an exception to the limitation of 939.71, Stats. 1965. La Fond v. State, 37 W (2d) 137, 154 NW (2d) 304.

939.72 History: 1955 c. 696; Stats. 1955 s. 939.72.

939.73 History: 1955 c. 696; Stats. 1955 s. 939.73.

939.74 History: 1955 c. 696; Stats. 1955 s. 939.74.

See note to sec. 8, art. I, on limitations imposed by the Fourteenth Amendment, citing State v. Midell, 40 W (2d) 516, 162 NW (2d) 54.

CHAPTER 940.

Crimes Against Life and Bodily Security.

940.01 History: 1955 c. 696; Stats. 1955 s. 940.01.

Murder at common law must be committed with some degree of deliberation and intelligence, and with the intention of doing great bodily harm. Rowan v. State, 30 W 129.

The words "premeditated design" in sec. 2, ch. 164, R. S. 1858, signify merely an intent to kill; sudden intent not excluded. Murder in the first degree requires actual malice, which includes cases of general as well as particular malice, where the other conditions of the crime are present; the intent to kill need not be an intent to kill any particular person. Hogan v. State, 36 W 226.

Every killing not justifiable, done with deliberation and with an intent or design sufficiently fixed and settled in the mind, is murder in the first degree, even though the killing followed immediately upon the formation of the design. (Terrill v. State, 95 W 276, 70 NW 356, and Sullivan v. State, 100 W 283, 75 NW 956, overruled.) Perugi v. State, 104 W 230, 80 NW 593.

An indictment charging murder of a person named is sufficient, although it does not allege that the person murdered was a "person" or a "human being." Bowers v. State, 122 W 163, 99 NW 447.

The evidence was sufficient to sustain a verdict of murder in the first degree. Schwantes v. State, 127 W 160, 106 NW 237.

In a prosecution for the murder of defendant's illegitimate child, the evidence was sufficient to show that the child was born alive and had an independent existence with respiration and circulation before the act was committed. Heubner v. State, 131 W 162, 111 NW 63.

The words "premeditated design" signify merely an intent to kill. Sudden intent is not excluded. A conviction of murder in the first degree, which was reversed upon appeal, did not amount to an acquittal by the jury of manslaughter in the second degree. Montgomery v. State, 136 W 119, 116 NW 876.

An instruction that the law presumes that the person intends the consequences of his acts is erroneous and the true rule is that only the ordinary and natural consequences are presumed to be intended. Beauregard v. State, 146 W 280, 131 NW 347.

The evidence was sufficient to sustain a conviction under the statute for murder in the first degree. Dietz v. State, 149 W 462, 136 NW 166.

"Premeditated design" is no more nor less than mental purpose to take human life, which may be formed on the instant preceding the fatal act or at some time prior thereto, it being sufficient that there was such precedent purpose persisted in to the consummation of the crime. Radej v. State, 152 W 504, 140 NW 21.

Where the accused disclaimed all knowledge of the crime, leaving no question of accident, heat of passion, or other inadvertence, he was guilty of murder in the first degree or not guilty. Meyer v. State, 176 W 184, 185 NW 520.

See note to 940.02, citing Lasecki v. State, 190 W 274, 208 NW 868.

The fact that the jury upon returning a verdict of murder in the first degree presented a written request to the court that the defendant be given a sentence for less than life does not render the verdict erroneous. Tendrup v. State, 193 W 482, 214 NW 356.

The evidence was sufficient to sustain a conviction for murder in the first degree. Ortiz v. State, 198 W 176, 223 NW 416.

The evidence was sufficient to sustain a conviction of murder in the first degree. Moore v. State, 220 W 404, 265 NW 101.

Evidence that the one defendant conspired with 2 others to stage holdups, urged the holdup at which the murder occurred, and was present participating in such holdup, was sufficient to support such defendant's conviction of murder in the first degree, although the death occurred as the result of shots fired by one of the others while such defendant remained in an automobile. State v. Henger, 220 W 410, 264 NW 922.

If there was no request on behalf of the defendant for the submission of lesser degrees of homicide, the trial court's omission in that respect does not constitute error of which the defendant can complain on appeal. Van Rite v. State, 237 W 212, 295 NW 688.

In a prosecution for murder against a defendant who killed his wife the refusal of the trial court to submit to the jury a question of guilty of manslaughter in the third degree was not error, where the evidence would not in any view support a finding that the killing was merely "in the heat of passion without a design to effect death," but instead established a premeditated design to kill, making the crime murder in the first degree. State v. Genova, 242 W 555, 8 NW (2d) 260.

