

## INDECENT ASSAULT AND BATTERY ON A CHILD UNDER FOURTEEN

G.L. c. 265, § 13B

The defendant is charged with indecent assault and battery on a child less than 14 years of age.

To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

*First:* That the alleged victim was not yet 14 years of age at the time of the alleged offense;

*Second:* That the defendant committed an assault and battery on that child. Assault and battery is the intentional touching of another person without legal justification or excuse.

and *Third:* The Commonwealth must prove beyond a reasonable doubt that the assault and battery was “indecent” as that word is commonly understood, measured by common understanding and practices.

An indecent act is one that is fundamentally offensive to contemporary standards of decency. An assault and battery may be

**“indecent” if it involves touching portions of the anatomy commonly thought private.**

**If the alleged victim is under 14 years of age, it is irrelevant whether or not (he) (she) consented to any touching.**

The model instruction reflects the law on the issue of consent applicable to such offenses committed on and after October 6, 1986, when St. 1986, c. 187 amended G.L. c. 265, § 13B to provide that “[i]n a prosecution under this section, a child under the age of fourteen years shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.”

For such an offense committed before October 6, 1986, the judge must charge that absence of consent is a fourth required element of the crime; the judge should also give the supplemental instruction to Instruction 6.500 (Indecent Assault and Battery), appropriately modified to discuss “maturity,” concerning the child-victim’s ability to consent. See *Commonwealth v. Reid*, 400 Mass. 534, 541 (1987) (prior to 1986 amendment, lack of consent was element of offense of indecent assault and battery on a child under the age of fourteen years); *Commonwealth v. Burke*, 390 Mass. 480, 487 (1983); *Commonwealth v. Maloney*, 23 Mass. App. Ct. 1016, 1016 (1987) (lack of consent inferable from age and verbal reluctance of witness).

*See also the citations and notes under Instruction 6.500 (Indecent assault and battery).*

*Where victim touches the defendant’s private part*

**An indecent act includes those acts where the defendant directs or commands the alleged victim to touch a private part of the defendant (or that of another person).**

*Where the defendant touches the victim with his or her private part*

**An indecent act includes those acts where a defendant touches the alleged victim with his (her) own private part (or that of another person).**

NOTES:

1. **Age of victim.** The age of the victim is an essential element of this offense. *Commonwealth v. Rockwood*, 27 Mass. App. Ct. 1137, 1139 (1989).

2. **Aggravated forms of offense.** Statute 2008, c. 205 (effective October 22, 2008), created two new aggravated forms of this offense:

Aggravated indecent assault and battery on a child under 14 (G.L. c. 265, § 13B½) provides for enhanced punishment if the offense was committed (1) by a person who was a mandated reporter of child abuse or neglect, or (2) if it was committed during the commission or attempted commission of twelve specified offenses: armed burglary (G.L. c. 266, § 14); unarmed burglary (G.L. c. 266, § 15); breaking and entering (G.L. c. 266, § 16); entering without breaking (G.L. c. 266, § 17); breaking and entering in a dwelling (G.L. c. 266, § 18); kidnapping (G.L. c. 265, § 26); armed robbery (G.L. c. 265, § 17); unarmed robbery (G.L. c. 265, § 19); assault and battery with a dangerous weapon (G.L. c. 265, § 15A); assault with a dangerous weapon (G.L. c. 265, § 15B); home invasion (G.L. c. 265, § 18C); or exhibiting a child in a state of nudity or sexual conduct (G.L. c. 272, § 29A).

Indecent assault and battery on a child under 14 after prior sex offense (G.L. c. 265, § 13B¾) provides for enhanced punishment if the offense was committed after a prior conviction or juvenile adjudication for any of ten sex offenses: indecent assault and battery on a child under 14 (G.L. c. 265, § 13B); aggravated indecent assault and battery on a child under 14 (G.L. c. 265, § 13B½); indecent assault and battery on a person 14 or older (G.L. c. 265, § 13H); assault to rape a child (G.L. c. 265, § 24B); rape of a child (G.L. c. 265, § 22A); aggravated rape of a child (G.L. c. 265, § 22B); statutory rape (G.L. c. 265, § 23); aggravated statutory rape (G.L. c. 265, § 23A); rape (G.L. c. 265, § 22); or “a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.”

