

## Assault and Battery<sup>1</sup>

DFT is charged with assault and battery on AVM on [DATE].

[<If both theories—intentional and reckless A&B—are charged:>

The Commonwealth can prove a person guilty of assault and battery based on an intentional touching or a touching that results from a reckless act.]

<Otherwise charge only on the relevant theory.>

### (a) Assault and Battery – Intentional Touching

To prove DFT guilty of assault and battery based on an intentional touching, the Commonwealth must prove four elements beyond a reasonable doubt:

1. DFT touched AVM;
2. DFT intended to touch AVM;
3. The touching caused or was likely to cause bodily harm to AVM, or happened without AVM's consent;<sup>2</sup> and

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<sup>1</sup> G.L. c. 265, § 13A(a) states: "Whoever commits an . . . assault and battery upon another shall be punished."

<sup>2</sup> We have not used the term "offensive" because the caselaw as it has evolved defines "offensive" as without the victim's consent. See *Commonwealth v. Viera*, 483 Mass. 417, 423-424 (2019) ("Offensive battery, by contrast, requires only that 'the defendant, without justification or excuse, intentionally touched the victim, and that the touching, however slight, occurred without the victim's consent.' . . . An offensive touching 'is so only because of lack of consent,' and comes into play 'when the alleged battery is not of the physically harmful type.' . . . 'The affront to the victim's personal integrity is what makes the touching offensive.' Such 'de minimis touchings' may include tickling, . . . spitting, . . . or moving someone from one room to another."); *Commonwealth v. Wentworth*, 482 Mass. 664, 672 (2019), quoting *Commonwealth v. Eberhart*, 461 Mass. 809 (2012): "[U]nder the common law there are two theories of assault and battery: intentional battery and reckless battery. Offensive battery and harmful battery are forms of intentional battery. A harmful battery is '[a]ny touching with such violence that bodily harm is likely to result'. An offensive battery occurs when 'the defendant, without justification or excuse, intentionally touched the victim, and . . . the touching, however slight, occurred without the victim's consent.'" See also *Cohen*, 55 Mass. App. Ct. 358, 359 (2002) ("The Commonwealth presented sufficient evidence to establish that the defendant had intentionally spat on the victim without her consent, **and that she found it**

4. The touching was not justified.<sup>3</sup>

As to the first element, touching is any physical contact, however slight. [*</if the touching is indirect.>* A touching may be direct like one person hitting another, or it may be indirect like one person setting in motion some force or item that hits another.]

The second element the Commonwealth must prove is that DFT intended to touch AVM. This refers to DFT's state of mind. A person intends to touch another person if he does it on purpose and not by accident. The Commonwealth does not have to prove that DFT intended to hurt AVM. The Commonwealth can prove the third element in one of three ways. The Commonwealth can prove that the touching (1) caused AVM bodily harm, (2) was likely to cause AVM bodily harm, or (3) was done without AVM's consent.

As to the fourth element, the law accepts some touching as justified, which means reasonable in the circumstances. A touching may be justified, even if it causes or is likely to cause bodily harm or is without the other person's consent. Here are some examples: the law allows a doctor to perform emergency surgery on a person who is unconscious; it allows a person to pull a pedestrian from the path of an oncoming car; and it allows some incidental bumping of another person on a crowded bus or train.

#### **(b) Assault and Battery – Reckless Conduct**

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

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**offensive.**" (emphasis added)). We have found no Massachusetts appellate decision holding that an unconsented-to touching was non-offensive.

<sup>3</sup> 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).

1. DFT acted recklessly;
2. DFT intended to do the act; and
3. DFT's reckless act caused AVM bodily injury.

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 that he did not do it accidentally. The Commonwealth does not have to prove that DFT intended to touch or injure AVM.

Finally, the Commonwealth must prove DFT's reckless act caused AVM to suffer "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 a minor discomfort. It must be more serious than that, but it does not have to cause permanent injury.

## SUPPLEMENTAL INSTRUCTIONS<sup>4</sup>

### Assault and Battery Causing Serious Bodily Injury<sup>5</sup>

*<Assault and battery causing serious bodily injury has one element in addition to those required for assault and battery. The judge should add the following element to the instructions for assault and battery:>*

1. DFT caused a 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.<sup>6</sup>

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. An injury that can be concealed or repaired may still be a permanent disfigurement.<sup>7</sup>

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<sup>4</sup> Assault and battery is a lesser included offense of each of the offenses described below.

<sup>5</sup> G.L. c. 265, § 13A(b)(1) states: “Whoever commits an assault and battery upon another and by such assault and battery causes serious bodily injury . . . shall be punished.”

