

**1175 HOMICIDE BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON  
— § 940.08**

**Statutory Definition of the Crime**

Homicide by negligent operation of a dangerous weapon, as defined in § 940.08 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 dangerous weapon.

**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 operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of (name of victim).

"Cause" means that the defendant's act was a substantial factor in producing the death.<sup>1</sup>

**Meaning of "Dangerous Weapon"**

"Dangerous weapon" means<sup>2</sup>

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.<sup>3</sup>]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.<sup>4</sup>]<sup>5</sup>

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

### **Meaning of "Criminal Negligence"**

"Criminal negligence" means:<sup>6</sup>

- the defendant's operation or handling of a dangerous weapon 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 or handling of a dangerous weapon 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.<sup>7</sup>

### **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 1175 was originally published in 1966 and revised in 1983, 1986, 1989, and 2006. This revision was approved by the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is for violations of § 940.08, which was changed by the 1989 homicide revision [1987 Wisconsin Act 399] in the following ways:

- 1) it removed "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle [see Wis JI-Criminal 1170]; and,
- 2) it further amended the list of instrumentalities by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapons, explosives or fire."

As to the second change noted above, the Judicial Council Note to § 940.08 (1987 Senate Bill 191) indicates that the intent was not to eliminate any of the previously mentioned instrumentalities:

The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons in addition to firearm, airgun, knife or bow and arrow. See s. 939.22(10), stats.

The instruction is drafted for a case involving a "dangerous weapon" and would need to be modified if "fire" or "explosives" was involved.

2011 Wisconsin Act 2 amended § 940.08 to add an exception by creating subsection (3) to read:

- (3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." Note that § 940.08 applies only to criminal negligence in the "operation or handling of a dangerous weapon, explosives, or fire . . ." It is not obvious to the Committee how the exception for health care providers would relate to the elements of this offense.

The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. 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.

2. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in s. 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

3. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

5. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

"Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

6. 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.

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