Chapter 49 Intoxication Offenses

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CPJC 49.1 Definition of “Intoxication”

The definition of “intoxication” in jury instructions in driving while intoxicated prosecutions is less influenced by the pleadings than has traditionally been the case.

In State v. Barbernell, 257 S.W.3d 248 (Tex. Crim. App. 2008), the court of criminal appeals made clear that a charging instrument for driving while intoxicated need no longer allege anything regarding the specific definitions of intoxication under Tex. Penal Code § 49.01(2). Under Barbernell, the charging instrument need only allege that the named accused “while operating a motor vehicle in a public place, was . . . intoxicated.” Barbernell, 257 S.W.3d at 249.

Consequently, which statutory options are properly included in the instructions will be determined by the evidence produced at trial and will be unaffected by the pleadings.

However, if the state alleges a particular theory of intoxication in the charging instrument (i.e., loss of normal use or *per se* intoxication), the application section of the jury charge should restrict the jury’s consideration only to that allegation and not the alternate. *See* Crenshaw v. State, 378 S.W.3d 460, 467 (Tex. Crim. App. 2012). In addition, the evidence will affect which intoxicants can be included in the first prong of the definition of intoxicated: “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body.” The application paragraph should reflect the evidence as actually presented in court, and the definition of intoxication should be limited to the evidence presented. *Compare* Burnett v. State, 541 S.W.3d 77 (Tex. Crim. App. 2017) (when evidence only supports intoxication by alcohol, submission of full definition in application paragraph was in error), *with* Ouellette v. State, 353 S.W.3d 868 (Tex. Crim. App. 2011) (submission of full definition of intoxication warranted by evidence).

Although the information or indictment need not allege a specific intoxicant listed in the definition provided by Tex. Penal Code § 49.01(2), the jury charge must account for what the evidence has shown. Section 49.01(2) lists specific intoxicants: “alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body.” The terms controlled substance, drug, and dangerous drug are statutorily defined, generally by reference to schedules and/or penalty groups. Therefore, consistent with the manner in which a court instructs the jury regarding a controlled-substance offense, if the state presents evidence that the defendant had a certain controlled substance, drug, or dangerous drug in their system, the trial court should instruct the jury that the substance in question “is a [controlled substance/drug/dangerous drug].” This is not a fact issue for a jury to decide because these substances, as a matter of law, are controlled substances, drugs, or dangerous drugs. See Black v. State, 491 S.W.2d 428, 431 (Tex. Crim. App. 1973), overruled on other grounds by Faulkner v. State, 549 S.W.2d 1, 4 (Tex. Crim. App. 1976); Cleveland v. State, No. 05-19-00515-CR, 2020 WL 2059912, at \*1 (Tex. App.—Dallas Apr. 29, 2020, no pet.). Rather, the fact issues for the jury to decide are whether that substance was in fact in the defendant’s system and whether that substance caused them to lose the normal use of mental or physical faculties. Accordingly, each of the intoxication instructions in this chapter includes a definition to be used if the evidence raises the presence of a controlled substance, drug, or dangerous drug.

CPJC 49.2 Definition of “Motor Vehicle”

The definition of “motor vehicle” is based on Tex. Penal Code § 49.01(3), which incorporates Tex. Penal Code § 32.34(a). This definition seems incomplete; there appears to be agreement that despite the statutory provisions, the definition should include a requirement that the device be self-propelled. The Texas Transportation Code states: “ ‘[m]otor vehicle’ means a self-propelled vehicle or a vehicle that is propelled by electric power from overhead trolley wires. The term does not include an electric bicycle or an electric personal assistive mobility device, as defined by Section 551.201.” See Tex. Transp. Code § 541.201(11).

The statutory definition is probably at best unhelpful, although there is seldom any need for careful definition of the term.

The Committee concluded that despite the statutory provision, trial judges could properly use more accurate definitions. Instructions could, for example, include:

“ Motor vehicle” means every vehicle which is self-propelled, and includes a passenger car, or motorcycle, or light truck, or truck, tractor, or farm tractor, or road tractor, or truck, or bus.

This definition is apparently widely used. See, e.g., Porter v. State, 921 S.W.2d 553, 555 (Tex. App.—Waco 1996, no pet.).

Alternatively, trial judges might appropriately use the following:

“ Motor vehicle” means an automobile, truck, motorcycle, tractor, bus, or any other device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

CPJC 49.3 Definition of “Operate”

The instructions in this chapter do not define the term operate. The court of criminal appeals in Kirsch v. State, 357 S.W.3d 645 (Tex. Crim. App. 2012), held that the trial court erred in defining the term in jury instructions. “[N]othing in our case law suggests that a risk exists that jurors may arbitrarily apply an inaccurate definition to the term ‘operate’ or that an express definition is required to assure a fair understanding of the evidence.” Kirsch, 357 S.W.3d at 650.

CPJC 49.4 “Synergistic Effect” Instruction

The Committee recommends the so-called synergistic effect instruction, which is included at the end of each of the relevant statutes units of the instructions in this chapter.

Use of a synergistic effect instruction was upheld against certain challenges in Gray v. State, 152 S.W.3d 125 (Tex. Crim. App. 2004). Judge Cochran, joined by Judge Meyers, dissented on the ground that the instruction “is not part of the law applicable to the case, and it is a comment on the weight of the evidence.” Gray, 152 S.W.3d at 138 (Cochran, J., dissenting). The majority characterized the contention that the instruction was a comment on the weight of the evidence as one presented by one of Gray’s grounds for review that was refused. “We do not address that claim today.” Gray, 152 S.W.3d at 134.

The Committee believed that the instruction is a part of the substantive definition of the statutory terms and thus should not, and ultimately will not, be regarded as a prohibited comment.

Gray was reaffirmed in Otto v. State, 273 S.W.3d 165, 170 (Tex. Crim. App. 2008). Otto held that when the state was limited to proving intoxication on alcohol, the jury instruction expanded beyond the charging instrument if it contained a concurrent causation instruction permitting conviction on proof that the defendant’s intoxication was caused concurrently by alcohol and another substance. The instruction recommended by the Committee contains no such concurrent causation provision.

The instruction does not require that the defendant be aware that the medication or other substance will interact with the alcohol and increase the alcohol’s intoxicating effects. Some members of the Committee believed that fairness requires that the synergistic effect analysis be used only if the evidence shows the defendant was aware that the other substance would have this impact.

CPJC 49.5 “No Defense” Instruction

Tex. Penal Code § 49.10 provides that “[i]n a prosecution under Section 49.03, 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, the fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense.”

Under this provision, a jury might be instructed as follows:

The fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense.

The Committee does not recommend such an instruction, because this is too likely to be a prohibited comment on the evidence.

CPJC 49.6 “No Culpable Mental State Requirement” Instruction

The Texas Penal Code provides:

(a) Notwithstanding Section 6.02(b), proof of a culpable mental state is not required for conviction of an offense under this chapter.

(b) Subsection (a) does not apply to an offense under Section 49.031 [possession of alcoholic beverage in motor vehicle].

Tex. Penal Code § 49.11.

Under this provision, a jury might be instructed as follows:

Proof of a culpable mental state is not required for conviction of the charged offense.

The Committee does not recommend such an instruction, because this is too likely to be a prohibited comment on the evidence.

CPJC 49.7 “Refusal” Instruction

The Texas Transportation Code provides that “[a] person’s refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person’s trial.” Tex. Transp. Code § 724.061.

Until Bartlett v. State, 270 S.W.3d 147 (Tex. Crim. App. 2008), there was some question whether in a driving while intoxicated trial the instructions could inform the jury of the substance of the statutory provision.

In Bartlett, the court of criminal appeals—applying the statutory prohibition against comments on the evidence—held that a trial judge erred in giving the following instruction:

You are instructed that where a defendant is accused of violating Chapter 49.04, Texas Penal Code, it is permissible for the prosecution to offer evidence that the defendant was offered and refused a breath test, providing that he has first been made aware of the nature of the test and its purpose. A Defendant under arrest for this offense shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood.

The prosecution asks you to infer that the defendant’s refusal to take the test is a circumstance tending to prove a consciousness of guilt. The defense asks you to reject the inference urged by the prosecution and to conclude that because of the circumstances existing at the time of the defendant’s refusal to take such test, you should not infer a consciousness of guilt.

The fact that such test was refused is not sufficient standing alone, and by itself, to establish the guilt of the Defendant, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not the Defendant’s refusal to take the test shows a consciousness of guilt, and the significance to be attached to his refusal, are matters for your determination.

Bartlett, 270 S.W.3d at 149.

Judge Johnson joined the opinion of the court, reasoning that the second and third paragraphs of the instruction impermissibly “drew attention to the refusal and were likely to have enhanced the apparent importance of it as evidence of guilt.” Bartlett, 270 S.W.3d at 155 (Johnson, J., concurring).

In fact, however, the reasoning of the Bartlett majority would have applied even if the trial judge had limited the instruction to the first of its three paragraphs. The opinion of the court acknowledged this when it summarized: “. . . we hold that a jury instruction informing the jury that it may consider evidence of a refusal to take a breath test constitutes an impermissible comment on the weight of the evidence.” Bartlett, 270 S.W.3d at 154.

The Committee concluded that, under Bartlett, any instruction on admitted evidence of the defendant’s refusal to submit to the taking of a blood or breath sample is impermissible. Consequently, the Committee’s proposed instructions do not include such a provision.

CPJC 49.8 Limited Use of Breath Test Evidence

In those cases in which the state has not introduced retrograde extrapolation evidence regarding what the breath test results suggest was the defendant’s alcohol concentration at the time of the driving, the jury might be instructed as follows:

You are instructed that evidence of the breath test administered to the defendant was admitted for the sole purpose of showing, if it does, that the defendant consumed alcohol. You are not to consider the breath test as evidence of the defendant’s alcohol concentration, if any, at the time he was driving.

In State v. Mechler, 153 S.W.3d 435 (Tex. Crim. App. 2005), the court of criminal appeals indicated the following:

We recently held [in Stewart v. State, 129 S.W.3d 93, 97 (Tex. Crim. App. 2004)] that intoxilyzer results are probative without retrograde extrapolation testimony. Mechler’s intoxilyzer results indicate that Mechler had consumed alcohol. As a result, they tend to make it more probable that he was intoxicated at the time of driving under both the per se and impairment definitions of intoxication. Mechler concedes that this factor weighs in favor of admissibility.

Mechler, 153 S.W.3d at 440.

Mechler held that the trial judge erred in excluding intoxilyzer results offered without extrapolation testimony under Texas Rule of Evidence 403 balancing analysis.

Neither Stewart nor Mechler determined whether, when breath test evidence is admitted without extrapolation testimony, it is best limited to consideration on whether the defendant consumed alcohol. The instruction suggested above would so limit it.

Proponents of an instruction as set out above also contend that when such extrapolation evidence has not been produced, the jury should not be instructed that it may find the defendant intoxicated by reason of having an alcohol concentration of 0.08 or more, even if this was alleged in the charging instrument.

CPJC 49.9 “Involuntary Intoxication” Defense Instruction

The Committee gave significant consideration to whether it should recommend an instruction on involuntary intoxication or some related bar to liability. It considered two possibilities but decided not to recommend instructions of either sort for intoxication offenses. For further discussion of the defense of involuntary intoxication, see chapter 8.

**“Insanity” by Involuntary Intoxication.** In Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. [Panel Op.] 1979), the court of criminal appeals held in effect that involuntary intoxication is a mental disease or defect that can trigger insanity under section 8.01 of the Texas Penal Code. Modified to accommodate post-1979 changes in the definition of “insanity,” Torres establishes generally that involuntary intoxication is an affirmative defense to criminal culpability when the defendant shows that (1) he exercised no independent judgment or volition in taking an intoxicant, and (2) as a result of the intoxication resulting from his taking the intoxicant, he did not know that his conduct was wrong. As the court recognized in Mendenhall v. State, 77 S.W.3d 815, 816 (Tex. Crim. App. 2002), this is the “affirmative defense of insanity due to involuntary intoxication.”

Later the same year as the Torres decision, the court suggested the involuntary intoxication “defense” recognized in Torres would apply in prosecutions under the intoxication offenses. See Hardie v. State, 588 S.W.2d 936, 939 (Tex. Crim. App. [Panel Op.] 1979).

Hardie was a prosecution for what was then involuntary manslaughter under Tex. Penal Code § 19.05(a)(2)(a). The offense was “by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, caus[ing] the death of an individual.” Hardie, 588 S.W.2d at 938. Rejecting Hardie’s claim that the trial court erred by failing to require the state to allege and prove that the intoxication was voluntary, the court explained:

Intoxication is an essential element of involuntary manslaughter under Section 19.05(a)(2). This provision does not require the State to allege and prove that the intoxication is voluntary. We note, however, that this Court has held that a defendant may raise the affirmative defense of involuntary intoxication. Torres v. State, 585 S.W.2d 746 (1979). If a defendant raises an affirmative defense, the defendant must prove it by a preponderance of the evidence. V.T.C.A. Penal Code, Section 2.04. The State is not required to negate the existence of an affirmative defense in the indictment. V.T.C.A. Penal Code, Section 2.04(b). The evidence in this case did not raise the issue of involuntary intoxication.

Hardie, 588 S.W.2d at 939. The Torres defense would apply, this suggests, if the facts supported it.

Despite Hardie’s hint that Torres would apply to what is now intoxication manslaughter, the courts of appeals have been unwilling to require in these cases that trial judges give instructions on insanity by involuntary intoxication.

Most have followed the approach of Aliff v. State, 955 S.W.2d 891, 892–93 (Tex. App.—El Paso 1997, no pet.), a prosecution for driving while intoxicated in which the defendant claimed his intoxication was involuntary because it was caused by prescription medication. Under Beasley v. State, 810 S.W.2d 838, 841 (Tex. App.—Fort Worth 1991, pet. ref’d), the court in Aliff reasoned, the Torres involuntary intoxication defense does not apply to driving while intoxicated and thus the trial court did not err in refusing Aliff’s request for a jury charge on involuntary intoxication. Accord Otto v. State, 141 S.W.3d 238, 241 (Tex. App.—San Antonio 2004) (“The offense of driving while intoxicated does not include as an element a culpable mental state. Therefore, the defense of involuntary intoxication is not relevant to the offense of driving while intoxicated.”) (citations omitted), pet. granted, 173 S.W.3d 70 (Tex. Crim. App. 2005) (per curiam); Nelson v. State, 149 S.W.3d 206, 210 (Tex. App.—Fort Worth 2004, no pet.); Stamper v. State, No. 05-02-01730-CR, 2003 WL 21540414 (Tex. App.—Dallas July 9, 2003, pet. ref’d) (not designated for publication); Godby v. State, No. 04-00-00334-CR, 2001 WL 752709 (Tex. App.—San Antonio July 5, 2001, no pet.) (not designated for publication); Bearden v. State, No. 01-97-00900-CR, 2000 WL 19638 (Tex. App.—Houston [1st Dist.] Jan. 13, 2000, pet. ref’d) (not designated for publication); Smith v. State, No. 03-97-00386-CR, 1998 WL 303880 (Tex. App.—Austin June 11, 1998, no pet.) (not designated for publication).

