

2024 NJSBA Fall Conference

Cases Ripped from the Headlines – Fall 2024 Version

Speakers:

Robert A. Bianchi, Esq.

The Bianchi Law Group, LLC, Parsippany and Red Bank

David J. Bruno, Esq.

The Bianchi Law Group, LLC Parsippany and Red Bank

Jennifer Mara, Esq.

Baldassare & Mara, LLC, Roseland

Ashley Willcott

Judge, Trial Attorney, Mediator, Legal Analyst

Court TV

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I. The "Daniel Penny Case" Comparison (NY vs NJ)

Daniel Penny was charged in the State of New York with second degree manslaughter (NY Penal Law 125.15) and criminally negligent homicide (NY Penal Law 125.10) in the death of Jordan Neely, a homeless man, who Penny placed in a chokehold after Neely was allegedly threatening passengers on a subway train.

A. Distinctions between New York and New Jersey Law

As set forth below, the definition of “recklessly” is almost identical under NY statutory law (NY Penal Law §15.05(3)) and NJ statutory law (N.J.S.A. 2C:2-2(b)(3)). However, NY law differs in that unlike the Model Penal Code, and as followed in New Jersey (N.J.S.A. 2C:2-3), New York Penal Law *does not define causation* by statute, although there is, as set forth below, a Model Charge in New York on “cause of death.”

Additionally, NJ differs from NY law in that New Jersey does not recognize the crime of negligent homicide (NY Penal Law § 125.10). State v. Lodzinski, 249 N.J. 116, 145 n. 9 (2021). Therefore, there is a distinction between the jury charge in State v Penny and the charge that would be applicable if the crime was committed in NJ because the NY charge will include an instruction on “criminally negligent homicide.”

Statutory Law

NY Statutory Law

NY Penal Law § 125.15 Manslaughter in the second degree Manslaughter person is guilty of manslaughter in the second degree when:1. He recklessly causes the death of another person or . . . he intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony.

NY Penal Law Recklessly § 15.05(3) “Recklessly.” A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

NY Penal Law § 125.10 Criminally negligent homicide A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person. Criminally negligent homicide is a class E felony.

NY Penal Law § 15.05(4) Criminal Negligence “Criminal negligence.” A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to

perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

NY Penal Law § 35.15 Justification; use of physical force in defense of a person

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) [Eff. until Sept. 1, 2024. See, also, par. (b) below.] He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(b) [Eff. Sept. 1, 2024. See, also, par. (b) above.] He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible aggravated sexual abuse, a crime formerly defined in section 130.50 of this chapter by force, or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

Unlike the Model Penal Code, the New York Penal Law does not define causation by statute.

NJ Statutory Law

N.J.S.A. 2C:11-4(b)(1) Manslaughter: Criminal homicide constitutes manslaughter when: (1) It is committed recklessly or (2) A homicide which would otherwise be murder under N.J.S.2C:11-3 is committed in the heat of passion resulting from a reasonable provocation.

Unlike New York, New Jersey does not recognize the *crime of negligent homicide*. State v. Lodzinski, 249 N.J. 116, 145 n. 9 (2021).

N.J.S.A. 2C:2-2(b)(3) General Requirements of Culpability: 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.

N.J.S.A. 2C:3-4(a) Use of Force in Self-Protection: Use of force justifiable for protection of the person. Subject to the provisions of this section and of section 2C:3-9, the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

Model Jury charges

NY Model Jury Charges

Manslaughter in the Second Degree (Reckless Homicide) Jury Charge NY Penal Law § 125.15(1)

The (specify) count is Manslaughter in the Second Degree. Under our law, a person is guilty of Manslaughter in the Second Degree when that person recklessly causes the death of another person.

The following term used in that definition has a special meaning:¹

A person acts RECKLESSLY with respect to a death when that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that another person's death will occur, and when he or she is aware of and consciously disregards that risk, and when that risk is of such nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

.....

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

¹ If causation, "death," or "person" is in issue, see Additional Charges at the end of this article.

1. That on or about (date) , in the county of (county) the defendant, (defendant's name), caused the death of (specify) ; and
2. That the defendant did so recklessly.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime. If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime

Criminally Negligent Homicide Jury Charge NY Penal Law § 125.10

The (specify) count is Criminally Negligent Homicide.

Under our law, a person is guilty of Criminally Negligent Homicide when, with criminal negligence, that person causes the death of another person. The following term used in that definition has a special meaning:²

A person acts with CRIMINAL NEGLIGENCE with respect to a death when that person engages in blameworthy conduct so serious that it creates or contributes to a substantial and unjustifiable risk that another person's death will occur, and when he or she fails to perceive that risk, and when the risk is of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.³

You may notice from that definition that CRIMINAL NEGLIGENCE is not the same type of negligence you may be familiar with from a civil lawsuit seeking a money judgment. The carelessness required for criminal negligence is appreciably more serious; it must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements: 1. That on or about (date) , in the county of (county) , the defendant, (defendant's name) , caused the death of (specify) ; and 2. That the defendant did so with criminal negligence.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime. If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.

