

234 BLOOD-ALCOHOL CURVE

Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant (had a prohibited alcohol concentration) (was under the influence) at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 234 was originally published in 1993 and revised in 1999. This revision was approved by the Committee in 2003.

This paragraph should be added to the instruction for the offense when there is evidence of an issue relating to the "blood alcohol curve." The text of this instruction has been part of the instructions for individual drunk driving offenses since 1982. It was first published as a freestanding instruction in 1993.

The presence of a prohibited alcohol concentration at the time of operation is the significant issue. The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over which the drinks were consumed, etc. The problem of the so-called blood-alcohol curve is discussed in State v. Vick, 104 Wis.2d 678, 312 N.W.2d 489 (1981).

Vick presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of test results may not be appropriate since there may be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol concentration at the time of driving. (See Ulster Co. v. Allen, 442 U.S. 140 (1979), for a discussion of the "rational connection" requirement when instructing the jury on statutory presumptions.)

The Committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect."