

**PJC 51.18           Emergency Care (Statutory)**

**PJC 51.18A       Emergency Care (Statutory)—Emergency Scene Outside a Hospital,  
Health Care Facility, or Medical Transport**

QUESTION 1

Did *Dr. Davis* perform the tracheotomy on *Paul Payne* without remuneration or the expectation of remuneration?

*[For actions filed before September 1, 2003, use the following instruction.]*

A person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering emergency care to the patient in question shall be deemed to be acting for or in expectation of remuneration even if the person waives or elects not to charge or receive remuneration on the occasion in question.

*[For actions filed on or after September 1, 2003, use the following instruction.]*

Being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you answered “Yes” to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was such emergency care rendered by *Dr. Davis* with willful or wanton negligence?

“Willful or wanton negligence” means an act or omission by *Dr. Davis*,

1. which when viewed objectively from the standpoint of *Dr. Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which *Dr. Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you answered “Yes” to Question 2, then answer Question 3. Otherwise, do not answer Question 3.

### QUESTION 3

Was such negligence a proximate cause of the [*injury*] [*occurrence*]?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

### COMMENT

#### When to use.

*Actions filed before September 1, 2003.* PJC 51.18A should be used if the evidence shows the scene of the emergency is outside a hospital, health care facility, or means of medical transport. The “Good Samaritan” statute provides that there is no liability for civil damages for administering the care in good faith “unless the act is wilfully or wantonly negligent.” See former Tex. Civ. Prac. & Rem. Code ch. 74 (Acts 1985, 69th Leg., R.S., ch. 959, § 1 (S.B. 797), eff. Sept. 1, 1985, amended by Acts 1993, 73d Leg., R.S., ch. 960, § 1 (S.B. 386), eff. Aug. 30, 1993).

*Actions filed on or after September 1, 2003.* PJC 51.18A should be used regardless of where the emergency in question occurred if such care was not provided for or in expectation of remuneration. Tex. Civ. Prac. & Rem. Code § 74.151(b)(1).

**Use of “injury” or “occurrence.”** See PJC 51.1.

**Substitution of “death.”** Under the Texas wrongful death statute, a defendant’s liability may be predicated only on “an injury that causes an individual’s death.” Tex. Civ. Prac. & Rem. Code § 71.002(b); see also *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word “death” may be substituted for the word “injury” in the negligence question.

**Remuneration.** In *McIntyre v. Ramirez*, 109 S.W.3d 741 (Tex. 2003), the supreme court rejected the argument that a person will be immune only if the person can prove that he is not “legally” entitled to receive payment.

**If emergency is in issue.** If performance of the emergency care at the scene of an emergency is in issue, a preliminary question would need to be submitted, such as—

*Did Dr. Davis perform the tracheotomy on Paul Payne during an emergency?*

Words describing the particular care rendered should be substituted for the phrase *perform the tracheotomy*.

**When to omit Question 3.** In the usual case, Question 2 will be pleaded and argued as an affirmative defense. Thus, the plaintiff will have requested and the court will have submitted questions on and definitions of ordinary negligence and proximate cause. In such a case, Question 3 should be omitted.

**Source of definition.** The definition of “willful or wanton negligence” is based on that of “gross negligence” in Tex. Civ. Prac. & Rem. Code § 41.001(11). See *Hernandez v. Lukefahr*, 879 S.W.2d 137, 141–42 (Tex. App.—Houston [14th Dist.] 1994, no writ) (based on predecessor to section 74.151).

**PJC 51.18B      Emergency Care (Statutory)—Emergency Scene Inside a Hospital, Health Care Facility, or Medical Transport**

**QUESTION 1**

Was such emergency care rendered by *Dr. Davis* with willful or wanton negligence?

“Willful or wanton negligence” means an act or omission by *Dr. Davis*,

1. which when viewed objectively from the standpoint of *Dr. Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which *Dr. Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you answered “Yes” to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

**QUESTION 2**

Was such negligence a proximate cause of the [*injury*] [*occurrence*]?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.**

*Actions filed before September 1, 2003.* PJC 51.18B should be used if the evidence shows the scene of the emergency is inside a hospital, health care facility, or means of medical transport. The “Good Samaritan” statute provides that there is no liability for civil damages for administering the care in good faith “unless the act is wilfully or wantonly negligent.” See former Tex. Civ. Prac. & Rem. Code ch. 74 (Acts 1985, 69th Leg., R.S., ch. 959, § 1 (S.B. 797), eff. Sept. 1, 1985, amended by Acts 1993, 73d Leg., R.S., ch. 960, § 1 (S.B. 386), eff. Aug. 30, 1993).

*Actions filed on or after September 1, 2003.* PJC 51.18B should be used regardless of where the emergency in question occurred if such care was not provided for or in expectation of remuneration. Tex. Civ. Prac. & Rem. Code § 74.151(b)(1).

**Use of “injury” or “occurrence.”** See PJC 51.1.

**Substitution of “death.”** Under the Texas wrongful death statute, a defendant’s liability may be predicated only on “an injury that causes an individual’s death.” Tex. Civ. Prac. & Rem. Code §

71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word “death” may be substituted for the word “injury” in the negligence question.

**If emergency is in issue.** If performance of the emergency care at the scene of an emergency is in issue, a preliminary question would need to be submitted, such as—

Did *Dr. Davis perform the tracheotomy on Paul Payne* during an emergency?

Words describing the particular care rendered should be substituted for the phrase *perform the tracheotomy*.

**When to omit Question 2.** In the usual case, Question 1 will be pleaded and argued as an affirmative defense. Thus, the plaintiff will have requested and the court will have submitted questions on and definitions of ordinary negligence and proximate cause. In such a case, Question 2 should be omitted.

**Source of definition.** The definition of “willful or wanton negligence” is based on that of “gross negligence” in Tex. Civ. Prac. & Rem. Code § 41.001(11). *See Hernandez v. Lukefahr*, 879 S.W.2d 137, 141–42 (Tex. App.—Houston [14th Dist.] 1994, no writ) (based on predecessor to section 74.151).