² If causation, "death," or "person" is in issue, see Additional Charges at the end of this article.

Cause of Death (NY Jury Charge)

(If there is an issue concerning whether the defendant's conduct was a sufficiently direct cause of death, the following charge should be given. It is recommended that this charge be included in the definition of the crime charged by adding the term "causes the death" to the terms that the court will define).

A person "causes the death" of another when that person's conduct is a sufficiently direct cause of the death of another. A person's conduct is a sufficiently direct cause of death when: one, the conduct is an actual contributory cause of the death; and two, the death was a reasonably foreseeable result of the conduct. Let me explain each of those two concepts.

First, when does a person's conduct constitute an actual contributory cause of the death of another?

A person's conduct is an actual contributory cause of the death of another when that conduct forged a link in the chain of causes which actually brought about the death – in other words, when the conduct set in motion or continued in motion the events which ultimately resulted in the death. An obscure or merely probable connection between the conduct and the death will not suffice.

At the same time, if a person's conduct is an actual contributory cause of the death of another, then it does not matter that such conduct was not the sole cause of the death, or that a pre-existing medical condition also contributed to the death, or that the death did not immediately follow the injury.

Second, when is death a reasonably foreseeable result of the conduct?

Death is a reasonably foreseeable result of a person's conduct when the death should have been foreseen as being reasonably related to the actor's conduct. It is not required that the death was the inevitable result or even the most likely result.

[Add if appropriate: If a person inflicts injury on another, a reasonably foreseeable consequence of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's death that the medical or surgical treatment contributed to the death of the victim. Only if the death of the victim is solely attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense.]

[Add if appropriate: The defendant argues that there was an intervening act between his/her conduct and the death of (specify); namely, (specify what the argued intervening event was). In that instance, liability for the death turns upon whether the intervening act is a normal or foreseeable consequence of the defendant's conduct. Thus, where the acts of a third person intervene between the defendant's conduct and a person's injury, the causal connection is not automatically severed. Rather, that other persons share some responsibility for the death does not absolve the defendant from liability because there

may be more than one cause of an injury. It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, that it may break the causal connection.]

NJ Model Jury Charges

Reckless Manslaughter (N.J.S.A. 2C:11-4b(1))

<https://www.njcourts.gov/sites/default/files/charges/homicide8.pdf?cb=5b9183a5>

Murder (N.J.S.A. 2C:11-3a(1) and 3a(2))

<https://www.njcourts.gov/sites/default/files/charges/homicide2.pdf?cb=5b9183a5>

Murder and aggravated /Reckless Manslaughter N.J.S.A. 2C:11-3a(1)(2); 2C:11-4a, b(1)

<https://www.njcourts.gov/sites/default/files/charges/homicide3.pdf?cb=5b9183a5>

Justification- Self Defense (N.J.S.A. 2C:3-4)

<https://www.njcourts.gov/sites/default/files/charges/justif001.pdf?cb=f2b7de01>

II. Strict Liability for Drug-Induced Deaths

The New Jersey Statute – N.J.S.A. 2C:35-9 provides that:

a. Any person who manufactures, distributes or dispenses methamphetamine, lysergic acid diethylamide, phencyclidine or any other controlled dangerous substance classified in Schedules I or II, or any controlled substance analog thereof, in violation of subsection a. of N.J.S. 2C:35-5, *is strictly liable for a death* which results from the injection, inhalation or ingestion of that substance, and is guilty of a crime of the first degree.

b. *The provisions of N.J.S. 2C:2-3 (governing the causal relationship between conduct and result) shall not apply* in a prosecution under this section. For purposes of this offense, the defendant's act of manufacturing, distributing or dispensing a substance is the cause of a death when:

(1) The injection, inhalation or ingestion of the substance is an antecedent but for which the death would not have occurred; and

(2) The death was not:

(a) too remote in its occurrence as to have a just bearing on the defendant's liability; or

(b) too dependent upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect as to have a just bearing on the defendant's liability.

c. It shall not be a defense to a prosecution under this section that the decedent contributed to his own death by his purposeful, knowing, reckless or negligent injection, inhalation or ingestion of the substance, or by his consenting to the administration of the substance by another.

d. Nothing in this section shall be construed to preclude or limit any prosecution for homicide. Notwithstanding the provisions of N.J.S. 2C:1-8 or any other provision of law, a conviction arising under this section shall not merge with a conviction for leader of narcotics trafficking network, maintaining or operating a controlled dangerous substance production facility, or for unlawfully manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense the controlled dangerous substance or controlled substance analog which resulted in the death.

