

**2670 FAILURE TO GIVE INFORMATION OR RENDER AID FOLLOWING AN ACCIDENT — § 346.67****Statutory Definition of the Crime**

Section 346.67 of the Wisconsin Statutes is violated when the operator of any vehicle involved in an accident on a highway<sup>1</sup> fails to reasonably investigate what was struck and if the operator knows or has reason to know that the accident resulted in (injury to a person) (death of a person) (damage to a vehicle driven or attended by a person) fails to stop the vehicle he or she is operating as close to the scene of the accident as possible and remain at the scene of the accident until the operator has given information (and rendered reasonable assistance to any person injured in the accident).

**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 four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant operated a vehicle involved in an accident<sup>2</sup> on a highway.<sup>3</sup>

A vehicle<sup>4</sup> is operated when it is set in motion.<sup>5</sup>

2. The defendant knew that the vehicle (he) (she) operated was involved in an accident on a highway.<sup>6</sup>
3. The defendant violated a duty after being involved in an accident. A driver who is involved in an accident has two duties.<sup>7</sup>

The State is required to satisfy you beyond a reasonable doubt that the defendant violated at least one of the two duties but you are not required to agree as to which duty was violated.

The first duty is to reasonably investigate what was struck.

The second duty is that a driver involved in an accident involving a person or an attended vehicle must stop and provide information and render aid. To prove a violation of this duty, the State must prove the following beyond a reasonable doubt:

- that the defendant knew or had reason to know that the vehicle (he) (she) was operating was involved in an accident involving (a person) (an attended vehicle) and that the accident resulted in (injury<sup>8</sup> to a person) (death of a person) (damage to a vehicle driven or attended by a person); and,
- that the defendant did not immediately stop (his) (her) vehicle as close to the scene of the accident as possible and remain at the scene until (he) (she) had done all the following:
  - (a) Gave (his) (her) name, address, and the registration number of the vehicle (he) (she) was driving to (the person struck) (the operator or occupant of or person attending any vehicle collided with);<sup>9</sup> and

(b) If it was requested and was available, exhibited (his) (her) operator's license to (the person struck) (the operator or occupant of or person attending any vehicle collided with)[; and<sup>10</sup>

(c) Rendered reasonable assistance to any person<sup>11</sup> injured in the accident including the transporting or making arrangements to transport the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that medical or surgical treatment is necessary or is requested by the injured person].

4. The defendant was physically capable of complying with these requirements.<sup>12</sup>

### **Deciding About Knowledge**

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four 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 ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.74(5)(b),(c), OR (d) IS CHARGED AND THE**

EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:<sup>13</sup>

[If you find the defendant guilty, you must answer the following question(s):

("Did the accident involve injury to a person?")<sup>14</sup>

(Did the accident involve injury to a person and did the person suffer great bodily harm?"

"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.)<sup>15</sup>

("Did the accident involve death to a person?")<sup>16</sup>

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

#### COMMENT

Wis JI-Criminal 2670 was originally published in 1969 and revised in 1979, 1980, 1982, 1983, 1985, 1993, 1994, 2003, 2004, 2008, 2009, and 2014. This revision was approved by the Committee in June 2018; it reflects changes made to § 346.67 by 2015 Wisconsin Act 319 [effective date: April 1, 2016].

The Committee concluded that § 346.67, as amended by 2015 Wisconsin Act 319, defines two ways to violate the statute. First, the offense is committed by one who is involved in an accident and fails to reasonably investigate. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute. The instruction addresses this by requiring in the third element that the "defendant violated a duty" and specifying the nature of the two duties that may be involved.

Section 346.74(5), which provides the penalties for violations of § 346.67, was amended by 2003 Wisconsin Act 74 to read as follows:

346.74(5) Any person violating any provision of s. 346.67(1):

(a) Shall be fined not less than \$300 nor more than \$1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person.

(b) May be fined not more than \$10,000 or imprisoned for not more than 9 months or both if the accident involved injury to a person but the person did not suffer great bodily harm.

(c) Is guilty of a Class E felony if the accident involved injury to a person and the person suffered great bodily harm.

(d) Is guilty of a Class D felony if the accident involved death to a person.

(e) Is guilty of a felony if the accident involved death or injury to a person.

Act 74 increased the penalties in subs. (c) and (d); the effective date is November 27, 2003.

Wis JI-Criminal 2670 is designed to be used for offenses involving any of the penalties. If the base penalty under sub. (5)(a) is involved, no additional questions need be asked. The facts specified in subs. (5)(b)-(d) that increase the penalty are to be handled by submitting extra questions to the jury. See the text of the instruction at note 13. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of failure to stop and give information or render aid at the scene of an accident under Wis. Stat. § 346.04, at the time and place charged in the [complaint] [information].

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question 'yes' or 'no.'"

[Add the appropriate question.]"

