

**CARETAKER WHO WANTONLY OR RECKLESSLY
ABUSED, NEGLECTED OR MISTREATED
AN ELDER OR DISABLED PERSON**

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G.L. c. 265, § 13K(d $\frac{1}{2}$)

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 the defendant wantonly or recklessly [(abused) (neglected) (mistreated)] [permitted another to (abuse) (neglect) (mistreat)] that (elder) (person with a disability).

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

First: That the defendant was a caretaker of [the alleged victim];

Second: That the defendant wantonly or recklessly [(abused) (neglected) (mistreated)] [permitted another to (abuse) (neglect) (mistreat)] [the alleged victim]

Third: That [the alleged victim] suffered (abuse) (neglect) (mistreatment), and

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

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].

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In order to prove the second element, the Commonwealth must prove that the defendant wantonly or recklessly [(abused) (neglected) (mistreated)] [permitted another to (abuse) (neglect) (mistreat)] [the alleged victim]_____ . To prove that the defendant acted wantonly or recklessly, 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) (failure to act) 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) (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) (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 conduct, 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 very likely to result in bodily harm to [the alleged victim].

Cf. Commonwealth v. Traylor, 472 Mass 260, 271 (2015) (noting that, with respect to the § 13J which prohibits wantonly or reckless causing or permitting injury to a child, “the statute 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 third element, the Commonwealth must prove that [the alleged victim] suffered (abuse) (neglect) (mistreatment).

Abuse Abuse is physical contact which harms or creates a substantial likelihood of harm.

Neglect Neglect is the failure to provide treatment or services necessary to maintain health and safety, and which either harms or creates a substantial likelihood of harm.

Mistreatment Mistreatment is the use of medications or treatments, isolation, or physical or chemical restraints which harms or creates a substantial likelihood of harm.

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In order to prove the fourth element, the Commonwealth must prove that on the date of the alleged offense was (an 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's age is not required. 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.** This offense, 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 (2015). Presumably it would not be a lesser included offense of G.L. c. 265, § 13K(d) (wantonly or recklessly permitting serious bodily injury to an elder or disabled person) as not being a lesser included offense either.
- 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.