ASSAULT AND BATTERY
BY MEANS OF A DANGEROUS WEAPON

G.L. c. 265, § 15A

I. INTENTIONAL ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

The defendant is charged with having committed an intentional assault and battery by means of a dangerous weapon.

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

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

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

Third: **That the touching was done with a dangerous weapon.**

If additional language on intent is appropriate. **The Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch** *[alleged victim]* **with the dangerous weapon, 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 *[alleged victim]* **.**

If no injury was sustained. **It is not necessary for the Commonwealth to prove that the defendant actually caused injury to** *[alleged victim]* **with a dangerous weapon. Any slight touching is sufficient, if it was done with a dangerous weapon.**

A. *If the alleged weapon is inherently dangerous.* **A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a _____ is a dangerous weapon.**

B. *If the alleged weapon is not inherently dangerous.* **An item that is normally used for innocent purposes can become a dangerous weapon if it is used as a weapon in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.**

For example, a brick can be a dangerous weapon if it is thrust against someone's head or a pillow if it is used to suffocate someone. In deciding

whether an item was used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

G.L. c. 265, § 15A(b). *Commonwealth v. Ford,* 424 Mass. 709, 711 (1997) (ABDW is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Commonwealth v. Waite,* 422 Mass. 792, 794 n.2 (1996) (ABDW does not require specific intent to do bodily harm with the dangerous weapon); *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 887 n.4 (1984) (ABDW "requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another, by means of an instrumentality capable of causing bodily harm"); *Commonwealth v. Manning*, 6 Mass. App. Ct. 430, 436-438 (1978) (ABDW must be "by means of" dangerous weapon, that is, weapon must come into contact with victim); *Commonwealth v. Moffett*, 383 Mass. 201, 212 (1981) (same); *Commonwealth v. Liakos*, 12 Mass. App. Ct. 57, 60-61 (1981) (use of dangerous weapon, though not found or testified to, inferable from nature of victim's wounds).

The Appeals Court approved giving "helpful examples to guide the jury's analysis" in *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 923 (1984), and much of the wording of the instruction regarding an item that is not inherently dangerous was reviewed in *Commonwealth v. Tevlin*, 433 Mass. 305, 310 (2001).

Where the dangerousness of the object is for the jury to decide, a lesser included instruction on assault and battery should always be given, and must be given on request. *Commonwealth v. Connolly, 49 Mass. App. Ct. 424, 426 (2000).*

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON

A. *If intentional ABDW was already charged on.* **There is a second way in which a person may be guilty of an assault and battery by means of a dangerous weapon. Instead of intentional conduct, it involves a *reckless* touching with a dangerous weapon that results in bodily injury.**

B. *If intentional ABDW was not already charged on.* **The defendant is charged with having committed a reckless assault and battery by means of a dangerous weapon upon** *[alleged victim]* **.**

In order to prove that the defendant is guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant engaged in actions which caused bodily injury to** *[alleged victim]* **.**

Second: **That the bodily injury was done with a dangerous weapon; and**

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

With regard to the first element, the bodily injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

A. *If the alleged weapon is inherently dangerous.* **A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a _____ is a dangerous weapon.**

B. *If the alleged weapon is not inherently dangerous.* **An item that is normally used for innocent purposes can become a dangerous weapon if it is used as a weapon in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.**

For example, a brick can be a dangerous weapon if it is thrust against someone's head or a pillow if it is used to suffocate someone. In deciding whether an item was used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

With regard to the third element, 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 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 such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway.

But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm 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 substantial injury.

G.L. c. 265, § 15A(b). *Ford,* 424 Mass. at 711 (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).

No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery by means of a dangerous weapon are alleged. Where the evidence warrants instructing on both intentional and reckless branches, the jurors need not be unanimous on whether the ABDW was intentional or reckless. The judge, therefore, need not give a specific unanimity instruction or provide verdict slips for the jury to indicate the basis of its verdict. See *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906, 906-07, rev. denied, 466 Mass. 1108 (2013). This is because "the forms of assault and battery are . . . closely related subcategories of the same crime." Id. at 907. "Specific unanimity is not required, because they are not 'separate, distinct, and essentially unrelated ways in which the same crime can be committed.' " *Id.*, quoting *Commonwealth v. Santos*, 440 Mass. 281, 288 (2003).

NOTES:

1. **"Dangerous weapon."** A weapon is "an instrument of offensive or defensive combat; . . . anything used, or designed to be used, in destroying, defeating, or injuring an enemy." *Commonwealth v. Sampson*, 383 Mass. 750, 754 (1981). A dangerous weapon is "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." *Commonwealth v. Farrell*, 322 Mass. 606, 614-615 (1948).

