

RECKLESS ENDANGERMENT OF A CHILD UNDER 18

A person may violate G.L. c. 265, § 13L either (I.) by wanton or reckless conduct creating a substantial risk to a child or (II.) by wantonly and recklessly failing to take reasonable steps to alleviate such a risk.

<p>I. RECKLESS ENDANGERMENT BY CREATING A RISK OF SERIOUS BODILY INJURY OR SEXUAL ABUSE</p>
--

The defendant is charged with wanton or reckless conduct creating a substantial risk of (serious bodily injury) (sexual abuse) to a child under the age of eighteen.

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

First: That the defendant engaged in conduct which created a substantial and unjustifiable risk of (serious bodily injury) (sexual abuse) to

[alleged victim] ;

Second: That the defendant's conduct was wanton or reckless; and

Third: That [alleged victim] was under the age of eighteen years.

To prove the first element, it is not enough for the Commonwealth to prove that there was a possibility of risk to [alleged victim]. The Commonwealth must prove that the defendant's conduct created a

substantial and unjustifiable risk of (serious bodily injury) (sexual abuse).

Serious bodily injury.

A serious bodily injury is one which results in a permanent disfigurement, a protracted loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

Sexual abuse.

Sexual abuse includes conduct amounting to (an indecent assault and battery on a child under the age of 14) (an indecent assault and battery on a person 14 or older) (rape) (rape of a child under age 16 with force) (rape and abuse of a child) (assault with intent to commit rape) (assault of a child with intent to commit rape).

[The trial judge should instruct on the elements of the applicable sexual abuse charge as illustrated below.]

For Indecent Assault and Battery on a Child Under Fourteen (G.L. c. 265, § 13B), see Instruction 6.520. For Indecent Assault and Battery on a Person 14 or Older (G.L. c. 265, § 13H), see Instruction 6.500. For the remaining underlying offenses, the following definitions may be of guidance:

“Rape” (G.L. c. 265, § 22) is natural or unnatural sexual intercourse with another person by force and against that person’s will, or that compels such person to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the sexual intercourse was accomplished by compelling the complainant to submit by force or threat of bodily injury and against his/her will. Natural intercourse is normal intercourse - that is, it consists of inserting the penis into the female sex organ. Unnatural sexual intercourse includes oral and anal intercourse, including fellatio and cunnilingus, and other intrusions of a part of a person’s body or other object into the genital or anal opening of another’s body. Either natural or unnatural sexual intercourse is complete on penetration, no matter how slight, of a person’s genital or anal opening. In addition to the vagina, the female genital opening includes the anterior parts known as the vulva and labia. Penetration into the vagina itself is not required.

“Rape of a child by use of force” (G.L. c. 265, § 22A) is natural or unnatural sexual intercourse with a child under the age of 16 years by force and against that child’s will, or that compels such child to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the natural or unnatural sexual intercourse was accomplished by force or by threat of bodily injury and against the complainant’s will. The force needed for rape may, depending on the

circumstances, be constructive force as well as physical force, violence or threat of bodily harm. The third element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense.

"Rape and abuse of a child" (G.L. c. 265, § 23) is natural or unnatural sexual intercourse with a child under the age of 16 years that is unlawful. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense. The third element is that the sexual intercourse was unlawful. Unlawful sexual intercourse is intercourse outside of a marital relationship. The defendant's honest belief that the victim was 16 years of age or older is not a defense to this charge. In the case of rape of a child under the age of 16 years committed without the use of force or threat, lack of consent is conclusively presumed by law.

"Assault with intent to commit rape" (G.L. c. 265, § 24) has two elements. First, that the defendant assaulted the alleged victim. An assault is defined as an attempt or offer by one person to do bodily injury to another by force and violence. Alternatively, an assault may consist of putting a person in fear of immediate bodily injury. An assault may be committed in one of two ways. The first type of assault consists of an offer or attempt to commit a battery. The second type of assault occurs when the defendant, with the intent to cause apprehension of immediate bodily harm, does some act that causes such apprehension. The second element is that the defendant possessed a specific intent to rape the complainant. See Instruction 3.120 (Specific Intent).

"Assault of child with intent to commit rape" (G.L. c. 265, § 24B) consists of the same two elements of assault with intent to commit rape, plus that the victim was under 16 years of age.

