



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Relating to Aggravated Recklessness

October 8, 2018

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” N.J.S. 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **December 18, 2018**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Introduction

The Criminal Code, at N.J.S. 2C:2-2b, defines four kinds of culpability: purposely, knowingly, recklessly, and negligently. The mental state of “aggravated recklessness”, recklessness under circumstances manifesting extreme indifference to human life, a fifth kind of culpability, is not defined in N.J.S. 2C:2-2b.

“Aggravated recklessness” is not derived from the Model Penal Code or from the 1971 Report of the Criminal Law Revision Commission. It was first added by L. 1979, c. 178, without reference to recklessness, with regard to the newly-added crime of aggravated manslaughter, which was defined as follows: “criminal homicide constitutes aggravated manslaughter when the actor other than purposely or knowingly causes death under circumstances manifesting extreme indifference to human life.”

Aggravated manslaughter, incorporating a distinct mental state, is the result of a clarifying amendment within L.1981, c.178. That change to the law, which established the current form of aggravated manslaughter, used the formulation, “recklessly causing death under circumstances manifesting extreme indifference to human life.” Similar language is used in defining one kind of aggravated assault (N.J.S. 2C:12-1b.(1), which reached its current form as part of L.1981, c.290.) See also discussion of the history of this language in *State v. Pindale*, 249 N.J. Super. 266 (App. Div. 1991).

The leading cases distinguish aggravated recklessness from ordinary recklessness in terms of the likelihood of the result. Thus, aggravated manslaughter has been interpreted as requiring a higher degree of recklessness than that required for ordinary manslaughter, in that the risk is of a probability or death rather than a possibility of death. *State v. Curtis*, 195 N.J. Super. 354, 366-367 (App. Div.) certif. den. 99 N.J. 212 (1984). See also, *State v. Bakka*, 176 N.J. 533, 549-550 (2003).

Some cases focus specifically on whether the defendant was extremely indifferent to human life. The Court in *State v. Curtis*, for example, held adequate a jury charge that aggravated manslaughter requires indifference as to whether or not the victim lived or died. And see, *State v. Reed*, 211 N.J. Super. 177, 183-184 (App. Div. 1986), certif. den. 110 N.J. 508 (1988).

One treatise finds a difference between these “subjective approach” cases and others making the “objective” distinction between possible death and probable death. Cannel, *New Jersey Code Annotated* (Gann 2018), p.134. That overstates the differences in the cases. Aggravated recklessness always has both an objective and subjective element. Cases may focus on whichever component is in issue, but both elements must be present. Recklessness involves the conscious disregard of a known risk. Aggravated recklessness adds the element of extreme indifference to human life, which means that the actor knew that the risk involved the likelihood of death and that the actor disregarded that risk. Inherently, the nature of the risk is objective and the actor’s knowledge and disregard of the risk are subjective.

While the cases form a relatively coherent view of the requirements for finding aggravated recklessness, case law is not a substitute for a legislative standard. Court opinions inherently and appropriately focus on the facts of the cases decided. Any one case will not usually provide a comprehensive standard applicable to all situations. The Criminal Code, at N.J.S. 2C:2-2, provides a legislative standard for the four culpability states that were contemplated when the Code was first enacted. The absence of a standard for the fifth culpability state, aggravated recklessness, has the capacity to cause confusion. Clarity makes it appropriate to add a standard that will provide for aggravated recklessness specifically.

As a result, the Law Revision Commission recommends amendment of N.J.S. 2C:2-2 as shown in the Appendix below.

Appendix

Proposed language is shown underlined below.

2C:2-2. General Requirements of Culpability.

a. Minimum Requirements of Culpability. Except as provided in subsection c.(3) of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

b. Kinds of culpability defined.

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

(3) Aggravated Recklessness. A person acts with aggravated recklessness with respect to a material element of an offense when he consciously disregards the probability that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

~~(3)~~ (4) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

~~(4)~~ (5) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. "Negligently" or "negligence" when used in this code, shall refer to the standard set forth in this section and not to the standards applied in civil cases.