926 CONTRIBUTORY NEGLIGENCE[1] — § 939.14

DO NOT GIVE THE FOLLOWING WITHOUT CLEAR JUSTIFICATION.[2]

Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[3] does not by itself provide a defense to the crime charged against the defendant.[4] Consider evidence of the conduct of (name of victim) only to the extent that it relates to (describe the element of the crime or the defense to which the evidence relates).[5]

COMMENT

Wis JI-Criminal 926 was originally published in 1996 and revised in 1997. This revision adopted a new format and was approved by the Committee in February 2005.

This instruction addresses the rule set forth in § 939.14, which provides as follows: "It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent." While the use of this statute has tended to emphasize conduct of the victim that could be characterized as "negligence," note that the rule also applies to conduct of the victim that may constitute criminal conduct.

The Committee originally concluded that an instruction on the rule provided in § 939.14 should not be given and Wis JI-Criminal 926 as originally published so advised. However, in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996), the Wisconsin Supreme Court recommended that an instruction be drafted to articulate the rule in § 939.14. The court stated:

> . . . we recommend that the Criminal Jury Instruction Committee adopt a jury instruction that sets forth the law as contained in s. 939.14, to the effect that it is no defense to a prosecution for a crime that the victim was contributorily negligent. The instruction also should contain an explanation of this rule, in particular that it means the defendant is not immune from criminal liability merely because the victim may have been negligent as well. See Hart, 75 Wis.2d 398.
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> In addition, we recommend that the Committee adopt a bridging instruction to be given when a court gives a contributory negligence instruction along with Wis JI-Criminal 1188, 1185, and/or 1186. The instruction should explain to the jury that although the victim's contributory negligence is not a defense, the jury may consider the acts of the victim in relation to the defendant's § 940.09(2) defense.
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> It is further recommended that the Committee in its comments caution circuit court judges so that they will not, without clear justification, give a contributory negligence instruction in a criminal case.

205 Wis.2d 182, 197-98.

This instruction attempts to carry out the court's recommendations. A tailored version of this instruction has been built-in to Wis JI-Criminal 1188, the standard instruction on the affirmative defense applicable to operating under the influence cases. It is intended to provide the bridging instruction the court recommended.

As noted above, the originally published version of Wis JI-Criminal 926 recommended that no instruction be given on the rule set forth in § 939.14. The comment stated:

> The rule as stated is an accurate statement of the law, but can create problems if literally applied. That is, evidence that may indicate negligence on the part of a victim may be relevant to an element of the crime – especially the cause element – or to a defense. In such a situation, the evidence is admissible despite § 939.14.

The comment went on to cite the court of appeals decision in State v. Lohmeier, 196 Wis.2d 432, 538 N.W.2d 487 (Ct. App. 1995), as an example of a case where instructing the jury on the rule of § 939.14 could cause a problem. In Lohmeier, the defendant was charged with two counts of homicide by intoxicated use of a vehicle. The defendant introduced evidence that the two victims were walking on the roadway, offering it in support of the affirmative defense provided in § 940.09(2): ". . . that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant. . . ." The trial court instructed on the defense but added an instruction that ". . . it is no defense to a prosecution for a crime that the victim may have been contributorily negligent." The court of appeals reversed the conviction, holding that

> . . . under the circumstances of this case, the court's jury instruction on contributory negligence effectively denied Lohmeier his defense. Here, the victims' contributory negligence in walking in the roadway, or stepping out into the roadway as Lohmeier's car approached, as alleged by the defense, could have risen to the level of intervening cause, making it impossible for Lohmeier to avoid the accident. This was a question for the jury to decide.

196 Wis.2d 437, 443.

The Wisconsin Supreme Court reversed the court of appeals. Although it found that the jury in that case was not misled by the potentially conflicting instructions, the court made the specific recommendations to the Committee that are addressed in this version of the instruction.

1. The term "contributory negligence" is used only in the title of the instruction. The Committee recommends that the title not be communicated to the jury and has drafted this instruction without using the term. Referring to the rule of § 939.14 by using "contributory negligence" creates difficulties. It is a technical term with a specialized meaning that, if used in an instruction, probably should be explained to the jury. Defining "negligence" is routine, but defining "contributory" is more difficult. The latter connotes that the conduct "contributed" to the harm caused, highlighting potential conflict with the cause element of the crime. Even in civil cases, "contributory negligence" is not a term used in instructing the jury. (It appears in the title, but not in the text of Wis JI-Civil 1008.) Therefore, the instruction does not use the term "contributory negligence." See notes 2 and 3, below.

2. The Lohmeier decision recommended that "the Committee in its comments caution circuit court judges so they will not, without clear justification, give a contributory negligence instruction. . . ." In the Committee's judgment, the court's concern about giving an instruction is addressed in two ways by this version of Wis JI-Criminal 926.

First, the Committee drafted the instruction without using the term "contributory negligence" because it concluded that there will rarely be "clear justification" for giving an instruction that uses it. Precisely because of the rule articulated in § 939.14, evidence referring to a victim's conduct as "contributory negligence" should not be admissible and lawyers should not be using the term to describe the victim's conduct. If this is correct, the only clear justification for an instruction using the term "contributory negligence" would be as a curative instruction – to be used when the term "contributory negligence" has mistakenly been used. Wis JI-Criminal 926 is not drafted for that rare situation.

Second, even an instruction like this version of Wis JI-Criminal 926 that does not use the term "contributory negligence" should be given only with "clear justification." Despite the rule of § 939.14, evidence of the victim's conduct will often be relevant and admissible. Where that evidence involves what could be described as negligent conduct, the conflict with § 939.14 emerges. This is the problem Lohmeier dealt with, but the problem was caused by instructing the jury on the § 939.14 rule. Had no instruction been given, the Lohmeier problem would not have existed; the jury would have been unencumbered in considering all evidence relevant to the affirmative defense, including evidence of the victim's conduct that could be characterized as involving "contributory negligence."

The Committee concluded that there is "clear justification" for giving Wis JI-Criminal 926 in the following circumstances: evidence of the victim's conduct has been admitted; that conduct involves what might be described as "negligent" conduct; either the state or the defense requests the instruction; and the trial court concludes that in the context of the particular case, the instruction would add to the jury's ability to understand the legal standard it is to apply.

3. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09,940.25, and 346.63. In cases involving that defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

4. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under, for example, § 940.09(2). To the ordinary person, a "reason why the defendant is not guilty" is likely to be considered a "defense." For this reason, the Committee recommends following this general statement with a more specific description of how the victim's conduct relates to the facts of the particular case. See note 5, below. This, the Committee concluded, is consistent with the recommendations in Lohmeier that a "bridging" instruction be drafted. See the comment preceding note 1, supra.

5. The Committee recommends identifying the element or the defense to which the evidence of the victim's conduct relates. The element to which it will most often relate is the cause element. The defense most likely to be involved is the one at issue in the Lohmeier case: the affirmative defense available in operating under the influence cases under §§ 940.09, 940.25, and 346.63(2). Wis JI-Criminal 1188, the standard instruction for that affirmative defense, includes the text of Wis JI-Criminal 926 with a tailored "bridge" to the substance of the defense. This is intended to address the third recommendation in the Lohmeier decision. See the comment preceding note 1, supra.