DRAFT

**PJC 51.20 The Emergency Medical Treatment and Active Labor Act (EMTALA)—  
Medical Screening Examinations and/or Stabilization before Transfer  
When a Patient Comes to a Hospital with an Emergency Medical  
Condition**

QUESTION 1

Did *Paul Payne* suffer personal harm as a direct result of the failure, if any, of *Dixon Hospital* ~~fail~~ to provide an appropriate medical screening ~~examination~~ exam after *Paul Payne* came to the hospital's emergency department?

“Personal harm” means injury to the person that is more than mere economic loss.

*Paul Payne* “came to the hospital's emergency department” if he presented to the hospital's emergency department seeking an examination of, or treatment for, a medical condition.

A “medical screening examination” means an examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists.

An “appropriate medical screening examination” means a screening examination that—

1. is reasonably calculated to identify critical medical conditions that may be afflicting symptomatic patients; and
2. provides that level of screening uniformly to all those who present substantially similar complaints.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you answered “Yes” to Question 1, then answer Question \_\_\_\_\_ [*applicable damages question*] and do not answer Question 2 or 3.

If you answered “No” to Question 1, then answer Question 2.

QUESTION 2

Did *Dixon Hospital* determine that *Paul Payne* had an emergency medical condition?

An “emergency medical condition” means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

1. placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy; or

2. serious impairment to bodily functions; or
3. serious dysfunction of any bodily organ or part.

An “emergency medical condition” with respect to a pregnant woman who is having contractions means—

1. that there is inadequate time to effect a safe transfer to another hospital before delivery; or
2. that transfer may pose a threat to the health or safety of the woman or the unborn child.

*Dixon Hospital* “determined there was an emergency medical condition” if it had actual knowledge that an emergency medical condition existed or actually detected an emergency medical condition.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you answered “Yes” to Question 2, then answer Question 3. Otherwise, do not answer Question 3.

#### QUESTION 3A (Transfer)

Did Paul Payne suffer personal harm as a direct result of an inappropriate transfer, if any, by *Dixon Hospital* ~~inappropriately transfer Paul Payne~~ to another medical facility before ~~the patient's~~ Paul Payne's emergency medical condition was stabilized?

An “emergency medical condition was stabilized” if no material deterioration of the condition was likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to a woman in inactive labor, the woman had delivered (including the placenta).

A hospital may not transfer a patient with an emergency medical condition that has not been stabilized unless—

1. the patient (or a legally responsible person acting on the patient’s behalf) is informed of the hospital’s stabilization obligations and of the risk of transfer, and the patient requests transfer to another medical facility in writing; or
2. a physician signs a certification indicating that based on the information available at the time of transfer, the medical benefits reasonably expected from appropriate medical treatment at another medical facility outweigh the increased risks of transferring the individual and, in the case of labor, the unborn child; or
3. if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person in consultation with a physician

signs a certification and the consulting physician that determined the medical benefits reasonably expected from appropriate medical treatment at another medical facility outweigh the increased risks of transfer subsequently countersigns the certification; and

4. the transfer is an appropriate transfer to the facility.

An appropriate transfer means—

1. the transferring hospital provided the medical treatment within its capacity to minimize the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child; and
2. the receiving facility had available space and qualified personnel for the treatment of the individual and agreed to accept transfer of the individual and to provide appropriate medical treatment; and
3. the transferring hospital sent to the receiving facility all medical records related to the emergency condition that were available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, and the results of any tests of the patient; and
4. the transferring hospital sent to the receiving facility the informed written consent or certification permitting transfer, and the name and address of any on-call physician who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment; and
5. the transfer was effected through qualified personnel and transportation equipment, as required, including the use of necessary and medically appropriate life support measures during the transfer.

Answer "Yes" or "No."

Answer: \_\_\_\_\_

#### QUESTION 3B (Discharge)

Did *Paul Payne* suffer personal harm as a direct result of an inappropriate discharge, if any, by *Dixon Hospital* ~~inappropriately discharge *Paul Payne*~~ before *Paul Payne*'s emergency medical condition was stabilized?

An "emergency medical condition was stabilized" if no material deterioration of the condition was likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to a woman in inactive labor, the woman had delivered (including the placenta).

*Dixon Hospital*'s discharge of *Paul Payne* before the emergency medical condition was stabilized was inappropriate unless—

1. *Paul Payne* (or a legally responsible person acting on *Paul Payne*'s behalf) was informed of the hospital's stabilization obligations and of the risk of discharge; and
2. *Paul Payne* requested a discharge in writing; or
3. *Paul Payne* left *Dixon Hospital*'s facilities without the permission of any person employed by the hospital.

Answer "Yes" or "No."

Answer: \_\_\_\_\_

### COMMENT

**When to use.** PJC 51.20 should be used in actions brought under the civil enforcement clause of 42 U.S.C. § 1395dd(d)(2)(A) if the evidence shows the hospital is a Medicare participating hospital with an emergency department and the patient suffered personal harm as a direct result of the participating hospital's violation of the Emergency Medical Treatment and Active Labor Act (EMTALA). *See* 42 U.S.C. § 1395dd(d)(2)(A), (e)(2). The EMTALA creates a cause of action for individuals who are purportedly harmed either by a participating hospital's failure to (1) provide them with an "appropriate medical screening" to establish if an emergency medical condition exists or (2) "stabilize" the patient before transfer or discharge if a statutorily defined emergency medical condition has been detected. *Tenet Hospitals, Ltd. v. Boada*, 304 S.W.3d 528, 533 (Tex. App.—El Paso 2009, pet. denied). Because the civil enforcement clause of the EMTALA permits damages for personal injury under the law of the state in which the hospital is located, PJC 51.20 is to be used with the appropriate damages questions in chapters 80, 81, and 82 in this volume upon a "Yes" answer to Question 1 or a "Yes" answer to Question 3A or 3B.

While the EMTALA defines transfers as including a discharge from a participating hospital, to reduce confusion between questions, Question 3A should be used if the evidence shows the participating hospital transferred the patient to another facility, whereas Question 3B should be used if the evidence shows the patient was discharged from the participating hospital. *See* 42 U.S.C. § 1395dd(c)(1), (c)(2), (e)(4).