Model Jury Charge Strict Liability for Drug Induced Deaths (N.J.S.A. 2C:35-9) can be found here: <https://www.njcourts.gov/sites/default/files/charges/cds015.pdf?cb=5b9183a5>

Case Law –

Background - N.J.S.A. 2C:35-9 was enacted as part of the Comprehensive Drug Reform Act of 1986 (see Comment to 2C:35-1). It creates an additional species of homicide, akin to felony-murder, 2C:11-3a(3), where death results from certain drugs distributed by the defendant to the victim. It was held to be constitutional in State v. Maldonado, 137 N.J. 536 (1994). See Canel, Criminal Code Annotated, Comment 1 to N.J.S.A. 2C:35-9 (Gann 2023). No criminal intent to cause death is required to establish culpability. A defendant may be found guilty under N.J.S.A. 2C:35-9 even if he has absolutely no idea that death may occur. State v. Maldonado, 137 N.J. 536, 547 (1994).

Proof Requirements for Distributed Substances - *N.J.S.A. 2C:35-9 requires proof that the defendant distributed CDS to the victim.* State v. Morrison, 188 N.J. 2, 13 (2006). Where the defendant and the victim jointly possessed the drugs there is no distribution and the charge cannot be proved. *Possession with intent to distribute will not suffice; there must be actual distribution.* State v. Ferguson, 238 N.J. 78 97-100 (2019). In Ferguson, two defendants bought drugs in New Jersey but distributed them in New York where the death also occurred. Thus, there was no basis for New Jersey jurisdiction since New York does not have a drug-induced death statute. Notably, however, *N.J.S.A. 2C:35-9* does not require that the distribution be directly to the victim. In Ferguson, one defendant distributed drugs to the others who distributed the drugs to the victim causing his death. That indirect distribution might have been a sufficient basis for prosecution under this statute had the death occurred in New Jersey. Relying on State v. Maldonado, 137 N.J. 536 (1994), the Court in Ferguson found that the remoteness of causation must always be charged. "The statutory language makes it an element of the crime." In that submission the court should not only explain the meaning of the remoteness factor, but its relationship to the facts. Likewise, that the death was not too dependent upon conduct of another person is an element which must be charged. The State must disprove both beyond a reasonable doubt. See Canel, Criminal Code Annotated, Comment 3 to N.J.S.A. 2C:35-9 (Gann 2023).

Causation – N.J.S.A. 2C:35-9 provides that any person who manufactures, distributes or dispenses certain specified drugs is strictly liable for a death which results from the injection, inhalation or ingestion of that substance. The provisions governing causation in N.J.S.A. 2C:2-3, as set forth above, do not apply to this section. Instead, the State must prove that the use of the drugs caused the victim's death, and that the victim's death was not (a) too remote in its occurrence as to have a just bearing on the defendant's liability or (b) too dependent upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect as to have a just bearing on the defendant's liability. State v. Ferguson, 238 N.J. 78, 95 (2019).

To that end, the causation standard in N.J.S.A. 2C:35-9 differs in some ways from the "probable consequence" standard adopted for felony murder in State v. Martin, 119 N.J. 2, 32 (1990). The Martin standard requires consideration of whether the death involved was "too remote" to be the responsibility of the defendant. The Legislature incorporated the "too remote" defense into N.J.S.A. 2C:35-9, but eliminated from considerations of remoteness the volitional acts of the decedent in taking the drugs. See Canel, Criminal Code Annotated, Comment 2 to N.J.S.A. 2C:35-9 (Gann 2023).

In State v. Maldonado, 137 N.J. 536, 573 (1994), the Court applied this section to two deaths, one from an unexplained overdose of heroin which the defendant had supplied as a gift, the other caused by the decedent's swallowing a large quantity of cocaine to conceal it from police. In State in Interest of A.J., 232 N.J. Super. 274, 288-290 (App. Div. 1989) the Appellate Division held that there was probable cause to believe that the standard under N.J.S.A. 2C:35-9 was met where the defendant, after distributing PCP to the victim, left her lying in a stupor on railroad tracks where she was soon after killed by a train.

Other Medical Conditions - The strict liability for drug-induced death statute is intended to impose criminal liability for drug overdoses resulting from the illegal distribution of drugs, and not deaths resulting from other medical conditions caused by drug abuse. The death cannot be too remote in its occurrence as to have a just bearing on the defendant's liability.

Standards for superseding/intervening causes – The State must prove that the victim's death was not too dependent *upon conduct of another person* which was unrelated to the injection, inhalation or ingestion of the substance or its effect as to have a just bearing on the defendant's liability. State v. Ferguson, 238 N.J. 78, 95 (2019).

The Daniel Penny Case from CNN:

<https://www.cnn.com/2024/11/01/us/daniel-penny-trial-jordan-neely-death/index.html>

The Sean Combs Case from CNN:

<https://www.cnn.com/2024/11/16/entertainment/sean-diddy-combs-case-jail/index.html>

Matthew Perry Death Investigation from CNN:

<https://www.cnn.com/2024/08/20/us/matthew-perry-death-5-charged/index.html>