ASSAULT AND BATTERY
BY MEANS OF A DANGEROUS WEAPON

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I. INTENTIONAL ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

The defendant is charged with having committed an intentional assault and battery by means of a dangerous weapon, specifically a *[alleged dangerous weapon]* **, upon** *[alleged victim]* **. Section 15A of chapter 265 of our General Laws provides as follows:**

> **"Whoever commits assault and battery upon another**
>
> **by means of a dangerous weapon**
>
> **shall be punished . . . ."**

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

First: **That the defendant touched the person of** *[alleged victim]* **, however slightly, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch** *[alleged victim]* **; and**

Third: **That the touching was done with a dangerous weapon.**

If additional language on intent is appropriate. **The Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch ___[alleged victim]___ with the dangerous weapon, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is *not* required to prove that the defendant specifically intended to cause injury to ___[alleged victim]___ .**

If no injury was sustained. **It is not necessary for the Commonwealth to prove that the defendant actually caused injury to ___[alleged victim]___ with a dangerous weapon. Any slight touching is sufficient, if it was done with a dangerous weapon.**

A. *If the alleged weapon is inherently dangerous.* **A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a ________ is a dangerous weapon.**

B. *If the alleged weapon is not inherently dangerous.* **An item that is normally used for innocent purposes can become a dangerous weapon if it is intentionally used as a weapon in a dangerous or potentially dangerous fashion. The law**

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considers any item to be a dangerous weapon if it is intentionally used in a way that it reasonably appears to be capable of causing serious injury or death to another person. For example, a lighted cigarette can be a dangerous weapon if it is used to burn someone; or a pencil, if it is aimed at someone's eyes. In deciding whether an item was intentionally used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

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G.L. c. 265, § 15A(b). *Commonwealth v. Ford,* 424 Mass. 709, 711, 677 N.E.2d 1149, 1151-1152 (1997) (ABDW is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Commonwealth v. Waite,* 422 Mass. 792, 794 n.2, 665 N.E.2d 982, 985 n.2 (1996) (ABDW does not require specific intent to do bodily harm with the dangerous weapon); *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 887 n.4, 469 N.E.2d 797, 801 n.4 (1984) (ABDW "requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another, by means of an instrumentality capable of causing bodily harm"); *Commonwealth v. Appleby*, 380 Mass. 296, 307-308, 402 N.E.2d 1051, 1058-1059 (1980) (ABDW "is a general intent crime in Massachusetts . . . . [that] does not require specific intent to injure; it requires only general intent to do the act causing injury . . . . [It] requires that the elements of assault be present . . . , that there be a touching, however slight . . . , that the touching be by means of the weapon . . . , and that the battery be accomplished by use of an inherently dangerous weapon, or by use of some other object as a weapon, with the intent to use that object in a dangerous or potentially dangerous fashion"); *Id.*, 380 Mass. at 308-311, 402 N.E.2d at 1059-1061 (consent is not a defense to ABDW). *Commonwealth v. Manning*, 6 Mass. App. Ct. 430, 436-438, 376 N.E.2d 885, 888-889 (1978) (ABDW must be "by means of" dangerous weapon, that is, weapon must come into contact with victim); *Commonwealth v. Moffett*, 383 Mass. 201, 212, 418 N.E.2d 585, 594 (1981) (same); *Commonwealth v. Liakos*, 12 Mass. App. Ct. 57, 60-61, 421 N.E.2d 486, 488 (1981) (use of dangerous weapon, though not found or testified to, inferable from nature of victim's wounds).

