# CPJC 42.36 General Comments on Animal Cruelty

In 2007, the legislature separated cruelty to livestock animals from cruelty to other animals by limiting section 42.09 of the Texas Penal Code to situations involving livestock animals and creating section 42.092 covering nonlivestock animals. Acts 2007, 80th Leg., R.S., ch. 886, § 2 (H.B. 2328), eff. Sept. 1, 2007. The two crimes have some similarities. Recklessness, however, is sufficient for liability under section 42.092 but not under section 42.09.

A charging instrument alleging that the offense was committed recklessly is subject to the requirement of article 21.15 that it specify the acts constituting recklessness. Tex. Code Crim. Proc. art. 21.15; *see Thomas v. State*, 352 S.W.3d 95, 103 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d); *State v. Vasquez*, 34 S.W.3d 332, 334 (Tex. App.—San Antonio 2000, no pet.).

**Applying Culpable Mental State Requirement.** Providing definitions of the required culpable mental states is difficult. Section 42.092(b) provides that the offense can be committed in nine distinguishable ways. Some of those ways focus on the “result-of-conduct” causing of a result—causing the death of, serious bodily injury to, or bodily injury to a covered animal. *See* Tex. Penal Code § 42.092(b)(1), (b)(2), (b)(6). Other provisions, in contrast, seem to define the offense in terms of the “nature-of-conduct.” The offense can be committed by abandoning or transporting an animal under certain circumstances. Some are more difficult to define, such as torturing or administering poison to an animal.

Section 6.03(c) defines “reckless” and restricts its application to result-of-conduct offenses and to the circumstances surrounding the conduct. It contains no language permitting it to be applied to nature-of-conduct elements. *See Price v. State*, 457 S.W.3d 437, 442–43 (Tex. Crim. App. 2015) (considering recklessness in context of third-degree family-violence assault). This might mean that the legislature intended section 42.092 to be construed so that recklessness does not apply if the state proceeds on one of those statutory alternatives that involve a nature-of-conduct element. In those situations, the legislature must have meant that the courts should require proof that the accused acted intentionally or knowingly and should prohibit convictions for reckless behavior. *But see Price*, 457 S.W.3d at 444–45 (Yeary, J., concurring). Further discussion relevant to individual charges can be found in the comments to those instructions.

**Statutory “Exception.”** Section 42.092(f) contains an exception to the application of the statutory section. Under section 2.02, this must be negated in the charging instrument and—like an element of the offense—submitted to the jury whether or not the evidence raises an issue as to whether or not it has been proved inapplicable. Tex. Penal Code § 2.02; *Baumgart v. State*, 512 S.W.3d 335, 338–39 (Tex. Crim. App. 2017); *LaBelle v. State*, 692 S.W.2d 102, 105 (Tex. Crim. App. 1985).

**Defenses Created by Section 42.092.** Section 42.092 itself provides for a number of defenses. *See* Tex. Penal Code § 2.03. If evidence is submitted supporting a defense, refer to CPJCs 42.42 and 42.43 for sample instructions.

Under section 42.092(d)(1), it is a defense that the defendant was in fear of harm from a dangerous wild animal as defined in Tex. Health & Safety Code § 822.101. That section defines “dangerous wild animal” as any one of nineteen enumerated wild animals or their hybrids. The offense penalizes cruelty, however, to any “wild living creature” only if it was previously captured. Tex. Penal Code § 42.092(a)(2). Although the defense is theoretically available for a dangerous wild animal that has never been previously captured (as with a coyote, for instance), the offense itself does not apply to cruelty against still-in-the-wild animals. Other statutory defenses may still apply for situations involving wild creatures not on the “dangerous” list. *See Chase v. State*, 448 S.W.3d 6, 13–14 (Tex. Crim. App. 2014).

Under section 42.092(d)(2), it is a defense that the accused was engaged “in bona fide experimentation for scientific research.”

A section 42.092(e) defense applies only to offenses under sections 42.092(b)(2) and (b)(6) (killing, poisoning, or causing serious bodily injury or bodily injury to the animal of another). Subsection (e)(1) addresses action against an animal believed to have done damage to animals or crops. Subsection (e)(2) gives a defense to public servants or a person associated with electricity generation or transmission or natural gas delivery, and only when acting within the scope of their employment.

