

2695 OPERATING A MOTORBOAT WHILE UNDER THE INFLUENCE OF AN INTOXICANT: CRIMINAL OFFENSE — § 30.681(1)(a) and § 30.80(6)(a)2.

Statutory Definition of the Crime

Section 30.681(1)(a) of the Wisconsin Statutes is violated by one who operates a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation.

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motorboat.

"Operate" means to control the speed or direction of a motorboat.¹

"Motorboat" means any boat equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion.²

2. At the time the defendant operated a motorboat, the defendant was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of safe motorboat operation.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a motorboat was impaired because of consumption of an alcoholic beverage.

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motorboat.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe operation. What is required is that the person's ability to safely control the motorboat be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motorboat is evidence of the defendant's alcohol concentration at the time of the operating.³

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.⁴

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED⁵ AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"⁶ THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING
MAY BE ADDED:⁷

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both 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 2695 was approved by the Committee in March 2012.

This instruction is drafted for second or subsequent violations of § 30.681(1)(a), which are crimes. See § 30.80(6)(a)2. As with regular operating under the influence offenses, the fact of a prior conviction is not an element of the criminal offense. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,

and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

A first offense under § 30.681(1) is a civil forfeiture. To use this instruction for the forfeiture offense, modify the instruction by substituting "to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "beyond a reasonable doubt." It may also be necessary to change the reference from "the state" to the unit of government that is prosecuting the case. See Wis JI-Criminal 2680 for a model.

This instruction is based on a violation for operating under the influence. For violations involving a prohibited alcohol concentration under § 30.681(1)(b)1., see Wis JI-Criminal 2660 for a model. For cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of operation, see Wis JI-Criminal 2696. For violations involving a detectable amount of a restricted controlled substance under § 30.681(1)(b)1m., Wis JI-Criminal 2664B for a model.

1. This is based on the definition provided in § 30.50(8g): "'Operation of a motorboat' means controlling the speed or direction of a motorboat, except a sailboat operating under sail alone."

2. This is the definition of "motorboat" provided in § 30.50(6). Also see § 30.50(9d) which defines "personal watercraft" as a "motorboat."

3. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. The statute specifically includes offenses involving operation of a motorboat. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

4. It may be that cases will be charged under § 30.681(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

5. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

6. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

7. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.