The two examples given in the fourth supplemental instruction were characterized by the Appeals Court as "helpful examples to guide the jury's analysis" in *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 923, 471 N.E.2d 1356, 1359 (1984), and much of the wording of the fourth supplemental instruction was reviewed in *Commonwealth v. Graves,* 35 Mass. App. Ct. 76, 88-89, 616 N.E.2d 817, 825 (1993). The fourth supplemental instruction also requires the jury, where the weapon is not inherently dangerous, to find, as *Appleby, supra,* requires, that the defendant used it "as a weapon, with the intent to use that object in a dangerous or potentially dangerous fashion." See also *Commonwealth v. Moore,* 36 Mass. App. Ct. 455, 458 n.2, 632 N.E.2d 1234, 1237 n.2 (1994)

(criticizing instruction that "failed to state that where the battery is by an object that is not inherently dangerous, there must be 'the intent to use that object in a dangerous or potentially dangerous fashion'"). But cf. *Commonwealth v. Dreyer,* 18 Mass. App. Ct. 562, 563, 468 N.E.2d 863, 865 (1984) (affirming judge's refusal to charge specifically that jury must find that defendant intended to use screwdriver as dangerous weapon).

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON

A. *If intentional ABDW was already charged on.* **There is a second way in which a person may be guilty of an assault and battery by means of a dangerous weapon. Instead of intentional conduct, it involves a *reckless* touching with a dangerous weapon that results in bodily injury.**

B. *If intentional ABDW was not already charged on.* **The defendant is charged with having committed a reckless assault and battery by means of a dangerous weapon upon** *[alleged victim]* **. Section 15A of chapter 265 of our General Laws provides that "Whoever commits assault and battery upon another by means of a dangerous weapon shall be punished . . . ."**

In order to prove that the defendant is guilty of having committed a reckless assault and battery by means of a dangerous weapon, the Commonwealth must prove three things beyond a reasonable doubt:

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First: **That the defendant engaged in actions which caused bodily injury to** ___*[alleged victim]*___**. The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.**

Second: **That the bodily injury was done with a dangerous weapon; and**

Third: **That the defendant's actions amounted to reckless conduct. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway.**

But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very

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likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Here instruct on the appropriate definition of "dangerous weapon" from I. above, depending on whether the weapon is inherently dangerous or allegedly dangerous as used.

G.L. c. 265, § 15A(b). *Ford,* 424 Mass. at 711, 677 N.E.2d at 1151 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

If both the intentional and reckless theories of culpability are submitted to the jury, the judge must provide the jury with a verdict slip to indicate the theory or theories on which the jury bases its verdict and is required, on request, to instruct the jurors that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta,* 422 Mass. 642, 646-647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett,* 422 Mass. 634, 640, 422 N.E.2d 833, 837 (1996); *Commonwealth v. Barry,* 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995). See the appendix for a sample verdict slip that may be used when an ABDW charge is submitted to the jury under both the intentional and reckless branches of ABDW, and without any lesser included offenses. The sample verdict slip must be adapted to include additional options if any lesser included offenses are submitted to the jury.

NOTES:

1. **Aggravated forms of offense**. Assault and battery on a person 60 years or older by means of a dangerous weapon (G.L. c. 265, § 15A[a]) is an aggravated form of ABDW (§ 15A[b]). The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess . . . ." *Commonwealth v. Pittman*, 25 Mass. App. Ct. 25, 28, 514 N.E.2d 857, 859 (1987). Pror to St. 1995, c. 297, § 5 (effective March 17, 1996), the aggravated offense covered persons 65 years or older. A further-aggravated sentence is provided for subsequent offenses.

An ABDW is also aggravated if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant, or if the defendant is 17 years of age or older and the victim is under the age of 14. G.L. c. 265, § 15A(c).

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2. **Automobile as extension of occupants**. As to whether a battery of an automobile is also a battery of its occupants, see *Commonwealth v. Burno*, 396 Mass. 622, 627-628, 487 N.E.2d 1366, 1370 (1986) (agreeing that "a battery could occur although no force was applied to a person directly," but reserving decision on whether "a battery could occur even if no force at all, direct or indirect, was applied to a person").

