924 CRIMINAL RECKLESSNESS — § 939.24

"Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

ADD THE FOLLOWING TO THE DEFINITION OF CRIMINAL RECKLESSNESS WHEN THERE IS EVIDENCE THAT THE CRIME WAS COMMITTED BY OMISSION.[1]

[Criminal recklessness 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 constituted criminal recklessness.[6]

COMMENT

Wis JI-Criminal 924 was originally published in 1994 and revised in 1999 and 2005. This revision was approved by the Committee in March 2015; it added to the text to address recklessness based on an omission and revised the Comment to reflect changes made by 2103 Wisconsin Act 307.

This instruction contains the definition of "criminal recklessness" found in the published instructions dealing with crimes of recklessness. It is published separately here to provide a convenient means of collecting appellate court decisions that deal with recklessness and to discuss issues in more detail than may be appropriate in the footnotes for individual offenses. The 1999 revision divided the definition into three parts to emphasize the separate characteristics of "criminal recklessness." For a discussion of the factor which aggravates simple recklessness to a more serious level, see Wis JI-Criminal 924A, Aggravated Recklessness: Circumstances Which Show Utter Disregard For Human Life.

The definition of "criminal recklessness" was created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. Therefore, it applies to offenses committed on or after January 1, 1989. "Criminal recklessness" is used in the following statutes: § 940.02, First Degree Reckless Homicide; § 940.06, Second Degree Reckless Homicide; § 940.23, Reckless Injury, and § 941.30, Recklessly Endangering Safety.

"Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

The first requirement – an unreasonable and substantial risk – is substantially the same as the corresponding part of the definition of "reckless conduct" found in § 940.06(2) before the revision. The only difference is the substitution of "unreasonable and substantial risk" for "a situation of unreasonable risk and high probability." The purpose of that change is to make it clear that no mathematical probability was required.

The second requirement – awareness of the risk – replaces the following statement under prior law: "demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury." The revision makes it clear that recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct.

The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense if the actor would have been aware of the risk if not intoxicated. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element of criminal recklessness. For cases arising before the effective date of Act 307, the suggestion included in the previous version of the Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

For decisions finding evidence sufficient to establish an unreasonable and substantial risk and awareness of that risk, see State v. Johnson, 184 Wis.2d 324, 516 N.W.2d 463 (Ct. App. 1993); and State v. Brulport, 202 Wis.2d 506, 551 N.W.2d 824 (Ct. App. 1996). Both decisions also emphasize that the victim need not sustain serious injury; it is sufficient that the conduct create an unreasonable and substantial risk of death or great bodily harm. Also see State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752, discussing "awareness of the risk" in a case involving a defendant with below average intelligence.

1. Crimes involving criminal recklessness may involve liability based on criminal omission or failure to act when there is a legal duty to act. When this is the case, the Committee recommends that the explanation of criminal liability for an omission be added to the instruction for the crime charged. A general instruction on omission liability is provided at Wis JI-Criminal 905, the substance of which is adapted for use here. 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 – 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."