Circumstantial evidence will sustain a conviction only where all the incidents are satisfactorily established and are consistent with the happening of some particular event, and inconsistent with any other reasonable theory than that they tell the correct story of how such event happened to take place. Le Fevre v. State, 242 W 416, 8 NW (2d) 288.

From the evidence that the defendant bought a revolver, which he claimed was solely for protection of funds which he intended to carry on a contemplated elopement with the victim's sister, and that he carried the gun fully loaded to a secluded meeting

place for an appointment with the victim, and that the concrete block which he claimed to have picked up spontaneously after the shooting to fasten to the victim's leg did not come from the vicinity, the jury could not conclude that his plan was laid before setting out for the appointment and that all of the equipment used in the act was on hand in his car. The record in this case warranted the submission of only 3 possible verdicts, namely, murder in the first degree, manslaughter in the fourth degree and not guilty, as against a contention that murder in the second degree and all other degrees of manslaughter should also have been submitted. State v. Babich, 258 W 290, 45 NW (2d) 660.

It is the duty of the trial court in a homicide case to accurately give to the jury the law of whatever degree of felonious homicide the evidence tends to prove, and no other. To justify a submittal of a lesser degree of homicide there must be some reasonable ground in the evidence, in the judgment of the trial court, for a conviction of the lesser offense. State v. Stortecky, 273 W 362, 77 NW (2d) 721.

See note to 940.02, citing Zenou v. State, 4 W (2d) 655, 91 NW (2d) 208.

Under the statutory definition of first-degree murder (940.01, Stats. 1965), which makes "intent to kill" an essential element of that offense, that phrase is defined as meaning the mental purpose to take the life of another human being. Payne v. State, 36 W (2d) 307, 152 NW (2d) 903.

See note to 939.23, citing State v. McCarter, 36 W (2d) 608, 153 NW (2d) 527.

One who stabs another in the neck with a knife must be held to understand that death is a natural and probable consequence of such act. Greer v. State, 40 W (2d) 72, 161 NW (2d) 255.

In a prosecution for first-degree murder, the evidence (largely circumstantial) was sufficient to support a conviction. State v. Davidson, 44 W (2d) 177, 170 NW (2d) 755.

Legal concepts of human life: the infanticide doctrines. Meldman, 52 MLR 105.

940.02 History: 1955 c. 696; Stats. 1955 s. 940.02.

"The first condition of the statute is, that the act producing death shall be imminently dangerous to others. It has been said that every act producing death must be thus dangerous. Perhaps this is literally true. But the statute does not go on fortuitous or latent danger, but on essential and apparent danger, of the act producing death. The act must be inherently and consciously dangerous to life, not such as casually produces death by misadventure. It must be dangerous in and of itself, as committed and when committed, whether death follow it or not." Hogan v. State, 36 W 226, 246-247.

"The imminently dangerous act evincing a depraved mind, regardless of human life, distinguishes this grade of crime from manslaughter, as the want of intent to kill distinguishes it from murder in the first degree; and we see no reason why it should not so distinguish it in all cases, whether of general or special malice." Hogan v. State, 36 W 226, 249-250.

To cock and discharge a loaded shotgun in a small room containing 10 or 11 persons scattered about is an act evincing a depraved mind. Frank v. State, 94 W 211, 68 NW 657.

The evidence was sufficient to warrant a conviction of murder in the second degree. Spick v. State, 140 W 104, 121 NW 664.

The evidence was sufficient to support a conviction of murder in the second degree. Lilystrom v. State, 146 W 525, 132 NW 132.

The facts and circumstances were such that the perpetrator of the act may well be held to have known that in its necessary and ordinary consequences it was dangerous to the life of another, and hence it furnishes the foundation for the legal inference of such constructive intent as is implied in the law from such conduct under the statute defining murder in the second degree. Zingler v. State, 146 W 531, 131 NW 837.

The testimony of an accused, accepted as true, proved him guilty of murder in the second degree and he was convicted of that crime. He was not prejudiced by an incorrect definition in the charge of manslaughter in the fourth degree. Carlowe v. State, 150 W 38, 136 NW 153.

Murder in the second degree is included within murder in the first degree, being distinguished therefrom only by the absence of express malice or "premeditated design to effect the death of the person killed or of any human being" necessary to constitute the higher offense. Radej v. State, 152 W 503, 140 NW 21.