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3. **"Dangerous weapon."** A weapon is "an instrument of offensive or defensive combat; . . . anything used, or designed to be used, in destroying, defeating, or injuring an enemy." *Commonwealth v. Sampson*, 383 Mass. 750, 754, 422 N.E.2d 450, 452 (1981). A dangerous weapon is "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." *Commonwealth v. Farrell*, 322 Mass. 606, 614-615, 78 N.E.2d 697, 702 (1948).

If a weapon is inherently dangerous, it need not have been used in a dangerous fashion. *Appleby*, 380 Mass. at 307 n.6, 402 N.E.2d at 1059 n.6. For the list of weapons which are considered inherently dangerous, see G.L. c. 269, § 10(a) & (b) and *Commonwealth v. Appleby,* 380 Mass. 296, 303 (1980).

Usually-innocent items are also considered to be dangerous weapons if used in a dangerous or potentially dangerous fashion. *Id.*, 380 Mass. at, 303-304, 307, 402 N.E.2d at 1056, 1058 (collecting cases on particular items). Whether an item is a dangerous weapon turns on how it is used, and not the subjective intent of the actor. *Commonwealth v. Lefebvre*, 60 Mass. App. Ct. 912, 802 N.E.2d 1056 (2004); *Commonwealth v. Connolly* 49 Mass. App. Ct. 424, 425 (2000). "The essential question, when an object which is not dangerous per se is alleged to be a dangerous weapon, is whether the object, as used by the defendant, is capable of producing serious bodily harm." *Marrero*, 19 Mass. App. Ct. at 922, 471 N.E.2d at. This is determined by how the object's potential for harm would have appeared to a reasonable observer. *Commonwealth v. Tarrant*, 367 Mass. 411, 414, 326 N.E.2d 710, 713 (1975). This determination is normally for the jury, to be decided on the basis of the circumstances surrounding the crime, the nature, size and shape of the object, and the manner in which it was handled or controlled. *Appleby*, 380 Mass. at 307 n.5, 402 N.E.2d at 1058 n.5; *Marrero, supra; Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 193, 406 N.E.2d 417, 420 (1980). The fact that an appellate court previously held that the object was capable of being used as a dangerous weapon does not make it such in all future cases, regardless of circumstances. *Appleby, supra*.

To qualify as a dangerous weapon, an item need not be capable of being wielded, possessed or controlled, and may be stationary. *Commonwealth v. Sexton,* 425 Mass. 146, 680 N.E.2d 23 (1997) (collecting cases). It may not, however, be a human body part. *Davis*, 10 Mass. App. Ct. at 192-198, 406 N.E.2d at 419-423 (teeth and other body parts). See also *Sexton, supra* (concrete pavement against which victim's head was repeatedly struck); *Commonwealth v. Scott,* 408 Mass. 811, 822-823, 680 N.E.2d 564, 370, 378 (1990) (gag); *Commonwealth v. Gallison*, 383 Mass. 659, 667-668, 421 N.E.2d 757, 762-763 (1981) (lit cigarette); *Commonwealth v. Barrett*, 386 Mass. 649, 654-656, 436 N.E.2d 1219, 1222-1223 (1980) (aerosol can sprayed in eyes of operator of moving vehicle); *Tarrant,* 367 Mass. at 416 n.4, 326 N.E.2d at 714 n.4 (German shepherd dog); *Commonwealth v. McIntosh,* 56 Mass. App. Ct. 827, 780 N.E.2d 469 (2002) (shattered window); *Commonwealth v. LeBlanc*, 3 Mass. App. Ct. 780, 780, 334 N.E.2d 647, 648 (1975) (auto door). The ocean is not a dangerous weapon for purposes of § 15A where the victim is abandoned far from shore, *Commonwealth v. Shea,* 38 Mass. App. Ct. 7, 15-16, 644 N.E.2d 244, 248-249 (1995), but perhaps it would be if the victim's head were held underwater, see *Sexton,* 425 Mass. at 150 & n.1, 680 N.E.2d at 26 & n1.

