

2605 PREMISES OTHER THAN HIGHWAYS — §§ 346.61, 346.66

[WHERE OPERATION ON PREMISES OTHER THAN A HIGHWAY IS INVOLVED, SUBSTITUTE THE FOLLOWING, AS APPROPRIATE, FOR THE FIRST ELEMENT OF THE INSTRUCTION]¹

1. The defendant (drove) (operated) a motor vehicle on

[premises held out to the public for use of their motor vehicles.]²

[premises provided by employers to employees for the use of their motor vehicles.]³

[premises provided to tenants of rental housing in buildings of four or more units for the use of their motor vehicles.]⁴

[ADD WHEN SUPPORTED BY THE EVIDENCE]⁵

[Operating a vehicle in a private parking area at a farm or single-family residence does not satisfy this element.]

COMMENT

Wis JI-Criminal 2605 was originally published in 1996 and amended in 2004. This revision updated the Comment and was approved by the Committee in February 2011.

This instruction is intended to address alternatives to "operation on a highway" for the following offenses:

- reckless driving in violation of § 346.62 [Wis JI-Criminal 2650-2654];
- operating under the influence in violation of § 346.63 [Wis JI-Criminal 2660-2669]; and,
- failure to stop and render aid in violation of § 346.67 [Wis JI-Criminal 2670].

The premises on which those offenses may be committed are specified in §§ 346.61 and 346.66, both of which were amended by 1995 Wisconsin Act 127. [Effective date: January 6, 1996]. The "on highway requirement" is also discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. I.

Section 346.01(1m), as created by 2009 Wisconsin Act 129, provides:

In this chapter, in addition to the meaning given in s. 340.01(22), "highway" includes a private road or driveway that is subject to an agreement for traffic regulation enforcement under s. 349.03(5).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983). That a vehicle was operated "on a highway" may be proved circumstantially. State v. Mertes, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813.

1. Sections 346.61 and 346.66 define the applicability of sections relating to reckless and drunken driving [§§ 346.62 to 346.64] and relating to accidents and accident reporting [§§ 346.67 to 346.70]. The first element of instructions for those offenses typically includes the requirement that the operation take place "on a highway." This instruction provides alternatives for cases where the operation takes place on premises other than highways as defined in §§ 346.61 and 346.66. Care should be taken that the restatement of the first element includes any additional facts that may be in that element.

2. The phrase "held out to the public" has been interpreted in three Wisconsin appellate decisions. In City of Kenosha v. Phillips, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court held that the privately-owned American Motors parking lot was not "held out to the public" because it is the intent of the owner that governs. The owner's intent was to hold the lot open to its employees, but not to the general public. The statute was amended by 1995 Wisconsin Act 127 to specifically include employee parking lots. See note 3, below.

In City of LaCrosse v. Richling, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993), the court held that the parking lot of a bar and restaurant was "held out to the public" because potential customers are part of "the public." "We believe the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." 178 Wis.2d 856, 860. The Richling test was applied in State v. Carter, 229 Wis.2d 200, 598 N.W.2d 619 (Ct. App. 1999), to hold that a parking lot of a closed gas station was also "held out to the public."

"The roadways of the Geneva National Community [a gated community] were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the community unchallenged. . ." State v. Tecza, 2008 WI App 79, ¶22, 312 Wis.2d 395, 751 N.W.2d 896.

The Committee Notes to the 1957 revision of the Motor Vehicle Code provide as follows with respect to § 346.61:

Legislative Council Note, 1957: Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms. This is a change in the law, for the attorney general has ruled that the present law relating to drunken driving applies only to driving on highways. 38 Att'y Gen. 184 (1949). Broader applicability, however, is in the interest of public safety and also is consistent with § 11-101 of the UVC. [Bill 99-S]

3. This alternative was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

4. This alternative was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.
5. The Committee suggests adding this statement only in the case where there is a factual dispute about the area where the operating took place and evidence supports a finding that a private parking area was involved. The statement was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.