## 925 CRIMINAL NEGLIGENCE — § 939.25

"Criminal negligence" means:[1]

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

THE COMMITTEE BELIEVES THE ABOVE IS SUFFICIENT IN MOST CASES.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY, CONTINUE WITH THE FOLLOWING.[2]

Criminal negligence is ordinary negligence to a high degree. Ordinary negligence exists when a person creates an unreasonable risk of harm to another by failing to exercise ordinary care. Ordinary care is the amount of care which a reasonable person exercises under similar circumstances. Negligence does not require that the person be aware of the risk of harm that his or her conduct creates; it is sufficient that a reasonable person in the same circumstances would be aware of that risk.[3]

Criminal negligence differs from ordinary negligence in two respects. First, the conduct must create a risk not only of some harm but also of serious harm – that is, of death or great bodily harm. Second, the risk of that harm must not only be unreasonable, it also must be substantial. Therefore, for the defendant's conduct to constitute criminal negligence, the defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another.[4]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED,[5] ADD THE FOLLOWING:

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that

 

Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

**COMMENT**

Wis JI-Criminal 925 was originally published in 1994 and revised in 1999. This revision adopted a new format and was approved by the Committee in February 2005.

The current definition of "criminal negligence" in § 939.25 was created by 1987 Wisconsin Act 399, as part of the revision of Wisconsin's homicide statutes. It applies to offenses committed on or after January 1, 1989. It is used in the following statutes: § 940.08, Homicide By Negligent Handling Of A Dangerous Weapon, Explosives, Or Fire; § 940.10, Homicide By Negligent Operation Of A Vehicle; § 346.62, Reckless Driving; § 941.01, Negligent Operation Of A Vehicle (Not Upon A Highway); § 941.10, Negligent Handling Of Burning Material; and § 941.20(1)(a), Endangering Safety By Negligent Use Of A Weapon.

The definition of "criminal negligence" in § 939.25 is not unconstitutionally vague:

> The statute makes clear that causing death by highly negligent operation of a vehicle is prohibited. True, the statute does not tell the public which specific acts are criminally negligent. The statute is incapable of such precision; whether a reasonable person would foresee that the conduct engaged in created an unreasonable and substantial risk of death or great bodily injury will necessarily vary with the facts of each case. This does not make the law unconstitutionally vague.

State v. Barman, 183 Wis.2d 180, 200-01, 515 N.W.2d 493 (Ct. App. 1994).

For cases finding the evidence to be sufficient to establish "criminal negligence," see Barman, supra; State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987); and, State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App. 1983).

In a case involving a vehicle that crossed the centerline of a highway, the evidence was sufficient to support a finding of criminal negligence; the jury is not required to agree unanimously about why the vehicle crossed the centerline. State v. Johannes, 229 Wis.2d 215, 228-29, 598 N.W.2d 299 (Ct. App. 1999).

1. The 1999 revision of this instruction divided the definition into three parts to emphasize the separate characteristics of "criminal negligence." The Committee concluded that the relatively brief definition in the first paragraph is sufficient in most cases, and it is included in the body of the instructions for offenses involving criminal negligence. The Committee concluded that the more concise definition is preferable to the approach used in the previously published instructions which began by trying to explain the meaning of "ordinary negligence." Then, the instruction tried to explain that criminal negligence required more than ordinary negligence. The Committee concluded that the statutory definition of criminal negligence is sufficiently clear that it is better to begin with it, rather than offering the potentially difficult definition of ordinary negligence and then asking the jury to go on from there.

 

The definition of "criminal negligence" provided in § 939.25 is essentially a restatement of what was known as "high degree of negligence" under prior Wisconsin law. (See § 940.08(2), 1985-86 Wis. Stats.) The only change is to substitute "substantial risk" for "high probability" in describing the risk of harm that must be presented by the conduct.

The nature of the risk is the same for criminal negligence as for criminal recklessness. Criminal recklessness differs in that it requires a subjective awareness of the risk. For criminal negligence, there is an objective standard – the defendant "should realize" the nature of the risk created by the conduct.