4. **Inoperable or toy weapon**. An item may qualify as a dangerous weapon even if it was not dangerous in fact; it need only have "reasonably appeared capable of inflicting bodily harm." *Commonwealth v. Hastings*, 22 Mass. App. Ct. 930, 930, 493 N.E.2d 508, 509 (1986). Accord, *Appleby*, 380 Mass. at 305, 402 N.E.2d at 1057 (essence of offense of assault with dangerous weapon is "the outward demonstration of force which breaches the peace, and therefore even an unloaded gun (known only by the defendant to be unloaded) may be a dangerous weapon in that context"); *Richards, supra* (unloaded handgun will suffice for armed robbery); *Commonwealth v. Henson*, 357 Mass. 686, 693, 259 N.E.2d 769, 774 (1970) (pistol loaded with blanks will suffice for assault with dangerous weapon); *Commonwealth v. White*, 110 Mass. 407, 409 (1872) (unloaded shotgun will suffice for assault with dangerous weapon); *Commonwealth v. Nicholson*, 20 Mass. App. Ct. 9, 17, 477 N.E.2d 1038, 1044 (1985) (toy gun will suffice for armed robbery).

5. **Joint venture.** A conviction of ABDW by joint venture requires knowledge that the co-venturer had a dangerous weapon, but this may be inferred from the circumstances. *Commonwealth v. Ferguson*, 365 Mass. 1, 8-9, 309 N.E.2d 182, 186-187 (1974); *Commonwealth v. Meadows*, 12 Mass. App. Ct. 639, 644, 428 N.E.2d 321, 324

(1981).

6. **Knives.** Not all knives are dangerous per se. *Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 694 n.1, 497 N.E.2d 29, 29 n.1 (1986) (discussing the definition of "dirk knife"). See also *Commonwealth v. Alex Maldonado*, 50 Mass. App. Ct. 1102, 735 N.E.2d 1276, 2000 WL 1477150 (No. 99-P-1679, Aug. 30, 2000) (unpublished opinion under Appeals Ct. Rule 1:28) (error to instruct that "as a matter of law . . . a knife is a dangerous weapon" because not all knives are dangerous per se). By statute, "any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches" is a dangerous weapon per se. G.L. c. 269, § 10(b). See *Commonwealth v. Smith,* 10 Mass. App. Ct. 770, 776-778, 667 N.E.2d 1160, 1164-1165 (1996) (a "knife having a double-edged blade" need not be double-edged for its entire length); *Miller, supra* (discussing the difficulties in defining a "dirk knife"). Straight knives typically are regarded as dangerous per se while folding knives, at least those without a locking device, typically are not. Possession of a closed folding knife is a dangerous weapon for purposes of G.L. c. 269, § 10(b) only if used or handled in a manner that made it a dangerous weapon. *Commonwealth v. Turner,* 59 Mass. App. Ct. 825, 798 N.E.2d 315 (2003).

7. **Lesser included offenses**. ABDW has as lesser included offenses assault and battery, simple assault, and assault with a dangerous weapon. *Commonwealth v. O'Donnell*, 150 Mass. 502, 503, 23 N.E. 217, 217 (1890); *Commonwealth v. Walsh*, 132 Mass. 8, 10 (1882); *Commonwealth v. Burke*, 14 Gray 100, 100 (1859); *Manning,* 6 Mass. App. Ct. at 437, 376 N.E.2d at 889; *Commonwealth v. Eaton*, 2 Mass. App. Ct. 113, 118, 309 N.E.2d 504, 507 (1974).

