

VANDALISM

G.L. c. 266, § 126A

The defendant is charged with having committed vandalism. In order to prove that the defendant is guilty of having committed the offense of vandalism, the Commonwealth must prove four things beyond a reasonable doubt:

First: That the defendant (painted) (marked) (scratched) (etched) (injured) (marred) (defaced) (or) (destroyed) property;

Second: That the defendant did so intentionally;

Third: That the defendant did so (wilfully with malice) (wantonly); and

Fourth: That the property was owned or possessed by someone other than the defendant.

To prove the second element, the Commonwealth must prove the defendant acted consciously and deliberately, rather than by accident or as the result of negligence.

To prove the third element, the Commonwealth must prove that the defendant acted (wilfully with malice) (or) (wantonly).

If wilful and malicious conduct is alleged:

A person acts wilfully if (he) (she) intends both the conduct and its harmful consequences. The act must be done with the intent that it have harmful consequences.

An act is done with “malice” if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of cruelty, hostility or revenge toward another.

Commonwealth v. Chambers, 90 Mass. App. Ct. 137, 144-45 (2016).

If wanton conduct is alleged:

A person acts wantonly by acting recklessly or with indifference to the fact that (his) (her) conduct would probably cause substantial injury to, or destruction of, another’s property. The Commonwealth must prove that the defendant consciously disregarded, or was indifferent to this probability.

Conduct is wanton if (1) the defendant knew it would create a risk of substantial injury or destruction to another’s property, or (2) a reasonable person – knowing what the defendant knew – would have realized the act posed a risk of substantial injury to or destruction of another’s property.

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. To prove the defendant acted wantonly, the Commonwealth must prove that the defendant’s actions went beyond mere negligence and amounted to wanton conduct as I have defined that term.

The defendant must have intended his (her) act, in the sense that it did not happen accidentally.

If relevant to evidence:

If you find that the defendant’s act occurred by accident, then you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTION

Likelihood of substantial damage.

A person cannot be convicted of wanton injury to property unless it was likely that his actions would result in substantial damage to others or their property. It is not enough that some slight or insignificant injury was likely to result. A person acts “wanton” only if it is likely that his actions will result in substantial harm.

However, it is not necessary that the damage actually was substantial, only that such actions were likely to cause substantial damage. The actual

outcome of someone's actions is sometimes a matter of luck, and here the law measures the nature of the actions, not the outcome.

Commonwealth v. Ruddock, 25 Mass. App. Ct. 508, 512-14 (1988).

NOTES:

1. **Malicious act must be wilful; wanton act requires only general intent.** The offense in G.L. c. 266, § 126A, includes two distinct theories with distinct elements. In order to prove malicious conduct, a specific intent must be proved and the act must be wilful and the defendant must have a specific intent to engage in the conduct and to achieve its harmful consequences. In order to prove wanton conduct, a general intent is all that is required. *Commonwealth v. McDowell*, 62 Mass. App. Ct. 15, 18-24, *rev. denied*, 442 Mass. 1113 (2004).

Wilful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor's conduct was indifferent to, or in disregard of, the probable consequences. *Commonwealth v. Armand*, 411 Mass. 167, 170-71 (1991); *Commonwealth v. Redmond*, 53 Mass. App. Ct. 1, 5, *rev. denied*, 435 Mass. 1107 (2001). "The forcible entry into an office will, without doubt, result in some destruction of property, but a messy thief is not necessarily malicious within the meaning of the statute." *Redmond*, 53 Mass. App. Ct. at 5. "The essence of the distinction appears to lie in the fact that a wilful actor intends both his conduct and the resulting harm whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm." *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is wilful and malicious if the rocks were aimed at passing cars. *Commonwealth v. Cimino*, 34 Mass. App. Ct. 925, 927 (1993). "It is worth noting that destruction of property which accompanies even violent crime may not by that token alone qualify as wilful and malicious." *Id.*