

## WILFUL AND MALICIOUS DESTRUCTION OF PROPERTY

The defendant is charged with wilful and malicious 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 wilful and malicious . . .  
shall be punished . . . .”

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

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

*Second:* That the defendant did so wilfully; (and)

*Third:* That the defendant did so with malice;

*If value of property is alleged to be greater than \$250.* and *Fourth:* That the amount of damage inflicted to the property was more than \$250.

**An act is “wilful” if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. A person acts wilfully if he (she) intends both the conduct and its harmful consequences.**

**An act is done with “malice” if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of hostility toward the owner of the property. This does not require that the person committing this offense knew the identity of the owner, but it does require that he (she) was hostile toward the owner, whoever that was.**

*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 wilful and malicious 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.**

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*O'Neil*, 67 Mass.App.Ct. 284, 291, 853 N.E.2d 576, 583 (2006) (offense requires proof of cruel, hostile or vengeful intent in addition to intentional doing of the unlawful act); *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 440-444, 446 N.E.2d 117, 119-121 (1983) (malice requires a showing that defendant was motivated by "cruelty, hostility or revenge"). See also *Commonwealth v. Victor Davila, Jr.*, 24 Mass. App. Ct. 1105, 507 N.E.2d 1067 (May 18, 1987) (unpublished decision under Appeals Court Rule 1:28) (malice not inferable from sawing through jail window incident to escape attempt).

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

*Where "wilful and malicious" and "wanton" destruction are both charged in separate counts.*

**If you find that it has been proved beyond a reasonable doubt that the defendant did commit the property damage as alleged, you must then go on to determine whether it was done "wilfully and maliciously" as alleged in Count \_\_ , or "wantonly" as alleged in Count \_\_. As I have informed you, such conduct would be "wilful and malicious" if the defendant acted out of hostility to the owner, and intended both the conduct and the harmful consequences. Such conduct would instead be "wanton" if the defendant intended the conduct but not the**

**harmful consequences, and was reckless or indifferent to the substantial damage that such conduct would probably cause. Since the required intent is different for the two counts, if you find the defendant guilty on one of those counts, you are to return a not guilty verdict on the other count.**

## 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); *Commonwealth v. Redmond* 53 Mass. App. Ct. 1, 5, 757 N.E. 2d 249(2001). “The forcible entry into an office will, without doubt, result in some destruction of property, but a messy thief is not necessarily malicious within the meaning of the statute.” 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 not lesser included offense of “wilful and malicious” destruction.** Wanton property destruction (see Instruction 8.260) is *not* a lesser included offense of wilful and malicious property destruction, 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. **Vandalism to motor vehicle or trailer.** Malicious damage to a motor vehicle or trailer is punishable also under G.L. c. 266, § 28. See Instruction 8.200.

4. **Value.** To prove the felony branch of this offense, the Commonwealth must additionally prove that “the value of the property so destroyed or injured” is over \$250. *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. *Commonwealth v. Deberry*, 441 Mass. 211, 221-222, 804 N.E.2d 911 (2004), *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.