A conviction for murder in the second degree was warranted by evidence which tended to establish that one who set a gun in his orchard was actuated by malice, deliberation, depravity of mind evincing disregard for human life, and intent to injure whoever might enter the orchard for the purpose of stealing apples. Schmidt v. State, 159 W 15, 149 NW 388.

An information that was insufficient to charge murder in the first degree was insufficient also to charge murder in the second or third degree because it contained no language charging such lower degree. In re Carlson, 176 W 538, 186 NW 722.

In a prosecution for murder in the second degree where the state made no claim that the defendant was so far intoxicated that he had lost his power of volition, it was not error to reject his offer of testimony to show that the liquor consumed on the day of the crime would not ordinarily have intoxicated him. The driving of an automobile at high speed along a much traveled street and into a group of persons about to board a street car evinced the "depravity of mind" contemplated by sec. 4339, Stats. 1917, if the resulting death was not effected with premeditated design. Montgomery v. State, 178 W 461, 190 NW 105.

Evidence that accused was drunk, had a revolver, was the last person seen with the deceased while he was alive, that he said he wanted to "roll" the deceased, that he later, while intoxicated, stated he was out in the country shooting, and that he had evaded of-

ficers was sufficient to sustain a conviction of murder in the second degree. A homicide, otherwise constituting first degree murder, committed by one too intoxicated to form a premeditated design to kill, is reduced to murder in the second degree, which is included in and contains all the elements of first degree murder except premeditated design. Where the proof leaves the existence of premeditated design to kill fairly in doubt, the question whether the offense is first or second degree murder is for the jury, and its verdict is conclusive on the question of the degree of homicide. Lasecki v. State, 190 W 274, 208 NW 868.

Second-degree murder is distinguished from first-degree murder by the absence of a premeditated design to effect death. Defendant, who was convicted of murder in the second degree, cannot complain and secure a reversal of the conviction because the jury found him guilty of a lower degree of homicide than first-degree murder, which latter would have been sustained by the evidence. Walsh v. State, 195 W 540, 218 NW 714.

The term "depraved mind", as used in defining second-degree murder, carries the suggestion of an induced or self-created condition of mind, which is to be distinguished from a state of mind generally described as insanity or feeble-mindedness resulting from some disease or defect existing from birth or early childhood. State v. Johnson, 233 W 668, 290 NW 159.

If the actions and mental state of a defendant are found to be such as to make him guilty of first-degree murder, with the sole exception that he does not have a mental purpose to take the life of another human being, he is guilty of second-degree murder. The "depravity" referred to in the definition of second-degree murder is present as well in first-degree murder, the difference being the absence of a design to effect death. Zenou v. State, 4 W (2d) 655, 91 NW (2d) 208.

Second-degree murder is first-degree murder without the intent to kill. First-degree murder may be submitted without also submitting second-degree murder where intent to kill clearly appears beyond a reasonable doubt. Where the actor kills in the heat of passion without such provocation as will reduce the defense to manslaughter, the killing is second-degree murder. Brook v. State, 21 W (2d) 32, 123 NW (2d) 535.

Defendant's claim that the homicide was by "misadventure" was dispelled by proof revealing that after being beaten by strangers in a tavern he secured a gun from his home, returned to the tavern, and during a struggle to disarm him discharged the weapon, killing one patron and injuring another, for the jury could infer therefrom that the conduct of the accused evinced a depraved mind regardless of human life, and such conduct was imminently dangerous to another. State v. Bond, 41 W (2d) 219, 163 NW (2d) 601.

940.03 History: 1955 c. 696; Stats. 1955 s. 940.03.

In order to make killing without design murder in the third degree the felony attempted or committed, from which the implied malice necessary to murder must be derived, must have an intimate relation and close connection with the killing; and when the act constituting felony is itself dangerous to life the killing must be naturally consequent to the felony. State v. Hammond, 35 W 315.

The evidence did not show that accused was guilty of murder in the third degree. Terrill v. State, 74 W 278, 42 NW 243.

There must be such a legal relation between the killing and the felony that it can be said that the former occurred by reason and as a part of the felony. Where the defendant's assault upon a third person with intent to do great bodily harm was terminated before the deceased was killed, the homicide was not third-degree murder. Hoffman v. State, 88 W 166, 59 NW 588.