Some members of the Committee were not persuaded by the analyses of the courts of appeals. Insanity (and hence insanity by involuntary intoxication), they reasoned, is apparently not limited to those offenses that require a culpable mental state. These members of the Committee noted that in Hardie itself the court of criminal appeals indicated involuntary intoxication would be available as a defense despite its conclusion that the statute at issue imposed strict liability. They also believed that the circumstances under which some defendants become intoxicated justify exempting them from criminal responsibility and that the insanity by involuntary intoxication defense is the only available vehicle by which to provide for this.

The majority of the Committee, however, relied on the considerable authority that insanity by involuntary intoxication is not available in prosecutions for the strict liability intoxication offenses. The majority also was unconvinced that application of the insanity standard—not knowing the conduct was “wrong”—would serve to identify those defendants whose intoxication justified exonerating them from these offenses.

The Committee therefore decided not to recommend an instruction on insanity by involuntary intoxication for use in intoxication offense cases.

**Voluntary Act or “Automatism.”** Defendants charged with intoxication offenses have sometimes sought instructions that criminal responsibility might be barred by the requirement set out in Tex. Penal Code § 6.01(a) that criminal liability be based on a voluntary act.

The year after Hardie v. State, the court of criminal appeals indicated that then-sec-tion 19.05(a)(2)(a) of the Penal Code, which covered what is now intoxication manslaughter, “requires the intoxication to be voluntary, thus satisfying the mandate of V.T.C.A. Penal Code, § 6.01 that conduct cannot be criminal unless it is voluntary.” See Guerrero v. State, 605 S.W.2d 262, 264 n.1 (Tex. Crim. App. 1980). This suggests that, independent of insanity by involuntary intoxication under Torres, 585 S.W.2d at 749, involuntary intoxication might bar conviction for certain intoxication offenses by establishing that the state has failed to prove under Code section 6.01 that the intoxication implicated in the offense was voluntary.

In one driving while intoxicated case, for example, the defendant testified that if he was intoxicated, he had not voluntarily drunk the substance that made him intoxicated. “This is a defense under section 6.01 of the penal code,” the court of appeals commented, and “[t]he trial court correctly charged the jury on this defense.” Andrews v. State, No. 05-96-00087-CR, 1998 WL 484610, at \*4 (Tex. App.—Dallas Aug. 19, 1998, no pet.) (not designated for publication).

There has been some confusion regarding the relationship between section 6.01(a)’s requirement and insanity by involuntary intoxication. Stamper, 2003 WL 21540414, at \*1 (defendant’s request for instruction on involuntary intoxication did not preserve any error in trial court’s refusal to give instruction on “the defense of an involuntary act”).

The distinction, however, was carefully drawn in Nelson, 149 S.W.3d 206, and instructions on the voluntary act requirement were held unnecessary.

Nelson sought instructions that “[a] person commits an offense only if he voluntarily engages in conduct, including . . . a bodily movement, whether voluntary or involuntary.” Nelson, 149 S.W.3d at 210. He also requested an instruction defining a “voluntary act” as a “conscious act.” By these requests, the court indicated, Nelson was attempting to raise what Mendenhall, 77 S.W.3d 815, described as the defense of “automatism” sometimes available under Code section 6.01. It continued:

Appellant . . . contends that his actual bodily movements—driving from work to home—were involuntary due to his intoxication.

Involuntary conduct is a defense to prosecution. See Tex. Penal Code § 6.01. However, in Texas a claim of involuntary conduct is not available when the defendant voluntarily took the intoxicant. Id. § 8.04(a); see also Torres, 585 S.W.2d at 749 (holding that the defendant must have exercised no independent judgment in taking the intoxicant).

Nothing in the record indicates that appellant was acting involuntarily when he got into his car and drove home from work. In fact, appellant testified that he made the decision to drive home from work because he was in pain. He recalled making the trip home. . . . We see no evidence in the record to indicate that appellant was unconscious or acting involuntarily when he decided to get into his car and drive home from work.

. . . The fact that appellant took the prescription drugs voluntarily, knowing their effect, bars his claim of involuntary conduct. Accordingly, we hold that appellant was not entitled to a special jury instruction on automatism.

Nelson, 149 S.W.3d at 211–12 (citations omitted). See also Peavey v. State, 248 S.W.3d 455, 464–66 (Tex. App.—Austin 2008, pet. ref’d) (no error in refusing instruction on voluntary act or automatism in prosecution for felony driving a motor vehicle while intoxicated and evading arrest).

Some members of the Committee believed—as suggested by Nelson—that the intoxication offenses permitted at most a claim that the operation of a vehicle was “involuntary.” The requirement of intoxication, they reasoned, is essentially a “circumstance” element and need not itself be the consequence of conduct—voluntary or otherwise—by the defendant. Seldom or never, they concluded, would defendants be able to make viable cases that their operation of the vehicles was involuntary.

Some members of the Committee believed that if unconsciousness is caused by ingestion of intoxicating substances, this removes the situation from section 6.01(a). A defendant’s only possible defensive use can be involuntary intoxication under Torres, and that defense is unavailable under the authorities cited above.

The Committee as a whole decided that the applicability of the voluntary act requirement to the intoxication offenses was sufficiently in doubt that it should not recommend an instruction on involuntary conduct or automatism for use in intoxication cases.

CPJC 49.10 Necessity Defense Instruction

**General Matters.**The instruction on necessity is based on the Committee’s general approach to defensive matters as described in chapter 1 of this product.

The necessity defense language is included in the instruction at CPJC 49.16 only. It could, of course, be modified for any of the other instructions to which the defense applies.

As “necessity” is defined in the Texas Penal Code, it has what might be called a third element: “a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.” Tex. Penal Code § 9.22(3).

The court of criminal appeals has indicated in dicta that this last aspect of the necessity standard is a matter of law that should not be submitted to the jury. See Williams v. State, 630 S.W.2d 640, 643 (Tex. Crim. App. 1982) (“The issue of a plain legislative purpose to exclude the justification is one of law, and the jury may not consider it.”). Accord Pennington v. State, 54 S.W.3d 852, 857 (Tex. App.—Fort Worth 2001, pet. ref’d) (“The requirements of [Penal Code] subsections 9.22(1) and (2) must be satisfied by evidence, while subsection (3) presents a question of law.”).

A defendant’s right to jury trial under the Sixth Amendment may require jury submission of what is technically an element of a substantive law defense to the charged offense. Apprendi v. New Jersey, 530 U.S. 466 (2000).

The Committee was of the view that whether a legislative purpose to exclude the justification offered plainly appears would best be treated as a matter of law for the court to determine. Even if as a purely theoretical matter a defendant has a right to jury submission of this matter, the Committee believed that no defendant would be harmed by failing to submit this to the jury. On the contrary, if the jury were instructed to address the matter, this could only harm a defendant. No possible harm can be done to criminal defendants by treating this as a matter of law to be decided by the judge. If the judge determines that the legislature has not plainly indicated a purpose to exclude the offered justification, defendants could be harmed only by in addition asking the jury to address in essence whether the defense applies to the type of case before it.

Consequently, at the expense of some trauma to the language of the statute, the Committee felt that the necessity defense instruction to be submitted to the jury should in fact have only two elements.

The Committee believed that a defendant’s Sixth Amendment right to jury trial would not be violated by this approach because jury submission of the final “element” of the defense could only harm the defendant.

Further discussion of the necessity defense may be found in chapter 9.

**“Unanimity” Instruction on Necessity.** The instruction does not include a requirement that the jury be unanimous on the specific basis on which it finds against the defendant on the defense of necessity. It does require the jury to be unanimous in finding that the state has established that necessity does not apply. As explained in chapter 1, this is apparently current Texas law, although there is some uncertainty.

CPJC 49.11 Reserved

This section is reserved.

CPJC 49.12 Reserved

This section is reserved.

CPJC 49.13 Reserved

This section is reserved.

CPJC 49.14 Reserved

This section is reserved.

