ASSAULT AND BATTERY ON AN EMERGENCY MEDICAL TECHNICIAN, AMBULANCE OPERATOR OR ATTENDANT, OR HEALTH CARE PROVIDER

G.L. c. 265, § 13I

The defendant is charged with having committed an assault and battery on an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider).

The statute defines "health care provider" by reference to G.L. c. 111, § 1. The term includes "any doctor of medicine, osteopathy, or dental science, or a registered nurse, registered pharmacist, social worker, doctor of chiropractic, or psychologist licensed under [G.L. c. 112], or an intern, or a resident, fellow, or medical officer licensed under [G.L. c. 112, § 9], or a hospital, clinic or nursing home licensed under [G.L. c. 111] and its agents and employees, or a public hospital and its agents and employees." G.L. c. 111, § 1.

I. INTENTIONAL ASSAULT AND BATTERY

To prove the defendant guilty of committing an intentional assault and battery on an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider), the Commonwealth must prove six things beyond a reasonable doubt.

***First*: That the defendant touched the person of [the alleged victim];**

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

***Third*: That the touching was <u>either</u> likely to cause bodily harm to [the alleged victim], <u>or</u> was offensive;**

***Fourth*: That [the alleged victim] was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider);**

***Fifth*: That [the alleged victim] was treating or transporting a person in the performance of their duties at the time of the alleged incident; and**

***Sixth*: That the defendant knew that [the alleged victim] was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) who was treating or transporting a person in the performance of their duties at the time of the alleged incident.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant touched [the alleged victim]. A touching is any physical contact, however slight.

Where there is evidence that the touching may be justified by a legally recognized "right" or "excuse," the jury should be instructed with the specific "right" or "excuse" instructions (e.g., Accident (Instruction 9.100), Necessity (Instruction 9.240), or self-defense (supplemental instruction below). See *Commonwealth v. Wood*, 90 Mass. App. Ct. 271, 286 (2016) (where evidence did not raise a claim of right or excuse, the jury need not consider whether the touching was without right or excuse); *Commonwealth v. Conley*, 34 Mass. App. Ct. 50, 58 (1993) (where no evidence of self-defense, jury need not be instructed that right or excuse may justify the touching).

If the touching was indirect. **A touching may be direct as when a person strikes another, or it may be indirect as when a person**

sets in motion some force or instrumentality that strikes another.

To prove the second element, 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.**

If additional language on intent is appropriate. **The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** [the alleged victim] .

Commonwealth v. Ford, 424 Mass. 709, 711 (1997) (assault and battery 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. Musgrave*, 38 Mass. App. Ct. 519, 521 (1995) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"), aff'd, 421 Mass. 610 (1996); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to cross-complaints of assault and battery; "such license is void, because it is against the law").

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the touching was either likely to cause bodily harm to [the alleged victim] **or was offensive. A touching is offensive when it is without consent.**

Commonwealth v. Burke, 390 Mass. 480, 484 (1983) (in a prosecution for a nonharmful battery, the Commonwealth must prove that the touching was nonconsensual); *Commonwealth v. Hartnett*, 72 Mass. App. Ct. 467, 477 (2008) ("[W]hat makes the

touching offensive is not that it is an affront to the victim's personal integrity as the defendant posits, but only that the victim did not consent to it. Nothing more is required.").

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that __[the alleged victim]__ **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider).**

A "health care provider" includes "any doctor of medicine, osteopathy, or dental science, or a registered nurse, registered pharmacist, social worker, doctor of chiropractic, or psychologist licensed under [G.L. c. 112], or an intern, or a resident, fellow, or medical officer licensed under [G.L. c. 112, § 9], or a hospital, clinic or nursing home licensed under [G.L. c. 111] and its agents and employees, or a public hospital and its agents and employees." G.L. c. 111, § 1.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that __[the alleged victim]__ **was treating or transporting a person in the performance of their duties at the time of the alleged offense. It is not sufficient for the Commonwealth to prove that** __[the alleged victim]__ **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider). They must have been treating or transporting a person in the performance of their duties at the time of the alleged offense.**

To prove the sixth element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that __[the alleged victim]__ **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) who was treating or**

transporting a person in the performance of their duties at the time of the alleged incident. It is not enough to prove that a prudent person would have known or believed that [the alleged victim] **was treating or transporting a person in the performance of their duties as an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider). To help you determine whether the defendant knew** [the alleged victim] **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) who was treating or transporting a person in the performance of their duties, you may examine any evidence regarding the defendant's actions or words, and all of the surrounding circumstances.**