The nature of this offense is discussed in two decisions which focused on the sufficiency of the charging document. See State v. Lloyd, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981), and State v. Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985) [reversing 120 Wis.2d 629, 357 N.W.2d 9 (Ct. App. 1984)]. Also see State v. Mann, 135 Wis.2d 420, 400 N.W.2d 489 (Ct. App. 1986), which discusses the meaning of "attended" and finds that the term "reasonable assistance" is not impermissibly vague.

In State v. Hartnek, 146 Wis.2d 188, 430 N.W.2d 361 (Ct. App. 1988), the court held that a single event of failing to stop and render aid following an accident may give rise to multiple charges under § 346.67 when there are multiple victims. The supreme court declined the defendant's request to overrule Hartnek in State v. Pal, 2017 WI 44, 374 Wis.2d 759, 893 N.W.2d 848, concluding that "the legislature authorized the State to charge multiple counts of the offense of hit and run resulting in death in cases involving multiple victims." ¶28.

The reporting requirement of § 346.67 does not infringe a person's Fifth Amendment privilege against self-incrimination. State v. Harmon, 2006 WI App 214 ¶29, 296 Wis.2d 861, 723 N.W.2d 732. Also see, California v. Byers, 420 U.S. 426 (1971).

1. Section 346.66 provides that § 346.67 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or

not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public . . .," the instruction must be modified.

See Wis JI-Criminal 2600 Operating While Intoxicated Introductory Comment Sec. I, for discussion of the "on a highway" element.

2. "'Accident' in § 346.67(1) means 'an unexpected, undesirable event' and may encompass intentional conduct." State v. Harmon, 2006 WI App 214 ¶1, 296 Wis.2d 861, 723 N.W.2d 732. Thus, the statute applies to a case where one view of the facts was that the defendant intentionally ran over the victim.

3. The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element.

"Highway" is defined by § 340.01(22). Also see Wis JI-Criminal 2600 Introductory Comment Sec. I, for discussion of the "on a highway" element.

The statute applies to a case where the defendant lost control of the vehicle and crashed into a house. "Because Dartz's loss of control of the vehicle occurred on the highway, even though the resulting collision occurred off the highway, we conclude she was 'involved in an accident' 'upon a highway' within the meaning of § 346.67(1). . ." State v. Dartz, 2007 WI App 126 ¶2, 301 Wis.2d 499, 731 N.W.2d 340.

2009 Wisconsin Act 62 [effective date: March 1, 2010] created § 346.66(2) to read as follows:

Sections 346.67, 346.68, and 346.69 apply to the operator of a vehicle that, whether by operator intention or lack of control, departs a highway or premises described in sub. (1)(a) immediately prior to an accident if the accident does not occur on real property owned or leased by the operator.

4. Section 340.01(74) defines "vehicle."

Section 346.66 provides that § 346.67 does "not apply to accidents involving only snowmobiles, all terrain vehicles, or vehicles propelled by human power or drawn by animals."

5. 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).

For purposes of cases involving operating under the influence, § 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."

See Wis JI-Criminal 2600 Operating While Intoxicated Introductory Comment Sec. III, for discussion of the "operating" element.

6. Wis JI-Criminal 2670 was originally published in 1969 and had an element requiring that "the defendant knew that he had been involved in accident which resulted in (injury to) (death of) any person" or "damage to a vehicle . . ." The element was reviewed many times and eventually revised to require that the "defendant knew that the vehicle he was operating was involved in an accident ..." Two published court of appeals decisions supported the conclusion. In State v. Hartnek, 146 Wis.2d 188, 195, 430 N.W.2d 361 (Ct. App. 1988), the court stated:

. . . Hartnek argues that sec. 346.67 does not require proof of scienter; therefore, it should be strictly construed so as not to authorize severe criminal penalties under [Collova]. However, as the state correctly notes, the standard jury instruction requires a finding that the defendant knew he or she had struck a person or an attended vehicle. Wis JI-Criminal 2670, *approved in State v. Mann*, 135 Wis.2d 420, 426, 400 N.W.2d 489, 491-92 (Ct. App. 1986). We therefore do not find Hartnek's argument particularly persuasive in this regard.

State v. Mann did state that "[t]he instruction [JI 2670] fairly and adequately informs the jury of the elements of the offense" but it did not focus on any particular part of the instruction or element of the crime.

