

905 LIABILITY FOR FAILURE TO ACT — CRIMINAL OMISSION

ADD THE FOLLOWING TO THE INSTRUCTION FOR THE CRIME CHARGED WHEN THERE IS EVIDENCE THAT THE CRIME WAS COMMITTED BY OMISSION.¹

Criminal liability may be based on either affirmative conduct or on a failure to act.

Evidence has been received that the defendant committed (specify crime) by failing to act. Criminal liability may be based on a failure to act when:

- the defendant has a legal duty to act.² In this case, it is alleged that the defendant had a legal duty to (identify the legal duty).³
- the defendant has knowledge of facts giving rise to the duty;⁴
- the defendant has the physical ability to act as the duty requires;⁵ and,
- the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act (specify the harm required for the crime charged).⁶

COMMENT

Wis JI-Criminal 905 was approved by the Committee in March 2015.

Criminal liability for an omission or failure to act is not codified in the Wisconsin Statutes but has been recognized in case law. See the summary titled "The Basis For Omission Liability In Wisconsin" that follows the footnotes below.

Criminal liability for omissions exists in two situations:

- where a statute defines a crime based on a failure to do something that the statute requires be done: failure to pay child support – § 948.22 [see Wis JI-Criminal 2152]; failure to file a tax return – § 71.83(2) [see Wis JI-Criminal 5010].;

- where a failure to act – when there is a legal duty to do so – substitutes for the act required for a generally applicable crime.

This instruction is drafted for the latter situation. The prosecution is for a generally applicable crime; the omission is a substitute for the "act" expressly or implicitly required by the statute defining that crime. All the regular elements of the crime must be established, along with the components necessary for omission liability.

1. The Committee recommends that the explanation of criminal liability for an omission, or failure to act when there is a legal duty to act, be added to the instruction for the crime charged. An example of how this could be done for a second degree reckless homicide charge based on an omission is provided at Wis JI-Criminal 1060A.

2. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

- 1) duty based on relationship B parent/child; husband/wife; ship captain/crew
 - 2) duty based on statute (other than the criminal statute whose violation is in question)
 - 3) duty based on contract
 - 4) duty based on voluntary assumption of care
 - 5) duty based on creation of the peril
 - 6) duty to control the conduct of others
 - 7) duty of landowner
- Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

3. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

4. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

5. See State v. Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law,

sec. 2.6).

6. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness." For an example, see Wis JI-Criminal 1060A.

The Basis For Omission Liability In Wisconsin

Wisconsin statutes do not define omission liability, but case law has recognized it.

State v. Neumann, 2013 WI 58, ¶94, 348 Wis.2d 455, 832 N.W.2d 560, confirmed that a prosecution for reckless homicide under § 940.06 may be based on an omission where a parent failed to provide medical care to a child: "Although the second degree reckless homicide statute, Wis. Stat. § 940.06(1), does not include specific language criminalizing an omission, the parties agree, as do we, that an actor may be criminally liable for a failure to act if the actor has a legal duty to act." [Citing State v. Williquette, 129 Wis.2d 239, 255-56, 385 N.W.2d 145 (1986).] Also see State ex rel. Cornellier v. Black, 144 Wis.2d 745, 758, 425 N.W.2d 11 (Ct. App. 1988): ". . . the statute [referring to § 940.06 1987 Wis. Stats.], impliedly, if not directly, acknowledges that the crime of reckless homicide may be committed by omission, as well as commission."

Neumann referred to Williquette as "the lead case" on omission liability. Williquette involved charges against the wife/mother for abuse of children directly committed by her husband. The defendant was charged under a child abuse statute B § 940.201, since repealed B that prohibited "subjecting a child to cruel maltreatment." The court held that the mother's actions and failure to protect the children were sufficient to constitute "subjecting," but it also directly addressed how an omission can constitute an element of a crime, even where the statute defining that crime is silent on that issue.

The court, however, also expressly rejects the defendant's claim that an act of commission, rather than omission, is a necessary element of a crime. The essence of criminal conduct is the requirement of a wrongful "act." This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act. LaFave and Scott, Criminal Law sec. 26 at 182, states the general rule applicable to omissions:

Some statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of conduct producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act, and (2) he can physically perform the act. The trend of the law has been toward enlarging the scope of duty to act.