<sup>6</sup> G. L. c. 265, § 13A(c). The statute sets forth three distinct routes for establishing serious bodily injury. Under the statute, “permanent” modifies only “disfigurement.” See *Commonwealth v. Marinho*, 464 Mass. 115, 118 (2013); *Commonwealth v. Jean-Pierre*, 65 Mass. App. Ct. 162, 163 (2005).

<sup>7</sup> The statute does not define “permanent disfigurement.” Case law defines “permanent” as “‘continuing or enduring (as in the same state, status, or place) without fundamental or marked change,’ synonymous with the words ‘lasting’ or ‘stable.’” *Commonwealth v. Heywood*, 484 Mass. 43, 50 (2020), quoting Webster’s Third New International Dictionary 1683 (1993). “Disfigurement” means “to be ‘ma[d]e less complete, perfect, or beautiful in appearance or character.”’ *Heywood*, 484 Mass. at 50, quoting Webster’s Third New International Dictionary 649. A disfiguring injury need not be static. The injury may change over time, but the disfigurement (or state of being disfigured) must remain permanent. *Commonwealth v. Frederick*, 95 Mass. App. Ct. 1104 (2019) (unpublished Rule 1:28 decision). See, e.g., *Heywood*, 484 Mass. at 49-52 (affirming conviction under theory of permanent disfigurement where victim suffered fractured orbital bone and cheekbone, retinal bleeding, and insertion of titanium plates into his face to hold bones in place; evidence also supported theory of impairment of bodily function where nerve damage in victim’s cheek resulted in

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

### Assault and Battery on Pregnant Person<sup>10</sup>

*<Assault and battery on a pregnant person has two elements in addition to those required for assault and battery. The judge should add the following two elements to the instructions for assault and battery:>*

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 on [date]. The Commonwealth also must prove either that DFT actually knew that AVM was pregnant at the time, or that a reasonable person in DFT’s position would have known that AVM was pregnant.

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chronic numbness). Whether a scar is permanently disfiguring may depend on the extent, size, severity, location, and duration of the injury. *Commonwealth v. Frederick*, 95 Mass. App. Ct. 1104 (2020) (unpublished Rule 1:28 decision), citing *Commonwealth v. Farrell*, 322 Mass. 606, 618 (1948) (jury could find cigarette burns and slash marks permanently disfiguring). See, e.g., *Commonwealth v. Johnson*, 92 Mass. App. Ct. 538, 542 (2017) (grand jury could find serious bodily injury based on “permanent disfiguring scar” on victim’s head).

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

<sup>9</sup> “Impairment of physical condition” means damage to any body part that ‘compromises its ability to perform its function in the victim’s body.’” *Commonwealth v. Scott*, 464 Mass. 355, 359 (2013). Impairment “draws its meaning from the medical context, where definitions emphasize an injury’s impact on the structure of a part of the victim’s anatomy and its ability to serve its usual role in the body.” *Id.* at 358; *Commonwealth v. Ryan*, 93 Mass. App. Ct. 486, 489 (2018).

<sup>10</sup> G.L. c. 265, § 13A(b)(ii) states: “Whoever 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 on Person with Vacate/Restraining/No-Contact Order<sup>11</sup>

*<Assault and battery on a person who has a vacate/restraining/no-contact order has two elements in addition to those required for assault and battery. The judge should add the following two elements to the instructions for assault and battery:>*

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; and
2. DFT knew that such order was in effect against DFT at the time.

*<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. The Commonwealth must also prove that the order was in effect at the time of the assault and battery. The [order/judgment] may be temporary or permanent.

As to 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.<sup>12</sup>

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<sup>11</sup> G.L. c. 265, § 13A(b)(iii) states: “Whoever 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.”

<sup>12</sup> *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 on a Public Employee<sup>13</sup>

*<Assault and battery on a public employee has three elements in addition to those required for assault and battery. The judge should add the following three elements to the instructions for assault and battery:>*

1. AVM was a public employee;
2. At the time of the assault and battery, AVM was performing his/her duties; and
3. DFT knew that AVM was a public employee performing his/her duties.

*<Add the following explanation of the additional elements:>*

A “public employee” is any person employed by a federal, state, county, or local government or governmental agency, department or office.

The Commonwealth must prove AVM was a “public employee” and was performing AVM’s work, that is, was doing AVM’s job as a public employee, at the time of the assault and battery.

The Commonwealth must also prove that at the time of the assault and battery DFT actually knew that AVM was a public employee and that AVM was doing AVM’s job.<sup>14</sup>

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<sup>13</sup> G.L. c. 265, § 13D, para. 1 states: “Whoever commits an assault and battery upon any public employee when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished.”

<sup>14</sup> See *Commonwealth v. Colon*, 81 Mass. App. Ct. 8, 22 (2011) (assault and battery on police officer requires proof that offense was committed on public employee in performance of his duty and “defendant knew his victim was a police officer”); *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 456-457 & n.2 (2000).