A homicide occurred when the defendant, while searching for a person whom he avowedly intended to kill, fatally shot another person who had ordered him off the premises. The trial court submitted to the jury the questions of murder in the first degree, murder in the second degree, and not guilty. The evidence supported a conviction for murder in the first degree, but would not support a conviction for murder in the third degree, nor for manslaughter in the second degree, and hence the court did not err in refusing to submit instructions on murder in the third degree or on manslaughter in the second degree. Lee v. State, 236 W 181, 294 NW 513.

Under 940.03 a defendant should not have been convicted of third-degree murder and also of the lesser felony necessarily included therein of arson of a building (in which an occupant thereof was burned to death as a result of a fire set by defendant). State v. Carlson, 5 W (2d) 595, 93 NW (2d) 355.

Where a defendant who had committed a burglary was stopped by an officer because of a loose license plate and the defendant killed him to prevent his looking in the car, there was no such connection between the burglary and the killing as to reduce the offense to third-degree murder. Brook v. State, 21 W (2d) 32, 123 NW (2d) 535.

A defendant convicted of third-degree murder under proof disclosing that the killing occurred during an attempted robbery was validly sentenced to an indeterminate term not to exceed 20 years under 940.03, Stats. 1961, since the maximum which could be imposed for that offense was 25 years. State ex rel. Ostrowski v. Burke, 33 W (2d) 151, 146 NW (2d) 809.

The evidence was sufficient to sustain a conviction of third-degree murder. Woodhull v. State, 43 W (2d) 202, 168 NW (2d) 281.

940.04 History: 1955 c. 696; Stats. 1955 s. 940.04.

Preservation of the mother's life relates only to a case where the death of the mother can reasonably be anticipated to result from natural causes unless the child is destroyed. It does not reach a case in which the pregnant woman has threatened to commit suicide unless she is relieved of the child, though such a threat has been communicated to the physi-

cian who removes it. Hatchard v. State, 79 W 357, 48 NW 380.

Where the abortion was produced by operating with a knife upon the womb of a healthy young woman who soon after was delivered of a partly-grown child and then attacked with peritonitis, of which she died, an irresistible inference is raised that the operation was not necessary to preserve the woman's life. The accused must prove that the operation was advised by 2 physicians. It is not a defense that one of the defendants, who was a physician, thought that it was necessary to save the woman's life, if it in fact was not necessary. Hatchard v. State, 79 W 357, 48 NW 380.

Dying declarations are admissible when made upon the reasonable request of a physician to enable him to diagnose the case or protect himself from prosecution. State v. Law, 150 W 313, 137 NW 457.

At common law the use of instruments or drugs upon a pregnant woman, though with her consent, for the purpose of producing abortion, if death was the result, was murder. It is not material whether the deceased woman was quick with child or not. State v. Dickinson, 41 W 299; State v. Walters, 199 W 68, 225 NW 167.

In a prosecution for causing death by abortion the state must prove beyond a reasonable doubt that the deceased was pregnant. The weight of the evidence is for the jury. Parke v. State, 204 W 443, 235 NW 775.

See note to 939.31, citing State v. Timm, 244 W 508, 12 NW (2d) 670.

In a prosecution under 351.22, Stats. 1947, proof of the use of instruments is not required. State v. Adams, 257 W 433, 43 NW (2d) 446.

The evidence was sufficient to sustain a conviction under 940.04, Stats. 1961. State v. Cohen, 31 W (2d) 97, 142 NW (2d) 161.

The evidence was sufficient to sustain a conviction under 940.04, Stats. 1965. State v. Gresens, 40 W (2d) 179, 161 NW (2d) 245.

The evidence was sufficient to sustain a conviction under 940.04, Stats. 1967. State v. Harling, 44 W (2d) 266, 170 NW (2d) 726.

940.05 History: 1955 c. 696; Stats. 1955 s. 940.05.

The fact that shooting and killing were preceded by a quarrel, much abusive language and great excitement will warrant a verdict of manslaughter. Perkins v. State, 78 W 551, 47 NW 827.

An officer who kills a person in attempting to arrest him under legal process and while he is resisting arrest is not guilty of a crime unless the killing was unnecessary, in which event the crime is manslaughter. Doherty v. State, 84 W 152, 53 NW 1120.

One who is charged with murder and against whom the evidence justifies a verdict of murder in the second degree cannot claim error because the court did not of his own motion submit the case to the jury for a verdict of manslaughter. Frank v. State, 94 W 211, 68 NW 657.