...

The requirement of an overt act, therefore, is not inherently necessary for criminal liability. Criminal liability depends on conduct which is a substantial factor in producing consequences. Omissions are as capable of producing consequences as overt acts. Thus, the common law rule that there is no general duty to protect limits criminal liability where it would otherwise exist. The

special relationship exception to the "no duty to act" rule represents a choice to retain liability for some omissions, which are considered morally unacceptable.

The defendant argues that imposing criminal liability for omissions is tantamount to creating a common law crime. She notes that sec. 939.10, Stats., specifically abolished common law crimes. Thus, she claims that the criminal code does require an overt act, regardless of whether an overt act otherwise is unnecessary for criminal liability.

Section 939.10, Stats., abolishes common law crimes, but it also states that "the common law rules of criminal law not in conflict with chs. 939 to 948 are preserved." We conclude that the rule applicable to omissions does not define a substantive crime. Failure to act when there is a special relationship does not, by itself, constitute a crime. The failure must expose the dependent person to some proscribed result. The definition of proscribed results constitutes the substantive crime, and it is defined in the criminal code. The rule regarding omissions, therefore, is not inconsistent with chs. 939 to 948.

Our conclusion is supported by persuasive authority. William A. Platz, formerly a Wisconsin Assistant Attorney General and the principal draftsman of the revised criminal code, construed the new code in an authoritative law review article, published contemporaneously with the code in 1956. Platz, *The Criminal Code*, 1956 Wis.L.Rev. 350. We consider such articles by the principal draftsman of a statutory enactment to be persuasive authority when construing a particular statute. Platz specifically concluded that the rule regarding criminal liability for omissions was not abolished by sec. 939.10, Stats.:

But the common law rules of criminal law not inconsistent with the code are expressly preserved by sec. 939.10. This is because the code fails to state all the rules, such as the defense of insanity, criminal liability for omissions, and others. It is unfortunate and in part unnecessary that the code omits some of the rules of criminal law which could have been (and were in the 1953 draft) codified.

The 1953 Legislative Council report on the proposed revision of the criminal code contained a section entitled "When Criminal Liability May Be Based on Omissions" (1953 Report, Vol. V at 7). This section was deleted from the final version of the 1955 code. Nonetheless, we agree with Platz that the rule regarding omissions was not abolished because it is not inconsistent with the criminal code.

State v. Williquette, 129 Wis.2d 239, 251-255, 385 N.W.2d 145 (1986).

The section of 1953 draft of the criminal code referred to in the quoted material above states the basic principles of omission liability that are reflected in this instruction:

339.09 When A Criminal Liability May Be Based On Omissions.

Criminal liability may be based upon an omission to act only if under the circumstances the actor has a legal duty to act and he is physically capable of performing that act and the crime charged is specifically prohibited by statute.

The Existence of a Legal Duty

The key requirement for omission liability is the establishment of a legal duty to act. The decisions in Neumann and Williquette recognize the duty of a parents to protect their children. Beyond that situation, there is less direct authority defining a duty to act. A leading commentator lists the following potential sources:

- 1) duty based on relationship B parent/child; husband/wife; ship captain/crew
- 2) duty based on statute (other than the criminal statute whose violation is in question)
- 3) duty based on contract
- 4) duty based on voluntary assumption of care
- 5) duty based on creation of the peril
- 6) duty to control the conduct of others
- 7) duty of landowner

Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

Failure To Act v. Affirmative Conduct

In some situations, it may be possible to characterize the basis for the defendant's criminal liability as affirmative conduct, making reliance on omission liability unnecessary. For example:

- leaving children in the home where they are abused could be characterized as an affirmative act [leaving] rather than an omission [failure to protect];
- leaving chemicals in improper storage conditions [improper storage rather than failure to properly store];
- praying for a seriously child's recovery rather than taking the child for medical treatment.

In these situations, the basis for criminal liability should be clearly identified:

- conduct and failure to act should not be combined, that is, "did X or failed to do Y" should not be presented as undefined alternatives;
- relying on omission liability may often be a clearer way to frame the issue – allowing a direct focus on exactly what the defendant did wrong;
- if there is to be any reliance on omission, all the requirements for omission liability must be presented – they become, in effect, additional elements of the crime.