

ACCIDENT

Evidence has been introduced in this case which you may consider in determining whether the defendant intentionally committed an act that was a criminal offense, or whether what occurred was a pure and simple accident.

In considering such evidence, please keep in mind that the Commonwealth must prove beyond a reasonable doubt that what occurred was not an accident. If the Commonwealth has failed to prove to you beyond a reasonable doubt that what occurred was not an accident, then you must find the defendant not guilty.

An “accident” is defined as an unexpected happening that occurs without intention or design on the defendant’s part. It means a sudden, unexpected event that takes place without the defendant’s intending it.

The term “accident” is used in two senses: unintended *conduct* or unintended *consequences*. Accident in the first, broad sense focuses on the nature of the conduct that produced the result and not simply on the result, and is a defense to the extent that it negates the crime’s scienter element. In the second sense it means the unintended consequences of a defendant’s act, and is a defense only if the Commonwealth is required to prove that the defendant intended the consequence of his act. *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 647-650, 779 N.E.2d 669, 673-676 (2002); *Commonwealth v. Palmariello*, 392 Mass. 126, 145, 466 N.E.2d 805, 817 (1984); *Commonwealth v. Hakala*, 22 Mass. App. Ct. 921, 923, 492 N.E.2d 376, 377 (1986).

Where the evidence raises an issue of accident, as a matter of due process the defendant is entitled on request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental. *Palmariello, supra*; *Commonwealth v. Zezima*, 387

Mass. 748, 756, 443 N.E.2d 1282, 1287 (1978); *Lannon v. Commonwealth*, 379 Mass. 786, 790, 400 N.E.2d 862, 865 (1980). This issue can be raised even by the Commonwealth's case in chief. *Commonwealth v. Lowe*, 15 Mass. App. Ct. 262, 264-265, 444 N.E.2d 1314, 1316-1318 (1983), cert. denied, 469 U.S. 840 (1984). In assessing the evidence, all reasonable inferences must be resolved in favor of the defendant. *Commonwealth v. Campbell*, 352 Mass. 387, 398, 226 N.E.2d 211, 219 (1967). An accident instruction is not required sua sponte where the case is defended solely on a self-defense theory. *Commonwealth v. Olson*, 24 Mass. App. Ct. 539, 544, 510 N.E.2d 787, 790 (1987).

The issue of accident goes to whether a defendant who committed the underlying act did so accidentally. Therefore, if the defendant denies causing the underlying act and asserts it was caused by another, then the defendant's theory of causality is not an affirmative defense requiring a separate instruction, and the usual charge on the Commonwealth's general burden of proof as to each element is adequate. *Commonwealth v. Hutchinson*, 395 Mass. 568, 578-579, 481 N.E.2d 188, 195 (1985).

The definition of "accident" in the model instruction is drawn from *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 83-84, 469 N.E.2d 797, 799 (1984), and *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 651-652, 477 N.E.2d 146, 149-150 (1985), and was cited favorably in *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 582 n.1, 571 N.E.2d 411, 413 n.1 (1991).

NOTE:

Abusive relationship evidence. Where there is a claim of accidental injury to another, "a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he or she had availed him or herself of all available means to avoid physical combat and/or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat: (a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; (b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse." G.L. c. 233, § 23E.