

**1249C PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF BODILY HARM TO AN ELDER PERSON UNDER CIRCUMSTANCES OR CONDITIONS THAT ARE LIKELY TO PRODUCE GREAT BODILY HARM — § 940.198(2)(c)**

**Statutory Definition of the Crime**

Physical abuse of an elder person<sup>1</sup>, as defined in § 940.198(2)(c) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant caused bodily harm to (name of victim).

“Cause” means that the defendant’s act was a substantial factor in producing the bodily harm.<sup>2</sup>

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.<sup>3</sup>

2. The defendant intentionally<sup>4</sup> caused bodily harm to (name of victim).

This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain

to cause that result.

3. The circumstances or conditions under which the defendant caused bodily harm were likely to produce great bodily harm.

“Great bodily harm” means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.<sup>5</sup>

4. The defendant knew that the circumstances or conditions under which (he) (she) caused bodily harm were likely to produce great bodily harm.<sup>6</sup>
5. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)’s age by the defendant is not required and a mistake regarding the (name of victim)’s age is not a defense.<sup>7</sup>

### **Deciding About Intent**

You cannot look into a person’s mind to find intent. Intent must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

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

**COMMENT**

Wis JI-Criminal 1249C was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing bodily harm under circumstances or conditions that are likely to produce great bodily harm as provided in Wis. Stat 940.198(2)(c). § 940.198(2)(c) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a “substantial risk of great bodily harm,” with the fact that the victim was over age 62 creating “a rebuttable presumption of conduct creating a substantial risk of great bodily harm.”

Subsection (2m) of § 939.66 provides that “a crime which is a less serious or equally serious type of battery than the one charged” qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of “elder person” is the one provided in § 940.198(1)(a) which provides: “‘Elder person’ means any individual who is 60 years of age or older.”

2. The Committee 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:

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

If a more extensive definition of “cause” is necessary, see Wis JI-Criminal 901.

3. This is the definition of “bodily harm” provided in § 939.22(4).

4. “Intentionally” is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have “mental purpose” as one definition of “intentionally.” It is the other alternative that changes from “reasonably believes his act, if successful, will cause that result” to “is aware that his conduct is practically certain to cause that result.” See Wis JI-Criminal 923A and B.

5. See § 939.22(14) and Wis JI-Criminal 914. The reference to “other serious bodily injury” at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an “ejusdem generis” rationale. *LaBarge v. State*, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as “serious bodily injury” is sufficient in most cases.

Whether or not an injury suffered amounts to “great bodily harm” is an issue of fact for the jury to resolve. See *Flores v. State*, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

6. Section 940.198(2)(c) applies to those who “intentionally cause bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm,” Section 939.23(3) provides

that when “intentionally” is used in a criminal statute, it requires that the actor “have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word ‘intentionally.’” The Committee concluded that this requires that the defendant charged under § 940.198(2)(c) must have known that the circumstances or conditions under which the he or she caused bodily harm were likely to produce great bodily harm.

7. This is the standard statement that is used in other instructions where the victim’s age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to “the age of a minor,” sub. (4) of § 940.198 provides a similar rule for this offense: “This section applies irrespective of whether the defendant had actual knowledge of the crime victim’s age. A mistake regarding the crime victim’s age is not a defense to prosecution under this section.” The Committee concluded that the standard statement is clearer; no change in meaning is intended.