One who unnecessarily but intentionally kills his assailant while resisting an attempt on his part to commit a felony or to do any unlawful act against him is not placed upon the same basis of criminality as one who commits murder in the first degree; he may, under such circumstances, be guilty under sec. 4351, R. S. 1878. The evidence would have sustained a verdict of manslaughter. Terrill v. State, 95 W 276, 70 NW 356.

Failure to instruct the jury respecting manslaughter was not a material error, in the absence of a specific request for instructions on that point, although the facts were applicable to that degree of homicide. Sullivan v. State, 100 W 283, 75 NW 956.

The circumstances of the case did not require the submission to the jury of the question of guilt for manslaughter. Perugi v. State, 104 W 230, 80 NW 593.

A charge that "heat of passion means something more than anger or irritation; it means that at the time of the act the reason is disturbed or obscured by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation or reflection and from passion rather than from judgment," was proper. Ryan v. State, 115 W 488, 92 NW 271.

Where the theory of the state was that the defendant either struck the deceased with a lamp intentionally or struck the lamp intentionally so as to cause the fire by which deceased was killed, and the theory of the defense was that the lamp was struck accidentally, it was not proper to submit the question of manslaughter under sec. 4363, Stats. 1898, because if the state's theory was correct then the means used were both cruel and unusual, and if the theory of the defense was correct, there was no heat of passion. Bliss v. State, 117 W 596, 94 NW 325.

The evidence was sufficient to sustain the conviction of manslaughter. Kenney v. State, 124 W 486, 102 NW 907.

The evidence was such as to require a charge to the jury as to manslaughter. Duthey v. State, 131 W 178, 111 NW 222.

Where an officer attempted to search a person without warrant and such person drew a revolver in the presence of the officer, he was thereupon guilty of a violation of sec. 4397, Stats. 1898, and the further attempt of the officer to arrest such person became lawful, so that the killing by such person was not manslaughter within sec. 4351. Anderson v. State, 133 W 601, 114 NW 112.

The evidence was sufficient to sustain a conviction for manslaughter. Pollock v. State, 136 W 136, 116 NW 851.

It is not sufficient proof of heat of passion for the accused to merely testify that he was exceedingly angry or passionate at the time in question. Such testimony must be supplemented by proof of facts and circumstances showing such provocation as would ordinarily produce heat of passion. Carlone v. State, 150 W 38, 136 NW 153.

Although seeking to justify on the ground of self-defense a defendant may nevertheless, if the evidence tends to show that the killing was done in a heat of passion, be entitled to have submitted the question as to the degree of manslaughter. Patzer v. State, 158 W 39, 147 NW 1022.

The fact that defendant testified that he was not acting under the heat of passion does not conclude him upon the subject and he is entitled to ask for an instruction that he might be found guilty of manslaughter. (Perugi v. State, 104 W 235, 80 NW 593, insofar as it holds to the contrary, overruled.) Montgomery v. State, 183 W 128, 107 NW 14.

Where there was testimony that officers had searched the quarters where the defendant lived against his protest and his demand for the production of a search warrant, an instruction that the fact that the officers had no search warrant had no bearing on the case except as relating to their credibility constituted prejudicial error, since such fact had a bearing in the circumstances on the question of "heat of passion" as an element in determining the degree of homicide. Melli v. State, 220 W 419, 265 NW 79.

The "heat of passion" which, under 940.05 (1), will reduce what would otherwise be murder to manslaughter is such mental disturbance, caused by reasonable, adequate provocation, as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason, make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from impelling force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition. The provocation, in order to be sufficient in law, must be such as, naturally and instantly, to produce in the minds of persons, ordinarily constituted, the highest degree of exasperation, rage, anger, sudden resentment, or terror. Zenou v. State, 4 W (2d) 655, 91 NW (2d) 208.

The slain police officer's act of allegedly striking the defendant in the mouth and attempting to pull his gun from the holster did not constitute sufficient provocation to cause such heat of passion in persons ordinarily constituted as to cause them to kill without intent to do so, so that, therefore, the trial court did not err in refusing to submit the lesser offense of manslaughter. Brook v. State, 21 W (2d) 32, 123 NW (2d) 535.

Provocation engendering "heat of passion" sufficient in law to reduce murder to manslaughter must be such as, naturally and instantly, would produce in the minds of persons, ordinarily constituted, the highest degree of exasperation, rage, anger, sudden resentment, or terror. State v. Hoyt, 21 W (2d) 284, 128 NW (2d) 645.

