1060A SECOND DEGREE RECKLESS HOMICIDE BY OMISSION — § 940.06

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

State's Burden Of Proof

Before you may find the defendant guilty of second degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; 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.[3]

Criminally reckless conduct may be based on either an affirmative act or on a failure to act.

Evidence has been received that the defendant committed second degree reckless homicide by failing to act. Criminal liability may be based on a failure to act when:

- the defendant has a legal duty to act.[4] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty) .[5]
- the defendant has knowledge of facts giving rise to the duty;[6]
- the defendant has the physical ability to act as the duty requires;[7] 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.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1060A was approved by the Committee in March 2015.

This instruction is for violations of § 940.06 that are based on liability for omission, or failure to act. Criminal liability for an omission or failure to act is not codified in the Wisconsin Statutes but has been recognized in case law. See Wis JI-Criminal 905 for a freestanding instruction on omissions and an explanation of the basis for omission liability in Wisconsin. This instruction adapts the model in JI 905 to a charge of second degree reckless homicide. See the Comment to Wis JI-Criminal 1060for a discussion of the history and application of second degree reckless homicide as defined in § 940.06.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. "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."

3. 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."

4. 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).

5. 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.

6. 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).

7. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law, sec. 2.6).

8. 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."

