INDECENT ASSAULT AND BATTERY

G.L. c. 265, § 13H

The defendant is charged with indecent assault and battery.

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

First: **That the defendant committed an assault and battery on the alleged victim. Assault and battery is the intentional touching of another person, without legal justification or excuse.**

Second: **That the assault and battery was "indecent."**

and *Third:* That the alleged victim did not consent to the alleged indecent assault and battery.

An indecent act is commonly understood as measured by common understanding and practices. It is one that is fundamentally offensive to contemporary standards of decency. An assault and battery may be "indecent" if it involves touching portions of the anatomy commonly thought private.

See Instruction 6.140 (Assault and Battery) for additional language defining assault and battery. If the alleged victim was under the age of 14, see Instruction 6.520 (Indecent Assault and Battery on a Child under 14).

"A touching is indecent when, judged by the normative standard of societal mores, it is violative of social and behavioral expectations in a manner which [is] fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper." *Commonwealth v. Vasquez,* 65 Mass. App. Ct. 305, 306 (2005) (internal quotations omitted). "It has been held that the intentional, unjustified touching of private areas such as 'the breasts, abdomen, buttocks, thighs, and pubic area of a female' constitutes an indecent assault and

battery." *Commonwealth v. Mosby,* 30 Mass. App. Ct. 181, 184-185 (1991) (quoting *Commonwealth v. De La Cruz,* 15 Mass. App. Ct. 52, 59 (1982)).

The above list of private anatomical parts and areas, however, "has never been declared to be exhaustive . . . . [and may] include other parts of the body — whether clothed or unclothed — that, if intentionally and unjustifiably touched, would violate our contemporary views of personal integrity and privacy." *Commonwealth v. Castillo,* 55 Mass. App. Ct. 563, 566 (2002) (internal quotations omitted).

SUPPLEMENTAL INSTRUCTION

Where victim touches the defendant's private part

An indecent act includes those acts where the defendant directs or commands the alleged victim to touch a private part of the defendant (or another person).

Where the defendant touches the victim with his or her private part

An indecent act includes those acts where a defendant touches the alleged victim with his (her) own private part (or that of another person).

Where capacity of victim over 14 to consent is at issue.

I have instructed you that one element of this offense is that *[alleged victim]* **did not consent to the touching.**

In some cases, you may also have to consider a related question: whether the alleged victim was *able* to consent. If a person is so impaired because of the consumption of drugs or

alcohol or for some other reason (for example, sleep, unconsciousness, intellectual disability, or physical helplessness) that he (she) is incapable of consenting, then it automatically follows that he (she) did not consent.

In such cases, the Commonwealth may prove that *[alleged victim]* **did not consent by proving beyond a reasonable doubt:**

***First,* that** *[alleged victim]* **was so impaired because of (consumption of alcohol or drugs) (intellectual disability) (injury) (physical helplessness) (sleep) (** *[other reason]* **) that he (she) was incapable of freely giving consent; and**

***Second,* that the defendant knew, or reasonably should have known, that** *[alleged victim's]* **condition rendered him (her) incapable of consenting.**

It is a question of fact in each case as to whether a particular person was or was not able to consent on a particular occasion. How do you determine this?

Where drugs or alcohol were involved: **(Consumption or intoxication with alcohol or drugs, by itself, does not necessarily mean that**

an individual is incapable of deciding whether to consent. It is a matter of common knowledge that there are many levels of intoxication. The question is whether, as a result of a person's consumption of drugs, alcohol, or both, that person was unable to give or to refuse consent.)

If intoxication is not involved: **(The crucial factors are often the person's intelligence or physical condition, but you may also consider other factors, such as the person's maturity and experience. The question comes down to whether the person was intelligent and aware enough to understand and evaluate what was happening, and to make a decision whether or not to consent based on that understanding.)**

If the Commonwealth has proved beyond a reasonable doubt that ___*[alleged victim]*___ **did not have enough understanding and awareness on that occasion to be able to consent, and that the defendant knew or reasonably should have known this, then the Commonwealth has proved that he (she) did not consent.**

If the Commonwealth has failed to prove beyond a reasonable doubt that ___*[alleged victim]*___ **was incapable of**

consenting and that the defendant knew or reasonably should have known this, then the Commonwealth must prove beyond a reasonable doubt that *[alleged victim]* **did not in fact give consent.**

In a case where the complainant's capacity to consent is at issue, the judge should instruct that if "because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse occurring during such incapacity is without that person's consent . . . . This formulation . . . is intended to communicate to the jury that intoxication must be extreme before it can render a complainant incapable of consenting." However, the judge should not suggest that the alleged victim must be "wholly insensible" or "unconscious or nearly so . . . . The issue is whether, as a result of such intoxication, the complainant was unable to give or refuse consent." *Commonwealth v. Blache,* 450 Mass. 583, 592 & n.14, 595 n.19 (2008).