CPJC 49.15 Reserved

This section is reserved.

CPJC 49.16 Instruction—Misdemeanor Driving While Intoxicated   
(with Necessity Defense)

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of driving while intoxicated.

# Relevant Statutes

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

# Definitions

Public Place

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Motor Vehicle

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

# Application of Law to Facts

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

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this in a public place; and

3. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. having an alcohol concentration of 0.08 or more.

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

[Select one of the following.]

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

[or]

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must next consider whether the defendant is not guilty because his conduct is justified by the [*insert defense, e.g.*, necessity] defense.

[Include the following if raised by the evidence.]

# Necessity

It is a defense to the offense of misdemeanor driving while intoxicated that, at the time of the conduct, both—

1. the person reasonably believed the conduct that constituted driving while intoxicated was immediately necessary to avoid imminent harm, and

2. the desirability and urgency of avoiding the harm clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting the conduct.

# Burden of Proof

The defendant is not required to prove that necessity applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defendant did not act out of necessity.

# Definition

Reasonable Belief

“Reasonable belief” means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

# Application of Law to Facts

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

1. the defendant did not reasonably believe the conduct that constituted driving while intoxicated was immediately necessary to avoid an imminent harm, in this case [*describe harm the defendant sought to avoid, such as the death of or serious bodily injury to someone*]; or

2. the desirability and urgency of avoiding [*describe harm the defendant sought to avoid, such as the death of or serious bodily injury to someone*] did not clearly outweigh, according to ordinary standards of reason-ableness, the harm sought to be prevented by the law prohibiting driving while intoxicated.

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 driving while intoxicated, and you believe, beyond a reasonable doubt, that the defendant did not act out of necessity, 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

Driving while intoxicated is prohibited by and defined in Tex. Penal Code § 49.04. The definition of “public place” is based on Tex. Penal Code § 1.07(a)(40). The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1). The defense of necessity is provided for in Tex. Penal Code § 9.22. The definition of “reasonable belief” is based on Tex. Penal Code § 1.07(a)(42).

Enhanced Misdemeanor Driving While Intoxicated. Driving while intoxicated and similar chapter 49 offenses can be enhanced under Tex. Penal Code § 49.09(a) with proof of a prior conviction. The court of criminal appeals has held that an enhancement under this provision is a punishment-stage matter. *See* Oliva v. State, 548 S.W.3d 518 (Tex. Crim. App. 2018). Therefore, the jury should not be instructed on the enhancement in this charge.

Necessity Defense Language. The necessity defense language is included in this instruction only. It could, of course, be modified and incorporated into any of the other instructions to which the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.17 Instruction—Driving While Intoxicated with Child -Passenger

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of driving while intoxicated with a child passenger.

# Relevant Statutes

A person commits the offense of driving while intoxicated with a child passenger if the person is intoxicated while operating a motor vehicle in a public place with a child passenger.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

# Definitions

Public Place

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Motor Vehicle

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

# Application of Law to Facts

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

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this in a public place; and

3. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. having an alcohol concentration of 0.08 or more; and

4. the motor vehicle was occupied by a passenger who was younger than fifteen years of age on the date listed in element 1 above.

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 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.”

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

COMMENT

Driving while intoxicated with a child passenger is prohibited by and defined in Tex. Penal Code § 49.045. The definition of “public place” is based on Tex. Penal Code § 1.07(a)(40). The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1).

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.18 Instruction—Misdemeanor Flying While Intoxicated

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of flying while intoxicated.

# Relevant Statutes

A person commits the offense of flying while intoxicated if the person is intoxicated while operating an aircraft.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

# Definitions

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Aircraft

“Aircraft” means a device intended, used, or designed for flight in the air.

# Application of Law to Facts

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

1. the defendant operated an aircraft in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. having an alcohol concentration of 0.08 or more.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the method of intoxication listed in elements 2.a and 2.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 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 two elements listed above, 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

Flying while intoxicated is prohibited by and defined in Tex. Penal Code § 49.05. The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1).

Definition of “Aircraft.” No definition of “aircraft” is provided in the definition section of chapter 49 of the Texas Penal Code, relating to intoxication and alcoholic beverage offenses. Some members of the Committee believed that the term aircraft should be defined despite that absence. Thus, we have borrowed the definition from the Texas Transportation Code. See Tex. Transp. Code § 21.001(2).

Enhanced Misdemeanor Flying While Intoxicated. Driving while intoxicated and similar chapter 49 offenses can be enhanced under Tex. Penal Code § 49.09(a) with proof of a prior conviction.

As with an enhanced misdemeanor driving-while-intoxicated charge, an enhancement under this provision is likely a punishment-stage matter. *See* Oliva v. State, 548 S.W.3d 518 (Tex. Crim. App. 2018). Therefore, the jury should not be instructed on the enhancement in this charge.

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.19 Instruction—Misdemeanor Boating While Intoxicated

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of boating while intoxicated.

# Relevant Statutes

A person commits the offense of boating while intoxicated if the person is intoxicated while operating a watercraft.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

# Definitions

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Watercraft

“Watercraft” means a vessel, one or more water skis, an aquaplane, or another device used for transportation or carrying a person on water, other than a device propelled only by the current of the water.

# Application of Law to Facts

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

1. the defendant operated a watercraft in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. by having an alcohol concentration of 0.08 or more.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the method of intoxication listed in elements 2.a and 2.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, 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

Boating while intoxicated is prohibited by and defined in Tex. Penal Code § 49.06. The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1).

Definition of “Watercraft.” The definition of “watercraft” is based on Tex. Penal Code § 49.01(4). This definition does not appear to require that the watercraft have a motor. The legislature does not define the term watercraft in the Texas Parks and Wildlife Code. However, the term motorboat is used and defined at Tex. Parks & Wild. Code § 31.003(3), and the legislature chose not to limit the definition of the term watercraft in the Penal Code in a similar manner. The legislature does clearly exclude from the definition provided in Penal Code section 49.01(4) any “device propelled only by the current” (emphasis added). The Committee believes that this definition thus may include any vessel propelled by motor, wind, or human power, such as sailboats, canoes, rowboats, rafts, kayaks, skis attached to motorized vessels, and motorized jet skis.

The definition of “watercraft” also appears in the Texas Transportation Code, where it means “a vessel subject to registration under Chapter 31, Parks and Wildlife Code.” Tex. Transp. Code § 683.001(8). If the legislature intended to define “watercraft” in the same manner as in the Penal Code, the Committee believes it would have done so rather than providing the alternative and different definition contained in Tex. Penal Code § 49.01(4). The Committee could find no case law on this point. However, if the Transportation Code definition does control, prosecutions would be limited in at least two ways. First, boating while intoxicated charges could be brought only if the watercraft operated in “public water.” Tex. Parks & Wild. Code § 31.004. Second, this Transportation Code definition appears to exempt all vessels registered in another state or country (Tex. Parks & Wild. Code § 31.022(a)(1), (2)) and “all canoes, kayaks, punts, rowboats, rubber rafts, or other vessels under 14 feet in length when paddled, poled, oared, or windblown” (Tex. Parks & Wild. Code § 31.022(c)).

Enhanced Misdemeanor Boating While Intoxicated. Driving while intoxicated and similar chapter 49 offenses can be enhanced under Tex. Penal Code § 49.09(a) with proof of a prior conviction.

As with an enhanced misdemeanor driving-while-intoxicated charge, an enhancement under this provision is likely a punishment-stage matter. *See* Oliva v. State, 548 S.W.3d 518 (Tex. Crim. App. 2018). Therefore, the jury should not be instructed on the enhancement in this charge.