The test to be applied with respect to provocation engendering "heat of passion" sufficient in law to reduce murder to manslaughter is not the subjective one of whether it was sufficient to produce in defendant such passion as to cause him to kill without intent to do so, but rather it is the objective one of whether the provocation would have caused such state of mind in persons ordinarily constituted. Weston v. State, 28 W (2d) 136, 135 NW (2d) 820; Bosket v. State, 31 W (2d) 586, 143 NW (2d) 553.

To constitute a legal defense of manslaughter as that crime is defined in 940.05 (1), Stats. 1963, it must be caused by a reasonable and adequate provocation, tested not by subjective existence of the state of mind of the actor but rather whether the provocation would have caused such a state of mind of an ordinary person under the same circumstances. State v. Bond, 41 W (2d) 219, 163 NW (2d) 601.

The required state of mind under the manslaughter statute. Baldikoski and Church, 1963 WLR 636.

940.06 History: 1955 c. 696; Stats. 1955 s. 940.06.

The evidence was such that the question of guilt, for gross negligence, should have been submitted to the jury. Bliss v. State, 117 W 596, 94 NW 325.

Where a person killed his wife during what was claimed to be insanity growing out of her conduct, it was not within sec. 4363, Stats. 1898. Duthey v. State, 131 W 178, 111 NW 222.

The gross negligence statute does not apply if the act involved constitutes homicide under some other statute. State v. Risjord, 228 W 535, 280 NW 680.

In a prosecution for manslaughter through gross negligence evidence that the defendant motorist, after stopping for a stop light at a street intersection, started his automobile and increased his speed without observing traffic in front of him, and failed to observe an automobile being pushed by several persons on a well-lighted bridge, and, while talking to a companion, struck the pushed car, causing fatal injuries to one of the persons pushing, was insufficient to sustain a finding that the defendant was guilty of "gross negligence" necessary for conviction. Bussard v. State, 233 W 11, 288 NW 187.

Reckless driving—prosecution and defense. O'Connell, 1958 WLR 210.

940.07 History: 1955 c. 696; Stats. 1955 s. 940.07.

940.08 History: 1955 c. 696; Stats. 1955 s. 940.08; 1965 c. 417.

The evidence on preliminary examination, sufficient to justify a finding of reasonable probability of the defendant's guilt of unlawful operation of his car on the highway in respect to driving carelessly and heedlessly or without due caution and circumspection, or so as to be likely to endanger life or limb, or without due regard to the traffic and other existing conditions, at the time of striking the girl, was sufficient to support holding the defendant for trial on a charge of negligent homicide under 340.271 (2), Stats. 1941. State ex rel. Shields v. Portman, 242 W 5, 6 NW (2d) 713.

See note to sec. 8, art. I, on limitations imposed by the Fourteenth Amendment, citing State ex rel. Zent v. Yanny, 244 W 342, 12 NW (2d) 45.

"It is considered that the negligence requisite for a conviction under sec. 340.271 (2), Stats., is substantially and appreciably higher in magnitude than ordinary negligence. It is

negligence of an aggravated character. It is great negligence. It represents indifference to legal duty. It is conduct that not only creates unreasonable risk of bodily harm to another, but also involves a high degree of probability that substantial harm will result to such other person. In other words, the culpability which characterizes all negligence is magnified to a higher degree as compared with that present in ordinary negligence. On the other hand, it is something less than wilful and wanton conduct which, by the law of this state, is the virtual equivalent of intentional wrong." State ex rel. Zent v. Yanny, 244 W 342, 347, 12 NW (2d) 45, 47.

See note to 346.62, citing 46 Atty. Gen. 110.

940.09 History: 1955 c. 696; Stats. 1955 s. 940.09.

On chemical tests for intoxication see notes to 885.235.

In a prosecution under 340.271 (1), Stats. 1951, if it is shown that the death was caused by the defendant's operation of the car, and also that the defendant was intoxicated when he so operated the car, it must be assumed that there existed a causal connection between the intoxication and the death, and the state has no further burden as to proving such causal connection. State v. Resler, 262 W 285, 55 NW (2d) 35.

In a prosecution under 340.271 (1), Stats. 1951, if for negligent homicide by the operation of an automobile while under the influence of alcoholic beverages, the important elements are that the operator was under the influence of alcoholic beverages, and that he caused the death of another person while operating such motor vehicle; and no testimony that the accident resulted from lack of due care on the part of the defendant, or resulted from the fact that he was under the influence of alcoholic beverages, is necessary. The "negligence" is the driving of a motor vehicle while under the influence of alcoholic beverages. State v. Peckham, 263 W 239, 56 NW (2d) 835.