Under G.L. c. 218, § 26, the District Court has jurisdiction over violations of G.L. c. 265, § 13B but does not have final jurisdiction over these aggravated forms (§§ 13B½ and 13B¾) of the offense.

The same statute also repealed the prior enhanced penalty for a subsequent conviction of § 13B.

3. **Hearsay statement by child victim.** General Laws c. 233, § 81 permits, under certain limited circumstances, the admission of hearsay statements by sexual abuse victims under 10 years of age. The Supreme Judicial Court has assumed without deciding that § 81 is facially constitutional. However, the judge “must strictly adhere” to the requirements of § 81 and in addition: (1) the Commonwealth must give the defense advance notice that it will seek to use such hearsay statements; (2) the Commonwealth must show its compelling need to do so “by more than a mere preponderance of evidence”; (3) any separate hearing regarding the reliability of the statement must be on the record, and the defendant and defense counsel must be permitted to attend “[w]here possible without causing severe emotional trauma to the child witness”; (4) the judge’s finding of reliability must be supported by specific findings on the record; (5) if the child is presently unavailable because incompetent to testify, that incompetence must not call into question the reliability of the hearsay statement; and (6) there must be other, independently-admissible evidence that corroborates the child’s hearsay statement. *Commonwealth v. Colin C.*, 419 Mass. 54, 61-66 & n.8 (1994). The judge should also consider the impact of *Crawford v. Washington*, 541 U.S. 36 (2004), on the viability of this statute. See *Commonwealth v. DeOliveira*, 447 Mass. 56, 64-65 (2006) (six year old child’s statement to doctor not testimonial, as it was made for medical treatment, not in anticipation of litigation).

4. **Individual voir dire required on request.** For the trial of any sexual offense against a minor, the judge must, on request, question prospective jurors individually as to whether they are the victim of a childhood sexual offense. *Commonwealth v. Flebotte*, 417 Mass. 348, 353-356 (1994).

5. **Inflammatory evidence.** In a trial based on the defendant having touched the breast of a 12 year old girl, the judge correctly admitted in evidence items taken from the defendant’s car which included photographs of fully clothed young girls in outdoors play, small-sized underwear, and pornographic magazines showing pictures of teenage girls and of sexual activity between adults. As evidence of the defendant’s voyeuristic interest in sexual matters and young females, they were probative as to whether the defendant had intentionally or accidentally touched the victim’s breast. The Appeals Court assumed that a second group of items from the car (consisting of a knife, rope, duct tape, and personal lubricant) should have been excluded as irrelevant and perhaps suggestive that the defendant intended to kidnap and rape the victim. *Commonwealth v. Wallace*, 70 Mass. App. Ct. 757, 764-766 (2007).

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6. **Lesser included offenses.** Since simple assault and battery (G.L. c. 265, § 13A) requires *either* an actually or potentially physically harmful touching *or* an unconsented touching, it is not a lesser included offense of indecent assault and battery on a child under 14 because lack of consent is no longer an element of the latter offense. *Commonwealth v. Farrell*, 31 Mass. App. Ct. 267, 268-269 (1991). Indecent assault and battery on a child under 14 is a lesser included offense of forcible rape of a child (G.L. c. 265, § 22A). *Commonwealth v. Cobb*, 26 Mass. App. Ct. 283, 284 (1988). Indecent assault and battery on a person over the age of fourteen is not a lesser included offense of indecent assault and battery on a child under the age of fourteen. See *Commonwealth v. Farrell*, 31 Mass. App. Ct. 267, 268-269 (1991). For offenses committed prior to October 6, 1986, indecent assault and battery on a child under 14 is not a lesser included offense of statutory rape (G.L. c. 265, § 23). *Reid*, 400 Mass. at 541.

7. **Contact with non-sexual parts of the body.** In *Commonwealth v. Cruz*, 93 Mass. App. Ct. 136, 139-140 (2017), the Appeals Court held that the almost-sixty year old defendant's hugging of the thirteen year old complainant "like a hug her parents would give her" was not indecent, nor was his lifting of her shirt at the hip where no part of her body was exposed.