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.20 General Comments on Felony Enhanced Offenses

Felony Enhanced Driving While Intoxicated. There are five grades of the offense of driving while intoxicated. The differences among the grades depend on the number and type of prior convictions of the defendant and whether a victim is injured or killed. The offense of driving while intoxicated with no alleged prior intoxication-related offense is a class B misdemeanor, with a minimum term of confinement of seventy-two hours. Tex. Penal Code § 49.04(b). If the state can show at trial that the defendant had previously been convicted of an offense listed in section 49.09(a) and defined in section 49.09(c), the offense of driving while intoxicated is a class A misdemeanor, with a minimum term of confinement of thirty days. Tex. Penal Code § 49.09(a), (c). If the state can show at trial that the defendant had previously been convicted of intoxicated manslaughter or two intoxication-related offenses, the offense of driving while intoxicated is a felony of the third degree. Tex. Penal Code § 49.09(b)(1), (2). If the state can show at trial that the defendant “caused serious bodily injury to a peace officer, a firefighter, or emergency medical services personnel while in the actual discharge of an official duty,” the offense of driving while intoxicated is a felony of the second degree. Tex. Penal Code § 49.09(b–1). If the state can show at trial that the defendant caused the death of a peace officer, a firefighter, or emergency medical services personnel while in the actual discharge of an official duty, the offense of driving while intoxicated is a felony of the first degree. Tex. Penal Code § 49.09(b–2).

The court of criminal appeals has held that the prior offenses required for enhanced felony penalties under Tex. Penal Code § 49.09(b) “are elements of the offense of driving while intoxicated. They define the offense . . . and are admitted into evidence as part of the State’s proof of its case-in-chief during the guilt-innocence stage of the trial.” Gibson v. State, 995 S.W.2d 693, 696 (Tex. Crim. App. 1999) (holding that state could rely on two prior convictions arising out of single act of DWI to enhance DWI offense to felony). Thus, such prior convictions must be pleaded in the indictment and proved to the jury beyond a reasonable doubt.

Stipulation to Enhancement Prior Conviction. The defendant may offer to stipulate to the jurisdictional prior involuntary manslaughter conviction in a felony DWI case brought pursuant to Tex. Penal Code § 49.09(b)(1). It is the defendant’s responsibility to draft an acceptable written stipulation, signed by the defendant. The trial judge need not accept a stipulation that is not dispositive of the jurisdictional element. Martin v. State, 200 S.W.3d 635, 640 n.12 (Tex. Crim. App. 2006).

However, when the defendant agrees to stipulate to the requisite number or type of convictions necessary to enhance the penalty, the prosecutor may not read the full indictment to the jury, nor may he present evidence of the convictions during the case-in-chief. The court of criminal appeals has held in two similar cases that this rule is necessary to strike a balance between Code of Criminal Procedure article 36.01(a)(1), which authorizes the reading of the full indictment, and rule 403 of the Texas Rules of Evidence, which prohibits the admission of evidence that is substantially more prejudicial than probative. In Tamez v. State, 11 S.W.3d 198 (Tex. Crim. App. 2000), the court of criminal appeals reversed a felony DWI conviction in which the state had read from the indictment each of the defendant’s six prior DWI convictions at the beginning of the trial and entered the six judgments into evidence during its case-in-chief.

In cases where the defendant agrees to stipulate to the two previous DWI convictions, we find that the proper balance is struck when the state reads the indictment at the beginning of trial, mentioning only the two jurisdictional prior convictions, but is foreclosed from presenting evidence of the convictions during its case-in-chief. This allows the jury to be informed of the precise terms of the charge against the accused, thereby meeting the rationale for reading the indictment, without subjecting the defendant to substantially prejudicial and improper evidence during the guilt/innocence phase of trial. Following this logic, any prior convictions beyond the two jurisdictional elements should not be read or proven during the State’s case-in-chief—as long as the defendant stipulates to the two prior convictions—as they are without probative value and can serve only to improperly prove the defendant’s “bad character” and inflame the jury’s prejudice.

Tamez, 11 S.W.3d at 202–03. See also Robles v. State, 85 S.W.3d 211 (Tex. Crim. App. 2002) (en banc) (when defendant stipulates to existence of the two alleged prior DWI convictions, state may read indictment but may not enter judgments into evidence, as jury could have gleaned from judgments that DWI charged was appellant’s fifth alcohol-related offense and that appellant had not served his full term for his last prior conviction). These cases all concern instances in which the enhancement to a felony required two prior convictions. In a Penal Code section 49.09(b)(1) case, only a single prior intoxication manslaughter conviction is required. Nevertheless, the Committee believes that it could be sufficiently prejudicial to the defendant to provide the details of this prior death that the state must accept a stipulation under Tamez if such a proper stipulation is offered.

However, although no evidence relating to the particulars of the prior conviction is admissible at trial, the jury instruction must include the jurisdictional element of the crime charged even if this element is a prior conviction and the defendant has stipulated to its existence. The court of criminal appeals recently suggested that the best procedure is to include the allegation of the prior manslaughter conviction in the application paragraph of the jury instruction, with a separate paragraph stating that the defendant has stipulated to the existence of this prior conviction and thus that element has been satisfied. See Martin, 200 S.W.3d at 639.

Instruction on Limited Use of Prior Conviction. Martin v. State ensures that even if a defendant stipulates to the prior convictions, the jury at the guilt/innocence stage of the trial will at least be told something about these prior convictions. See Martin, 200 S.W.3d at 640–41. Those prior convictions, of course, cannot be used by the jury in determining whether the defendant operated a vehicle while intoxicated as alleged in the charged offense.

In Martin, the court of criminal appeals assumed that if the jury is told that the defendant stipulated to the prior convictions, the instruction conveying this information “would also instruct the jury to find that the jurisdictional prior convictions may not be used for any other purpose in determining the guilt of the defendant on the charged occasion.” Martin, 200 S.W.3d at 639.

The Committee concluded that such limiting instructions should be used in every case in which the jury hears evidence about, or is instructed concerning, such prior convictions.

CPJC 49.21 Instruction—Felony Driving While Intoxicated (Two Prior DWI Convictions)

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the enhanced offense of driving while intoxicated.

# Relevant Statutes

A person commits the enhanced offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place and that person has previously been convicted two times of offenses relating to [*select one or more of the following:* operating a motor vehicle while intoxicated/operating an aircraft while intoxicated/operating a watercraft while intoxicated/operating or assembling an amusement ride while intoxicated].

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

[Include the following if raised by the evidence.]

[*Offense*] is an offense relating to [*select one or more of the following:* operating a motor vehicle while intoxicated/operating an aircraft while intoxicated/operating a watercraft while intoxicated/operating or assembling an amusement ride while intoxicated].

# Definitions

Public Place

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Motor Vehicle

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

[Include the following if there is no stipulation to the prior convictions  
and therefore evidence concerning those convictions was introduced.]

# Evidence of Possible Prior Convictions of Defendant

You have heard evidence that the defendant may have been convicted of prior offenses. This evidence may be considered by you only in determining whether the state has proved the fourth element of the offense charged, consisting of two prior convictions.

This evidence may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, it may not be used to suggest that, because the defendant committed intoxication offenses in the past, he is more likely to have committed the presently charged intoxication offense.

# Application of Law to Facts

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

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this in a public place; and

3. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. having an alcohol concentration of 0.08 or more; and

4. the defendant was convicted both—

a. on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*], for the offense of [*offense*]; and

b. on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*], for the offense of [*offense*].

[If the defendant has stipulated to the prior convictions, insert the   
stipulation here and include the following.]

The defendant has stipulated to the prior convictions, the fourth element of the offense charged. Because this element is uncontested, no evidence regarding the prior convictions is necessary. You are hereby directed to find that element 4 of this felony DWI offense is established.

These prior convictions may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, they may not be used to suggest that, because the defendant committed intoxication offenses in the past, he is more likely to have committed the presently charged intoxication offense.

[If the defendant has stipulated to the prior convictions,   
eliminate the option that includes element 4   
from each of the following paragraphs.]

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, 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

Enhancement of driving while intoxicated to a felony by proving two prior offenses is provided for in Tex. Penal Code § 49.09(b)(2). The definition of “public place” is based on Tex. Penal Code § 1.07(a)(40). The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1).

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.22 Instruction—Felony Driving While Intoxicated (Prior Intoxication Manslaughter Conviction)

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the enhanced offense of driving while intoxicated.

# Relevant Statutes

A person commits the enhanced offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place and that person has previously been convicted one time of [an offense of intoxication manslaughter under Texas Penal Code section 49.08/an offense under the laws of another state if the offense contains elements that are substantially similar to the elements of intoxication manslaughter under Texas Penal Code section 49.08].

[Include the following if the state relies on a prior   
conviction in another state.]

[*Offense*] is an offense under the laws of another state that contains elements substantially similar to the elements of intoxication manslaughter under Texas Penal Code section 49.08.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

# Definitions

Public Place

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Motor Vehicle

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

[Include the following if there is no stipulation to the prior conviction and therefore evidence concerning that conviction was introduced.]

# Evidence of Possible Prior Conviction of Defendant

You have heard evidence that the defendant may have been convicted of a prior offense. This evidence may be considered by you only in determining whether the state has proved the fourth element of the offense charged, consisting of a prior conviction.

This evidence may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, it may not be used to suggest that, because the defendant committed an intoxication offense in the past, he is more likely to have committed the presently charged intoxication offense.

# Application of Law to Facts

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

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this in a public place; and

3. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. having an alcohol concentration of 0.08 or more; and

4. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*], for the offense of [*offense*].

[If the defendant has stipulated to the prior conviction,  
 insert the stipulation here and include the following.]

The defendant has stipulated to the prior manslaughter conviction, the fourth element of the offense charged. Because this element is uncontested, no evidence regarding the prior conviction is necessary. You are hereby directed to find that element 4 of this felony DWI offense is established.

This prior conviction may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, it may not be used to suggest that, because the defendant committed this intoxication offense in the past, he is more likely to have committed the presently charged intoxication offense.

[If the defendant has stipulated to the prior conviction,   
eliminate the option that includes element 4 from each of   
the following paragraphs.]

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, 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

Enhancement of driving while intoxicated to a felony by proving a prior intoxication manslaughter conviction is provided for in Tex. Penal Code § 49.09(b)(1). Intoxication manslaughter is prohibited by and defined in Tex. Penal Code § 49.08. The definition of “public place” is based on Tex. Penal Code § 1.07(a)(40). The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1).

Prior Conviction for Involuntary Manslaughter. A prior conviction for involuntary manslaughter under former Texas Penal Code section 19.05(a)(2) may not be used to enhance a sentence under section 49.09(b)(1). Ex parte Roemer, 215 S.W.3d 887, 890 (Tex. Crim. App. 2007).

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.23 General Comments on Death or Injury Intoxication Offenses—Causation

The language instructing the jury on causation in the intoxication manslaughter and intoxication assault instructions follows the approach outlined in chapter 1 of this product and CPJC 49.1 through CPJC 49.10.

The language regarding causation does not contain a definition of a concurrent cause. Nor does it explain what is meant by several causes acting concurrently. Neither statutory nor case law provides sufficient guidance about how these matters could be defined.

As discussed previously, the Committee encountered considerable difficulty with causation as a general matter. Two of the offenses addressed in this chapter—intoxication manslaughter and intoxication assault—required the Committee to struggle even more intensely with causation under Texas law.

Both of these offenses require proof that the accused, while engaging in certain specified activities, “by reason of [the defendant’s] intoxication causes” some harm to the victim. Intoxication assault requires that the harm be serious bodily injury, and intoxication manslaughter requires that it be death.

For several reasons, causation issues in prosecutions for these offenses arise more frequently and present difficult issues more often than with other offenses requiring proof of results.

The fact situations involved—automobile accidents—offer more opportunity for a defendant to argue that factors other than the defendant’s conduct contributed to the result. Further, in reality, the causal link to be proved is more complex than in most other cases: the state must prove that the defendant’s intoxication influenced or “caused” the defendant’s conduct and that this conduct then “caused” the result.

Additionally, in many other offenses requiring proof that the accused caused a result, the requirement of a culpable mental state narrows the scope of liability. Intoxication manslaughter and intoxication assault, in contrast, require no culpable mental state. Thus the requirement of causation becomes more attractive as a defense target.

There is considerable existing law on causation issues in prosecutions for these offenses, although almost all of that law is under intoxication manslaughter or its statutory predecessor.

Under the pre-1974 manslaughter law, the state was entitled to have the jury told that the state could prevail on proof that the defendant’s intoxication contributed to the victim’s death. The defendant was entitled to have the jury told that his intoxication did not cause the victim’s death as required by the crime if, although he was intoxicated, he behaved as he would have if he had been sober. Long v. State, 229 S.W.2d 366, 367 (Tex. Crim. App. 1950) (jury instructed “if you find and believe that under the same or similar circumstances a reasonable prudent person who was not intoxicated nor under the influence of intoxicating liquor could not have avoided the collision, or if you have a reasonable doubt thereof, you will find the defendant not guilty”); Fox v. State, 165 S.W.2d 733, 735 (Tex. Crim. App. 1942) (jury instructed “that [if] after seeing [the victim], in an effort to avoid striking him, the defendant thereafter operated his automobile in the same manner that it would have been operated by a person not intoxicated . . . then . . . it would be their duty to acquit the defendant, or if they had a reasonable doubt thereof to acquit him”).

The 1974 Penal Code clearly changed this. Causation under the intoxication manslaughter statute is now controlled by the general causation provision, Tex. Penal Code § 6.04(a).

As a matter of substantive law, the state under the Penal Code still must prove not only that the defendant was intoxicated and while intoxicated caused the death of the victim but also that the intoxication caused the death of the victim. Daniel v. State, 577 S.W.2d 231, 233 (Tex. Crim. App. 1979) (“The death must be the result of the intoxication and proof must be made and submitted to the jury of that thing which worked a causal connection between the intoxication and the death.” (quoting Long)). Accord Hardie v. State, 588 S.W.2d 936, 939 (Tex. Crim. App. [Panel Op.] 1979); Garcia v. State, 112 S.W.3d 839, 852–54 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Specifying Conduct of Defendant on Which State’s Theory Is Based. An initial problem in translating Texas Penal Code section 6.04(a) into an intoxication manslaughter or intoxication assault jury instruction is that section 6.04(a) is phrased in terms of the defendant’s being responsible when the defendant’s conduct is the cause of the result. Intoxication assault and intoxication manslaughter, however, require that the instruction address whether the accused’s intoxication—a “condition,” rather than conduct—had a sufficient impact on events to render the defendant responsible for the death. In reality, of course, what the law means is that an aspect of the defendant’s conduct caused by his intoxication must have caused the result.

The Committee concluded that the instructions under current law should convey the substance of what was communicated to juries under prior law: if the defendant’s conduct and the sequence of events would have been the same had the defendant not been intoxicated, the defendant did not by intoxication cause the death of or injury to the victim.

Section 6.04(a) indicates the instructions should refer to “the conduct of the [accused].” Tex. Penal Code § 6.04(a). The definitions of intoxication manslaughter (section 49.08) and intoxication assault (section 49.07) indicate that the instruction should refer to the accused “by reason of [the defendant’s] intoxication causes” death or serious bodily injury. Tex. Penal Code §§ 49.07, 49.08.

Consequently, the Committee drafted the instructions to focus on whether the result—death or serious bodily injury—was caused by the part or aspect of the accused’s conduct that was in turn caused or determined by the accused’s intoxication.

Instructions If Concurrent Causation Not Raised. If the facts of the case do not raise concurrent causation, a trial judge does not err (or at least does not reversibly err—the opinion is not clear) in giving an abstract instruction containing all of section 6.04(a)’s causation law, including that portion applying to concurrent causation. Hughes v. State, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994). See also McKinney v. State, 177 S.W.3d 186, 201–02 (Tex. App.—Houston [1st Dist.] 2005), aff’d after review on other grounds, 207 S.W.3d 366 (Tex. Crim. App. 2006).

But at least sometimes a trial court errs by instructing the jury only in the abstract portion of the instruction that the state can meet its burden of persuasion by proving that the defendant’s intoxication contributed to the death of the victim. This is because that approach, permissible under pre-1974 law, is barred by section 6.04(a)’s explicit provision for concurrent causation. Robbins v. State, 717 S.W.2d 348, 350 (Tex. Crim. App. 1986) (trial court erred by telling jury abstract law required proof that defendant by reason of intoxication “caused or contributed to” death of victim).

It would seem to follow that a trial court errs under Robbins by telling the jury—in the terms of section 6.04(a)—that the defendant is responsible for the victim’s death or injury if that death or injury would not have occurred but for the defendant’s intoxication, “operating either alone or concurrently with another cause.” Robbins, 717 S.W.2d at 351. If the instruction mentions concurrent causation, Robbins holds, it must also make clear the limits on concurrent causation even if the facts do not raise concurrent causation.

Robbins assumed, first, that prior law required only that the intoxication-induced conduct of the defendant in some unqualified way contributed to causing the death or serious bodily injury. It assumed, second, that section 6.04(a)’s concurrent cause provisions imposed a minimal requirement regarding “the degree of contribution” the intoxication-induced conduct of the defendant must make to causing the death or serious bodily injury. Thus, whenever causation issues of any sort arise, juries should not be told that other factors or causes may also operate to cause the result without also being told about the concurrent causation law that defines for any of these situations the degree of contribution the defendant’s conduct must have made.

Distinguishing Alternative Causation. If the defendant’s argument is that the death or injury to the victim is attributable to something that is neither the defendant’s conduct specified by the state as the basis for its theory nor a concurrent cause, the argument must be “alternative” causation.

A defendant’s contention that the events were influenced by his exhaustion but not his intoxication, Robbins held, does not raise concurrent causation. This is because “[a] concurrent cause is ‘another cause’ in addition to the actor’s conduct, an ‘agency in addition to the actor.’ ” Robbins, 717 S.W.2d at 351 n.2.

Apparently, however, a defendant can argue that he would have driven exactly as he did even if he was sober, and thus his intoxication is not a “but for” cause of the death or injury arising from the accident. It seems as though such a defendant can argue that his exhaustion is an alternative cause. This is not, however, to be reflected in the jury instruction, in either the abstract portion or the application portion.

Determining Whether Concurrent Causation Is Raised. In theory, concurrent causation is raised and a jury instruction on it is appropriate if the evidence would permit the jury to find all of the following:

1. The facts show something that can constitute a “concurrent cause.”

2. The death or injury to the victim was caused by intoxication-induced conduct of the defendant and this concurrent cause was “operating . . . concurrently.”

3. The concurrent cause was clearly sufficient to produce the death or injury to the victim.

4. The intoxication-induced conduct of the defendant was clearly insufficient to produce the death or injury to the victim.

The most difficult questions are how to decide elements 3 and 4. Nugent v. State, 749 S.W.2d 595, 596–97 (Tex. App.—Corpus Christi–Edinburg 1988, no pet.), provides an example. Nugent was operating a vehicle on Alameda Street in Corpus Christi, Texas, when it collided with another vehicle being operated by Marcus Meza. The Meza vehicle had been traveling in the opposite direction on Alameda and attempted a left-hand turn into a convenience store parking lot at the time of the wreck. Three passengers in the Meza vehicle were killed. There was evidence that Nugent was intoxicated and that he was driving at a speed considerably over the posted limit.

Nugent’s intoxication could have affected his conduct in at least two ways: It could have caused him to speed. Or it could have so dulled his reflexes that he was unable to avoid the Meza vehicle when it turned in front of his car, although he would have been able to avoid it if he had been sober.

Clearly Nugent might have argued alternative causation—his conduct, insofar as it was induced or caused by intoxication, did not affect the events, which were caused only by Meza’s left turn.

The court of appeals stated that “[t]here was . . . evidence from which the jury could conclude that Meza’s conduct concurrently contributed to the wreck.” Nugent, 749 S.W.2d at 597. Assuming that is correct, how should the trial judge determine whether the jury could find that Meza’s conduct alone was clearly sufficient to cause the deaths? His left turn would not have caused the deaths had not some vehicle been approaching in a manner that did not permit the driver to avoid Meza. If Nugent’s intoxication caused him to speed and thus “but for” his intoxication he would not have been driving his vehicle at that particular spot, would this be sufficient?

How should the trial judge determine whether Nugent’s intoxication-induced conduct was clearly insufficient to produce the deaths? His speeding and reduced reflexes would not have caused any harm to anyone had he not encountered some impediment to proceeding on the street.

The Committee was unable to discern from the numerous decisions any guidelines for making these difficult determinations. Nevertheless, trial judges must make them to determine, under present law, whether jury instructions should include coverage of concurrent causation.

Instructing on Concurrent Causation When Such Instruction Is Required. If the facts raise concurrent causation under section 6.04(a), a trial court must not only instruct on concurrent causation in the abstract but also apply that law to the facts. Nugent, 749 S.W.2d 595 (conviction for involuntary manslaughter reversed for failure to apply concurrent causation to facts).

In Robbins, the court of criminal appeals referred to the involuntary manslaughter instruction in the ninth edition of Texas Criminal Forms and Trial Manual as “a proper charge.” See Robbins, 717 S.W.2d at 352 n.3. But this charge did not apply causation to the facts at all. What Robbins apparently meant was that the instruction properly set out causation law in the abstract. See 8 Michael J. McCormick et al., Texas Practice Series: Criminal Forms and Trial Manual § 93.11 (9th ed. 1985).

Concurrent causation under section 6.04(a), the Committee concluded, is “[a] ground of defense in a penal law that is not plainly labeled in accordance with [chapter 2 of the Penal Code].” Tex. Penal Code § 2.03(e). Thus, under Texas Penal Code section 2.03(d), (e), it is treated as a “defense,” and “the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.” See Tex. Penal Code § 2.03(d), (e).

Pursuant to the general approach described in chapter 1 of this product, the Committee drafted the language instructing the jury on concurrent causation in the intoxication manslaughter and intoxication assault instructions in terms of what the state must prove as a procedural result of the defendant’s having raised the issue.

Case law provides little in the way of examples of careful applications of concurrent causation to the facts of particular cases. Nugent is something of an exception. Defendant Nugent argued that he was relieved of responsibility for the death of the victim because Meza, the driver of the other car involved in the fatal collision, made a left turn into the path of the defendant’s car and in doing so failed to yield the right of way to the defendant. The trial court instructed the jury on section 6.04(a) in abstract terms. Defense counsel unsuccessfully sought the following application instruction:

Therefore, in order to find the defendant guilty, you must believe beyond a reasonable doubt that the accident would not have occurred but for the intoxication of the defendant, if he was, operating either alone or concurrently with the conduct of Marcus Meza; and further, if you believe that Marcus Meza’s conduct was clearly sufficient to cause the accident, and the defendant’s intoxication was clearly insufficient to cause the accident, you must acquit the defendant.

Nugent, 749 S.W.2d at 597. The court of appeals apparently regarded this instruction as appropriate. See Nugent, 749 S.W.2d at 598. The Committee agreed and used it as the basis for its language instructing the jury on concurrent causation in the intoxication manslaughter and intoxication assault instructions.

