

**ASSAULT AND BATTERY ON A CHILD UNDER 14
CAUSING BODILY INJURY**

G.L. c. 265, § 13J(b ¶ 1)

The defendant is charged under G.L. c. 265, § 13J, with having committed an assault and battery on and thereby caused bodily injury to a child under 14 years of age.

I. INTENTIONAL ASSAULT AND BATTERY

In order to prove the defendant guilty of having committed this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: That [the alleged victim] was a person under 14 years of age;

Second: That the defendant touched the person of [the alleged victim], without having any right or excuse for doing so;

Third: That the defendant intended to touch [the alleged victim]; and

Fourth: That [the alleged victim] suffered bodily injury.

If additional language on intent is appropriate.

As I

mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended to touch* [the alleged victim], in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to [the alleged victim].

To prove the fourth element, the Commonwealth must prove that [the alleged victim] suffered a bodily injury. Under the law, a bodily injury is a substantial impairment of the physical condition, including:

(a burn)

(a fracture of any bone)

(a subdural hematoma)¹

(any injury to any internal organ)

(any injury which occurs as the result of repeated harm to any bodily

¹ Note: Generally speaking, a subdural hematoma refers to bleeding on the brain.

function or organ including human skin)

**(any physical condition which substantially imperils a child's health
or welfare).**

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery was already charged on.*

There is a

second way in which a person may be guilty of an assault and battery. Instead of intentional conduct, it involves reckless conduct that results in bodily injury.

B. *If intentional assault and battery was not already charged on.*

The

defendant is charged under G.L. c. 265, § 13J, with having committed an assault and battery upon [the alleged victim] by reckless conduct and thereby caused bodily injury to a child under 14 years of age.

In order to prove that the defendant is guilty of having committed an assault and battery on and thereby caused injury to a child under 14 years of age by reckless conduct, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* That [the alleged victim] was a person under 14 years of age;**

***Second:* That the defendant intentionally engaged in actions which**

caused bodily injury to [the alleged victim]; and

***Third:* That the defendant's actions amounted to reckless conduct.**

To prove the second element, the Commonwealth must prove that the defendant acted consciously and deliberately and not accidentally. It must further prove that his actions caused a bodily injury which is defined as a substantial impairment of the physical condition, including:

(a burn)

(a fracture of any bone)

(a subdural hematoma)²

(any injury to any internal organ)

(any injury which occurs as the result of repeated harm to any bodily function or organ including human skin)

(any physical condition which substantially imperils a child's health or welfare).

To prove the third element, the Commonwealth must prove that the defendant acted wantonly or recklessly. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that

² Note: Generally speaking, a subdural hematoma refers to bleeding on the brain.

the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that his (her) [actions were] [failure to act was] very likely to result in bodily harm to [the alleged victim] but he (she) ran that risk and [went ahead anyway] [failed to act anyway].

It is not necessary that the defendant intended that [the alleged victim] be harmed or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to result in bodily injury to [the alleged victim] and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in bodily harm to [the alleged victim].

G.L. c. 265, § 15A(b). *Ford*, 424 Mass. at 711, 677 N.E.2d at 1151 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

If relevant to the evidence.

If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.

Commonwealth v. Burno, 396 Mass. 622, 625-627, 487 N.E.2d 1366, 1368-1370 (1986) (“the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another”; injury must have “interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the ‘injury’ in each instance would be transient and trifling at most”); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-277, 450 N.E.2d 1100, 1102-1104 (1983) (“The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct”; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act). See also *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4, 505 N.E.2d 171, 174 n.4 (1987) (“The standard of wanton or reckless conduct is at once subjective and objective’ It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts”); *Commonwealth v. Godin*, 374 Mass. 120, 129, 371 N.E.2d 438, 444, cert. denied, 436 U.S. 917 (1977) (standard “is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards”); *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944) (“Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences”).

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping.

The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused [the alleged victim] reasonably to fear an immediate attack from the defendant, which then led him (her) to try to (escape) (or) (defend) himself

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Issued May 2011

(herself) from the defendant, and in doing so injured himself

(herself).

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

NOTES:

1. **Verdict slip where there are alternate theories of guilt.** If the evidence would warrant a guilty verdict for the offense of assault and battery on more than one theory of culpability, the judge must provide the jury with a verdict slip to indicate the theory or theories on which the jury bases its verdict and, on request, instruct the jurors that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta*, 422 Mass. 642, 646-647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett*, 422 Mass. 634, 640, 422 N.E.2d 833, 837 (1996); *Commonwealth v. Barry*, 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995). See the appendix for a sample verdict slip that may be used when an assault and battery charge is submitted to the jury under both the intentional and reckless branches of assault and battery, and without any lesser included offenses. The sample verdict slip must be adapted to include additional options if any lesser included offenses are submitted to the jury. Where only an assault is charged or the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010).

2. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798, 803 (1994).

3. **Transferred intent.** An instruction on transferred intent indicates that the Commonwealth need only prove intent as to one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11, 763 N.E.2d 1092, 1099 n.11 (2002). "It is a familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553, 32 N.E. 862, 863 (1893). Accord, *Commonwealth v. Drumgold*, 423 Mass. 230, 259, 668 N.E.2d 300, 319 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669, 532 N.E.2d 34, 36 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, 474 N.E.2d 1078, 1083-1084 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13, 544 N.E.2d 1276, 1281 n.13 (1983).

4. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.