ASSAULT AND BATTERY ON AN ELDER OR DISABLED PERSON CAUSING SERIOUS BODILY INJURY

G.L. c. 265, § 13K(c)

The defendant is charged with having committed an assault and battery causing serious bodily injury to (an elder which under our law is a person 60 years of age or older) (a disabled person).

I. INTENTIONAL ASSAULT AND BATTERY

In order to prove the defendant guilty of committing an intentional assault and battery causing serious bodily injury to (an elder which under our law is a person 60 years of age or older) (a disabled person), the Commonwealth must prove four 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 caused serious bodily injury to [the alleged victim]; and**

***Fourth*: That [the alleged victim] was (an elder) (a person with a disability) on the date of the alleged offense.**

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

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 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].

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 (9.100); necessity (9.240); self-defense (9.260). See *Commonwealth v. Wood*, 90 Mass. App. Ct. 271, 286-86 (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).

To prove the third element, the Commonwealth must prove that the touching caused serious bodily injury to [the alleged victim]. **Under the law, a serious 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 **An 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 **An impairment of a limb occurs when, because of significant damage to its structure, its capacity to perform its usual function is compromised.**

Organ **An 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, § 13K(a); *Commonwealth v. Scott*, 464 Mass. 355, 359 (2013).

To prove the fourth element, the Commonwealth must prove that the [the alleged victim] **was (an elder which under our law is a person 60 years of age or older) (a person with a disability) on the date of the alleged offense.**

Definition of disability. **A person with a disability is a person with a permanent or long-term physical or mental impairment that prevents or restricts the individual's ability to provide for his or her own care or protection.**

G.L. c. 265, § 13K(a)

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. Moore*, 36 Mass. App. Ct. 455, 457-60 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 584 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"). See *Commonwealth v. Bianco*, 388 Mass. 358, 366-367 (1983) (assault and battery by joint venture).

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 serious bodily injury.**

B. *If intentional assault and battery was not already charged on.* **The defendant is charged with having committed an assault and battery by reckless conduct causing serious bodily injury to (an elder which under our law is a person 60 years of age or older) (a disabled person).**

In order to prove the defendant guilty of having committed an assault and battery by reckless conduct causing serious bodily injury

to a person (who was an elder) (with a disability), the Commonwealth must prove three things beyond a reasonable doubt:

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

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

***Third*: That** [the alleged victim] **was (an elder) (a person with a disability) on the date of the alleged offense.**

To prove the first element, the Commonwealth must prove that the defendant intended (his) (her) acts which resulted in the touching, in the sense that the defendant consciously and deliberately intended the act or acts to occur and that the act or acts did not happen accidentally.

The Commonwealth must also prove that the defendant's acts caused serious bodily injury to [the alleged victim] **. Under the law, a serious 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 **An 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 **An impairment of a limb occurs when, because of significant damage to its structure, its capacity to perform its usual function is compromised.**

Organ **An 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, § 13K(a). *Commonwealth v. Scott*, 464 Mass. 355, 359 (2013). Note that this instruction differs from Instruction 6.150 (Reckless Assault and Battery) because the definition of bodily injury by case law that is applicable to the reckless branch of assault and battery ("a bodily injury . . . sufficiently serious to interfere with the alleged victim's health or comfort." *Commonwealth v. Burno*, 396 Mass. 622, 625-627 (1986)), is different from the statutory definition of "serious bodily injury" applicable to this offense which requires proof of permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death. G.L. c. 265, § 13K(a).

To prove the second element, the Commonwealth must prove 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 (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.

To prove the third element, the Commonwealth must prove that [the alleged victim] **was (an elder which under our law is a person 60 years of age or older) (a person with a disability) on the date of the alleged offense.**

Definition of disability. **A person with a disability is a person with a permanent or long-term physical or mental impairment that prevents or restricts the individual's ability to provide for his or her own care or protection.**

G.L. c. 265, § 13K(a)

Commonwealth v. Correia, 50 Mass. App. Ct. 455, 457-58 (2000) (statute prohibiting assault and battery sets forth the common law crime which includes both intentional and reckless forms of the crime). See also *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)); *Commonwealth v. Godin*, 374 Mass. 120, 129 (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 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTIONS

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

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 731, 734, rev. denied, 402 Mass. 1104 (1988)

NOTES:

1. **Jurisdiction**. District Court has final jurisdiction over this aggravated offense as it is specifically enumerated in G.L. c. 218, § 26.

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)).

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, 463-64 (1994).

Relying on medical records without expert testimony may be insufficient to establish impairment of an organ. *Commonwealth v. Beal*, 474 Mass. 341, 362 (2013) (notation in medical records of "grade II hepatic laceration" and "laceration of the liver" insufficient to establish how any injury affected the liver's ability to fulfil its functional role). Compare *Commonwealth v. Beal*, 474 Mass. 341, 346-47 (2016) (although evidence did not explain the precise biological mechanism by which the gunshot wound

impaired the victim's ability to walk, the jury were permitted to conclude, based on common sense, that the gunshot wound to the victim's back compromised his ability to use his lower legs).

3. **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 is an elder or disabled is not required. The Commonwealth need only prove that the victim was an elder or disabled at the time of the offense. See *Commonwealth v. Montalvo*, 50 Mass. App. Ct. 85, 88-89 & n.3 (2000).

4. **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 (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. Drumgold*, 423 Mass. 230, 259 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-69 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-10 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13 (1983).

5. **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.