

**CARETAKER WANTONLY OR RECKLESSLY
PERMITTED (SERIOUS) BODILY INJURY
TO AN ELDER OR DISABLED PERSON**

**CARETAKER WHO WANTONLY OR RECKLESSLY
PERMITS (SERIOUS) BODILY INJURY TO
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G.L. c. 265, § 13K(d) and (e)

The defendant is charged with being a caretaker of (an elder which under our law is a person 60 years of age or older) (a person with a disability) when that person suffered a (serious) 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 was a caretaker of [the alleged victim];**

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

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

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

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In order to prove the first element, the Commonwealth must prove that the defendant was a caretaker of the [the alleged victim] . A caretaker is [continue with the caretaker definition(s) that apply to the case on trial]

Family Member . . . a family member who has provided primary and substantial assistance for the care and protection of the [the alleged victim] as would lead a reasonable person to believe that failure to provide such care would adversely affect the physical health of the person.

Contracted Caretaker . . . a person who is responsible for providing primary and substantial assistance for the care of [the alleged victim] because of a bargained for agreement or contract by which they receive a monetary or personal benefit or gain as a result.

Voluntary Caretaker . . . a person who has voluntarily assumed responsibility for providing primary and substantial assistance for the care of [the alleged victim] such that the person's conduct would lead a reasonable person to believe that failure to provide such care would adversely affect the physical health of [the alleged victim] , and at least one of the following criteria is met: (i) the person is living in the household of the [the alleged victim] , or present in the household on

a regular basis; or (ii) the person would have reason to believe, as a result of the actions, statements or behavior of the [the alleged victim] _____, that (he) (she) is being relied upon for providing primary and substantial assistance for physical care.

Caretaker with a fiduciary duty [A caretaker with a fiduciary duty] . . . a person who is legally required to use the assets of [the estate of] [the alleged victim] to provide the necessities essential for the physical health of the [the alleged victim]. (This fiduciary duty may arise from a person's position as a guardian of the person or assets of an [elder] [person with a disability]).

The definition of "caretaker with a fiduciary duty" does not include reference to a conservator or attorney-in-fact even though listed in G.L. c. 265, § 13K(a)(ii), as the reference to these terms is tied to Chapters 201 and 201B of the General Laws, which have been repealed.

A person may be found to be a caretaker only if a reasonable person would believe that (his) (her) failure to fulfill such responsibility would adversely affect the physical health of the [the alleged victim].

G.L. c. 265, § 13K(a).

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In order to prove the second element, the Commonwealth must prove that [the alleged victim] suffered a (serious) 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, § 13K(a); *Commonwealth v. Ryan*, 93 Mass. App. Ct. 486, 489-90 (2018)

Serious Bodily Injury 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

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**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).

**In order to prove the third element, the Commonwealth must
prove that the defendant wantonly or recklessly permitted the
(serious) bodily injury to [the alleged victim] either by proving that the
defendant wantonly or recklessly permitted the (serious) 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 (serious) bodily injury to [the alleged victim].**

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Wantonly or Recklessly Permitting To prove that the defendant wantonly or recklessly permitted the (serious) 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) (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

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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 (serious) 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 (serious) 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

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victim] but (he) (she) ran that risk and (went ahead anyway) (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].

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

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elder which under our law is a person 60 years of age or older) (a person with a disability).

Disability Under our law, 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.

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. **Lesser included offenses.** Wantonly or recklessly committing or permitting another to commit abuse, neglect or mistreatment upon an elder or disabled person (G.L. c. 265, § 13K(d $\frac{1}{2}$)) is not a lesser included offense of wantonly or recklessly permitting serious bodily injury to an elder or disabled person under his care (G.L. c. 265, § 13K(e)). *Commonwealth v. Cruz*, 88 Mass. App. Ct. 206, 210-12 & n.5 (2015) (holding that conduct that constitutes "abuse, neglect or mistreatment," arising out of the same course of conduct, is not duplicative of § 13K(e) (wantonly or reckless permitting serious bodily injury)). Presumably this holding would extend to § 13K(d) (wantonly or reckless permitting bodily injury).

4. **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.