of the HGN test in each and every case in which they seek to introduce the test as evidence.

The science, however, is well settled. The HGN test is a valid, reliable tool to determine whether a driver is operating a vehicle in violation of the law. The National Highway Traffic Safety Administration (“NHTSA”) has published data indicating that the HGN test is more strongly correlated with blood alcohol content than two other standardized field sobriety tests: the one-leg stand test and walk-and-turn test. Nevertheless, evidence of these other two tests is

routinely admitted in Massachusetts without litigation over the science behind them while the courts have imposed extra requirements on the admission of the HGN test. Case by case litigation over the use of the HGN test is unnecessary, inefficient and, to the extent it would lead to different outcomes, unjust.

Lawmakers can and should weigh in and affirm the validity of the HGN test and establish standards for its admissibility and use in Massachusetts. This legislation inserts language into our drunk driving and drunk boating laws that parallels existing language regarding the admissibility of breath test results. It allows for their admissibility when administered according to NHTSA standards and establishes statewide standards on when the outcome of the test should allow for an inference that a driver was or was not under the influence and when the outcome of the test should allow for no inference at all.

Drunk driving remains a significant cause of traffic fatalities in Massachusetts. Ensuring that trials are based on all available evidence will empower our judges and juries to reach true verdicts, and hold drunk drivers accountable for their actions. I urge your prompt enactment of this legislation.

Respectfully submitted,

Charles D. Baker,  
*Governor*

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## The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court  
(2017-2018)

An Act relative to the admissibility of evidence in a prosecution for operating under the influence.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Paragraph (e) of subdivision (1) of section 24 of chapter 90 of the General  
2 Laws as appearing in the 2016 Official Edition is hereby amended by adding the following  
3 paragraph:-

4           In any prosecution for a violation of paragraph (a) in which the defendant is alleged to be  
5 under the influence of intoxicating liquor; of a central nervous system depressant; of a  
6 dissociative anesthetic, such as phencyclidine or ketamine; or of toxic vapors, such as vapors of  
7 glue; evidence of impairment, as shown by the administration of a horizontal gaze nystagmus  
8 test conducted pursuant to a method approved by the National Highway Traffic Safety  
9 Administration, and the detection of one or more of the following indicators: 1) lack of smooth  
10 pursuit in left eye; 2) lack of smooth pursuit in right eye; 3) distinct nystagmus at maximum  
11 deviation in left eye; 4) distinct nystagmus at maximum deviation in right eye; 5) onset at or  
12 prior to 45 degrees in left eye; 6) onset at or prior to 45 degrees in right eye; shall be admissible

13 and deemed relevant to the determination of the question of whether such defendant was at such  
14 time impaired. If such evidence is that 4 or more such indicators were present, there shall be a  
15 permissible inference that such defendant was under the influence of intoxicating liquor; of a  
16 central nervous system depressant; of a dissociative anesthetic, such as phencyclidine or  
17 ketamine; or of toxic vapors, such as vapors of glue. If such evidence is that fewer than 2 such  
18 indicators were present, there shall be a permissible inference that such defendant was not under  
19 the influence of intoxicating liquor; of a central nervous system depressant; of a dissociative  
20 anesthetic, such as phencyclidine or ketamine; or of toxic vapors, such as vapors of glue. If such  
21 evidence is that 2 or 3 such indicators were present, there shall be no permissible inference from  
22 such evidence with regard to whether the defendant was under the influence. In any such  
23 prosecution, a court may take judicial notice of a contemporary publication of the National  
24 Highway Traffic Safety Administration with regard to the proper administration of the horizontal  
25 gaze nystagmus test.

26 SECTION 2. Paragraph (2) of subsection (a) of section 8 of chapter 90B of the General  
27 Laws, as so appearing, is hereby amended by adding the following subparagraph:-

28 (C) In any prosecution for a violation of paragraph (1) in which the defendant is alleged  
29 to be under the influence of intoxicating liquor; of a central nervous system depressant; of a  
30 dissociative anesthetic, such as phencyclidine or ketamine; or of toxic vapors, such as vapors of  
31 glue; evidence of impairment, as shown by the administration of a horizontal gaze nystagmus  
32 test conducted pursuant to a method approved by the National Highway Traffic Safety  
33 Administration, and the detection of one or more of the following indicators: 1) lack of smooth  
34 pursuit in left eye; 2) lack of smooth pursuit in right eye; 3) distinct nystagmus at maximum  
35 deviation in left eye; 4) distinct nystagmus at maximum deviation in right eye; 5) onset at or

36 prior to 45 degrees in left eye; 6) onset at or prior to 45 degrees in right eye; shall be admissible  
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38 time impaired. If such evidence is that 4 or more such indicators were present, there shall be a  
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