Optional: **This may include whether** [the alleged victim] **was wearing a uniform or exhibited credentials such as a badge, patch, insignia, or identification card, or had other equipment consistent with a person performing the duties of an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider).**

If the Commonwealth has proved all six elements of an intentional assault and battery on (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery instruction was already given.* **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 instruction was not already given.* **The defendant is charged with having committed an assault and battery on an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) by reckless conduct.**

To prove the defendant guilty of an assault and battery on (emergency medical technician) (ambulance operator) (ambulance

attendant) (health care provider) by reckless conduct, the Commonwealth must prove five things beyond a reasonable doubt:

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

***Second*:** **That the defendant's actions amounted to reckless conduct;**

***Third*:** **That** [the alleged victim] **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider);**

***Fourth*:** **That** [the alleged victim] **was treating or transporting a person in the performance of their duties at the time of the alleged incident; and**

***Fifth*:** **That the defendant knew that** [the alleged victim] **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) who was treating or transporting a person in the performance of their duties at the time of the alleged incident.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant intended the act or acts that caused bodily injury. In other words, the Commonwealth

must prove that the defendant consciously and deliberately intended the act or acts to occur and that (it was) (they were) not accidental.

The Commonwealth must also prove beyond a reasonable doubt that the defendant's actions caused bodily injury to [the alleged victim] **. To qualify, 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.**

> *Commonwealth v. Burno*, 396 Mass. 622, 625-627 (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.") (citation omitted).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant acted recklessly. 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. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness.

The defendant acted recklessly if they knew, or should have known, that their actions were very likely to cause substantial harm to

someone, but they ran that risk and went ahead anyway. The Commonwealth need not prove that the defendant intended to injure or strike [the alleged victim], **or that the defendant foresaw the harm that resulted, or that the defendant was conscious of the serious danger that was inherent in such conduct. It is enough 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 a substantial injury to another person.**

Commonwealth v. Grey, 399 Mass. 469, 472 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.") (quoting *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944)).

If additional language on intent is appropriate. **The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** [the alleged victim].

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that [the alleged victim] **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider).**

A "health care provider" includes "any doctor of medicine, osteopathy, or dental science, or a registered nurse, registered pharmacist, social worker, doctor of chiropractic, or psychologist licensed under [G.L. c. 112], or an intern, or a resident, fellow, or medical

> officer licensed under [G.L. c. 112, § 9], or a hospital, clinic or nursing home licensed under [G.L. c. 111] and its agents and employees, or a public hospital and its agents and employees." G.L. c. 111, § 1.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that __[the alleged victim]__ **was treating or transporting a person in the performance of their duties at the time of the alleged offense. It is not sufficient for the Commonwealth to prove that** __[the alleged victim]__ **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider). They must have been treating or transporting a person in the performance of their duties at the time of the alleged offense.**

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that __[the alleged victim]__ **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) who was treating or transporting a person in the performance of their duties at the time of the alleged incident. It is not enough to prove that a prudent person would have known or believed that** __[the alleged victim]__ **was treating or transporting a person in the performance of their duties as an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider). To help you determine whether the**

defendant knew [the alleged victim] **was an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) who was treating or transporting a person in the performance of their duties, you may examine any evidence regarding the defendant's actions or words, and all of the surrounding circumstances.**

> *Optional:* **This may include whether** [the alleged victim] **was wearing a uniform or exhibited credentials such as a badge, patch, insignia, or identification card, or had other equipment consistent with a person performing the duties of an (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider).**

If the Commonwealth has proved all five elements of the charge of reckless assault and battery beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

Right of self-defense when the defendant is alleged to be under treatment.

A person has a right to refuse medical treatment. An (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) may not provide medical treatment to a person without their consent, except in certain emergency circumstances.

If a person does not consent to medical treatment, the person may defend themselves with as much force as reasonably appears necessary to prevent that treatment.

If there is evidence that the defendant did not consent to the medical treatment, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense.

To prove that the defendant did not act in self-defense, the Commonwealth must prove at least <u>one</u> of the following propositions beyond a reasonable doubt:

First: **That the defendant consented to the treatment, either expressly by their words or conduct, or implicitly; <u>or</u>**

Second: **That there was an emergency that required immediate medical treatment, the defendant was incapable of**

consenting to the treatment, and either time or circumstances did not permit the (emergency medical technician) (ambulance operator) (ambulance attendant) (health care provider) to obtain consent for the treatment from a family member; or

Third: **That the defendant did not do everything that was reasonable in the circumstances to avoid physical combat before resorting to force; or**

Fourth: **That the defendant used more force to defend themselves than was reasonably necessary in the circumstances.**

If there is evidence of self-defense and the Commonwealth has failed to prove at least one of these things beyond a reasonable doubt, you must find the defendant not guilty.