**Causation.** The EMTALA requires a showing of personal harm to the plaintiff that is the direct result of the participating hospital's violation of the Act. 42 U.S.C. § 1395dd(d)(2)(A); *Abney v. University Medical Center of Southern Nevada*, No. 2:09-cv-02418-RLH-PAL, 2011 WL 468349, at \*5 (D. Nev. Feb. 4, 2011) (plaintiff must show personal harm to plaintiff that was caused by the hospital's violation of the statute); *see also Baugher v. Kadlec Health System*, No. 4:14-CV-5118-TOR, 2015 WL 5165553, at \*9 (E.D. Wash. Sept. 3, 2015) (plaintiff may maintain EMTALA action for emotional distress that is proximately caused by defendant's conduct).

**Source of definitions.** The definitions for when a patient comes to the hospital and for a medical screening examination can be found at 42 U.S.C. § 1395dd(a). *See also C.M. v. Tomball Regional Hospital*, 961 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1997, no writ) (The "EMTALA requires a medicare provider hospital with an emergency room to accept any individual who comes to the emergency department and requests an examination or treatment for a medical condition."). A medical screening examination is appropriate if it is "reasonably calculated to identify critical medical conditions that may be afflicting symptomatic patients and provides that level of screening uniformly to all those who present substantially similar complaints." *Guzman v. Memorial Hermann Hospital System*, 637 F. Supp. 2d 464, 491 (S.D. Tex. 2009) *aff'd*, 409 F. App'x 769 (5th Cir. 2011); *Tomball Regional Hospital*, 961 S.W.2d at 241 (holding that a hospital is required "to provide each patient with a medical screening similar to one that it would provide to any other patient").



The definition of an emergency medical condition can be found at 42 U.S.C. § 1395dd(e)(1). *See also Tenet Hospitals, Ltd.*, 304 S.W.3d at 534. A hospital’s duty to stabilize does not arise unless the hospital has actual knowledge of or actually detects an emergency medical condition. *See Rios v. Baptist Memorial Hospital System*, 935 S.W.2d 799, 804 (Tex. App.—San Antonio 1996, writ denied) (“An additional duty arises if an emergency medical condition is discovered during the screening process.”); *Guzman*, 637 F. Supp. 2d at 507 (“Courts require ‘actual detection’ or ‘actual knowledge’ to trigger the duty to stabilize because a hospital cannot be held liable for failing to stabilize a condition of which it was unaware.”). It is necessary to include this clarification because failure to diagnose an emergency medical condition is not actionable under the EMTALA. *See Tenet Hospitals Ltd.*, 304 S.W.3d at 534 (holding that there is no liability for failure to diagnose); *Marshall on Behalf of Marshall v. E. Carroll Parish Hospital Service District*, 134 F.3d 319, 323 (5th Cir. 1998) (“Failure to appreciate the extent of the patient’s injury or illness, as well as a subsequent failure to order an additional diagnostic procedure, may constitute negligence or malpractice, but cannot support an EMTALA claim for inappropriate screening.”).

**Caveat.** If there is competent evidence that the conditions or diagnoses noted in the patient’s chart, even if incorrect or incomplete, would nonetheless constitute an “emergency medical condition” under the statutory definition, a jury question similar to QUESTION 2 above should be submitted for jury determination. *See Battle v. Memorial Hospital*, 228 F.3d 544, 559 (5th Cir. 2000).

The definition of “stabilized” can be found at 42 U.S.C. § 1395dd(e)(3)(A), ~~(e)(3)(B)~~. *See Corpus Christi Day Cruise, LLC v. Christus Spohn Health System Corp.*, 398 S.W.3d 303, 313 (Tex. App.—Corpus Christi—Edinburg 2012, pet. denied). The definitions of an appropriate and inappropriate transfer or discharge can be found at 42 U.S.C. § 1395dd(c).

## PJC 61.4 Question and Instruction on Negligent Misrepresentation

QUESTION \_\_\_\_\_

Did *Dora Dotson* make a negligent misrepresentation on which *Paul Payne* justifiably relied?

Negligent misrepresentation occurs when—

1. a party makes a representation in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary interest; and
2. the representation supplies false information for the guidance of others in their business; and
3. the party making the representation does not exercise reasonable care or competence in obtaining or communicating the information.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

### COMMENT

**When to use.** PJC 61.4 is a broad-form question that ~~should be appropriate in most cases involving~~ submits a claim ~~offor~~ negligent misrepresentation ~~if the court, as a matter of law, or the jury, as a matter of fact, has found that the plaintiff is within the class of persons allowed to bring this cause of action based on~~ Restatement (Second) of Torts § 552 (1977). See *Federal Land Bank Ass’n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (adopting *Restatement (Second) of Torts § 552 (1977)*, tort of negligent misrepresentation, and listing elements). A section 552 cause of action is recognized against professionals. See *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999) (listing examples of various professionals against whom a section 552 cause of action is recognized, including auditors, physicians, real estate brokers, securities placement agents, surveyors, accountants, and title insurers). The court in *McCamish, Martin* extended the list to include attorneys, holding that the absence of an attorney-client relationship does not preclude a nonclient from suing an attorney for negligent misrepresentation under *Restatement (Second) of Torts § 552*. *McCamish, Martin*, 991 S.W.2d at 791. The court reasoned that under the tort of negligent misrepresentation, liability is based not on a duty a professional owes a client, but an “independent duty to nonclients based on the professional’s manifest awareness of the nonclient’s reliance on the misrepresentation and the professional’s intention that the nonclient so rely.” *McCamish, Martin*, 991 S.W.2d at 792. However, certain limitations apply. A section 552 cause of action is available “only when information is transferred by an attorney to a known party for a known purpose.” *McCamish, Martin*, 991 S.W.2d at 794; see also *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 788 (Tex. 2006) (liability is limited to those situations in which the attorney provided information to a third party with the knowledge that the third party intended to rely on it); *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 920 (Tex. 2010) (“Unless a plaintiff falls within this scope of liability, a defendant cannot be found liable for negligent misrepresentation”).

**Source of question and instruction.** The question and instruction are from the supreme court’s opinion in *Sloane*, 825 S.W.2d at 442.

