

2006.2 BATTERY: SELF-DEFENSE; DEFENDANT'S DWELLING, MOTOR VEHICLE, PLACE OF BUSINESS; WIS. STAT. § 895.62

This case involves an allegation of unlawful and forcible entry into a (dwelling) (motor vehicle) (place of business) and self-defense is an issue. The law of self-defense allows (defendant) to intentionally use force if (defendant) believed (his) (her) (or) (another's) life was in danger, or that (he) (she) (or) (another) was likely to suffer bodily harm.

(Defendant), who alleges that (he) (she) acted in self defense, has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed the use of force was necessary to prevent death or bodily harm.

A belief may be reasonable even though mistaken. In determining whether (defendant)'s beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in (defendant)'s position under the circumstances that existed at the time of the alleged offense. The reasonableness of (defendant)'s beliefs must be determined from the standpoint of (defendant) at the time of (his) (her) acts and not from the viewpoint of the jury now.

You may not consider whether (defendant) had an opportunity to flee or retreat before (he) (she) used force and (defendant) is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to (himself) (herself) (or) (another person), if you find that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business);
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business); and

- (Defendant) knew or had reason to believe that an unlawful and forcible entry was occurring or had already occurred.

(NOTE: Insert a presumption instruction, Wis JI-Civil 350 or 352, adapted to the presumption created in Wis. Stat. § 895.62(3).)

[Alternative 1: Based on Wis JI-Civil 350:

There is a conflict in the evidence as to:

- Whether (plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- Whether (defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- Whether (defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

If you find the existence of each of these facts more probable than not, then by law a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is also evidence from which you may conclude that (defendant)'s belief was not reasonable. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that the (defendant)'s belief was not reasonable, you must answer question _____ "yes."]

[Alternative 2: Based on Wis JI-Civil 352:

There is no dispute in the evidence that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- (Defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

From these facts, a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is evidence in the case which may be believed by you that (defendant)'s belief was not reasonable. You must resolve this conflict.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (defendant) did not reasonably believe the force used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person), you must answer question ____ "yes."]

SPECIAL VERDICT**Question No. 1.**

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 1, then answer Question No. 2.

Question No. 2.

Was the battery a cause of (plaintiff's) injuries?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3.

Did (defendant) act in self-defense when (he) (she) [e.g. struck] (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 2012. The word "not" was inadvertently omitted in the 2012 version from the last sentence of paragraph 3. This omission was corrected in 2015. The defense, created by Wis. Stat. § 895.62, refers to what is commonly termed the "Castle Doctrine." See also Wis JI-Criminal 805. The comment was updated in 2015.

On December 21, 2011, 2011 Wisconsin Act 94 became effective. It applies to a use of force that occurs on or after December 21, 2011. Act 94 creates Wis. Stat. § 895.62. It establishes a presumption of immunity in civil actions involving force that is intended or likely to cause death or great bodily harm if an actor reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person and either item 1. or 2., below, applies. A person is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person if either of the following applies:

1. The person against whom the force was used was unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business; the actor was on his or her property or present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that an unlawful and forcible entry was occurring.
2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; the actor was present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The presumption does not apply if: (a) the actor was engaged in criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time he or she used force; or (b) the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties if the public safety worker identified himself or herself to the actor before force was used by the actor or the actor

knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

The new law also provides that if either of the circumstances described above in paragraph 1 or 2 applies, the fact finder may not consider whether the actor had an opportunity to flee or retreat before he or she used force.

Presumption. It is not clear whether the presumption set out in Wis. Stat. § 895.62(3) is rebuttable; or whether read in conjunction with the presumption in Wis. Stat. § 939.48(1m)(ar), is not. The committee believes the more prudent course is to follow well-established law as to presumptions, and therefore recommends giving Wis JI-Civil 350 or 352, which would shift the burden of proof to the party seeking to overcome the presumption. The committee agrees that another reading of the statute would render the presumption conclusive, not subject to rebuttal. There is no logical way to harmonize these two views, and this is our recommendation until further guidance on this issue is received from the appellate courts or the legislature. The statutory presumption in Wis. Stat. § 895.62(3) does not apply if (1) the defendant was engaged in criminal activity or using his or her property to further a criminal activity or (2) the plaintiff was a public safety worker who identified himself or herself or who the defendant knew or reasonably should have known was a public safety worker. Wis. Stat. § 895.62(4).

Definition of Dwelling. The civil "Castle Doctrine" statute (Wis. Stat. § 895.62) incorporates the following definition of "dwelling" given in Wis. Stat. § 895.07(1)(h):

"Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements.

In a criminal case, the Court of Appeals held that the defendant was not entitled to an instruction under the criminal "Castle Doctrine" statute (Wis. Stat. § 939.48(1m)) because the defendant fired a gun at persons who were fleeing from the defendant's apartment building through a parking lot and were not in the defendant's "dwelling." *State v. Chew*, Appeal No. 2013AP2592 (recommended for publication). The court noted that "dwelling" is defined in Wis. Stat. § 895.07(1)(h).