**Defense Created by Health and Safety Code.** According to section 822.013(a) of the Health and Safety Code, “a dog or coyote that is attacking, is about to attack, or has recently attacked livestock, domestic animals, or fowls may be killed by (1) any person witnessing the attack; or (2) the attacked animal’s owner or a person acting on behalf of the owner if the owner or person has knowledge of the attack.” The court of criminal appeals has held that this language creates a defense under section 42.092(b)(6) (causing bodily injury to the animal). *Chase*, 448 S.W.3d at 28. This defense is probably applicable in prosecutions under other result-of-conduct versions of this offense that result in death or serious bodily injury to the animal. See CPJC 42.44 for a sample instruction.

**Deadly Weapon.** A deadly-weapon instruction generally may not be included in animal cruelty cases. *Prichard v. State*, 533 S.W.3d 315, 330–31 (Tex. Crim. App. 2017). Some courts of appeals have held the *Prichard* rule not to be absolute. *See Scales v. State*, 601 S.W.3d 380, 384–87 (Tex. App.—Amarillo 2020, no pet.); *Galindo v. State*, 564 S.W.3d 223, 227 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Rather, according to those courts, if a weapon is used against a *person* while committing or in flight from the commission of animal cruelty, then a deadly-weapon instruction could be appropriate in the animal-cruelty charge. In such cases, “a proper jury instruction would have advised the jury that a deadly-weapon finding could only be made if the jury were to determine beyond a reasonable doubt that a deadly weapon was used or exhibited by the defendant against a human being during the course of the commission of the underlying offense or during the immediate flight following the commission of that offense.” *Scales*, 601 S.W.3d at 387.

# CPJC 42.37 Instruction—Misdemeanor Cruelty to Nonlivestock Animal

**LAW SPECIFIC TO THIS CASE**

The state accuses the defendant of having committed the offense of cruelty to nonlivestock animals.

**Relevant Statutes**

A person commits the offense of cruelty to nonlivestock animals if the person intentionally, knowingly, or recklessly fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person’s custody.

Conduct is not a crime if it is either—

1. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

a. fishing, hunting, or trapping; or

b. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or

2. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

**Definitions**

*Animal*

“Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.

*Custody*

“Custody” includes responsibility for the health, safety, and welfare of an animal subject to the person’s care and control, regardless of ownership of the animal.

*Necessary Food, Water, Care, or Shelter*

“Necessary food, water, care, or shelter” includes food, water, care, or shelter provided to the extent required to maintain the animal in a state of good health.

*Intentionally Failing to Provide Necessary Food, Water, Care, or Shelter for an*

*Animal*

A person intentionally fails to provide necessary food, water, care, or shelter for an animal if it is the person’s conscious objective or desire to fail to provide necessary food, water, care, or shelter for an animal.

*Knowingly Failing to Provide Necessary Food, Water, Care or Shelter for an*

*Animal*

A person knowingly fails to provide necessary food, water, care, or shelter for an animal if the person is aware that he is failing to provide the animal with necessary food, water, care, or shelter.

*Knowing an Animal Is in the Person’s Custody*

A person knows an animal is in the person’s custody if the person is aware that the animal is in the person’s custody.

*Being Reckless about Whether the Animal Is in the Person’s Custody*

A person is reckless about whether an animal is in the person’s custody if the person is aware of but consciously disregards a substantial and unjustifiable risk that the animal is in the person’s custody. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise under all the circumstances as viewed from the defendant’s standpoint.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], [*insert specifics, e.g.*, Dog # 1] was in the defendant’s custody;

2. [*insert specifics, e.g.*, Dog # 1] was an animal;

3. the defendant knew or was reckless about the fact that the animal was in his custody;

4. the defendant failed to provide necessary food, water, care, or shelter for [*insert specifics, e.g.*, Dog # 1];

5. the defendant’s failure was intentional or knowing;

6. the defendant’s failure was unreasonable; and

7. the conduct constituting the offense was neither—

a. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

i. fishing, hunting, or trapping; or

ii. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; nor

b. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

You must all agree on elements 1, 2, 3, 4, 5, 6, and 7 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the seven elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the seven elements listed above, you must [find the defendant “guilty”/next consider whether the defendant is not guilty because of the defense of [*insert defense*]].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

The court of criminal appeals often looks to the gravamen of the offense to decide to which conduct elements an explicit culpable mental state applies. *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015). For animal cruelty under Tex. Penal Code § 42.092(b)(3), the Committee concluded that the gravamen is the failure to provide the animal with the necessities of life. Also, under *McQueen*, the general rule is that when the circumstances of the conduct render specific conduct unlawful, a mens rea must apply to that circumstance. *McQueen v. State*, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989). Although no case applies *McQueen* to this statute, the Committee believes courts would most likely do so, because failing to provide is not a crime unless the animal is in the person’s custody. *See White v. State*, 509 S.W.3d 307, 312–13 (Tex. Crim. App. 2017). As a result, the instruction attaches a mens rea both to the gravamen of the offense—failing to provide—and a separate mens rea to the circumstances of the offense—the fact of the defendant’s custody of the animal.

Moreover, the culpable mental states of intentional and knowing both can apply to the nature of conduct, but reckless cannot, while intentional cannot be a mental state of the circumstances, though knowing and reckless mental states can. Tex. Penal Code § 6.03. Although the statutory language in section 42.092 is not precise on the issue, the Committee decided the most accurate reflection of the law required a twofold clarification. First, the gravamen of the offense—the defendant’s failure—must be committed intentionally or knowingly. Second, the defendant must have knowledge of or be reckless about circumstances of the offense—the fact of the defendant’s custody of the animal.

All Committee members believed it appropriate to include recklessness as the mens rea for the custody element. The majority believed that knowledge also attached under the reasoning of *McQueen*, the statutory language including knowledge as a mens rea, and the applicability of knowledge to circumstances elements. Other members believed that under Penal Code section 6.02, only recklessness should attach, given *McQueen*’s finding that a mens rea was to be implied and considering the awkward grammatical construction of the statute that did not easily allow for a transfer of the mens rea recitation down through each elemental recitation (the so-called “traveling mens rea” issue). *See State v. Ross*, 573 S.W.3d 817, 824 (Tex. Crim. App. 2019) (“[T]here remains the question of ‘how far down the sentence’ the culpable mental state of ‘intentionally or knowingly’ travels.”). The distinction, however, may be immaterial. Under either theory, the state only needs to allege or prove recklessness, because recklessness is a lesser mens rea fully included in the knowledge mens rea.

The Committee also considered the issue of a mental state regarding the unreasonableness of the defendant’s failure and concluded that the complexity of stacking a mental state onto this reasonableness standard was unworkable. The Committee also believed that reasonableness was most likely measured as an objective standard, to which a mens rea did not easily attach in this case. *But see Ross*,573 S.W.3d at 824–25 (attaching knowledge mens rea in disorderly conduct to the element “objectively likely to frighten an ordinary person”).

# CPJC 42.38 Instruction—Felony Cruelty to Nonlivestock Animal—Killing or Causing Serious Bodily Injury to an Animal in a Cruel Manner

**LAW SPECIFIC TO THIS CASE**

The state accuses the defendant of having committed the offense of cruelty to nonlivestock animals.

**Relevant Statutes**

A person commits the offense of cruelty to nonlivestock animals if the person intentionally, knowingly, or recklessly in a cruel manner [kills/causes serious bodily injury to] an animal.

Conduct coming within the definition of this offense is not a crime if the conduct constituting the offense is either—

1. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

a. fishing, hunting, or trapping; or

b. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or

2. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

**Definitions**

*Animal*

“Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.

*Cruel Manner*

“Cruel manner” includes a manner that causes or permits unjustified or unwarranted pain or suffering.

*[Include the following definitions for the “killing” manner of committing the offense.]*

*Intentionally in a Cruel Manner Killing an Animal*

A person intentionally in a cruel manner kills an animal if it is the person’s conscious objective or desire to kill the animal in a cruel manner.

*Knowingly in a Cruel Manner Killing an Animal*

A person knowingly in a cruel mannerkills an animal if the person is aware that he is killing the animal in a cruel manner.

*Recklessly in a Cruel Manner Killing an Animal*

A person is reckless about whether he is killing an animal in a cruel manner if the person is aware of but consciously disregards a substantial and unjustifiable risk that he is killing the animal in a cruel manner. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise under all the circumstances as viewed from the defendant’s standpoint.

*[Include the following definitions for the “causing serious bodily injury” manner of committing the offense.]*

*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

*Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Intentionally in a Cruel Manner Causing Serious Bodily Injury*

A person intentionally in a cruel manner causes serious bodily injury to an animal if it is the person’s conscious objective or desire to cause serious bodily injury to the animal in a cruel manner.

*Knowingly in a Cruel Manner Causing Serious Bodily Injury*

A person knowingly in a cruel manner causes serious bodily injury to an animal if the person is aware that the person’s conduct is reasonably certain to cause serious bodily injury to the animal in a cruel manner.

Recklessly in a Cruel Manner Causing Serious Bodily Injury

A person recklessly in a cruel manner causes serious bodily injury to an animal if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause serious bodily injury to the animal in a cruel manner. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant in a cruel manner [killed/caused serious bodily injury to] [*insert specifics, e.g.*, Dog # 1];

2. the defendant did so intentionally, knowingly, or recklessly;

3. [*insert specifics, e.g.*, Dog # 1] was an animal; and

4. the conduct constituting the offense was neither—

a. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

i. fishing, hunting, or trapping; or

ii. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; nor

b. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must [find the defendant “guilty”/next consider whether the defendant is not guilty because of the defense of [*insert defense*]].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

Tex. Penal Code 42.092(b)(1) penalizes three acts: to torture, to kill, and to cause serious bodily injury. For simplicity’s sake, the Committee decided to create two instructions—this one for killing or causing serious bodily injury to an animal and CPJC 42.39 for torturing an animal. All three acts are the same level offense under subsection (c–1).

The Penal Code provides no definition of “kill,” nor is a definition generally recommended. The Committee considered in what way “to kill” as recited in this statute is the same as or different from the statutory phrase “to cause death” as recited in the homicide offenses. The Committee concluded that the terms were similar enough to treat them the same for purposes of assigning a mens rea, and so the instruction includes a definition of recklessness, even though phrasing the element as “to kill” might otherwise suggest it is a nature-of-conduct element for which there is no definition of “reckless.” Unlike in homicide offenses, the different levels of mens rea do not change the offense level for this type of animal cruelty.

# CPJC 42.39 Instruction—Felony Cruelty to Nonlivestock Animal—Torturing an Animal

**LAW SPECIFIC TO THIS CASE**

The state accuses the defendant of having committed the offense of cruelty to nonlivestock animals.

**Relevant Statutes**

A person commits the offense of cruelty to nonlivestock animals if the person intentionally, knowingly, or recklessly tortures an animal.

Conduct coming within the definition of this offense is not a crime if the conduct constituting the offense is either—

1. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

a. fishing, hunting, or trapping; or

b. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or

2. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

**Definitions**

*Animal*

“Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.

*Torture*

“Torture” includes any act that causes unjustifiable pain or suffering.

*Intentionally Torture an Animal*

A person intentionally tortures an animal if it is the person’s conscious objective or desire to torture the animal.

*Knowingly Torture an Animal*

A person knowingly tortures an animal if the person is aware that he is torturing an animal.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant tortured [*insert specifics, e.g.*, Dog # 1];

2. the defendant did so intentionally or knowingly;

3. [*insert specifics, e.g.*, Dog # 1] was an animal; and

4. the conduct constituting the offense was neither—

a. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

i. fishing, hunting, or trapping; or

ii. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; nor

b. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must [find the defendant “guilty”/next consider whether the defendant is not guilty because of the defense of [*insert defense*]].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

The definition of “torture” comes from Tex. Penal Code § 42.092(a)(8) (“‘Torture’ includes any act that causes unjustifiable pain or suffering.”). The Code Construction Act specifies that the term *includes* is a “term[] of enlargement and not of limitation or exclusive enumeration” and “does not create a presumption that components not expressed are excluded.” Tex. Gov’t Code § 311.005(13). The Committee notes that this formulation could make “torture” broad enough to encompass conduct by omission, not just by an act. Of course, any such omission must comply with Tex. Penal Code § 6.01(c) in that the law provides that the omission is an offense or “otherwise provides that [a person] has a duty to perform [a particular] act.”

The Committee debated whether “torture” is a nature-of-conduct or result-of-conduct offense. Although the Committee offers the instruction based on its conclusion that torture is a nature-of-conduct offense, thus requiring the omission of a reckless mens rea (see Tex. Penal Code § 6.03(c), providing no reckless definition for nature of conduct), the Committee recognizes there are arguments that torturing is a result-of-conduct offense, in particular because the act can be tied to the result of causing unjustifiable pain or suffering.

# CPJC 42.40 Instruction—Felony Cruelty to Nonlivestock Animal—Killing or Causing Serious Bodily Injury without Effective Consent

**LAW SPECIFIC TO THIS CASE**

The state accuses the defendant of having committed the offense of cruelty to nonlivestock animals.

**Relevant Statutes**

A person commits an offense if the person intentionally, knowingly, or recklessly, without the owner’s effective consent, [kills/causes serious bodily injury to] an animal.

Conduct coming within the definition of this offense is not a crime if the conduct constituting the offense is either—

1. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

a. fishing, hunting, or trapping; or

b. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or

2. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

**Definitions**

*Animal*

“Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.

*Consent*

“Consent” means assent in fact, whether express or apparent.

*Effective Consent*

*[Include relevant parts of definition as raised by the evidence.]*

“Effective consent” includes consent by a person legally authorized to act for the owner. Consent is not effective if it is—

1. induced by force, threat, or fraud;
2. given by a person the actor knows is not legally authorized to act for the owner;
3. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable decisions; or
4. given solely to detect the commission of an offense.

*[Include the following definitions for the “killing” manner of committing the offense.]*

*Intentionally Killing an Animal*

A person intentionally kills an animal if it is the person’s conscious objective or desire to kill the animal.

*Knowingly Killing an Animal*

A person knowingly kills an animal if the person is aware that he is killing the animal.

*Recklessly Killing an Animal*

A person recklessly kills an animal if the person is aware of but consciously disregards a substantial and unjustifiable risk that he is killing the animal. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise under all the circumstances as viewed from the defendant’s standpoint.

*[Include the following definitions for the “causing serious bodily injury” manner of committing the offense.]*

*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

*Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Intentionally Causing Serious Bodily Injury*

A person intentionally causes serious bodily injury to an animal if it is the person’s conscious objective or desire to cause serious bodily injury to the animal.

*Knowingly Causing Serious Bodily Injury*

A person knowingly causes serious bodily injury to an animal if the person is aware that the person’s conduct is reasonably certain to cause serious bodily injury to the animal.

Recklessly Causing Serious Bodily Injury

A person recklessly causes serious bodily injury to an animal if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause serious bodily injury to the animal. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

[*Continue with the following.*]

*Knowing that He Does Not Have the Owner’s Effective Consent*

A person knows that he does not have the owner’s effective consent if the person is aware that he does not have the owner’s effective consent.

*Reckless about Not Having the Owner’s Effective Consent*

A person is reckless about not having the owner’s effective consent if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person does not have the owner’s effective consent. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, seven elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant [killed/caused serious bodily injury to] [*insert specifics, e.g.*, Dog # 1];

2. the defendant did so intentionally, knowingly, or recklessly;

3. [*insert specifics, e.g.*, Dog # 1] was an animal;

4. [*insert specifics, e.g.*, Dog # 1] was owned by [*name of owner*];

5. the defendant did not have the effective consent of [*name of owner*] to [kill/cause serious bodily injury to] [*insert specifics, e.g.*, Dog # 1];

6. the defendant knew [he/she] did not have, or was reckless about not having, the effective consent of the owner; and

7. the conduct constituting the offense was neither—

a. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

i. fishing, hunting, or trapping; or

ii. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; nor

b. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

You must all agree on elements 1, 2, 3, 4, 5, 6, and 7 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the seven elements listed above, you must [find the defendant “guilty”/next consider whether the defendant is not guilty because of the defense of [*insert defense*]].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

Tex. Penal Code § 42.092(b)(2) penalizes three acts: to kill, to administer poison to, and to cause serious bodily injury. For simplicity’s sake, the Committee decided to create two instructions—this one for killing or causing serious bodily injury and CPJC 42.41 for administering poison to an animal. All three acts are the same level offense under subsection (c–1). The Committee considered in what way “to kill,” as recited in this statute is the same as or different from the statutory phrase “to cause death” as recited in the homicide offenses. The Committee concluded that the terms were similar enough to treat them the same for purposes of assigning a mens rea, and so the instruction includes a definition of recklessness, even though phrasing the element as “to kill” might otherwise suggest it is a nature-of-conduct element for which there is no definition of “reckless.” Unlike in homicide offenses, the different levels of mens rea do not change the offense level for this type of animal cruelty.

Grammatically, the element “without the effective consent” follows immediately after the culpable mental state in the statute, which suggests the culpable mental state applies to it as well as to the gravamen. In addition, this element is the circumstance that makes the otherwise lawful conduct unlawful. Because this element is a circumstance of the offense, the mens rea of intentional does not apply. *See* Tex. Penal Code § 6.03(a).

# CPJC 42.41 Instruction—Felony Cruelty to Nonlivestock Animal—Administering Poison without Effective Consent

**LAW SPECIFIC TO THIS CASE**

The state accuses the defendant of having committed the offense of cruelty to nonlivestock animals.

**Relevant Statutes**

A person commits an offense if the person intentionally, knowingly, or recklessly, without the owner’s effective consent, administers poison to an animal.

Conduct coming within the definition of this offense is not a crime if the conduct constituting the offense is either—

1. a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

a. fishing, hunting, or trapping; or

b. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or

2. a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

**Definitions**

*Animal*

“Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.

*Consent*

“Consent” means assent in fact, whether express or apparent.

*Effective Consent*

*[Include relevant parts of definition as raised by the evidence.]*

“Effective consent” includes consent by a person legally authorized to act for the owner. Consent is not effective if it is—

1. induced by force, threat, or fraud;
2. given by a person the actor knows is not legally authorized to act for the owner;
3. given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable decisions; or
4. given solely to detect the commission of an offense.

*Intentionally Administering a Substance to an Animal*

A person intentionally administers a substance to an animal if it is the person’s conscious objective or desire to administer it to the animal.

*Knowingly Administering a Substance to an Animal*

A person knowingly administers a substance to an animal if the person is aware that the person is administering it to the animal.

*Knowing a Substance Is Poison*

A person knows a substance is poison if the person is aware that it is poison.

Reckless that a Substance Is Poison

A person is reckless about whether a substance is poison if the person is aware of but consciously disregards a substantial and unjustifiable risk that the substance is poison. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

*Knowledge about Not Having the Owner’s Effective Consent*

A person knows that he does not have the owner’s effective consent if the person is aware that he does not have the owner’s effective consent.

*Reckless about Not Having the Owner’s Effective Consent*

A person is reckless about not having the owner’s effective consent if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person does not have the owner’s effective consent. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

**Application of Law to Facts**

You must determine whether the state has proven, beyond a reasonable doubt, eight elements. The elements are that—

1.         in [*county*] County, Texas, on or about [*date*], the defendant administered a substance to [*insert specifics, e.g.*, Dog # 1];

2.         the defendant did so intentionally or knowingly;

3.         the defendant knew or was reckless about whether it was poison;

4.         [*insert specifics, e.g.*, Dog # 1] was an animal;

5.         [*insert specifics, e.g.*, Dog # 1] was owned by [*name of owner*];

6.         the defendant did not have the effective consent of [*name of owner*] to administer the poison;

7.         the defendant knew [he/she] did not have or was reckless about not having the consent of [*name of owner*]; and

8.         the conduct constituting the offense was neither—

a.        a generally accepted and otherwise lawful form of conduct occurring solely for the purpose of or in support of—

i. fishing, hunting, or trapping; or

ii. wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; nor

b.        a generally accepted and otherwise lawful animal husbandry or agriculture practice involving livestock animals.

You must all agree on all of the elements above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the eight elements listed above, you must [find the defendant “guilty”/next consider whether the defendant is not guilty because of the defense of [*insert defense, e.g.*,bona fide experimentation for scientific research]].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

The Penal Code provides no definition of “poison,” nor is a definition generally recommended. The Committee debated whether administering poison is a nature-of-conduct or result-of-conduct offense. On the one hand, the legislature chose to make the bad act the administering of poison, not “poisoning” or “causing an animal to be poisoned,” which might lean toward a conclusion the offense is a nature of conduct. On the other hand, administering poison implies a result—that the poison was administered.

Yet, the concepts of the verb “to administer” (which suggests nature of conduct) and the noun “poison” (which suggests circumstance) seem separable, and separating them may more closely respect the intention of the legislature based on the grammatical structure of the statute and existing rules and the mental state definitions. The plain language of “administer” seems to require direct application to the animal, and recklessness does not fit naturally with that concept. But the application of recklessness to “poison” as a circumstance of the offense seems easy and clear. The Committee thus decided to offer mens rea definitions that separate out the two concepts. This approach seems to respect the decision of the legislature in this offense to include recklessness as a culpable mental state while also honoring its definitions of the culpable mental states and its restriction of their applications.

# CPJC 42.42 Instruction—Defense of Bona Fide Experimentation

*[Insert instructions for underlying offense.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant is not guilty because of the defense of bona fide experimentation for scientific research.

**Scientific Research Defense**

It is a defense to cruelty to nonlivestock animals that, at the time of the conduct, the person was engaged in bona fide experimentation for scientific research.

**Burden of Proof**

The defendant is not required to prove that he was engaged in bona fide experimentation for scientific research. Rather, the state must prove, beyond a reasonable doubt, that the defendant was not engaged in bona fide experimentation for scientific research.

**Application of Law to Facts**

To decide the issue of scientific research, you must determine whether the state has proved, beyond a reasonable doubt, that the defendant was not engaged in bona fide experimentation for scientific research.

If you all agree that the state has failed to prove, beyond a reasonable doubt, that the defendant was not engaged in bona fide experimentation for scientific research, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of cruelty to nonlivestock animals, and you all agree the state has proved, beyond a reasonable doubt, that the defendant was not engaged in bona fide experimentation for scientific research, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

The defense of bona fide experimentation is provided for in Tex. Penal Code § 42.092(d)(2). No term in the defense is defined by statute. As a result, no definitions are included in the instruction.

# CPJC 42.43 Instruction—Defense Based on Harm to Livestock Animals or Crops

*[Insert instruction for underlying offense.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant is not guilty because of the defense based on harm to livestock animals or crops.

**Defense of Protection of Livestock Animals or Crops**

It is a defense to cruelty to nonlivestock animals that the person engaged in this conduct [when/after] the animal was discovered on the person’s property in the act of or after injuring or killing the person’s livestock animals or damaging the person’s crops and the person killed or injured the animal at the time of this discovery.

**Burden of Proof**

The defendant is not required to prove that the defense based on harm to livestock animals or crops applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply.

**Definitions**

*Livestock Animal*

“Livestock animal” means—

1. cattle, sheep, swine, goats, ratites, or poultry commonly raised for human consumption;

2. a horse, pony, mule, donkey, or hinny;

3. native or nonnative hoofstock raised under agriculture practices; or

4. native or nonnative fowl commonly raised under agricultural practices.