The evidence sustained a conviction under 340.271 (1), Stats. 1951, for negligent homicide by the operation of an automobile while under the influence of intoxicating liquor, as against a claim that the defendant's alleged "fainting spells," his erratic driving, and his unawareness of events were due to a physical condition caused by pernicious anemia. State v. Schmack, 264 W 333, 58 NW (2d) 668.

940.12 History: 1955 c. 696; Stats. 1955 s. 940.12.

940.20 History: 1955 c. 696; Stats. 1955 s. 940.20; 1961 c. 245.

Where the verdict finds one accused of assault with intent to do great bodily harm guilty of the assault, but innocent of the intent, the punishment should be for a simple assault only. Vosburgh v. State, 82 W 168, 51 NW 1092.

Where the blow and consequent damage was admitted by the defendant, the burden is upon him to prove facts constituting a justification. Where property is in the peaceful possession of the plaintiff the owner has no right to retake it by force. Monson v. Lewis, 123 W 583, 101 NW 1094.

Where a person has peaceful possession of the key of a building in which defendant's goods are, defendant is not justified in making an assault for the purpose of obtaining possession of the key. Winter v. Beebe, 126 W 379, 105 NW 953.

A person on trial for any degree of homicide cannot be convicted of assault and battery. An assault and battery, not resulting in death, is not a lesser degree of homicide; but when it causes death the assailant is guilty of some degree of homicide, at least manslaughter of the fourth degree. Roohana v. State, 167 W 500, 167 NW 741.

Judgments against 6 defendants were supported by findings that one or more of them assaulted plaintiff, and the others were present aiding and encouraging the assault by words or actions. Shear v. Woodrick, 181 W 30, 193 NW 968.

See note to 939.32, citing State v. Vinson, 269 W 305, 68 NW (2d) 712, 70 NW (2d) 1.

940.201 History: 1969 c. 456; Stats. 1969 s. 940.201.

940.205 History: 1967 c. 216; Stats. 1967 s. 940.205.

There is no ambiguity in 940.205, Stats. 1967, which upgrades the seriousness and increases the penalty for causing harm to a police officer or fireman, the 5 elements of the offense being clearly and explicitly delineated therein. State v. Caruso, 44 W (2d) 696, 172 NW (2d) 195.

940.205 was not intended only to give added protection to police officers and firemen during situations of mass disorder, but was designed to deal with the risk of danger to such officers wherever unprovoked striking takes place. State v. Caruso, 44 W (2d) 696, 172 NW (2d) 195.

Knowledge on the part of the defendant that the officer was present and acting in an official capacity is not an element of the offense defined in 940.205. State v. Caruso, 44 W (2d) 696, 172 NW (2d) 195.

In a prosecution for inflicting bodily harm on a police officer, contrary to 940.205, the evidence was sufficient to sustain a conviction. State v. Caruso, 44 W (2d) 696, 172 NW (2d) 195.

In a prosecution for battery to a city police officer, in violation of 940.205, the evidence was sufficient to sustain a conviction. Williams v. State, 45 W (2d) 44, 172 NW (2d) 31.

Battery to peace officers and firemen in Wisconsin. 1969 WLR 340.

940.206 History: 1969 c. 252; Stats. 1969 s. 940.206.

940.21 History: 1955 c. 696; Stats. 1955 s. 940.21.

340.35, Stats. 1937, is not applicable to a vasectomy performed for the purpose of benefiting the health of the patient. 27 Atty. Gen. 416.

A doctor performing a sterilization operation, such as a salpingectomy or vasectomy, at the voluntary rational consent of a patient, is not committing a crime under Wisconsin law. 57 Atty. Gen. 191.

940.22 History: 1955 c. 696; Stats. 1955 s. 940.22; 1961 c. 48.

An assault with intent to do great bodily harm, under sec. 4377, Stats. 1919, is the same whether committed in the heat of passion or with deliberation. Mainville v. State, 173 W 12, 179 NW 764.

The submission of a verdict covering assault with intent to murder while armed with a dangerous weapon, assault with intent to do great bodily harm, under 340.41, Stats. 1941, and simple assault, and a conviction for assault with intent to do great bodily harm, were proper as against the contention that the offense of assault with intent to murder while armed with a dangerous weapon excludes lower forms of assault while so armed. State v. Wagner, 239 W 634, 2 NW (2d) 229.

