

2696 OPERATING A MOTORBOAT WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTORBOAT WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CRIMINAL CHARGE — §§ 30.681(1)(a) and 30.681(1)(b)1.

Statutory Definition of the Crime

The first count in the criminal complaint charges that the defendant operated a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation in violation of § 30.681(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant operated a motorboat while the defendant had a prohibited alcohol concentration in violation of § 30.681(1)(b)1. of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.¹

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.²

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 – Operating Under The Influence

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 Count 1 – Operating Under The Influence

1. The defendant operated a motorboat.

"Operate" means to control the speed or direction of a motorboat.³

"Motorboat" means any boat equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion.⁴

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.⁵

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.

Definition of Count 2 – Operating With A Prohibited Alcohol Concentration

Section 30.681(1)(b)1. of the Wisconsin Statutes is violated by one who operates a motorboat with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following two elements were present.

Elements of Count 2 – Prohibited Alcohol Concentration

1. The defendant operated a motorboat.
2. The defendant had a prohibited alcohol concentration at the time the defendant operated a motorboat.

"Prohibited alcohol concentration" means⁶

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

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.⁷

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 232.⁸

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED⁹ AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"¹⁰ 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 or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so. You the jury are here to decide these questions 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 or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:¹¹

[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 the defendant operated a motorboat while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant operated a motorboat while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.

COMMENT

Wis JI-Criminal 2696 was approved by the Committee in June 2012.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of § 30.681(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more in violation of § 30.681(1)(b)1. It is based on Wis JI-Criminal 2669 and is intended to implement the procedure set forth in § 30.681(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is drafted for criminal charges; for two civil forfeiture offenses, see Wis JI-Criminal 2668 for a model.

The constitutionality of the two-charge procedure for operating a motor vehicle under the influence was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

1. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal 115 is also given, the statement need not be repeated here.

2. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the statement need not be repeated here.

3. 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."

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

5. The instruction is drafted for cases involving the influence of an intoxicant. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

6. The definitions are those provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V. Section 30.50(1g) provides that "alcohol concentration" has the meaning given in s. 340.01(1v).

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. 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.

8. 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.

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

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

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