The knowledge requirement was changed again in 2014 to read: "This requires that the defendant knew the accident involved (a person) (an attended vehicle) before (he) (she) left the scene of the accident." The second sentence was added after the Committee reviewed State v. Sperber, an unpublished Court of Appeals decision [No. 2013AP358-CR, Oct. 15, 2013]. Sperber involved a driver who struck a person in a wheelchair and drove off without stopping. The driver claimed he did not know he struck a person; he thought it was a garbage can. At trial, the jury asked about when the defendant's knowledge must exist: ". . . does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements of the second item?" The trial judge referred the jury to the instruction and did not directly answer the question. Three hours later, the jury asked a similar question and was told to "Read 2670 in its entirety." Sperber was convicted and alleged on appeal that defense counsel was ineffective for failing to request that the jury be instructed that knowledge was to be considered as of the time he departed the accident scene. The court of appeals agreed and, also concluding that the real controversy was not fully tried, reversed the conviction. The Committee found Sperber persuasive and decided that a specific statement should be added to the instruction to clarify that knowledge that the accident involved a person or attended vehicle must exist before the defendant left the scene.

The changes in § 367.67 made by 2015 Wisconsin Act 319 are believed to be in reaction to the Sperber decision, with the focus being on eliminating the requirement of knowledge that the accident involved a person or attended vehicle. See sec. 346.67(3) which provides: "A prosecutor is not required to allege or prove that an operator knew that he or she collided with a person or a vehicle driven or attended by a person in a prosecution under this section." {Emphasis added.} The Committee concluded that only a limited knowledge requirement remains – knowledge that the person was involved in an accident. This is consistent with one of the basic requirements of omission liability: knowledge of facts giving rise to the duty. See Wis JI-Criminal 905 Liability For Failure To Act: Criminal Omissions.

Liability for violating § 367.67 is in essence liability for an omission – failure to fulfill a legal duty imposed as a result of being involved in an accident.

7. The third element reflects the Committee's conclusion that § 346.67, as amended by 2015 Wisconsin Act 319, creates two duties, violation of either of which can be the basis for a conviction. First, the offense is committed by one who is involved in an accident and fails to reasonably investigate. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute. The instruction addresses this by requiring in the third element that the "defendant violated a duty" and specifying the nature of the two duties that may be involved.

8. The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

9. "§ 346.67(1) requires an operator of a vehicle to identify him or herself as the operator of the vehicle." State v. Wuteska, 2007 WI App 157 ¶1, 303 Wis.2d 646, 795 N.W.2d 574. Wuteska involved a driver who provided the information required but did not identify herself as the driver of the vehicle. The court of appeals reversed the dismissal of the complaint. In a Wuteska-type situation, element 3. should be modified to address the issue directly.

10. The paragraph in brackets, preceded by "(c)," should be given when there is evidence that a person was injured in the accident. The statute does cover cases where there has been no personal injury – those involving "damage to a vehicle which is driven or attended by any person." § 346.67(1).

11. The duty to stop and render aid applies even though the only other "person injured" in the accident died at the scene. State v. Swatek, 178 Wis.2d 1, 7-8, 502 N.W.2d 909 (Ct. App. 1993): "Thus, the duty under sec. 346.67(1)(c), Stats., does not turn on whether a person's injuries are immediately fatal, but on whether the operator rendered that amount of assistance which an ordinary, reasonable person would render under the same or similar circumstances. We also conclude that whether an operator has fulfilled this duty will, in most instances, present a question for the jury."

The reference to "any person" was discussed in State v. Lloyd, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981). The defendant in Lloyd argued that the reference meant he had fulfilled his duty under the statute by rendering aid to one of several persons injured in the accident. The court rejected this interpretation, holding that "any" does not mean "at least one." (The court's discussion suggests that what is meant by "any" is really "any and all" persons injured.) 104 Wis.2d 49, 62-63.



The extent of the duty to render aid was discussed in State v. Mann, 120 Wis.2d 629, 357 N.W.2d 9 (Ct. App. 1984). However, this decision was reversed by the Wisconsin Supreme Court in a decision that focused on the sufficiency of the complaint rather than the requirements of the statute. State v. Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985).

12. Section 346.67 expressly bases criminal liability on the person's omission or failure to act. The physical ability to perform the required act is a basic requirement of omission liability. See Wis JI-Criminal 905 Liability For Failure To Act: Criminal Omissions. Also see LaFave and Scott, Substantive Criminal Law, § 3.3(c) (West 1986), an earlier version of which was cited with approval in State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986).

13. 2003 Wisconsin Act 74 (effective date: November 27, 2003) revised § 346.74, which identifies the penalties for violations of § 346.67. See the Comment preceding note 1, supra. The Committee concluded that the best way to handle the facts which increase the penalty is to submit a special question to the jury, asking whether the fact has been established beyond a reasonable doubt. This is the same way the question of value is handled in a theft case. See Wis JI-Criminal 1441.

14. This question need not be added to the instruction if the "injury to any person" alternative was selected in element 3.

15. Section 346.74 does not provide a definition of "great bodily harm" but the Committee concluded that the definition in § 939.22(14) should apply. The Committee recommends defining the term in the manner used in the instruction. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

16. This question need not be added to the instruction if the "death of any person" alternative was selected in element 3.