Blache also held that a defendant's reasonable mistake as to the complainant's ability to consent is a defense to a rape charge that is premised on the complainant's inability to consent. When a complainant is able to give or refuse consent, mistake about consent is not a defense because the need to prove the use or threat of force should negate any such mistake. But where the complainant is incapable of consenting, the Commonwealth need only prove the force necessary for penetration, and this increases the possibility of a reasonable mistake about consent. In rape cases tried after the *Blache* rescript (February 21, 2008) that are premised on inability to consent, the Commonwealth must prove that the defendant knew or reasonably should have known that the complainant was incapable of consenting. *Id.,* 450 Mass. at 592-597.

This supplemental instruction assumes that *Blache* is to be applied also in indecent assault and battery cases, and incorporates the contents of the suggested model instruction set out in *Blache,* 450 Mass. at 595 n.19.

NOTES:

1. **Accidental touching**. If there is evidence, no matter how incredible, that the touching may have been accidental, the judge must charge on request that the Commonwealth has the burden of proving beyond a reasonable doubt that the touching was not accidental. *Commonwealth v. Maloney,* 23 Mass. App. Ct. 1016, 1016-1017(1987). See Instruction 9.100 (Accident).

2. **Aggravated forms of offense if victim 60 or older or disabled, or after prior sex offense.** General Laws c. 265, § 13H provides for an aggravated form of this offense if the victim is 60 or older or disabled. The District Court lacks final jurisdiction over that aggravated offense.

3. **First complaint**. Testimony concerning "first complaint" (See Instruction 3.660) is not limited to rape

prosecutions, but may be received in other cases of sexual assault. *Commonwealth v. King,* 445 Mass. 217, 237-248 (2005) (replacing fresh complaint doctrine with first complaint rule for "sexual assaults"); *Commonwealth v. Brenner,* 18 Mass. App. Ct. 930, 931-932 (1984) (fresh complaint doctrine applicable to indecent assault and battery).

4. **Intent**. Indecent assault and battery does not require a specific intent, but only "the general criminal intent to do that which the law prohibits." *Commonwealth v. Egerton,* 396 Mass. 499, 504 (1986). "The intent element [of indecent assault and battery] is satisfied upon proof that 'the defendant intended – had a conscious purpose . . . – to commit an indecent or offensive touching without [the victim's] consent.'" *Commonwealth v. Kennedy*, 478 Mass. 804, 810 (2018), quoting *Commonwealth v. Marzilli*, 457 Mass. 64, 67 (2010). See also *Commonwealth v. Confrey,* 37 Mass. App. Ct. 290, 299-301 (1994) (indecent assault and battery on a child under G.L. c. 265, § 13B is not a specific intent crime, and therefore need not have been done for the purpose of sexual gratification or arousal).

5. **Kissing, hugging, and touching of clothing.** The mouth and its interior are an intimate part of the body. *Commonwealth v. Rosa*, 62 Mass. App. Ct. 622, 623-624 (2004) (insertion of thumb into mouth, coupled with other suggestive circumstances, found indecent). "[A]n unwanted kiss on the mouth has been held to constitute indecent conduct, at least in circumstances involving the forced insertion of the tongue, when coupled with surreptitiousness and a considerable disparity in age and authority between the perpetrator and the victim. We do not read our cases, however, as requiring that there always be tongue involvement for an act that might be characterized as a kiss to be found indecent, as other facts and circumstances may allow the trier of fact rationally to determine that the kiss was an indecent act . . . . [I]n most situations it would not be appropriate to criminalize a brief kiss on the mouth that did not involve the insertion or attempted insertion of the tongue [except where] the kiss could be viewed as having improper, sexual overtones, violative of social and behavioral expectations." *Commonwealth v. Vasquez,* 65 Mass. App. Ct. 305, 307, 309 (2005) (internal quotations omitted). See *Commonwealth v. Castillo,* 55 Mass. App. Ct. 563, 566-567(2002) (kiss with forced insertion of tongue).

6. **Lesser included offenses**. Indecent assault and battery is a lesser included offense of forcible rape (G.L. c. 265, § 22). *Commonwealth v. Thomas,* 401 Mass. 109, 119-120 (1987); *Egerton,* 396 Mass. at 503 n.3. Assault and battery is a lesser included offense of indecent assault and battery; there is no lesser included offense of "indecent assault." *Commonwealth v. Eaton,* 2 Mass. App. Ct. 113, 116-118 (1974). See *Commonwealth v. Niels N.*, 73 Mass. App. Ct. 689, 694 (2009) (assault and battery not a lesser included offense of indecent assault and battery on a child). Indecent assault and battery on a person over the age of fourteen is not a lesser included offense of indecent assault and battery on a child under the age of fourteen. *See Commonwealth v. Farrell*, 31 Mass. App. Ct. 267, 268-269 (1991).

7. **Parental Activity.** There is no risk that a jury could consider "normal parental activity" indecent where the judge instructed that an indecent act is to be "measured by common understanding and practices." *Commonwealth v. Trowbridge*, 419 Mass. 750, 758 (1995).

