

**1320 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON:
NEGLIGENT OPERATION OR HANDLING — § 941.20(1)(a)**

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who endangers another's safety 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 criminally negligent manner endangered the safety of another.

Meaning of "Dangerous Weapon"

"Dangerous weapon" means¹

[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.²]

[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.³ "Great bodily harm" means serious bodily injury.⁴]

[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:⁵

- 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.]⁶

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

This instruction was originally published as Wis JI-Criminal 1321 in 1969 and revised in 1988. It was republished as Wis JI-Criminal 1320 in 1995. This revision was approved by the Committee in August 2004 and involved adoption of a new format and a change in the definition of "criminal negligence."

This instruction is for a violation of § 941.20(1)(a), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989, and this instruction replaced Wis JI-Criminal 1321 (8 1969) for offenses committed on or after that date. 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.

In addition to changing the title of § 941.20 from "reckless use of weapons" to "endangering safety by the use of a dangerous weapon," the homicide revision made two substantive changes in subsection (1)(a):

- 1) it changed the culpability requirement from reckless conduct to criminal negligence; and,
- 2) it amended the list of instrumentalities by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapon."

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

2. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete definition of "great bodily harm."

3. 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.

4. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete definition of "great bodily harm."

5. 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.

6. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs. It also includes material relating to violation of a safety statute.