

Assault and Battery by Means of a Dangerous Weapon¹

DFT is charged with assault and battery on AVM by means of a dangerous weapon on [DATE].

[<*If both theories—intentional reckless ABDW—are charged:*>

The Commonwealth may prove a person guilty of assault and battery by means of a dangerous weapon based on intentional or reckless conduct.]

<*Otherwise charge only on the relevant theory.*>

(a) Intentional Assault and Battery by Means of a Dangerous Weapon

To prove DFT guilty of intentional assault and battery by means of a dangerous weapon, the Commonwealth must prove four elements beyond a reasonable doubt:

1. DFT touched AVM;
2. DFT did so by means of a dangerous weapon;
3. DFT intended to touch AVM; and
4. The touching was not justified.²

As to the first element, the Commonwealth must prove that DFT touched AVM. A touching is any physical contact, however slight. [<*If the touching was not direct:*> A touching may be direct, such as a person striking another with an object, or it may be indirect, such as a person causing another to come in contact with an object or surface.]

¹ G.L. c. 265, § 15A states: “Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished.”

² The traditional phrase found in the caselaw – “justification or excuse” – is redundant; “justification” and “excuse” are synonyms. *Commonwealth v. Franchino*, 61 Mass. App. Ct. 367, 375 (2004). We have drafted this instruction without the unnecessary repetition. There may be cases in which the jury should be instructed on a specific legal justification for a touching, such as the use of force in making an arrest. See, e.g., *Commonwealth v. Garvey*, 99 Mass. App. Ct. 139 (2021).

Second, the Commonwealth must prove DFT touched AVM by means of a dangerous weapon. A dangerous weapon is any object that by its design or how it is used can cause serious bodily injury or death. For instance, an object such as a gun, dagger, sword or the like³ is a dangerous weapon based on its designed purpose to cause serious bodily injury or death. [*<If the object is dangerous by use, include>* Another object, such as a pocket knife, baseball bat, shoe, or even a pencil, that is not designed to cause injury or harm, becomes a dangerous weapon if a person uses it to cut, strike, or otherwise touch someone in a way that a reasonable person would recognize could cause serious bodily injury or death.]

The third element – “intended to touch” – requires you to consider DFT’s state of mind. A person intends to touch if the person means to touch, as opposed to doing it accidentally or carelessly. The Commonwealth does not have to prove that DFT intended to harm AVM, but the Commonwealth must prove DFT meant to touch AVM with a dangerous weapon.

As to the fourth element, the law accepts certain touchings as justified even if done with a potentially dangerous weapon. For example, when a doctor performs surgery or when a person consents to expected contact by playing certain sports. The Commonwealth must prove the touching was not justified.

(b) Reckless Assault and Battery by Means of a Dangerous Weapon

To prove DFT guilty of assault and battery by means of a dangerous weapon by reckless conduct, the Commonwealth must prove four elements beyond a reasonable doubt:

1. DFT acted recklessly;
2. DFT intended to do the act;
3. DFT’s reckless act caused AVM bodily injury; and
4. The bodily injury was done by means of a dangerous weapon.

³ See G.L. c. 269, §§ 10, 12.

As to the first element, the Commonwealth must prove DFT acted recklessly. A person who acts “recklessly” does something even though he knows or should know his action is very likely to cause substantial bodily injury to another person. It is not enough for the Commonwealth to prove that DFT was careless or negligent, or that DFT did not act reasonably. The Commonwealth must prove that DFT recognized, or a reasonable person in DFT’s position would have recognized, that DFT’s actions were so dangerous that they were very likely to cause substantial bodily injury to someone else, but DFT nonetheless went ahead anyway. The Commonwealth does not have to prove that DFT intended to strike or hurt anyone or that DFT expected that anyone would be hurt.

As to the second element, the Commonwealth must prove that DFT consciously decided to do the act and he did not do it accidentally. The Commonwealth does not have to prove that DFT intended to injure or touch AVM.

As to the third element, the Commonwealth must prove that DFT’s reckless act caused AVM bodily injury. “Bodily injury” is injury that is serious enough to hurt AVM or interfere with AVM’s health or physical welfare. Bodily injury is something that does more than just shake AVM up or cause AVM minor discomfort. It must be more serious than that, but it does not have to cause permanent injury.⁴

As to the fourth element, the Commonwealth must prove that the bodily injury was done by means of a dangerous weapon. [*<If “dangerous weapon” was previously defined, reference that definition here. Otherwise insert:>* A dangerous weapon is any object that by its design or how it is used can cause serious bodily injury or death. For instance, an object such as a gun, dagger, sword or the like⁵ is a dangerous weapon based on its

⁴ See *Commonwealth v. Ashford*, 486 Mass. 450, 461 (2020); *Commonwealth v. Burno*, 396 Mass. 622, 626-627 (1986).

