

**WANTONLY OR RECKLESSLY PERMITTING
(SUBSTANTIAL) BODILY INJURY TO A CHILD UNDER 14**

G.L. c. 265, § 13J(d) ¶3 & ¶4

The defendant is charged with being a person having care and custody of a child under 14 years of age when the child received a (substantial) bodily injury which the defendant wantonly or recklessly permitted to occur.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following four things beyond a reasonable doubt.

First: That the defendant had the care and custody of [the alleged victim];

Second: That the [the alleged victim] suffered a (substantial) bodily injury;

Third: That the defendant wantonly or recklessly permitted the (substantial) bodily injury to occur; and

Fourth: That, on the date of the alleged offense, [the alleged victim] was a child under 14 years of age.

In order to prove the first element, the Commonwealth must prove that the defendant had care and custody of the [the alleged victim]. Persons who have care and custody may include a parent, guardian, employee of a home or institution, or any other person with equivalent supervision or care of a child, whether the supervision is temporary or permanent.

G.L. c. 265, § 13J(a)

In order to prove the second element, the Commonwealth must prove that [the alleged victim] suffered a (substantial) bodily injury.

Bodily Injury Under the law, a bodily injury is a substantial impairment of the physical condition. It is an injury to any body part that considerably or significantly compromises its usual bodily function such as, but not limited to: (a burn) (a fracture of any bone) (a subdural hematoma) (injury to any internal organ) (any injury which occurs as a result of repeated harm to any bodily function or organ, including human skin).

G.L. c. 265, § 13J(a); *Commonwealth v. Ryan*, 93 Mass. App. Ct. 486, 489-90 (2018)

Substantial Bodily Injury Under the law, a substantial bodily injury is one which results in (permanent disfigurement) (protracted loss or impairment of a bodily function, limb or organ) (a substantial risk of death).

Bodily Function Impairment of a bodily function arises when a part or system of the body, other than an organ or limb, is significantly impeded in its ability to fulfil its role.

Limb Impairment of a limb occurs when, because of significant damage to its structure, its capacity to perform its usual function is compromised.

Organ Impairment of an organ occurs when damage to the structure of the organ is significant enough to compromise its ability to perform its function in the victim's body.

G.L. c. 265, § 13J(a); *Commonwealth v. Scott*, 464 Mass. 355, 359 (2013).

In order to prove the third element, the Commonwealth must prove that the defendant wantonly or recklessly permitted the

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Revised December 2019

(substantial) bodily injury to [the alleged victim] either by proving that the defendant wantonly or recklessly permitted the (substantial) bodily injury to [the alleged victim] or by proving that the defendant wantonly or recklessly permitted another to commit an assault and battery that caused (substantial) bodily injury to [the alleged victim].

Wantonly or Recklessly Permitting To prove that the defendant wantonly or recklessly permitted the (substantial) bodily injury, 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 wanton or reckless conduct. The defendant acted wantonly or recklessly if (he) (she) knew or should have known that (his) (her) (actions were) (or) (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) (or) (failed to act anyway).

It is not necessary for the Commonwealth to prove 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) (actions were) (or) (failure to act was) very likely to result in bodily harm to [the alleged victim] and decided to run that risk, such conduct would be wanton or reckless. But even if (he) (she) was not conscious of the danger that was inherent in such (actions) (or) (failure to act), it is still wanton or reckless conduct if a reasonable person, under the circumstances that were known to the defendant, would have recognized that such (actions were) (or) (failure to act was) very likely to result in bodily harm to [the alleged victim].

Wantonly or Recklessly Permitting Another to Commit Assault and Battery

To prove that the defendant wantonly or recklessly permitted another to commit assault and battery on the [the alleged victim] resulting in (substantial) bodily injury, the Commonwealth must prove that the defendant's wanton or reckless conduct permitted someone other than the defendant to intentionally touch [the alleged victim] in a way that was likely to cause harm and resulted in (substantial) bodily injury. 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

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actions went beyond mere negligence and amounted to wanton or reckless conduct. The defendant acted wantonly or recklessly if (he) (she) knew or should have known that (his) (her) (actions were) (or) (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) (or) (failed to act anyway).

It is not necessary for the Commonwealth to prove 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) (actions were) (or) (failure to act was) very likely to result in bodily harm to [the alleged victim] and decided to run that risk, such conduct would be wanton or reckless. But even if (he) (she) was not conscious of the danger that was inherent in such (actions) (or) (failure to act), it is still wanton or reckless conduct if a reasonable person, under the circumstances that were known to the defendant, would have recognized that such (actions were) (or) (failure to act was) very likely to result in bodily harm to [the alleged victim].

Commonwealth v. Traylor, 472 Mass 260, 271 (2015) (“the statute [§ 13J] criminalizes acts of omission in addition to acts of commission, and a defendant may be convicted

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under the statute even in the absence of proof regarding precisely how the injuries to the child occurred”) (internal citation omitted).

In order to prove the fourth element, the Commonwealth must prove that, on the date of the alleged offense, [the alleged victim] _____ was under 14 years of age.

NOTES:

1. **Proof of victim’s status.** Where the Legislature has not expressly provided scienter about age or disability to be an element of the offense, proof that the defendant knew the victim was an elder or disabled is not required. The Commonwealth need only prove that the victim was an elder or a person with a disability at the time of the offense. See *Commonwealth v. Montalvo*, 50 Mass. App. Ct. 85, 88-89 & n.3 (2000).

2. **Unit of prosecution.** To sustain multiple convictions under the statute, the Commonwealth must prove separate and discrete instances in which a defendant engaged in the proscribed conduct, or that multiple victims were harmed as a result of the defendant’s conduct. *Cf. Commonwealth v. Traylor*, 472 Mass. 260, 270, 273 (2015) (holding that the resulting injuries is not the proper unit of prosecution for G.L. c. 265, § 13J, the equivalent statute applicable to children; “[n]othing in the language of the statute indicates a legislative intent to make the resulting injuries, rather than distinct instances of proscribed conduct or distinct victims, the unit of prosecution.”)

3. **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.