## Assault and Battery on Child – Bodily Injury<sup>15</sup>

*<Assault and battery on a child causing bodily injury has two elements in addition to those required for assault and battery. The judge should add the following two elements to the instructions for assault and battery:>*

1. AVM was a child; and
2. DFT caused bodily injury to AVM.

*<Add the following explanation of the additional elements:>*

A “child” is any person under 14 years of age.<sup>16</sup>

“Bodily injury” means substantial impairment of a person’s physical condition, including a burn, broken bone, subdural hematoma, injury to an internal organ, injury from repeated harm to a bodily function or organ including human skin, or any other physical condition that substantially imperils a child’s health or welfare.<sup>17</sup>

## Assault and Battery on Child - Substantial Bodily Injury<sup>18</sup>

*<Assault and battery on a child causing substantial bodily injury has two elements in addition to those required for assault and battery. The judge should add the following two elements to the instructions for assault and battery:>*

1. AVM was a child; and

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<sup>15</sup> G.L. c. 265, § 13J(b), para. 1, states: “Whoever commits an assault and battery upon a child and by such assault and battery causes bodily injury shall be punished.”

<sup>16</sup> G.L. c. 265, § 13J(a) (“Child”).

<sup>17</sup> G.L. c. 265, § 13J(a) (defining “[b]odily injury” to mean “substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child’s health or welfare.”).

<sup>18</sup> G.L. c. 265, § 13J(b), para. 2, states: “Whoever commits an assault and battery upon a child and by such assault and battery causes substantial bodily injury shall be punished.” Assault and battery on a child causing bodily injury, G.L. c. 265, § 13J(b), para. 1, is a lesser included offense of this crime.



2. DFT caused substantial bodily injury to AVM.

*<Add the following explanation of the additional elements:>*

A "child" is any person under 14 years of age.<sup>19</sup>

"Bodily injury" means substantial impairment of a person's physical condition, including a burn, broken bone, subdural hematoma, injury to an internal organ, injury from repeated harm to a bodily function or organ including human skin, or any other physical condition that substantially imperils a child's health or welfare.<sup>20</sup> "Substantial bodily injury" means bodily injury which creates a permanent disfigurement, protracted loss or impairment of the function of a body member, limb or organ, or substantial risk of death.<sup>21</sup>

"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. Injury that can be concealed or repaired may still be a permanent disfigurement.

A "body member" is a part or organ of the human body, such as a finger or sexual organ.<sup>22</sup>

Loss or impairment of the function of a body member, limb or organ is damage to any body part that compromises – that is, negatively affects – its ability to perform its function.<sup>23</sup>

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<sup>19</sup> G.L. c. 265, § 13J(a) ("Child").

<sup>20</sup> G.L. c. 265, § 13J(a) (defining "[b]odily injury" to mean "substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare.").

<sup>21</sup> G.L. c. 265, § 13J(a) ("Substantial bodily injury").

<sup>22</sup> See, e.g., *Commonwealth v. Silvia*, 97 Mass. App. Ct. at 156-157 (mayhem - finger).

<sup>23</sup> See generally footnotes to Instruction for Assault and Battery Causing Serious Bodily Injury.

## Assault and Battery on Family or Household Member<sup>24</sup>

*<Assault and battery on a family or household member has one element in addition to those required for assault and battery. The judge should add the following element to the model instructions for assault and battery:>*

1. DFT and AVM were “family or household members” at the time.

*<Add the following explanation of the additional element:>*

Two people are “family or household members” if they *<Only include relevant portions of this definition>* (i) are or were married to one another, (ii) have a child in common regardless of whether they were ever married or lived together, or (iii) are or have been in a substantive dating or engagement relationship.<sup>25</sup>

[*<If definition (iii) is relevant, including the following:>* To determine if a relationship is “substantive,” you should consider the type of relationship it was, how long it lasted, how often the parties interacted, whether either person ended the relationship, and, if it was ended, how much time passed since the relationship ended.<sup>26</sup>]

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<sup>24</sup> G.L. c. 265, § 13M(a) states: “Whoever commits an . . . assault and battery on a family or household member shall be punished.” The statute was substantively rewritten in 2014. See St.2014, c. 260, § 23 (eff. Aug. 8, 2014). The current statute contains a different, and in some respects narrower, definition of “family or household member” than the earlier version of the statute.

<sup>25</sup> If only one of these alternatives applies, the instruction may omit the others. If alternative (iii) does not apply, the last paragraph of this draft instruction should be omitted.

<sup>26</sup> G.L. c. 265, § 13M(c). See *Commonwealth v. Dustin*, 476 Mass. 1003, 1004-1006 (2016) (rescript).