~~); see also *McCamish, Martin, Brown & Loeffler v. Relationship to professional negligence.* Negligent misrepresentation is distinct from malpractice. *McCamish, Martin*, 991 S.W.2d at 792. In *LAN/STV v. Eby*, 435 S.W.3d 234, 235–36, 246–47 (Tex. 2014), the supreme court examined its precedents and found that “[t]hese cases should not be read to suggest that recovery of economic damages is broader for negligent misrepresentation than for negligent performance of services.” *LAN/STV*, 435 S.W.3d at 245. “The economic loss rule should not apply differently to these two tort theories in the same situation.” *LAN/STV*, 435 S.W.3d at 246. The issue in *LAN/STV* was whether the economic loss rule permitted the general contractor to recover the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentation in the plans and specifications. The court held that under those facts the economic loss rule did not allow recovery. *LAN/STV*, 435 S.W.3d at 250.~~

~~**Damages.** *F.E. Applying Interests*, 991 S.W.2d 787, 791 (Tex. 1999). A defendant is liable only for pecuniary loss caused to the plaintiff by the plaintiff’s justifiable reliance on the representation. *See Sloane*, 825 S.W.2d at 442–43.~~

~~**Source of question and instruction.** The question and instruction are from the supreme court’s opinion in *Sloane*, 825 S.W.2d at 442.~~

**Damages.**—Economic damages for negligent misrepresentation are limited to those necessary to compensate the party for the pecuniary loss caused by the misrepresentation. Benefit-of-the-bargain and lost-profit damages are not available. *Sloane*, 825 S.W.2d at 442–43 (adopting *Restatement (Second) of Torts* § 552B (1977)); *see also D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663–64 (Tex. 1998). In *D.S.A., Inc.*, the court also recognized that under *Restatement (Second) of Torts* § 311 (1965), “[a] party may recover for negligent misrepresentation involving a risk of physical harm only if actual physical harm results.” *D.S.A., Inc.*, 973 S.W.2d at 664; *accord Sloane*, 825 S.W.2d at 443 n.4. For submission of negligent misrepresentation damages, see PJC 84.6.

## QUESTION \_\_\_\_\_

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit capital murder that was a proximate cause of the damages, if any, to *Paul Payne*?

*Don Davis* acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

“Murder” means that a person—

1. intentionally or knowingly causes the death of an individual; or
2. intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
3. commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

“Capital murder” means—

1. the person murders a peace officer or firefighter who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or firefighter; or
2. the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat; or
3. the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration; or
4. the person commits the murder while escaping or attempting to escape from a penal institution; or
5. the person, while incarcerated in a penal institution, murders another—
  - a. who is employed in the operation of the penal institution; or

- b. with the intent to establish, maintain, or participate in a combination or in the profits of a combination; or
6. the person—
    - a. while incarcerated for an offense under this section or for murder, murders another; or
    - b. while serving a sentence of life imprisonment or a term of ninety-nine years for aggravated kidnapping, aggravated sexual assault, or aggravated robbery, murders another; or
  7. the person murders more than one person—
    - a. during the same criminal transaction; or
    - b. during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or
  8. the person murders an individual under ten years of age; or
  9. the person murders an individual ten years of age or older but younger than fifteen years of age; or
  - 9.10. the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

#### COMMENT

**When to use.** PJC 72.3 tracks a provision of the Texas Penal Code (Tex. Penal Code § 19.03), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(B).

**Name of person or entity.** Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

**Accompanying definitions and instructions.** Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. “Person” means an individual; or a corporation, or an association, a limited liability company, or other entity or organization governed by the Texas Business Organizations Code. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

**PJC 80.7**      **Personal Injury Damages—~~Exclusionary~~ Instruction ~~for Other~~ in Cases Involving Preexisting Injury or Condition**

**PJC 80.7A**      **Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—No Aggravation of Preexisting Symptomatic Injury or Condition and No Eggshell Plaintiff**

Do not include any amount for any injury or condition that did not result from the occurrence in question.

**PJC 80.7B**      **Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—Aggravation of Symptomatic Preexisting Injury or Condition**

If the damages you found resulted in part from any preexisting injury or condition that was causing symptoms at the time of the occurrence in question, do not include any amount for any such preexisting injury or condition, except to the extent the preexisting injury or condition was aggravated by the occurrence in question.

**PJC 80.7C**      **Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—Asymptomatic Preexisting Injury or Condition—Eggshell Plaintiff**

If a preexisting injury or condition was not causing any symptoms at the time of the occurrence in question but made the plaintiff more susceptible to injury than a person without that injury or condition, include damages, if any, resulting from a combination of the preexisting injury or condition and the occurrence in question.

**COMMENT**

~~When to use—after question, before elements of damages.~~ When to use—after question, before elements of damages. The instructions in PJC 80.7 address situations in which a plaintiff has a preexisting injury or condition that (1) is not aggravated by the occurrence in question and does not make the plaintiff more susceptible to injury by the occurrence in question (PJC 80.7A), (2) is symptomatic at the time of the occurrence in question and is aggravated by the occurrence in question (PJC 80.7B), and (3) is asymptomatic at the time of the occurrence in question and makes the plaintiff more susceptible to injury—the “eggshell” or “thin skull” plaintiff scenario (PJC 80.7C). If one or more of the instructions in PJC 80.7 is applicable, as discussed below, it should be given after the question and before the elements of damages.

**Cases involving no aggravation of preexisting symptomatic injury or condition and no eggshell plaintiff.** PJC 80.7A should be given if there is evidence that the plaintiff suffers from another physical infirmity not caused or aggravated by the occurrence in question and if the injuries flowing from the prior existing ~~infirmity~~injury or condition and those flowing from the defendant’s negligence are closely connected and intermingled to the extent that the jury might become confused. See *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955); *Dallas Railway & Terminal v. Orr*, 215 S.W.2d 862, 864 (Tex. 1948) (citing *Dallas Railway & Terminal v. Ector*, 116 S.W.2d 683, 685 (Tex. [Comm’n Op.] 1938-)). A tortfeasor is ~~not~~ only liable for damages ~~not~~ of such general character as might reasonably have been anticipated. See *Hoke v. Poser*, 384 S.W.2d 335 (Tex. 1964); *Carey v. Pure Distributing Corp.*, 124

S.W.2d 847 (Tex. 1939). ~~If applicable, this instruction should be given after the question and before the elements of damages.~~

~~**When not to use if liability question uses “injury.”**—If the liability question is submitted with the term “injury,” PJC 80.7 should not be submitted.~~

~~**Aggravation**~~Cases involving aggravation of preexisting symptomatic injury or condition. If PJC 80.7B should be given if there is evidence that the ~~occurrence in question aggravated plaintiff had a symptomatic preexisting injury or condition,~~ PJC 80.8 should be given in lieu of PJC 80.7.

~~**Substitution of existing before.**—The phrase *existing before* may be substituted for the phrase that *did not result from* if it would add clarity in the individual case was aggravated by the occurrence in question. The tortfeasor is liable with regard to the preexisting injury or condition only to the extent the preexisting injury or condition was aggravated by the occurrence in question. *Ector*, 116 S.W.2d at 686; *see also Hoke*, 384 S.W.2d at 339.~~

~~**Addition of “arising after the occurrence in question.”**—If there is evidence that a condition arose after the original occurrence, the phrase “arising after the occurrence in question” may be added after the words “for any condition” for added clarity.~~

~~**Alternative exclusionary instruction for specific condition.**—If it would add clarity in the individual case, an instruction not to consider specific, named, preexisting bodily conditions would be proper, if requested, in lieu of the above instruction. *Tyler Mirror & Glass Co. v. Simpkins*, 407 S.W.2d 807 (Tex. Civ. App.—Tyler 1966, writ ref’d n.r.e.). Such an instruction should specify all preexisting conditions raised by the evidence.~~Cases involving preexisting asymptomatic injury or condition—“eggshell plaintiff.” PJC 80.7C may be given if there is evidence that the plaintiff had a preexisting injury or condition that was asymptomatic at the time of the occurrence in question and which made the plaintiff more susceptible to an injury than a person without the injury or condition and that the occurrence in question may have aggravated—the “eggshell plaintiff” or “thin skull” scenario. *See Katy Springs & Manufacturing, Inc. v. Favalora*, 476 S.W.3d 579, 591–92 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Singh v. Pavan*, No. 04-17-00111-CV, 2018 WL 4096402, at \*5–8 (Tex. App.—San Antonio Aug. 29, 2018, no pet.); *Transcontinental Bus System, Inc. v. Scirratt*, 376 S.W.2d 56, 62–63 (Tex. App.—Tyler 1964, writ ref’d n.r.e.). A tortfeasor takes a plaintiff as he finds him. *Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988) (orig. proceeding). Thus, the tortfeasor is held responsible for all injuries caused by the occurrence in question, even if the plaintiff suffered from a preexisting but asymptomatic injury or condition before the occurrence in question and therefore suffered a greater degree of injury than a person who does not have such a preexisting injury or condition would have suffered. *Coates*, 758 S.W.2d at 752; *Driess v. Frederich*, 11 S.W. 493, 493–94 (Tex. 1889); *Favalora*, 476 S.W.3d at 591–92; *Thompson v. Quarles*, 297 S.W.2d 321, 329–30 (Tex. App.—Galveston 1956, writ ref’d n.r.e.).

Cases involving both aggravation of preexisting symptomatic injury or condition and preexisting asymptomatic injury or condition. If there is evidence of both an aggravated symptomatic preexisting injury or condition and an asymptomatic preexisting injury or condition that enhanced the plaintiff’s susceptibility to injury, both PJC 80.7B and 80.7C may be submitted.

**~~PJC 80.8 — Personal Injury Damages — Exclusionary Instruction for Preexisting Condition That Is Aggravated~~**

~~Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question.~~

**COMMENT**

~~**When to use — after question, before elements of damages.** — PJC 80.8 should be given if there is evidence that the plaintiff was suffering from a prior physical infirmity that was aggravated by the occurrence in question. See *Dallas Railway & Terminal v. Ector*, 116 S.W.2d 683 (Tex. 1938); *Armellini Express Lines of Florida v. Ansley*, 605 S.W.2d 297 (Tex. Civ. App. — Corpus Christi 1980, writ ref'd n.r.e.), disapproved on other grounds by *Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986); see also *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955). If applicable, this instruction should be given after the question and before the elements of damages.~~

~~**When not to use — if liability question uses “injury.”** — If the liability question is submitted with the term “injury,” PJC 80.8 should not be submitted.~~

~~**Discussion of standards.** — For discussion of the standards governing submission of this instruction, see James B. Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. Tex. L.J. 217, 238–46 (1977).~~



**PJC 80.98 Personal Injury Damages—Exclusionary Instruction for Failure to Mitigate**

Do not include any amount for any condition resulting from the failure, if any, of *Paul Payne* to have acted as a person of ordinary prudence would have done under the same or similar circumstances in caring for and treating *his* injuries, if any, that resulted from the occurrence in question.

**COMMENT**

**When to use—after question, before elements of damages.** PJC 80.98 should be **used given** if there is evidence that the plaintiff, through want of care, aggravated or failed to mitigate the effects of his injuries resulting from the occurrence in question. *Moulton v. Alamo Ambulance Service*, 414 S.W.2d 444 (Tex. 1967); *City of Fort Worth v. Satterwhite*, 329 S.W.2d 899 (Tex. Civ. App.—Fort Worth 1959, no writ); cf. *Armellini Express Lines of Florida v. Ansley*, 605 S.W.2d 297, 309 (Tex. Civ. App.—Corpus Christi—Edinburg 1980, writ ref'd n.r.e.) (evidence failed to show plaintiff was negligent in gaining weight after car accident and did not support submission of instruction for failure to mitigate), *disapproved on other grounds by Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986).

PJC 80.98 may be used under circumstances such as those described in *Moulton*—

in which there is evidence of negligence on the part of the plaintiff in failing to consult a doctor, in failing to consult a doctor as soon as a reasonable prudent person would, in failing to follow a doctor's advice, or simply in failing properly to care for and treat injuries which do not require the attention of a doctor.

*Moulton*, 414 S.W.2d at 450. If applicable, the instruction should be given after the question and before the elements of damages.

**If liability question uses “injury.”** If the liability question is submitted with the term “injury,” the liability and proportionate responsibility questions (see, e.g., PJC 51.4) should be modified to instruct the jury not to include failure to mitigate in the percentage of the injury attributable to the plaintiff.

**Modify instruction not to reduce amounts because of plaintiff's negligence.** If PJC 80.98 is given, the instruction not to reduce amounts because of the negligence of the plaintiff, injured spouse, or decedent, which appears in PJC 80.3–80.5, 80.1211, 81.3–81.6, 82.3, 83.3, 83.4, and 84.3, should be modified to read—

Do not reduce the amounts in your answers because of the negligence, if any, that you have attributed to *Paul Payne* in Questions \_\_\_\_\_ [*the negligence question*] and \_\_\_\_\_ [*the percentage causation question*]. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

**Discussion of standards.** For discussion of the standards governing submission of this instruction, see James B. Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. Tex. L.J. 217, 246–53 (1977).

**PJC 80.109 Personal Injury Damages—Cautionary Instruction Concerning Damages Limit in Health Care Suit**

Do not consider, discuss, or speculate whether any party is or is not subject to any damages limit under applicable law.

**COMMENT**

**When to use.** The above instruction is derived from the Texas Civil Practice and Remedies Code, which requires the following instruction to be given in any action on a health care liability claim: “Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.” Tex. Civ. Prac. & Rem. Code § 74.303(e). If applicable, this instruction should be given after the question and before the elements of damages. Although PJC 80.109 varies from the statutory language, the Committee believes the former more fully effectuates the intent of the legislation. Moreover, the parties can agree to waive its submission. Tex. R. Civ. P. 279.

**Definition of “health care liability claim.”** As defined in the Code—

“Health care liability claim” means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety or professional or administrative services directly related to health care, which proximately resulted in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

**PJC 80.4110 Personal Injury Damages—Child’s Loss of Consortium— Question about Parent’s Injury**

If you answered “Yes” to Question[s] \_\_\_\_\_ [question(s) establishing the liability of one or more defendants], then answer the following question. Otherwise, do not answer the following question.

QUESTION \_\_\_\_\_

Was the physical injury to *Paul Payne* a serious, permanent, and disabling injury?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 80.4110 is to be used in conjunction with PJC 80.4211 to submit a cause of action for loss of parental consortium. *See Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1991). On rehearing, the court addressed the question whether there must be a separate finding on the nature of the injury or whether an instruction would suffice. It held that when the facts are disputed “there must be a threshold finding by the finder of fact that the injury to the parent was a serious, permanent, and disabling injury before the finder of fact determines the consortium damage issue.” *Reagan*, 804 S.W.2d at 468.

**Use of “physical injury.”** The term “physical injury” is used because “the plaintiff must show that the defendant physically injured the child’s parent in a manner that would subject the defendant to liability.” *Reagan*, 804 S.W.2d at 467. The Committee expresses no opinion on whether a nonphysical injury could be “serious, permanent, and disabling.”

**PJC 80.1211 Personal Injury Damages—Child’s Loss of Consortium— Damages Question**

If you answered “Yes” to Question \_\_\_\_\_ [80.1110], then answer the following question. Otherwise, do not answer the following question.

QUESTION \_\_\_\_\_

What sum of money, if paid now in cash, would fairly and reasonably compensate *Polly Payne* for the loss, if any, of parental consortium that resulted from the physical injury to *Paul Payne*?

“Parental consortium” means the positive benefits flowing from the parent’s love, affection, protection, emotional support, services, companionship, care, and society.

In considering your answer to this question, you may consider only the following factors: the severity of the injury to the parent and its actual effect on the parent-child relationship, the child’s age, the nature of the child’s relationship with the parent, the child’s emotional and physical characteristics, and whether other consortium-giving relationships are available to the child.

Do not include interest on any amount of damages you find. Do not reduce the amounts, if any, in your answer because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Answer in dollars and cents for damages, if any, that—

were sustained in the past;

Answer: \_\_\_\_\_

in reasonable probability will be sustained in the future.

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 80.1211 should be used in conjunction with PJC 80.1110 to submit a cause of action for loss of parental consortium. See *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1991). The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045.

**Definition of “consortium”; factors to consider.** The definition of “parental consortium” and the instruction on what factors the jury may consider are from *Reagan*, 804 S.W.2d at 467. Although the Committee has suggested a limiting instruction, the court left open the possibility of other factors. Depending on the facts of the case, other factors may be added to those listed above, and some of those listed above may be deleted.

**Derivative damages subject to reduction because of negligence of injured parent.** Because a claim for loss of parental consortium, like that for loss of spousal consortium, is derivative, any percentage of contributory negligence attributable to the parent will reduce the amount of the child’s recovery. *Reagan*, 804 S.W.2d at 468.

**Instruction not to reduce amounts because of negligence of injured parent.** If the negligence of the injured parent is also in question, the exclusionary instruction given in this PJC before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the injured parent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 80.98.

**Mental anguish damages not included.** A claim for loss of consortium does not include a claim for negligent infliction of mental anguish. In *Reagan* the court specifically noted that recovery for mental anguish that is not based on the wrongful death statute requires proof that the plaintiff was “among other things, located at or near the scene of the accident, and that the mental anguish resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the incident, as contrasted with learning of the accident from others after the occurrence.” *Reagan*, 804 S.W.2d at 467. *See* PJC 80.3 comment, “Bystander injury.”

DRAFT

**PJC 85.5 Question and Instructions—Murder as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(1))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit murder?

“Murder” means that a person—

1. intentionally or knowingly causes the death of an individual; or
2. intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
3. commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

A person acts with intent with respect to ~~the nature of his conduct or to~~ a result of *his* conduct when it is the*his* conscious objective or desire to ~~engage in the conduct or~~ cause the result.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 85.5 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 19.02, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(1). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 19.02, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(1). ~~If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7).~~

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 19.02; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.5 should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Culpable mental state. Capital murder and murder are result-of-conduct offenses, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the death. *Roberts v. State*, 273 S.W.3d 322, 328–29 (Tex. Crim. App. 2008); *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (citing *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

~~Source of instruction and definition.~~ The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 19.02; Tex. Civ. Prac. & Rem. Code § 41.008.

