

WANTON DESTRUCTION OF PROPERTY

The defendant is charged with wanton destruction of property (of a value over \$250). Section 127 of chapter 266 of our General Laws provides as follows:

“Whoever destroys or injures
the (personal property) (dwelling house) (building) of another in
any manner . . .
if such destruction or injury is wanton . . .
shall be punished”

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

First: That the defendant injured or destroyed the (personal property) (dwelling house) (building) of another; (and)

Second: That the defendant did so wantonly.

If value of property is alleged to be greater than \$250, add third element. (and)

Third: That the amount of damage inflicted to the property was more than \$250.

An act of destruction is “wanton” if the person was reckless or indifferent to the fact that his conduct would probably cause substantial damage. Someone acts “wantonly” when he consciously disregards, or is indifferent to, an immediate danger of substantial harm to other people or their property.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. The Commonwealth must prove that the defendant’s actions went beyond mere negligence and amounted to recklessness. The defendant acted wantonly if he (she) knew, or should have known, that such actions were likely to cause substantial harm to other people or their property, but he (she) recklessly ran that risk and went ahead anyway.

The defendant must have intended his (her) act, in the sense that it did not happen accidentally.

***If relevant to evidence.* If you find that the defendant’s act occurred by accident, then you must find the defendant not guilty.**

But it is not necessary that the defendant intended or foresaw the damage that in fact resulted to the alleged victim's property. If the defendant actually realized the degree of danger associated with his (her) conduct and decided to run that risk, that would of course be wanton conduct. But even if he (she) was not conscious of the danger that was inherent in such conduct, it is still wanton or 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 substantial injury to others or their property would very likely result.

Commonwealth v. McGovern, 397 Mass. 863, 868, 494 N.E.2d 1298, 1301 (1987); *Commonwealth v. Dellamano*, 393 Mass. 132, 137, 469 N.E.2d 1254, 1257 (1984); *Commonwealth v. Welansky*, 316 Mass. 383, 398-399, 55 N.E.2d 902, 910 (1944); *Commonwealth v. Ruddock*, 25 Mass. App. Ct. 508, 512-514, 520 N.E.2d 501, 503-504 (1988); *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 440-444, 446 N.E.2d 117, 119-121 (1983).

If value of property is alleged to be greater than \$250.

If you determine that

the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of wanton destruction of property, you must go on to determine whether the Commonwealth also proved beyond a reasonable doubt that the reasonable cost of

repair of the damaged property — or the reasonable cost of replacement if it cannot be repaired — was in excess of \$250.

See *Commonwealth v. Kirker*, 441 Mass. 226, 228, 804 N.E.2d 922, 925 (2004); *Commonwealth v. Deberry*, 441 Mass. 211, 804 N.E.2d 911 (2004).

As to whether the value of the property is an element of the offense, compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-970, 527 N.E.2d 1174, 1175-1176 (1988) (in prosecution for wanton destruction of property, “if there is an allegation in a complaint . . . that the value of the property so destroyed or injured exceeded” \$250 then jury must determine that issue, but instruction need not present that factor as an essential element of the offense since it is not such) with *Commonwealth v. Beale*, 434 Mass. 1024, 1025 & n.2, 751 N.E.2d 845, 847 & n.2 (2001) (“the value of the property must be treated as an element of the felony of malicious destruction of property” but “the focus of the constitutional inquiry is not a formalistic examination of whether a finding is labeled an ‘element’ or a ‘sentencing factor,’ but whether the finding is made by a jury on proof beyond a reasonable doubt”).

SUPPLEMENTAL INSTRUCTION

Likelihood of substantial damage.

A person cannot be convicted of wanton injury to property unless it was likely that his actions would result in substantial damage to others or their property. It is not enough that some slight or insignificant injury was likely to result. A person acts “wantonly” only if it is likely that his actions will result in substantial harm.

However, it is not necessary that the damage actually was substantial, only that such actions were likely to cause substantial damage. The actual outcome of someone’s actions

is sometimes a matter of luck, and here the law measures the nature of the actions, not the outcome.

Commonwealth v. Ruddock, 25 Mass. App. Ct. 508, 512-514, 520 N.E.2d 501,503-504 (1988).

NOTES:

1. **Distinction between “wilful and malicious” and “wanton” destruction.** Wilful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor’s conduct was indifferent to, or in disregard of, the probable consequences. *Commonwealth v. Armand*, 411 Mass. 167, 170-171, 580 N.E.2d 1019, 1022 (1991). The essence of the distinction “appears to lie in the fact that a wilful actor intends both his conduct and the resulting harm, whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm.” *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920, 456 N.E.2d 760, 763 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is wilful and malicious if the rocks were aimed at passing cars. *Commonwealth v. Cimino*, 34 Mass. App. Ct. 925, 927, 611 N.E.2d 738, 740-741 (1993). “It is worth noting that destruction of property which accompanies even violent crime may not by that token alone qualify as wilful and malicious.” *Id.*

2. **“Wanton” destruction is not lesser included offense of “wilful and malicious” destruction.** Wanton property destruction is *not* a lesser included offense of wilful and malicious property destruction (see Instruction 8.280), since wanton conduct requires proof that the likely effect of the defendant’s conduct was substantial harm, but wilful and malicious conduct does not. *Commonwealth v. Schuchardt*, 408 Mass. 347, 352, 557 N.E.2d 1380, 1383 (1990).

3. **“Tagging” of property.** General Laws c. 266, § 126B provides that “[w]hoever sprays or applies paint or places a sticker upon a building, wall, fence, sign, tablet, gravestone, monument or other object or thing on a public way or adjoined to it, or in public view, or on private property, . . . , and either as an individual or in a group, joins together with said group, with the intent to deface, mar, damage, mark or destroy such property, shall be punished”

4. **Vandalism of walls, signs or gravestones.** Certain of these offenses may also be punishable under G.L. c. 266, § 126A, which provides that “[w]hoever intentionally, willfully and maliciously or wantonly, paints, marks, scratches, etches or otherwise marks, injures, mars, defaces or destroys the real or personal property of another including but not limited to a wall, fence, building, sign, rock, monument, gravestone or tablet, shall be punished”

5. **Value.** The value of the property destroyed or injured is a question for the jury and must be established beyond a reasonable doubt before it may be relied on to increase the range of punishment. *Commonwealth v. Beale*, 434 Mass. 1024, 751 N.E.2d 845 (2001); *Commonwealth v. Lauzier*, 53 Mass. App. Ct. 626, 633 n.10, 760 N.E.2d 1256 (2002). Where the damage is repairable, the value of the property is to be measured by the pecuniary loss (usually the reasonable repair or replacement cost), and not by the fair market value of the whole property or of the damaged portion. *Deberry*, 441 Mass. at 221-222, 804 N.E.2d 911, rev’g 57 Mass. App. Ct. 93, 751 N.E.2d 858 (2003). “Of course, in certain circumstances a seemingly minor type of damage may effectively destroy the value of an entire property, such as a tear in a valuable painting or a chip in an antique cup.” *Id.*, 441 Mass. at 222 n.20, 804 N.E.2d at 919 n.20.