



## Legal Update

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November 2018

*The Appeals Court held that the defendant's conduct of kicking his five year-old daughter in the chest while he was wearing snow boots qualified as assault and battery with a dangerous weapon and was not protected under the parental privilege.*

*Commonwealth v. Rosa*, 94 Mass. App. Ct. 458 (2018): On January 17, 2017, the defendant walked with his son and five year old daughter to a CVS located in Northampton. A store employee testified that she recalled the children running around the store and the defendant shouting obscenities at his daughter. The daughter was laughing and hiding from her father. As the defendant stood in line to pay for a bottle of ice coffee, the daughter approached and tried to grab his legs. "The defendant shoved his daughter in the chest with his hand, causing her to take a step or two to regain her balance." The defendant shoved his daughter a second time as she attempted to cling to his lower legs. At this point, the daughter fell on her buttocks and immediately got back up. The CVS employee testified that as the defendant paid for his items, he warned his daughter to stay away from him, telling her, "[G]et the fuck away from me. Trust me, you don't want to fucking be near me right now." The daughter approached the defendant again and he responded by lifting his foot and kicking his daughter in the chest. The force of the defendant's kick knocked the daughter to the ground and caused her to briefly cry.

**For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.**

After the defendant left the store with the daughter and his son, the CVS employee called the police, who detained the defendant. The defendant told police he was concerned about this daughter being kidnapped and he told police he nudged her a little bit. The defendant admitted he used his foot to make contact with his daughter and he said "I don't raise pussies." The police noted that the defendant was wearing "snow boot style boots/shoes." Although the police did not observe any red marks, bruises or injuries to the daughter and she did not need medical attention, the defendant weighed approximately three hundred pounds. The daughter was approximately three feet tall, and weighed less than fifty pounds. The defendant was charged and convicted of assault and battery by means of a dangerous weapon. The defendant appealed arguing that his conduct was protected under the parental privilege. The Appeals Court heard the case on further appeal.

**Conclusion:** The Appeals Court affirmed the defendant's convictions for assault and battery with a dangerous weapon and held that the defendant's conduct was unreasonable and did not fall within the parameters of the parental privilege.

The Appeals Court emphasized that certain factors should be considered when determining whether the parental privilege defense will apply. Some of the factors include "the child's 'age,' the 'physical and mental condition of the child,' and 'the nature of [the child's] offense,'" among others. *Commonwealth v. Dorvil*, 472 Mass. 1, 13 (2015). Additionally, the parental privilege defense balances two competing interests: (i) protection of the parental right to autonomy over the care and upbringing of children; and, (ii) safeguarding children from punishment so excessive that it constitutes abuse. *Id.* at 12. The parental privilege allows a parent to use force against his or her child without facing criminal liability as long as the force used meets the following criteria:

- (1) the force used against the minor child is reasonable;
- (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
- (3) the force used neither causes, nor creates a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress. *Id.*

The Appeals Court found that the defendant's force was not reasonable in this case. When the defendant kicked his daughter, he no longer feared she would be kidnapped. The defendant's statements indicated that he did not even "want his daughter close by." Although the defendant testified that he only nudged his daughter, the judge expressly found the defendant not to be credible.

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