

215 CHIPS: ABUSE BY PHYSICAL INJURY [WIS. STAT. § 48.13(3) and § 48.02(1)(a)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) the victim of abuse?

The burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes."

In this case, "abuse" means physical injury which is intentionally or recklessly inflicted on a child, including injury which is self-inflicted.¹ "Intentionally" means that the person who causes the physical injury had the purpose to cause physical injury or was aware that his or her conduct was practically certain to cause that result. "Recklessly" means that the physical injury was caused by conduct which creates an unreasonable risk of harm to the child and demonstrates a conscious disregard for the safety of the child. "Abuse" does not include physical injury which is inflicted by accident.

"Physical injury" includes, but is not limited to, lacerations, fractured bones, burns, internal injuries, and severe or frequent bruising. It also includes bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.²

The burden is on (petitioner) to establish that abuse occurred, but (petitioner) need not prove who caused the abuse.

[The following paragraph is for use if the court determines that an instruction on reasonable discipline is appropriate:³ Abuse does not include injury which is the result of reasonable discipline of a child by a parent or other person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person would believe to be necessary under the circumstances. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or which creates an unreasonable risk of great bodily harm or death. "Great bodily harm" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.]

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 215 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial change was made to the comment in 2005. A statutory citation in the comment was updated in 2008.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(a), based on physical injury as defined in § 48.02(14g). The physical abuse jurisdictional basis was substantially revised by 1995 Wisconsin Act 275. With respect to physical abuse, the most notable change was the addition of a specific definition of "physical injury."

Subsection 48.13(3) now provides as follows:

48.13 Jurisdiction over children alleged to be in need of protection or services.

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

(3) Who has been the victim of abuse, as defined in s. 48.02(1) (a), (b), (c), (d), (e), (f), or (g), including injury that is self-inflicted or inflicted by another

Subsection 48.02(1)(a) defines abuse to include physical injury:

(1) "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:

(a) Physical injury inflicted on a child by other than accidental means.

The term "physical injury" is defined in 48.02(14g):

(14g) "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

When a petition alleges more than one theory of abuse under § 48.02(1), this instruction should be combined with other appropriate abuse instructions. See Wis JI-Children 217 through 219.

NOTES

1. The requirement that the injury be "intentionally or recklessly inflicted" reflects the Committee's interpretation of the phrase "by other than accidental means." It is the Committee's view that the phrase "by other than accidental means" is intended to exclude an injury caused by simple negligence. The Committee further concluded that rather than attempting to define "accident," the effect of requiring more than simple negligence is best expressed by a requirement that the injury be caused intentionally or recklessly. Anything less would arguably be "an accident." Our definition of "intentionally" is taken from § 939.23(3). The definition of "recklessly" is from § 948.03(1).

2. The statutory definition of "physical injury" is shown in the comment above. For the sake of clarity, we have broken this definition into two sentences. The first sentence recites the definition except for the reference to "great bodily harm." The second sentence incorporates the statutory definition of great bodily harm from § 939.22(14), without using the term "great bodily harm."

3. **Reasonable Discipline.** The Committee did not reach a consensus as to whether this jurisdictional basis was intended to preclude a defense of reasonable parental discipline. 1995 Senate Bill 501, which ultimately became 1995 Wisconsin Act 275, initially defined physical injury by reference to the very broad "bodily harm" definition of § 939.22(4), and specifically exempted reasonable discipline of a child. While the law ultimately passed with a definition of physical injury which is closer to the Criminal Code concept of "great bodily harm" and without any reference to reasonable discipline, the trial court might still encounter a reasonable discipline defense. Subsection 939.45(5) provides that such discipline is a defense to prosecution for a crime based on that conduct, limiting reasonable discipline as follows:

Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

While this statutory privilege is not specifically applicable to a CHIPS petition, it does seem incongruous to allow for Children's Code jurisdiction based on conduct deemed "reasonable" by the Criminal Code. Moreover, while an injury which is great bodily harm can never be reasonable discipline, the new CHIPS definition of "physical injury" appears to reach beyond great bodily harm. Despite the nebulous quality of the "great bodily harm" definition, which ends with the phrase "or other serious bodily injury," great bodily harm does not seem to include all lacerations or burns or bruising. Thus, if discipline results in an injury which arguably satisfies the CHIPS definition but not the definition of "great bodily harm," a parent could claim that the jury should be instructed on this issue.