8. **Shod foot.** A person's foot which is shod in footwear that is capable "of inflicting . . . greater injury than an unshod foot" may be a dangerous weapon depending on the nature and extent of the victim's injuries. *Commonwealth v. Huot*, 380 Mass. 403, 410, 403 N.E.2d 411, 415-416 (1980) (shoes); *Commonwealth v. Durham*, 358 Mass. 808, 265 N.E.2d 381 (1970) (shoes); *Commonwealth v. Charles,* 57 Mass. App. Ct. 595, 785 N.E.2d 384 (2003) (kicking was "not so minimal as to foreclose an inference" that shod feet were being used as dangerous weapons capable of causing serious injury); *Commonwealth v. Zawatsky,* 41 Mass. App. Ct. 392, 398-399, 670 N.E.2d 969, 974 (1996) (unnecessary for prosecutor to prove exactly what type of shoes defendant wore where there was evidence that defendant was wearing shoes and gave victim a vicious kick to the head resulting in injury); *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 397, 509 N.E.2d 300, 304 (1987) (jury may infer that foot was shod, but no more than a nudge was insufficient); *Commonwealth v. Polydores*, 24 Mass. App. Ct. 923, 924-925, 507 N.E.2d 775, 776-777 (1987) (running shoes); *Marrero*, 19 Mass. App. Ct. at 922-924, 471 N.E.2d at 1357-1359 (boots or sneakers); *Commonwealth v. Belmonte*, 4 Mass. App. Ct. 506, 511-512, 351 N.E.2d 559, 564 (1976) (shoes).

9. **Specification of dangerous weapon**. The particular type of dangerous weapon with which the offense was committed is not an essential element of ABDW. *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 929-930, 525 N.E.2d 430, 433-434 (1988). See *Commonwealth v. A Juvenile (No. 1)*, 365 Mass. 421, 440, 313 N.E.2d 120, 131-132 (1974) (same for murder); *Commonwealth v. Harris*, 9 Mass. App. Ct. 708, 712, 404 N.E.2d 662, 665 (1980) (same for armed robbery). It is therefore surplusage in a complaint and, if the defendant is not surprised, its specification in the complaint may be amended at anytime to conform to the evidence. *Salone, supra.* See G.L. c. 277, § 21; *Commonwealth v. Jordan*, 207 Mass. 259, 266-267, 93 N.E. 809, 812 (1911), aff'd, 225 U.S. 167 (1912) (murder).

10. **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.

11. **Transferred intent**. An instruction on transferred intent indicates that the Commonwealth need only prove intent as to one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11, 763 N.E.2d 1092, 1099 n.11 (2002). "It is a

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familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553, 32 N.E. 862, 863 (1893). Accord, *Commonwealth v. Drumgold,* 423 Mass. 230, 259, 668 N.E.2d 300, 319 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669, 532 N.E.2d 34, 36 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, 474 N.E.2d 1078, 1083-1084 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13, 544 N.E.2d 1276, 1281 n.13 (1983).

12. **Unseen weapon**. A defendant who claimed to have a weapon may be taken at his word, if it is possible that he did have such a weapon. *Hastings, supra* (where victim felt sharp object against her, defendant claiming to have unseen knife may be convicted of ABDW); *Commonwealth v. Foley*, 17 Mass. App. Ct. 238, 239, 457 N.E.2d 654, 656 (1983) (defendant claiming to have unseen knife may be convicted of assault by means of dangerous weapon). But a defendant may not be convicted of an offense involving a weapon if he could not have had the weapon, though he claimed he did. See *Commonwealth v. Howard*, 386 Mass. 607, 609-611, 436 N.E.2d 1211, 1212-1213 (1982) (defendant who could not have had gun, though he claimed he did, may not be convicted of armed robbery).

13. **Victim injured while escaping.** A defendant may be convicted of ABDW where the victim was cut with the defendant's knife while trying to grab the knife away from the pursuing defendant. *Commonwealth v. Rajotte*, 23 Mass. App. Ct. 93, 96, 499 N.E.2d 312, 314 (1986). See the supplemental instruction to Assault and Battery (Instruction 6.140).

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