

## VANDALISM

G.L. c. 266, § 126A

The defendant is charged with having committed vandalism. In order to prove that the defendant is guilty of having committed the offense of vandalism, the Commonwealth must prove four things beyond a reasonable doubt:

*First:* That the defendant (painted) (marked) (scratched) (etched) (injured) (marred) (defaced) (or) (destroyed) property;

*Second:* That the defendant did so intentionally;

*Third:* That the defendant did so (wilfully with malice) (wantonly); and

*Fourth:* That the property was owned or possessed by someone other than the defendant.

To prove the second element, the Commonwealth must prove the defendant acted consciously and deliberately, rather than by accident or as the result of negligence.

To prove the third element, the Commonwealth must prove that the defendant acted (wilfully with malice) (or) (wantonly).

If wilful and malicious conduct is alleged:

**A person acts wilfully if (he) (she) intends both the conduct and its harmful consequences. The act must be done with the intent that it have harmful consequences.**

**A person acts with malice when acting out of cruelty, hostility, or revenge. To act with malice, one must act not only deliberately, but out of hostility toward the owner or person in possession of the property whoever that may be. The defendant does not have to know the identity of the owner or person in possession of the property.**

If wanton conduct is alleged:

**A person acts wantonly by acting recklessly or with indifference to the fact that (his) (her) conduct would probably cause substantial injury to, or destruction of, another's property. The Commonwealth must prove that the defendant consciously disregarded, or was indifferent to, an immediate danger of substantial harm to another's property.**

**It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person**

**would not. To prove the defendant acted wantonly, the Commonwealth must prove that the defendant’s actions went beyond mere negligence and amounted to recklessness. The defendant acted wantonly if (he) (she) knew, or should have known, that (his) (her) actions would probably cause substantial harm to other people or their property, but (he) (she) recklessly ran that risk by going ahead anyway. But even if the defendant was not conscious of the danger that was inherent in such conduct, it is still wanton conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions would very probably result in substantial injury to another’s property.**

NOTES:

1. **Malicious act must be wilful; wanton act requires only general intent.** The offense in G.L. c. 266, § 126A, includes two distinct crimes with distinct elements. When malicious conduct is alleged, a specific intent must be proved and the act must be wilful and the defendant must have a specific intent to engage in the conduct and to achieve its harmful consequences. When wanton conduct is alleged, a general intent is all that is required. *Commonwealth v. McDowell*, 62 Mass. App. Ct. 15, 18-24, *rev. denied*, 442 Mass. 1113 (2004). See note 2 below from the notes pertaining to § 127 of chapter 266 of the General Laws.

2. **Distinction between “wilful and malicious” and “wanton” destruction.** Wilful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor’s conduct was indifferent to, or in disregard of, the probable consequences. *Commonwealth v. Armand*, 411 Mass. 167, 170-71 (1991); *Commonwealth v. Redmond*, 53 Mass. App. Ct. 1, 5, *rev. denied*, 435 Mass. 1107 (2001). “The forcible entry into an office will, without doubt, result in some destruction of property, but a messy thief is not necessarily malicious within the meaning of the statute.” *Redmond*, 53 Mass. App. Ct. at 5. “The essence of the distinction appears to lie in the fact that a wilful actor intends both his conduct and the resulting harm whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm.” *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is wilful and malicious if the rocks were aimed at passing cars. *Commonwealth v. Cimino*, 34 Mass. App. Ct. 925, 927 (1993). “It is worth noting that destruction of property which accompanies even violent crime may not by that token alone qualify as wilful and malicious.” *Id.*

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Issued June 2016

3. **“Wanton” destruction not lesser included offense of “wilful and malicious” destruction.** Wanton property destruction (see Instruction 8.260) is *not* a lesser included offense of wilful and malicious property destruction, as wanton conduct requires proof that the likely effect of the defendant’s conduct was substantial harm, but wilful and malicious conduct does not. *Commonwealth v. Schuchardt*, 408 Mass. 347, 352 (1990).
4. **Vandalism to motor vehicle or trailer.** Malicious damage to a motor vehicle or trailer is punishable also under G.L. c. 266, § 28. See Instruction 8.200.