8. **Prior uncharged sexual contacts with same victim.** Evidence of the defendant's prior illicit sexual acts with the same victim, not charged in the complaint, may be admissible to show inclination to commit the acts charged in the complaint if sufficiently similar and not too remote in time. *Commonwealth v. Sosnowski*, 43 Mass. App. Ct. 367, 371 (1997) (two months not too remote); *Commonwealth v. Calcagno,* 31 Mass. App. Ct. 25, 26-27 (1991) (court properly admitted two acts of uncharged sexual conduct, one of which was one year prior to charged act and the other four months prior to the charged act); *Commonwealth v. King,* 387 Mass. 464, 469-470 (1982) (prior uncharged acts were contemporaneous to the charged acts).

9. **Privileged records.** In a prosecution for a sexual offense, the defense may seek pretrial access to statutorily privileged records of the alleged victim (e.g., psychological records) by a motion under Mass. R. Crim. 17(a)(2). The prosecutor must notify the subject and the record holder that they may, but are not required to, appear and be heard. After hearing, the judge must determine (1) whether the records are presumptively privileged, i.e., prepared in circumstances suggesting that some or all are likely to be privileged, and (2) whether the four requirements of *Commonwealth v. Lampron,* 441 Mass. 265 (2004), have been satisfied: that the documents are evidentiary and relevant, that they are not otherwise procurable by due diligence, that the defense cannot properly prepare for trial without them, and that the application is made in good faith and is not a general fishing expedition. If so, the judge is to order the clerk-magistrate to issue a summons for the records along with written instructions to the record keeper,

who is then to deliver them under seal to the clerk-magistrate. Defense counsel is to be permitted to inspect them after signing a protective order with "stringent provisions" against disclosure (including to the defendant). Defense counsel must seek court authorization to disclose the privileged records to others, and must file a motion in limine no later than the final pretrial conference in order to use privileged content at trial. *Commonwealth v. Dwyer,* 448 Mass. 122 (2006).

10. **Rape shield law.** The admission of evidence concerning the prior sexual conduct of the victim is limited by the rape shield law, G.L. c. 233, § 21B. *Commonwealth v. Ruffen,* 399 Mass. 811, 816 (1987). In some circumstances, the statute may have to yield to the defendant's right to demonstrate bias on the part of the victim, but only if evidence of bias cannot otherwise be elicited. *Commonwealth v. Elder,* 389 Mass. 743, 750-751 (1983); *Commonwealth v. Joyce,* 382 Mass. 222, 224-232 (1981). See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 4.13.

11. **Rape trauma syndrome.** It is within a judge's discretion to permit expert testimony regarding post-assault behavior and symptoms of adult or child victims of sexual abuse. Such testimony is for the limited purpose of helping the jury to assess the alleged victim's credibility, and is not admissible as affirmative evidence that sexual abuse did occur. *Commonwealth v. Hudson,* 417 Mass. 536, 540-543 (1994) (child victims); *Commonwealth v. Dockham,* 405 Mass. 618, 629 (1989) (same); *Commonwealth v. Mamay,* 407 Mass. 412, 421-422 (1990) (adult victims).

However, it is reversible error to permit such an expert witness to offer an opinion that the alleged victim was in fact sexually assaulted. *Commonwealth v. Colin C.,* 419 Mass. 54, 59-61 (1994). If the expert witness has interviewed or evaluated the alleged victim in the case, particular care must be taken to prevent the expert from implicitly rendering an opinion as to the alleged victim's truthfulness. *Trowbridge,* 419 Mass. at 759 (expert testimony that child's behavior was consistent with that of sexually abused children, and that child's physical condition was consistent with type of abuse alleged in the case, was impermissible endorsement of child's credibility). In such cases, the judge should conduct a voir dire at which the expert answers the proposed questions. If the judge allows the testimony, the witness should be cautioned in advance not to opine on the credibility of the particular victim or that of sexual abuse victims in general. The judge should charge the jury after the expert's testimony and again during final instructions on the role of experts, and also charge on request that expert testimony is not affirmative evidence of sexual abuse and that the expert did not assess the credibility of the particular alleged victim. Counsel too should be very careful in closing argument not to imply that the expert vouched for the credibility of the particular alleged victim. *Commonwealth v. Rather,* 37 Mass. App. Ct. 140 (1984).

12. **Self-defense claim.** In a prosecution for indecent assault and battery involving a scuffle between the complainant and the defendant, the defendant is not entitled to a self-defense charge if the evidence would only permit the jury to find that the defendant initiated an indecent touching of the complainant, which triggered her physical response. The defendant is entitled to a self-defense charge if the evidence would permit the jury to find that the complainant initiated the scuffle and that any contact between the defendant and a sexually private area of the complainant occurred only when he tried to push her away in justifiable self-defense. *Commonwealth v. Lyons,* 71 Mass. App. Ct. 671 (2008).

13. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

14. **Consent**. It appears that absence of consent may not be an element of an indecent assault and battery upon a victim who is 14 or older if the touching was "physically harmful" or "potentially physically harmful." See *Commonwealth v. Burke,* 390 Mass. 480, 487 (1983).

15. **Defendant does not perform touching**. The case law supports a conclusion that forcing a victim to take off his or her clothing, or forcing the victim to commit an indecent touching, may constitute indecent assault and battery. *A.P. v M.T.*, 92 Mass. App. Ct. 156, 164 (2017).