

1171 HOMICIDE OF AN UNBORN CHILD BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10(2)**Statutory Definition of the Crime**

Homicide by negligent operation of a vehicle, as defined in § 940.10(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of an unborn child 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.

"Criminal negligence" means:

- the defendant's operation of a vehicle created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; 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.³

3. The defendant's operation of the vehicle in a manner amounting to criminal negligence caused the death of an unborn child.

"Cause" means that criminal negligence by the defendant was a substantial factor in producing the death.⁴

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.⁵

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant operated a vehicle in a manner constituting criminal negligence and that the defendant's criminal negligence caused the death of an unborn child, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1171 was originally published in 1999. This revision was approved by the Committee in April 2005 and involved adoption of a new format.

This instruction is for a violation of § 940.10(2), created by 1997 Wisconsin Act 295. The penalty for violating § 940.10 is that for a Class E felony: imprisonment for not more than 2 years.

Act 295 also created sub. (2) of § 940.08, prohibiting causing the death of an unborn child by the negligent operation or handling of a dangerous weapon, explosives, or fire. A separate instruction for that offense has not been published. If one is needed, the third element of this instruction should be substituted for the third element of Wis JI-Criminal 1175.

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 instruction on 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.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient in 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.

5. This is the definition of "unborn child" provided in § 939.75(1).