To prove the second element of the offense, the Commonwealth must prove that the defendant's conduct was wanton or reckless. It is not enough for the Commonwealth to prove that the defendant acted negligently – that is, in a way that a reasonably careful person would not act. The Commonwealth must prove that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that his (her) act would result in (serious bodily injury) (sexual abuse).

The Commonwealth is not required to prove that the defendant intended that [alleged victim] be (injured) (sexually abused), but it must prove that he (she) was consciously aware of and disregarded a substantial and

unjustifiable risk (of serious bodily injury) (of sexual abuse). The risk must have been of such a nature and degree that to disregard it would constitute a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

To prove the third element of the offense, the Commonwealth must prove that [alleged victim] was under the age of eighteen years.

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

II. RECKLESS ENDANGERMENT BY FAILING TO ALLEVIATE

The defendant is charged with wantonly or recklessly failing, where he (she) had a duty to act, to take reasonable steps to alleviate a substantial risk that a child under the age of eighteen years would suffer (serious bodily injury) (sexual abuse).

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

First: That [alleged victim] was a child under the age of eighteen years;

Second: That there was a substantial and justifiable risk that [alleged victim] would suffer (serious bodily injury) (sexual abuse);

Third: That the defendant was under a duty to take reasonable steps to alleviate that risk to the child; and

Fourth: That the defendant wantonly or recklessly failed to take such steps.

To prove the first element, the Commonwealth must prove that [alleged victim] was under the age of eighteen years.

To prove the second element, it is not enough for the Commonwealth to prove that there was only a possibility of risk to [alleged victim] . The Commonwealth must prove that the defendant's failure to act created a substantial and unjustifiable risk of (serious bodily injury) (sexual abuse).

Serious bodily injury. A serious bodily injury is one which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death.

Sexual abuse. Sexual abuse includes conduct amounting to (an indecent assault and battery on a child under the age of 14) (an indecent assault and battery on a person 14 or older) (rape) (rape of a child under

age 16 with force) (rape and abuse of a child) (assault with intent to commit rape) (assault of a child with intent to commit rape).

[The trial judge should instruct on the elements of the applicable sexual abuse charge as illustrated below.]

For Indecent Assault and Battery on a Child Under Fourteen (G.L. c. 265, § 13B), see Instruction 6.520. For Indecent Assault and Battery on a Person 14 or Older (G.L. c. 265, § 13H), see Instruction 6.500. For the remaining underlying offenses, the following definitions may be of guidance:

“Rape” (G.L. c. 265, § 22) is natural or unnatural sexual intercourse with another person by force and against that person’s will, or that compels such person to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the sexual intercourse was accomplished by compelling the complainant to submit by force or threat of bodily injury and against his/her will. Natural intercourse is normal intercourse - that is, it consists of inserting the penis into the female sex organ. Unnatural sexual intercourse includes oral and anal intercourse, including fellatio and cunnilingus, and other intrusions of a part of a person’s body or other object into the genital or anal opening of another’s body. Either natural or unnatural sexual intercourse is complete on penetration, no matter how slight, of a person’s genital or anal opening. In addition to the vagina, the female genital opening includes the anterior parts known as the vulva and labia. Penetration into the vagina itself is not required.

“Rape of a child by use of force” (G.L. c. 265, § 22A) is natural or unnatural sexual intercourse with a child under the age of 16 years by force and against that child’s will, or that compels such child to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the natural or unnatural sexual intercourse was accomplished by force or by threat of bodily injury and against the complainant’s will. The force needed for rape may, depending on the circumstances, be constructive force as well as physical force, violence or threat of bodily harm. The third element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense.

“Rape and abuse of a child” (G.L. c. 265, § 23) is natural or unnatural sexual intercourse with a child under the age of 16 years that is unlawful. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense. The third element is that the sexual intercourse was unlawful. Unlawful sexual intercourse is intercourse outside of a marital relationship. The defendant’s honest belief that the victim was 16 years of age or older is not a defense to this charge. In the case of rape of a child under the age of 16 years committed without the use of force or threat, lack of consent is conclusively presumed by law.

“Assault with intent to commit rape” (G.L. c. 265, § 24) has two elements. First, that the defendant assaulted the alleged victim. An assault is defined as an attempt or offer by one person to do bodily injury to another by force and violence. Alternatively, an assault may consist of putting a person in fear of immediate bodily injury. An assault may be committed in one of two ways. The first type of assault consists of an offer or attempt to commit a battery. The second type of assault occurs when the defendant, with the intent to cause apprehension of immediate bodily harm, does some act that causes such apprehension. The second element is that the defendant possessed a specific intent to rape the complainant. See Instruction 3.120 (Specific Intent).