⁵ See G.L. c. 269, §§ 10, 12.

designed purpose to cause serious bodily injury or death.] [*<And if the object is dangerous by use, include.>* Another object, such as a pocket knife, baseball bat, shoe, or even a pencil, that is not designed to cause injury or harm, becomes a dangerous weapon if a person uses it to cut, strike, or otherwise touch someone in a way that a reasonable person would recognize could cause serious bodily injury or death.] The Commonwealth must prove that the bodily injury was done by DFT using a dangerous weapon, causing a dangerous weapon to come in contact with AVM, or causing AVM to come into contact with a dangerous weapon.

SUPPLEMENTAL INSTRUCTIONS⁶

Assault and Battery by Means of a Dangerous Weapon Causing Serious Bodily Injury⁷

<Assault and battery by means of a dangerous weapon causing serious bodily injury has one element in addition to those required for assault and battery by means of a dangerous weapon. The judge should add the following element to the instructions for assault and battery by means of a dangerous weapon.>

1. DFT caused serious bodily injury to AVM.

<Add the following explanation of the additional element:>

“Serious bodily injury” is defined as bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb, or organ, or a substantial risk of death.

A “permanent disfigurement” is an injury which causes an enduring visible change to a person’s appearance or affects the character of a person’s body.

⁶ Assault and battery with a dangerous weapon is a lesser included offense of each of the offenses described below.

⁷ G.L. c. 265, § 15A(c)(i) states: “Whoever [] by means of a dangerous weapon, commits an assault and battery upon another and by such assault and battery causes serious bodily injury . . . shall be punished.”

An injury that can be concealed or repaired may still be a permanent disfigurement.

“Loss or impairment of a bodily function, limb, or organ”⁸ is damage to any body part that negatively affects its ability to perform its function.⁹

Assault and Battery by Means of a Dangerous Weapon on a Person who is Pregnant¹⁰

<Assault and battery by means of a dangerous weapon on a person who is pregnant has two elements in addition to those required for assault and battery by means of a dangerous weapon. The judge should add the following elements to the instructions for assault and battery by means of a dangerous weapon:>

1. AVM was pregnant at the time; and
2. DFT knew or had reason to know at the time that AVM was pregnant.

<Add the following explanation of the additional elements:>

As to the last two elements, the Commonwealth must prove that AVM was pregnant when DFT touched AVM with a dangerous weapon on [date]. The Commonwealth must also prove either that DFT knew that AVM was pregnant at the time, or that a reasonable person in DFT’s position would have known that AVM was pregnant.

⁸ The judge should instruct on the specific theory of impairment i.e., organ, limb, or bodily function, that applies to the case.

⁹ See generally the footnotes to the instruction for Assault and Battery Causing Serious Bodily Injury.

¹⁰ G.L. c. 265, § 15A(c)(ii) states: “Whoever [] by means of a dangerous weapon, commits an assault and battery upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant . . . shall be punished.”

Assault and Battery by Means of a Dangerous Weapon on a Person with a Vacate, Restraining, or No-Contact Order¹¹

<Assault and battery by means of a dangerous weapon on a person with a vacate, restraining, or no-contact order has two elements in addition to those required for assault and battery by means of a dangerous weapon. The judge should add the following elements to the instructions for assault and battery by means of a dangerous weapon:>

1. AVM had a [vacate/restraining/no-contact] [order/judgment] under [insert applicable statutory citation, e.g. G.L. c. 209A] in effect against DFT at the time of the assault and battery; and
2. DFT knew that such order was in effect against DFT at the time of the assault and battery.

<Add the following explanation of the additional elements:>

As for the “court order” element, the Commonwealth must prove that a court issued an [order/judgment] under [insert applicable statutory citation] requiring DFT to vacate and/or stay away from a particular location, or to stay away from, not to contact, or not to abuse AVM, which was in effect at the time DFT touched AVM with a dangerous weapon. The [order/judgment] may be temporary or permanent.

To prove the last element, the Commonwealth must prove DFT knew the [order/judgment] was in effect, either because he received a copy of it or because he learned about it in some other way.¹²

¹¹ G.L. c. 265, § 15A(c)(iii) states: “Whoever [] by means of a dangerous weapon, commits an assault and battery upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault and battery . . . shall be punished.”

¹² *Commonwealth v. Welch*, 58 Mass. App. Ct. 408, 410 (2003) (failure to prove service of restraining order on defendant “is not fatal if the Commonwealth can demonstrate that the defendant had actual knowledge of the terms of the order”).

Assault and Battery by Means of a Dangerous Weapon on a Person under Age 14¹³

<Assault and battery by means of a dangerous weapon on a person under age 14 has two elements in addition to those required for assault and battery by means of a dangerous weapon. The judge should add the following elements to the instructions for assault and battery by means of a dangerous weapon:>

1. DFT was 18 years of age or older at the time; and
2. AVM was a child under the age of 14 at the time.

<Add the following explanation of the additional elements:>

The last two elements are self-explanatory.

¹³ G.L. c. 265, § 15A(c)(iv) states: "Whoever [] is 18 years of age or older and, by means of a dangerous weapon, commits an assault and battery upon a child under the age of 14[] . . . shall be punished."