

1170 HOMICIDE BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10**Statutory Definition of the Crime**

Homicide by negligent operation of a vehicle, as defined in § 940.10 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a vehicle.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated¹ a vehicle.²
2. The defendant operated a vehicle in a manner constituting criminal negligence.
3. The defendant's criminal negligence caused the death of (name of victim).

"Cause" means that the defendant's act was a substantial factor in producing the death.³

The Meaning of "Criminal Negligence"

"Criminal negligence" means:⁴

- § the defendant's operation of a vehicle 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) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.⁵

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:⁶

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). 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.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three 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 1170 was originally published in 1966 and revised in 1983, 1984, 1986, and 1989. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 940.10, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

This offense was formerly covered by § 940.08. The homicide revision changed former § 940.08 by removing "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle.

1. Though the statute refers to "operation or handling" of a vehicle, the instruction uses "operate" throughout.

The Criminal Code does not define "operate." If a definition is needed, the one provided in § 346.63(3)(b) may be appropriate: "Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion." See Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980), which interprets § 346.63(3)(b). Also see Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977), which provide a definition of "operate" used before the § 346.63 definition was enacted.

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. The Committee has 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 immediately preceding the sentence in the instruction beginning with "before":

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

Also see, Wis JI-Criminal 901 Cause.

4. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

5. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

6. 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 whether the defendant violated the statute and, if so, whether the conduct constituted negligence. Such a 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.