**Application of Law to Facts**

To decide the issue of defense of protection of livestock animals or crops, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant did not discover [*insert specifics, e.g.*, Dog # 1], the animal, on the defendant’s property [in the act of/after] [injuring or killing the defendant’s livestock animals/damaging the defendant’s crops]; or

2. the defendant did not kill or injure [*insert specifics, e.g.*, Dog # 1] at the time of this discovery.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of cruelty to nonlivestock animals, and you all agree the state has proved, beyond a reasonable doubt, that the defendant did not act in response to the injury or killing of the defendant’s livestock animals or crops, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

The defense based on harm to livestock animals or crops is from Tex. Penal Code § 42.092(e)(1). “Crop” is not defined in the Penal Code. “Livestock animal” is defined in Tex. Penal Code § 42.09, incorporated into this statute under subsection (a)(6).

# CPJC 42.44 Instruction—Defense from a Dangerous Dog

*[Insert instructions for underlying offense.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the elements listed above, you must next consider whether the defendant is not guilty because of the defense of dangerous dog.

**Dangerous Dog Defense**

It is a defense to cruelty to nonlivestock animals that the animal killed was a dog that was attacking, was about to attack, or had recently attacked livestock, domestic animals, or fowls, and the defendant was:

1. a person witnessing the attack; or

2. the attacked animal’s owner; or

3. a person acting on behalf of the owner of the attacked animal if the owner or person had knowledge of the attack.

**Burden of Proof**

The defendant is not required to prove that the defense of dangerous dog applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply.

**Definitions**

*Dog*

“Dog” means a domesticated animal that is a member of the canine family and includes a crossbreed between a dog and a coyote.

*Livestock*

“Livestock” means—

1. cattle, sheep, swine, goats, ratites, or poultry commonly raised for human consumption;

2. a horse, pony, mule, donkey, or hinny;

3. native or nonnative hoofstock raised under agriculture practices;

4. native or nonnative fowl commonly raised under agricultural practices; or

5. grass-eating or plant-eating, single-hooved or cloven-hooved mammals that are not indigenous to this state and are known as ungulates, including animals from the swine, horse, tapir, rhinoceros, elephant, deer, and antelope families.

*Owner*

“Owner” means a person who owns or has custody or control of the dog.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant’s conduct was not within the defense of dangerous dog.

To decide the issue of defense of dangerous dog, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the animal killed was not a dog that was attacking, was about to attack, or had recently attacked livestock, domestic animals, or fowls; or

2. the defendant was not—

a. a person who witnessed the attack; or

b. the attacked animal’s owner; or

c. a person acting on behalf of the owner of the attacked animal and the owner or person had knowledge of the attack.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of cruelty to nonlivestock animals, and you all agree the state has proved, beyond a reasonable doubt, that the defendant did not act according to the dangerous dog defense, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]*

**COMMENT**

The dangerous dog defense is defined in Tex. Health & Safety Code § 822.013, which falls within subchapter B of Tex. Health & Safety Code ch. 822 (Regulation of Animals). *See Chase v.* State, 448 S.W.3d 6, 28 (Tex. Crim. App. 2014) (statute provides defense to offense of cruelty to nonlivestock animals). Within that subchapter and applicable to section 822.013 are two definitions of terms that appear in section 822.013:

(1) “Dog or coyote” includes a crossbreed between a dog and coyote.

(2) “Livestock” includes exotic livestock as defined by Section 161.001, Agriculture Code.

Tex. Health & Safety Code § 822.011. This statute raises two issues for the proper definitions for jury instructions.

First, the definition of “livestock animal” in the instruction has five subparts. The first four are the “livestock animal” definition from Tex. Penal Code § 42.09—which is incorporated into section 42.092 (Cruelty to Nonlivestock Animals) under subsection (a)(6). The final subpart in the instruction is a necessary addition to that definition because section 822.011 adds to but does not replace the Penal Code definition. Thus, the offered definition is the definition of “livestock animal” from the Health and Safety Code section 822.011 grafted onto the definition from Penal Code section 42.09.

Second, definitions of “dog” and “owner” from nearby subchapter D—Tex. Health & Safety Code § 822.041(3), (5)— have also been included in the instruction. These definitions are not strictly applicable to this defense. The defense appears in subchapter B of chapter 822, and these definitions, strictly construed, only apply to subchapters A and D. The Committee decided to include these definitions because they are logically connected to the issues presented to the jury.