2. The paragraphs in brackets are included here in the event that a more extensive definition is believed to be necessary. The first brackets contain a revision of the long-standing definition of ordinary negligence. [Compare Wis JI-Civil 1005.] No substantive change was intended; the revision is believed to be more easily understood.

3. This is a revision of the long-standing definition of ordinary negligence. [Compare Wis JI-Civil 1005.] No substantive change was intended; the revision is believed to be more easily understood.

4. This paragraph attempts to emphasize and clarify the difference between ordinary and criminal negligence. That distinction is discussed in Hart v. State, 75 Wis.2d 371, 249 N.W.2d 810 (1977), and State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App. 1983). (Both cases discuss § 940.08 as it existed before the 1989 homicide revision, but the law has not changed significantly. See note 1, supra.)

Hart involved a collision on a country road between an automobile and a person riding a bicycle. The automobile was going 65 miles per hour in a 55 mile per hour zone and struck the bicyclist in a no-passing zone just over the crest of a hill. The court concluded that

> Passing a bicyclist in a no-passing zone may not always be negligent. However, in this case the defendant passed in an intersection at a high rate of speed, and the jury properly could have found that an ordinarily prudent person would not have done so, but rather would have seen the bicyclist earlier than defendant did, would have moderated his speed well in advance of the intersection, and would have allowed the bicyclist to clear the intersection before overtaking him. The jury could have found that in acting as he did the defendant should have realized that he created a situation of unreasonable risk to persons near the intersection.
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> Defendant's car was moving at 60 mph at the hillcrest by defendant's own admission, and if the risk of striking a human being on a bicycle at a speed such as this does not carry with it a high probability of death, it is difficult to imagine a situation that would.

75 Wis.2d 371, 397.

In Cooper, the defendant's car went through a red light and struck another vehicle, killing its two occupants. On appeal, the defendant argued that this was only ordinary negligence. The court of appeals disagreed:

> A high degree of negligence, as defined by sec. 940.08(2), Stats., requires not only an unreasonable risk of harm, as in ordinary negligence, but a high probability of death or great bodily harm to another. Consequently, if an actor is ordinarily negligent, and should reasonably foresee that his or

 

her negligence creates a high probability of death or great bodily harm to another, then the second element of the definition is met. Hart at 383, 249 N.W.2d at 814-15.

The jury could find that going through a red light at 50 m.p.h. creates a high probability of death or great bodily harm. The legality of the 50 m.p.h. speed has nothing to do with it. Every driver knows or should know that the greater the speed, the greater the impact, and the greater the probability of death or great bodily injury.

117 Wis.2d 30, 38

[The court in Cooper expressed its concern about the result. Though legally correct, it allows a finding of criminal negligence and thus, a felony, when lawful but high speed combines with ordinary negligence. The Wisconsin Legislature and courts have been involved in a series of attempted solutions to this problem. The experience is recounted in Hart, 75 Wis.2d 371, 379-84.]

5. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). In Dyess, the court held that the following instruction violated the requirements of § 903.03 by requiring the jury to find the presumed fact (negligence) upon proof of the basic fact (speeding):

The safety statute in the motor vehicle code provides that, no person shall drive a vehicle at a speed in excess, and on 14th Street in particular, of 30 miles per hour. Any speed in excess of that limit would be negligent speed regardless of other conditions. It is for you to determine whether Johrie Dyess's speed was over said limit and, if under, whether it was, nevertheless, a negligent speed under the conditions and circumstances then present and under the rules of law given to you in these instructions. (Emphasis in original.) 124 Wis.2d 525, 531.

The court said that if the directions of § 903.03 had been followed, the trial court "would have informed the jury that, if it found as a matter of fact that Dyess was exceeding the posted speed limit of 30 miles per hour, it could regard that fact as sufficient evidence of negligence to make that finding but it was not required to do so." 124 Wis.2d 525, 539.

The suggested instruction tries to implement Dyess and § 903.03 by advising the jury that it is for them to determine the weight to give the evidence that the defendant violated the statute in making its decision whether, under all the circumstances, the defendant's conduct constituted criminal negligence. This format should be used instead of the uniform civil instructions dealing with statutory violations. (See, e.g., Wis JI-Civil 1290.) As the court stated in Dyess: "No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3)." 124 Wis.2d 525, 536.

 