If a weapon is inherently dangerous, it need not have been used in a dangerous fashion. *Appleby*, 380 Mass. at 307 n.6. For the list of weapons which are considered inherently dangerous, see G.L. c. 269, § 10(a) & (b) and *Commonwealth v. Appleby,* 380 Mass. 296, 303 (1980) (item is inherently dangerous "if designed for the purpose of bodily assault or defense"). See *Commonwealth v. Lord*, 55 Mass.App.Ct. 265, 267 (2002) (mace spraying device dangerous per se).

Usually-innocent items are also considered to be dangerous weapons if used in a dangerous or potentially dangerous fashion. *Id.* at 303-304, 307 (riding crop; and collecting cases on particular items). See also *Commonwealth v. Scott,* 408 Mass. 811, 822-823 (1990) (gag); *Commonwealth v. Gallison*, 383 Mass. 659, 667-668 (1981) (lit cigarette); *Commonwealth v. Barrett*, 386 Mass. 649, 654-656 (1980) (aerosol can sprayed in eyes of operator of moving vehicle); *Commonwealth v. Fettes,* 64 Mass. App. Ct. 917, 918 (2005) (dog). However, the fact that an appellate court previously held that the object was capable of being used as a dangerous weapon does not make it such in all future cases, regardless of circumstances. *Appleby, supra*. "The essential question, when an object which is not dangerous per se is alleged to be a dangerous weapon, is whether the object, as used by the defendant, is capable of producing serious bodily harm." *Marrero*, 19 Mass. App. Ct. at 922. This is determined by how the object's potential for harm would have appeared to a reasonable observer. *Commonwealth v. Tarrant*, 367 Mass. 411, 414 (1975). This determination is normally for the jury, to be decided on the basis of the circumstances surrounding the crime, the nature, size and shape of the object, and the manner in which it was handled or controlled. *Appleby*, 380 Mass. at 307 n.5; *Marrero, supra; Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 193 (1980). "That a dangerous weapon was used can be inferred from the victim's injuries." *Commonwealth v. Roman*, 43 Mass. App. Ct. 733, 736, S.C., 427 Mass. 1006 (1998). Whether an item is a dangerous weapon turns on how it is used, and not the subjective intent of the actor. *Commonwealth v. Lefebvre*, 60 Mass. App. Ct. 912, 913 (2004); *Commonwealth v. Connolly* 49 Mass. App. Ct. 424, 425 (2000).

To qualify as a dangerous weapon, an item need not be capable of being wielded, possessed or controlled, and may be stationary. *Commonwealth v. Sexton,* 425 Mass. 146, 152 (1997) (concrete pavement against which victim's head was repeatedly struck; and collecting cases). See also *Commonwealth v. McIntosh,* 56 Mass. App. Ct. 827, 829 (2002) (windowpane). It may not, however, be a human body part. *Davis*, 10 Mass. App. Ct. at 192-193 (teeth and other body parts). The ocean is not a dangerous weapon for purposes of § 15A where the victim is abandoned far from shore, *Commonwealth v. Shea,* 38 Mass. App. Ct. 7, 15-16, (1995), but perhaps it would be if the victim's head were held underwater, see *Sexton,* 425 Mass. at 150 & n.1.

2. **Knives.** Not all knives are dangerous per se. *Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 694 n.1 (1986) (noting Legislature has not designated all knives as dangerous per se, and discussing the definition of "dirk knife"). By statute, "any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches" is a dangerous weapon per se. G.L. c. 269, § 10(b). See *Commonwealth v. Smith,* 10 Mass. App. Ct. 770, 776-78 (1996) (a "knife having a double-edged blade" need not be double-edged for its entire length); *Miller, supra* (discussing the difficulties in defining a "dirk knife"). Straight knives typically are regarded as dangerous per se while folding knives, at least those without a locking device, typically are not. *Commonwealth v. Turner,* 59 Mass. App. Ct. 825, 828 (2003). See *Commonwealth v. Young*, 461 Mass. 198, 211-12 (2012) (affirming instruction that a nine-inch knife with a five-inch double-edge blade was dangerous per se). Possession of a closed folding knife is a dangerous weapon for purposes of G.L. c. 269, § 10(b) only if used or handled in a manner that made it a dangerous weapon. *Turner,* 59 Mass. App. Ct. at 828-29.

3. **Shod foot.** "Footwear, such as a shoe, when used to kick, can be a dangerous weapon." *Commonwealth v. Tevlin*, 433 Mass. 305, 311 (2001); Commonwealth *v. Fernandez*, 43 Mass. App. Ct. 313, 315 (1997) (sneakers); *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984) (boots or sneakers); *Commonwealth*

v. Zawatsky, 41 Mass. App. Ct. 392, 398-399 (1996) (unnecessary for prosecutor to prove exactly what type of shoes defendant wore where there was evidence that defendant was wearing shoes and gave victim a vicious kick to the head resulting in injury). Compare *Commonwealth v. Charles,* 57 Mass. App. Ct. 595, 599 (2003) (kicking was "not so minimal as to foreclose an inference" that shod feet were being used as dangerous weapons capable of causing serious injury) with *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 397 (1987) (jury may infer that foot was shod, but no more than a nudge was insufficient).

4. **Unseen weapon**. A defendant who claimed to have a weapon may be taken at his word, if it is possible that he did have such a weapon. *Commonwealth v. Hastings,* 22 Mass. App. Ct. 930, 930 (1986) (where victim felt sharp object against her, defendant claiming to have unseen knife may be convicted of ABDW).

5. **Specification of dangerous weapon**. The particular type of dangerous weapon with which the offense was committed is not an essential element of ABDW. *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 929 (1988). It is therefore surplusage in a complaint and, if the defendant is not surprised, its specification in the complaint may be amended at any time to conform to the evidence. See G.L. c. 277, § 21.

6. **Automobile as extension of occupants**. As to whether a battery of an automobile is also a battery of its occupants, see *Commonwealth v. Burno*, 396 Mass. 622, 627-628 (1986) (agreeing that "a battery could occur although no force was applied to a person directly," but reserving decision on whether "a battery could occur even if no force at all, direct or indirect, was applied to a person").

7. **Victim injured while escaping.** A defendant may be convicted of ABDW where the victim was cut with the defendant's knife while trying to grab the knife away from the pursuing defendant. *Commonwealth v. Rajotte*, 23 Mass. App. Ct. 93, 96 (1986). See the supplemental instruction to Assault and Battery (Instruction 6.140).

8. **Consent not a defense.** *Commonwealth v. Appleby*, 380 Mass. 296, 310 (1980) (consent is not a defense to ABDW). *Commonwealth* v. *Burke,* 390 Mass. 480, 482-483 (1983); *Commonwealth* v. *Leonard,* 90 Mass. App. Ct. 187 (2016).

9. **Transferred intent**. An instruction on transferred intent indicates that the Commonwealth need only prove an intent to touch 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 (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 (1893). Accord, *Commonwealth v. Dung Van Tran*, 463 Mass. 8, 25 & n.19 (2012); *Commonwealth v. Drumgold,* 423 Mass. 230, 259, (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669 & n. 6 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13 (1983).

10. **Joint venture.** A conviction of ABDW by joint venture requires knowledge that the co-venturer had a dangerous weapon, but this may be inferred from the circumstances. *Commonwealth v. Ferguson*, 365 Mass. 1, 8-9 (1974); *Commonwealth v. Meadows*, 12 Mass. App. Ct. 639, 644 (1981). See *Commonwealth v. Britt*, 465 Mass. 87, 100 (2013) (where conviction is based on joint venture theory of crime that has as element use or possession of weapon, Commonwealth bears "the burden of proving that [the defendant] had knowledge that a member of the joint venture had a weapon"). However, "there is no need to prove an anticipatory compact between the parties to establish joint venture, if, at the climactic moment the parties consciously acted together in carrying out the criminal endeavor." *Commonwealth v. Sexton*, 425 Mass. 146, 152 (1997) (joint venture liability for ABDW upheld where defendant continuously kicked and punched the victim while his coventurer repeatedly slammed the victim's head into the pavement, and at no time during this conflict did the defendant seek to withdraw).

11. **Aggravated forms of offense**. Assault and battery on a person 60 years or older by means of a dangerous weapon (G.L. c. 265, § 15A[a]) is an aggravated form of ABDW (§ 15A[b]). The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess . . . ."

Commonwealth v. Pittman, 25 Mass. App. Ct. 25, 28 (1987). A further-aggravated sentence is provided for subsequent offenses.

An ABDW is also aggravated if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant, or if the defendant is 18 years of age or older and the victim is under the age of 14. G.L. c. 265, § 15A(c)).

12. **Lesser included offenses**. ABDW has as lesser included offenses assault with a dangerous weapon, and assault and battery (Instruction 6.140). Commonwealth v. Beal, 474 Mass. 341, 347 (2016) (ADW lesser included offense of ABDW); Commonwealth v. Connolly, 49 Mass. App. Ct. 424, 426 (2000) (assault and battery lesser included offense of ABDW). Both theories of assault (Instruction 6.120) are lesser included offenses of *intentional* ABDW; there is still an open question about whether both theories are lesser included offenses of reckless ABDW). See *Commonwealth v. Porro*, 458 Mass. 526, 534 & n.8 (2010). If the evidence would also permit a jury finding of a lesser included offense, the jury should be instructed on lesser included offenses (Instruction 2.280).

13. **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.