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. *See* PJC 85.6–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.

**PJC 85.6 Question and Instructions—Capital Murder as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(2))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit capital murder?

“Capital murder” means—

*[See comment below to insert one or more of the subparts under section 19.03 of the Texas Penal Code.]*

A person acts with intent with respect to ~~the nature of his conduct or to~~ a result of his conduct when it is ~~the~~his conscious objective or desire to ~~engage in the conduct or~~ cause the result.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 85.6 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 19.03, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(2). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 19.03, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(2). ~~If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. See Tex. Civ. Prac. & Rem. Code § 41.008(c)(7).~~

**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 19.03; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.6 should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).



**Culpable mental state.** Capital murder and murder are result-of-conduct offenses, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the death. *Roberts v. State*, 273 S.W.3d 322, 328–29 (Tex. Crim. App. 2008); *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (citing *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

**Various conduct that satisfies the definition of capital murder under section 19.03 of the Texas Penal Code.** In an appropriate case, the question should include one or more of the following subparts:

1. the person murders a peace officer or firefighter who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or firefighter; or
2. the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat; or
3. the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration; or
4. the person commits the murder while escaping or attempting to escape from a penal institution; or
5. the person, while incarcerated in a penal institution, murders another—
  - a. who is employed in the operation of the penal institution; or
  - b. with the intent to establish, maintain, or participate in a combination or in the profits of a combination; or
6. the person—
  - a. while incarcerated for capital murder or murder, murders another; or
  - b. while serving a sentence of life imprisonment or a term of ninety-nine years [for aggravated kidnapping, aggravated sexual assault, or aggravated robbery], murders another; or
7. the person murders more than one person—
  - a. during the same criminal transaction; or
  - b. during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or
8. the person murders an individual under ten years of age; or
9. the person murders an individual ten years of age or older but younger than fifteen years of age; or
- 9.10. the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

See Tex. Penal Code § 19.03(a).

~~Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 19.03; Tex. Civ. Prac. & Rem. Code § 41.008.~~

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5, 85.7–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.

**PJC 85.7 Question and Instructions—Aggravated Kidnapping as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(3))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit aggravated kidnapping?

“Aggravated kidnapping” means—

a person intentionally or knowingly abducts another person with the intent to—

*[See comment below to insert one or more of the subparts under section 20.04 of the Texas Penal Code.]*

*[or]*

a person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense.

A person acts with intent with respect to ~~the nature of his conduct or to~~ a result of *his* conduct when it is ~~the~~his conscious objective or desire to ~~engage in the conduct or~~ cause the result.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 85.7 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 20.04, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(3). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 20.04, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(3). ~~If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. See Tex. Civ. Prac. & Rem. Code § 41.008(c)(7).~~

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 20.04; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.7 should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Culpable mental state. Kidnapping is a result-of-conduct offense, which means the culpable mental state relates to the result of the conduct, i.e., the abduction of the victim. “By extension, aggravated kidnapping is also a result-oriented offense which raises the level of culpability in a kidnapping by the addition of an aggravating circumstance, a specific intent defined by statute, being present at the time of the abduction.” *Gonzales v. State*, 270 S.W.3d 282, 288 (Tex. App.—Amarillo 2008, pet. ref’d.).

**Various conduct that satisfies the definition of aggravated kidnapping under section 20.04 of the Texas Penal Code.** In an appropriate case, the question should include one or more of the following subparts:

1. hold him for ransom or reward; or
2. use him as a shield or hostage; or
3. facilitate the commission of a felony or the flight after the attempt or commission of a felony; or
4. inflict bodily injury on him or violate or abuse him sexually; or
5. terrorize him or a third person; or
6. interfere with the performance of any governmental or political function.

*See* Tex. Penal Code § 20.04(a).

~~Source of instruction and definition.~~ The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 20.04; Tex. Civ. Prac. & Rem. Code § 41.008.

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. *See* PJC 85.5, 85.6, 85.8–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.

**PJC 85.8 Question and Instructions—Aggravated Assault as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(4))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit aggravated assault?

“Aggravated assault” means a person commits assault and the person—

1. causes serious bodily injury to another, including the person’s spouse; or
2. uses or exhibits a deadly weapon during the commission of the assault.

“Assault” means that a person—

1. intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse; or
2. intentionally or knowingly threatens another with imminent bodily injury, including the person’s spouse; or
3. intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

*[Use the following instruction if the crime underlying the alleged aggravated assault is assault by causing bodily injury.]*

A person acts with intent with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

*[Use the following instruction if the crime underlying the alleged aggravated assault is assault by threat.]*

A person acts with intent with respect to the nature of his conduct ~~or to a result of his conduct~~ when it is ~~the~~his conscious objective or desire to engage in the conduct ~~or cause the result~~.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

## COMMENT

**When to use.** PJC 85.8 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 22.02, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(4). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 22.02, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(4). ~~If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. *See* Tex. Civ. Prac. & Rem. Code § 41.008(e)(7).~~

**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.02; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.8 should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

**Culpable mental state.** Aggravated assault with the underlying crime of assault by causing bodily injury is a result-of-conduct offense, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the injury. Aggravated assault with the underlying crime of assault by threat is a nature-of-conduct offense, which means the culpable mental state relates to the nature of the conduct, i.e., the threatening of another with imminent bodily injury. “[A]ggravated assault under each distinct assaultive crime is a separate crime: aggravated assault with the underlying crime of assault by causing bodily injury and aggravated assault with the underlying crime of assault by threat. The first is a result-oriented offense and the second is a conduct-oriented offense.” *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008). “If the gravamen of an offense is the result of conduct, the jury charge on culpable mental state should be tailored to the result of conduct and likewise for nature-of-conduct offenses.” *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015).

~~**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.02; Tex. Civ. Prac. & Rem. Code § 41.008.~~

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. *See* PJC 85.5–85.7, 85.9–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.