See note to 939.32, citing State v. Vinson, 269 W 305, 68 NW (2d) 712, 70 NW (2d) 1.

Assault with intent to do great bodily harm is a lesser offense than mayhem and is included therein, so that he may be found guilty of the lesser when the greater offense is not proved. State v. Carli, 2 W (2d) 429, 86 NW (2d) 434, 87 NW (2d) 830.

Where defendant struck his victim over the head with a ratchet wrench and she suffered a two inch scalp laceration which required hospitalization for a few days, but she suffered no pain other than headaches and a sore jaw, the victim did not sustain "great bodily harm" within the meaning of 940.22. State v. Bronston, 7 W (2d) 627, 97 NW (2d) 504, 98 NW (2d) 468.

940.23 History: 1955 c. 696; Stats. 1955 s. 940.23.

A charge under sec. 4374a, Stats. 1921, is much more serious than a charge of manslaughter. Except as to death, the charge must correspond with a charge of murder in the second degree. Driving a motorcycle upon a country highway at 2 o'clock in the morning at a high rate of speed resulting in a collision and injury to persons in another vehicle was not a violation of this section, since there was lacking proof of a depraved mind, regardless of human life. Njecick v. State, 178 W 94, 189 NW 147.

See note to 940.02, citing State v. Johnson, 233 W 668, 290 NW 159.

940.24 History: 1955 c. 696; Stats. 1955 s. 940.24; 1965 c. 417.

On homicide by negligent use of vehicle or weapon see notes to 940.08.

940.28 History: 1955 c. 696; Stats. 1955 s. 940.28.

940.29 History: 1955 c. 696; Stats. 1955 s. 940.29.

A rule of the state board of public welfare authorizing corporal punishment of inmates of the industrial school for boys does not conflict with the statute and is authorized under 46.03 (5). Excessive punishment would violate the statute as well as constitute assault and battery giving rise to an action for damages. 33 Atty. Gen. 127.

940.30 History: 1955 c. 696; Stats. 1955 s. 940.30.

940.31 History: 1955 c. 696; Stats. 1955 s. 940.31.

The intent mentioned in sec. 4387, R. S. 1878, qualifies each preceding clause thereof to which it can be made applicable, and must be alleged and proved in order to support a conviction thereunder. Smith v. State, 63 W 453, 23 NW 879.

For an information conceded to be insufficient under the statute, but good at common law, see Davies v. State, 72 W 54, 38 NW 722.

Conviction of the offense of kidnaping does not require proof that the victim was carried beyond the boundaries of the state or that it was the intention of defendants to carry him without the state. An allegation of intent to secretly confine or imprison another person within the state against his will is sufficient to distinguish the offense of kidnaping from the offense of false imprisonment. Hackbarth v. State, 201 W 3, 229 NW 83.

The power to arrest does not confer upon the arresting officer the power to detain a prisoner for other purposes. The defendants in an action for false imprisonment, having detained the plaintiff in the exercise of a supposed power which they did not possess, cannot complain that upon the trial they were not permitted to justify the act upon other grounds. An officer who unlawfully arrests and detains a person upon one charge cannot justify his conduct by showing that the person so arrested was subject to a legal arrest upon other grounds. Geldon v. Finnegan, 213 W 539, 252 NW 369.

A mother, having temporary lawful custody of a child by virtue of a divorce decree, is not guilty of kidnaping where she takes such child out of the state and refuses to surrender it to the custody of the father, who is entitled to permanent custody under the divorce decree. 4 Atty. Gen. 802.

940.32 History: 1955 c. 696; Stats. 1955 s. 940.32.

A mother is not guilty of an offense under 355.55, Stats. 1929, if she secretly takes her own children away from her husband who has custody of the children after a divorce. 20 Atty. Gen. 91.

A conviction under the abduction statute is not a conviction of "kidnaping". 28 Atty. Gen. 4.

See note to 971.19, citing 37 Atty. Gen. 401.

CHAPTER 941.

Crimes Against Public Health and Safety.

941.01 History: 1955 c. 696; Stats. 1955 s. 941.01; 1957 c. 674.

See note to 346.62, citing 46 Atty. Gen. 110.

941.03 History: 1955 c. 696; Stats. 1955 s. 941.03.

It is not necessary, in an action under sec. 4386, Stats. 1898, to show that the defendant was actuated with an intent to prevent the safe running of trains or injure human life. State v. Bisping, 123 W 267, 101 NW 359.

941.04 History: 1955 c. 696; Stats. 1955 s. 941.04.