A competent person has the right to refuse medical treatment, as a matter of both constitutional and common law. *Shine v. Vega*, 429 Mass. 456, 463 (1999); *accord Norwood Hosp. v. Munoz*, 409 Mass. 116, 122 (1991); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 430 (1986); *In re Spring*, 380 Mass. 629, 634 (1980); *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728, 739, 742 (1977). The decision to decline a particular treatment belongs to the competent person, regardless of the wisdom of that decision or the life-saving nature of the treatment. *Shine*, 429 Mass. at 463-464 (citing *Norwood Hosp.*, 409 Mass. at 122-123).

Medical treatment of a competent person without their consent is a battery, absent an emergency or overriding governmental interest. *In re Spring*, 380 Mass. at 638; *see also Shine*, 429 Mass. at 465 (emergency-treatment exception "does not and cannot override the refusal of treatment by a patient who is capable of providing consent."). "If, and only if, the patient is unconscious or otherwise incapable of giving consent, and either time or circumstances do not permit the physician to obtain the consent of a family member, may the physician presume that the patient, if competent, would consent to life-saving medical treatment." *Shine*, 429 Mass. at 466; *see also id.* (quoting Restatement (Second) of Torts § 892D cmt. a (1979) (emergency treatment exception "can arise only . . . when there is no time to consult the other or one empowered to consent for

[them], or for reasons such as the unconsciousness of the other, [their] consent cannot be obtained").

The four recognized governmental interests that may override the right to refuse medical treatment in life-threatening situations are: "(1) the preservation of life; (2) the prevention of suicide; (3) the maintenance of the ethical integrity of the medical profession; and (4) the protection of innocent third parties." *Norwood Hosp.*, 409 Mass. at 125. However, these interests do not automatically take precedence over the right to refuse medical treatment. In *Norwood Hospital*, the Supreme Judicial Court held that none of the governmental interests overrode a patient's right to refuse a life-saving blood transfusion, even where the patient had a minor child. *Id.* at 125-131.

NOTES:

1. Lesser included offenses. Assault and battery is a lesser included offense of assault and battery on an emergency medical technician, ambulance personnel, or health care provider. *See Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982) (it was error to deny the defendant's request for a lesser included instruction where the evidence was in dispute about whether the alleged victim was a public employee). Likewise, the model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983); see *Commonwealth v. Porro*, 458 Mass. 526, 533-35 (2010). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.

2. No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery are alleged. Where the evidence warrants instructing on both intentional assault and battery and reckless assault and battery, the jurors need not be unanimous on whether the assault and battery 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. *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).

3. Knowledge of alleged victim's status. Under the intentional prong of assault and battery, the Commonwealth must prove that the defendant intended to strike an emergency medical technician, ambulance personnel, or health care provider who was treating or transporting a person in the performance of their duties. See *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982). Even though the statute does not specifically provide for scienter as an element of the offense, older cases interpreting similar offenses suggest that knowledge of the victim's identity was required to establish the common law offense and have continued to include this requirement under the statutory offense. See *Commonwealth v. Kirby*, 2 Cush. 577, 579, 581–582 (1849); *Commonwealth v. Hurley*, 99 Mass. 433, 434 (1868); *Commonwealth v. Sawyer*, 142 Mass. 530, 533 (1886). See also C*ommonwealth v. Deschaine*, 77 Mass. App. Ct. 506, 514-515 (2010) ("assault and battery upon a person of a certain type requires that the defendant know that the other is of a certain type"); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 461 (1994), citing *Commonwealth v. Francis,* 24 Mass. App. Ct. 576, 577 (1987) ("the officer must be engaged in the performance of his duties at the time and the defendant must know that the victim was an officer engaged in the performance of his duties").

Assault and battery on an emergency medical technician, ambulance personnel, or health care provider may be done recklessly as well as intentionally, and the intent to strike the technician, personnel, or provider, which is required under the intentional assault and battery theory, is not required under the

recklessness analysis. See *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 457-58 (2000). However, appellate decisions have assumed, without deciding, even under the reckless branch, that the defendant must know that the 'victim is one of those individuals engaged in the performance of their duties at the time of the alleged incident. See *id*. at 459 n.6.

4. Transferred intent. Where this offense requires an intent to strike an emergency medical technician, ambulance personnel, or health care provider, a defendant who inadvertently strikes one of those individuals while intending to strike someone else may be convicted only of the lesser included offense of assault and battery. *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982).

5. 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, 463-64 (1994).

6. 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.