**PJC 85.11 Injury to a Child, Elderly Individual, or Disabled Individual as a Statutory Ground for Removing Limitation on Exemplary Damages**

**PJC 85.11A Question and Instructions—Injury to a Child as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(7))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit injury to a child?

“Injury to a child” means that a person—

*[See comment below to insert one or more of the subparts under section 22.04 of the Texas Penal Code.]*

“Child” means a person fourteen years of age or younger.

A person acts with intent with respect to ~~the nature of his conduct or to~~ a result of *his* conduct when it is ~~the~~his conscious objective or desire to ~~engage in the conduct or~~ cause the result.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 85.11A should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 22.04, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 22.04, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(7). If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7).

**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.04; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.11A should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

**Culpable mental state.** Injury to a child is a result-of-conduct offense, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the injury. *See Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985).

**Various conduct that satisfies the definition of injury to a child under section 22.04 of the Texas Penal Code.** In an appropriate case, the question should include one or more of the following subparts:

intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child—

1. serious bodily injury; or
2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

[or]

is an owner, operator, or employee of a group home, nursing facility, assisted living facility, boarding home facility, intermediate care facility for persons with an intellectual or developmental disability, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a child who is a resident of that group home or facility—

1. serious bodily injury; or
2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

*See* Tex. Penal Code § 22.04(a), (a–1).

~~**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.04; Tex. Civ. Prac. & Rem. Code § 41.008.~~

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. *See* PJC 85.5–85.10, 85.12–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.



**PJC 85.11B Question and Instructions—Injury to an Elderly Individual as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(7))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit injury to an elderly individual?

“Injury to an elderly individual” means that a person—

*[See comment below to insert one or more of the subparts under section 22.04 of the Texas Penal Code.]*

“Elderly individual” means a person sixty-five years of age or older.

A person acts with intent with respect to ~~the nature of his conduct or to~~ a result of *his* conduct when it is ~~the~~*his* conscious objective or desire to ~~engage in the conduct or~~ cause the result.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

**COMMENT**

**When to use.** PJC 85.11B should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 22.04, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 22.04, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(7). If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7).

**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.04; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.11B should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

**Culpable mental state.** Injury to an elderly individual is a result-of-conduct offense, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the injury. *Kelly v. State*, 748 S.W.2d 236, 239 (Tex. Crim.App. 1988).

**Various conduct that satisfies the definition of injury to an elderly individual under section 22.04 of the Texas Penal Code.** In an appropriate case, the question should include one or more of the following subparts:

intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to an elderly individual—

1. serious bodily injury; or
2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

[or]

is an owner, operator, or employee of a group home, nursing facility, assisted living facility, boarding home facility, intermediate care facility for persons with an intellectual or developmental disability, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to an elderly individual who is a resident of that group home or facility—

1. serious bodily injury; or
2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

*See* Tex. Penal Code § 22.04(a), (a–1).

~~**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.04; Tex. Civ. Prac. & Rem. Code § 41.008.~~

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. *See* PJC 85.5–85.10, 85.12–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.

**PJC 85.11C      Question and Instructions—Injury to a Disabled Individual as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(7))**

Answer the following question only if you unanimously answered “Yes” to Question \_\_\_\_\_ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* commit injury to a disabled individual?

“Injury to a disabled individual” means that a person—

*[See comment below to insert one or more of the subparts under section 22.04 of the Texas Penal Code.]*

“Disabled individual” means an individual—

1. with one or more of the following:
  - a. autism spectrum disorder, as defined by [insert language from Texas Insurance Code section 1355.001]; or
  - b. developmental disability, as defined by [insert language from Texas Human Resources Code section 112.042]; or
  - c. intellectual disability, as defined by [insert language from Texas Health and Safety Code section 591.003]; or
  - d. severe emotional disturbance, as defined by [insert language from Texas Family Code section 261.001]; or
  - e. traumatic brain injury, as defined by [insert language from Texas Health and Safety Code section 92.001]; or
  - f. mental illness, as defined by [insert language from Texas Health and Safety Code section 571.003]; or
2. who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person’s self from harm or to provide food, shelter, or medical care for the person’s self.

A person acts with intent with respect to ~~the nature of his conduct or to~~ a result of *his* conduct when it is ~~the~~his conscious objective or desire to ~~engage in the conduct or~~ cause the result.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

### COMMENT

**When to use.** PJC 85.11C should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 22.04, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 22.04, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(7). If the conduct results in an injury to a child, elderly individual, or disabled individual and is conduct occurring while providing health care as defined by section 74.001, the exception to the limitation on the amount of recovery does not apply. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(7).

**Source of instruction and definition.** The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.04; Tex. Civ. Prac. & Rem. Code § 41.008.

**Bifurcation.** If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.11C should be answered in the first phase of the trial.

**Caveat—burden of proof.** The Committee expresses no opinion on whether the burden of proof is a preponderance of the evidence or clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

**Culpable mental state.** Injury to a disabled individual is a result-of-conduct offense, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the injury. *See Kelly v. State*, 748 S.W.2d 236, 239 (Tex. Crim. App. 1988).

**Various conduct that satisfies the definition of injury to a disabled individual under section 22.04 of the Texas Penal Code.** In an appropriate case, the question should include one or more of the following subparts:

intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a disabled individual—

1. serious bodily injury; or
2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

[or]

is an owner, operator, or employee of a group home, nursing facility, assisted living facility, boarding home facility, intermediate care facility for persons with an intellectual or developmental disability, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a disabled individual who is a resident of that group home or facility—

1. serious bodily injury; or

2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

See Tex. Penal Code § 22.04(a), (a–1).

~~Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 22.04; Tex. Civ. Prac. & Rem. Code § 41.008.~~

**Unanimity.** For actions filed on or after September 1, 2003, “[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e); Tex. R. Civ. P. 226a. Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish “liability for and the amount of exemplary damages”; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5–85.10, 85.12–85.21.

**Actions filed before September 1, 2003.** A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered “Yes” to Question \_\_\_\_\_ [85.1], then answer the following question. Otherwise, do not answer the following question.