“Assault of child with intent to commit rape” (G.L. c. 265, § 24B) consists of the same two elements of assault with intent to commit rape, plus that the victim was under 16 years of age.

To prove the third element, the Commonwealth must prove that the defendant had a duty to alleviate the risk of (serious bodily injury) (sexual abuse).

Parents and legal guardians have a legal duty to take reasonable steps to prevent harm to a child in their care. Those who accept responsibility as caretakers also have a duty to take reasonable steps to prevent harm to a child who is in their care. Other persons may also have a duty to alleviate a risk of harm to a child. You should look to the facts of this case to determine whether the Commonwealth has proven that the defendant had this duty to act.

To prove the fourth element of the offense, the Commonwealth must prove that the defendant wantonly and recklessly failed to take reasonable steps to alleviate the risk.

It is not enough for the Commonwealth to prove that the defendant was negligent — that is, failed to act in a way that a reasonably careful person would act. It must prove that the defendant’s failure to act went substantially beyond negligence and amounted to wanton or reckless

behavior.

The defendant was wanton or reckless if he (she) was aware that a failure to act created a substantial and unjustifiable risk of (serious bodily injury to) (sexual abuse of) [alleged victim], but he (she) consciously disregarded that risk. The risk must have been of such nature and degree that disregarding the risk was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

If appropriate: capacity and means to alleviate risk.

The defendant may be found guilty only if he (she) had the capacity and means to alleviate the risk and failed to do so. You may consider any evidence about the ability of the defendant to take steps to alleviate the risk and about any risk the defendant might incur if he (she) sought to aid [alleged victim]. You may take into account that in a dangerous situation, a person may have to make decisions quickly and while under emotional strain.

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the

Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

NOTES:

1. **Statutory history.** The statute was added by St. 2002, c. 322.
2. **Consciousness of risk.** A defendant may be found guilty only if he (she) was aware of the risk and consciously disregarded the risk.
3. **Persons who have a “duty to act”.** The statute does not define who has a “duty to act”. A parent has a common law duty to provide for the care and welfare of his (her) children. See *Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948). Other persons, such as a caretaker, may also be considered to have a “duty to act”. The Department of Children and Families, in 110 Code Mass. Regs. § 2.00, gives a broad definition of “caretaker”: child’s parent, stepparent, guardian, “any other household member entrusted with the responsibility for a child’s health and welfare”, any other person entrusted with responsibility for a child, including a babysitter, and those in a child’s school, day care center. Appellate courts have employed that definition in various cases. See, e.g., *Adoption of Fran*, 54 Mass. App. Ct. 455, 766 N.E.2d 91 (2002), where the court said that a non-parent could be considered responsible for the death of a child because he was a “caretaker.” Appellate courts have allowed fresh complaint testimony to be admitted despite long delays where the alleged perpetrator “is an authority figure in the child’s life” such as a parent, teacher or babysitter. *Commonwealth v. Traynor*, 40 Mass. App. Ct. 527, 666 N.E.2d 527 (1996). Note, however, that a child born alive cannot maintain a cause of action in tort against her mother for personal injuries incurred before birth because of the mother’s negligence. *Remy v. MacDonald*, 440 Mass. 675, 801 N.E.2d 260 (2004).
Other persons may also be found to have a “duty to act.” The Child Trespasser Statute (G.L. c. 231, § 85Q) imposes liability on property owners a duty of reasonable care. It might be found that a property owner who wantonly or recklessly fails to take steps to alleviate a risk of serious bodily injury to a child trespasser has violated this statute. Schools may also owe a duty of care to students. See *Alter v. Newton*, 35 Mass. App. Ct. 142, 617 N.E.2d 656 (1993) (“Because of the relationship between a school and its students, the city had a duty of care to the plaintiff to provide her with reasonably safe school premises”).
4. **Means and capacity to alleviate the risk.** A parent or other may not be liable for failure to alleviate a risk if he (she) did not have the means and capacity of performing this duty. See *Commonwealth v. Hall*, *supra*.
5. **Acts covered by the statute.** While the preamble to the statute speaks to the need to protect children from physical and sexual abuse, the plain language of the statute proscribes all wanton and reckless conduct that creates a substantial (and unjustifiable) risk of serious bodily injury to a child. *Commonwealth v. Hendricks*, 452 Mass. 97, 101, 891 N.E.2d 209, 214 (2008).