

2623C OPERATING WHILE REVOKED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(b) and (2)(ar)3. and 4.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked and causes (great bodily harm) (death).

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 a motor vehicle¹ on a highway.²

A motor vehicle is operated when it is set in motion.³

2. The defendant's operating privilege⁴ was duly revoked at the time the defendant operated a motor vehicle.

[A person's operating privilege remains revoked until it is reinstated.]⁵

3. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim).

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).⁶

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.]⁷

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.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I OR H FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.⁸

If you find the defendant guilty, you must answer the following question:

Did the defendant know at the time of the violation that (his) (her) operating privilege was revoked?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2623C was approved by the Committee in April 2018; it reflects changes to § 343.44(1)(b) made by 2017 Wisconsin Act 127.

This instruction is for violations of § 343.44(1)(b) – operating while revoked – where great bodily harm or death is caused. It is to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed before that date see Wis JI-Criminal 2623B.

While Act 127 deleted the knowledge requirement from the offense definition, it retained it in the penalty section. An offense resulting in great bodily harm is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class I felony. See § 343.44(2)(ar)3. An offense resulting in death is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class H felony. See § 343.44(2)(ar)4. This instruction may be used for either misdemeanor or felony charges; it includes a special question for felonies regarding the knowledge requirement.

Note: Deleting the knowledge requirement from the offense definition eliminated the penalty anomaly under prior law whereby misdemeanor and felony violations had the same elements. See the Comment to Wis JI-Criminal 2663B.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.
2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. 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).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

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).

4. Subsection 340.01(40) defines "operating privilege" as follows:

"Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license

issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. 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:

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.

7. See § 939.22(14) and Wis JI-Criminal 914.

8. The special question addresses the penalty-increasing facts in § 353.44(2)(ar)3. and 4. A violation of § 343.44(1)(b) resulting in great bodily harm is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class I felony. See § 343.44(2)(ar)3. An offense resulting in death is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class H felony. See § 343.44(2)(ar)4.