The instructions that follow reflect the Committee’s best efforts to explain how section 6.04(a)’s provisions should be applied to this unusually troublesome area. If in fact section 6.04(a)’s language was developed to address a very limited type of situation in causation law, applying it here across the board cannot be expected to provide satisfactory results.

CPJC 49.24 Instruction—Intoxication Manslaughter

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of intoxication manslaughter.

# Relevant Statutes

A person commits the offense of intoxication manslaughter if the person operates a motor vehicle in a public place, is intoxicated, and by reason of that intoxication causes the death of another by accident or mistake.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

[Include the following if an instruction on causation is appropriate  
but no issue of concurrent causation is raised by the facts.]

A person who is intoxicated causes the death of another by reason of that intoxication if the intoxication causes the person to engage in particular conduct and the death of the other would not have occurred but for the person’s intoxication-influenced conduct.

[Include the following if the facts raise an issue   
concerning concurrent causation.]

A person who is intoxicated causes the death of another by reason of that intoxication if the intoxication causes the person to engage in particular conduct, and the death of the other would not have occurred but for the person’s intoxication-influenced conduct operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the intoxication-influenced conduct of the person was clearly insufficient.

# Definitions

Public Place

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Motor Vehicle

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

[Include the following if raised by the facts.]

Death

“Death” means the irreversible cessation of a person’s spontaneous respiratory and circulatory function, according to ordinary standards of medical practice. If artificial means of support preclude a determination whether a person’s spontaneous respiratory and circulatory functions have ceased, death means the irreversible cessation of all a person’s spontaneous brain functions, according to ordinary standards of medical practice.

[Include if applicable.]

Person

“Person” means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

# Application of Law to Facts

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

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this in a public place; and

3. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of [include as applicable: alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances, or any other substance] into the body; or

b. having an alcohol concentration of 0.08 or more; and

4. the defendant, by reason of the intoxication, caused the death of [*name of decedent*] by accident or mistake.

[Include the following if the jury was instructed in the   
relevant statutes unit on concurrent causation.]

5. a. [*concurrent cause*] did not contribute to causing the death of [*name of decedent*]; or

b. [*concurrent cause*] contributed to causing the death of [*name of decedent*], but [*concurrent cause*] was clearly insufficient to cause the death of [*name of decedent*]; or

c. [*concurrent cause*] contributed to causing the death of [*name of decedent*], but the intoxication of the defendant was clearly sufficient to cause the death of [*name of decedent*].

[Continue with the following.]

You must all agree on elements [1, 2, 3, and 4/ 1, 2, 3, 4, and 5] listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above [and you do not have to agree on which of elements 5.a, 5.b, or 5.c that the state may have proven beyond a reasonable doubt].

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, 3, and 4/1, 2, 3, 4, and 5] 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/five] elements listed above, 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

Intoxication manslaughter is prohibited by and defined in Tex. Penal Code § 49.08. The causation instructions are based on Tex. Penal Code § 6.04. The definition of “public place” is based on Tex. Penal Code § 1.07(a)(40). The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1). The definition of “person” is based on Tex. Penal Code § 1.07(a)(26), (38).

Definition of “Death.” The definition of “death” is based on the standard used to determine death as set out in the Texas Health and Safety Code. See Tex. Health & Safety Code § 671.001(a), (b). In Grotti v. State, 273 S.W.3d 273 (Tex. Crim. App. 2008), the court approved use of this definition in homicide cases.

By Accident or Mistake. It has long been settled law that the requirement that the person have caused the death or injury of another “by accident or mistake” means that the person need not have had criminal intent or any culpable mental state.

Under pre-1974 law, the court of criminal appeals explained:

[T]he terms “accident” and “mistake” . . . not having been defined in the statute . . . are there used in the sense ordinarily understood and mean “unintentional.” They are often used in conjunction with each other and interchangeably. The phrase “mistake or accident” is found [elsewhere in the statutes], and it seems that it has never been found necessary to further define the meaning of such phrase, the words composing the phrase being common and ordinary ones the meaning whereof being easily and readily understood.

Johnson v. State, 216 S.W.2d 573, 578 (Tex. Crim. App. 1949) (citation omitted). Under Johnson, a trial court’s failure to define the terms is not error. Cave v. State, 274 S.W.2d 839, 842 (Tex. Crim. App. 1955). See also Druery v. State, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007). (“Where terms used are words simple in themselves, and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms and under such circumstances such common words are not necessarily to be defined in the charge to the jury.”) (quoting King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977)).

The Committee has for some time taken the view that these terms add nothing to the state's burden of proof but simply reflect what is not required, and thus the Committee has historically chosen to omit these terms from the application section.

Appellate courts consistently characterize these terms as “statutory elements” of the offense. See, e.g., Aldrich v. State, 296 S.W.3d 225, 230–31 (Tex. App.—Fort Worth 2009, pet. ref’d); Wooten v. State, 267 S.W.3d 289, 294–95 (Tex. App.—Houston [14th Dist.] 2008, pet. ref’d); accord Ex parte Watson, 306 S.W.3d 259, 263 (Tex. Crim. App. 2009) (construing section 49.07). As such, they should arguably be included in both the statutory definition and the application paragraph. See Curry v. State, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000) (a hypothetically correct jury charge states “the statutory elements of the offense . . . as modified by the charging instrument”). The Committee recommends no definition or further explanation of these terms be included except as required by statute.

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.

CPJC 49.25 Instruction—Intoxication Assault

LAW SPECIFIC TO THIS CASE

The state accuses the defendant of having committed the offense of intoxication assault.

# Relevant Statutes

A person commits the offense of intoxication assault if the person, by accident or mistake, while operating a motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another.

[Include the following if raised by the evidence.]

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

[Include the following if raised by the evidence.]

[*Substance*] is a [controlled substance/drug/dangerous drug].

[Include the following if an instruction on causation is appropriate  
but no issue of concurrent causation is raised by the facts.]

A person who is intoxicated causes serious bodily injury to another by reason of that intoxication by accident or mistake if the intoxication causes the serious bodily injury of the other. Intoxication causes the serious bodily injury of another if that serious bodily injury would not have occurred but for the person’s intoxication.

[Include the following if the facts raise an issue   
concerning concurrent causation.]

A person who is intoxicated causes serious bodily injury to another by reason of that intoxication if the serious bodily injury would not have occurred but for the intoxication, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the serious bodily injury and the intoxication of the person was clearly insufficient.

# Definitions

Public Place

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

Intoxicated

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

Alcohol Concentration

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

Motor Vehicle

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

Serious Bodily Injury

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

# Application of Law to Facts

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

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and

2. the defendant did this in a public place; and

3. the defendant did this while intoxicated, by either—

a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

b. having an alcohol concentration of 0.08 or more; and

4. the defendant, by reason of the intoxication, caused serious bodily injury to [*name of victim*] by accident or mistake.

[Include the following if the jury was instructed in the   
relevant statutes unit on concurrent causation.]

5. a. [*concurrent cause*] did not contribute to causing the serious bodily injury of [*name of victim*]; or

b. [*concurrent cause*] contributed to causing the serious bodily injury of [*name of victim*], but [*concurrent cause*] was clearly insufficient to cause the serious bodily injury of [*name of victim*]; or

c. [*concurrent cause*] contributed to causing the serious bodily injury of [*name of victim*], but the intoxication of the defendant was clearly sufficient to cause the serious bodily injury of [*name of victim*].

[Continue with the following.]

You must all agree on elements [1, 2, 3, and 4 / 1, 2, 3, 4, and 5] listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above [and you do not have to agree on which of elements 5.a, 5.b, or 5.c that the state may have proven beyond a reasonable doubt].

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, 3, and 4 / 1, 2, 3, 4, and 5] 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/five] elements listed above, 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

Intoxication assault is prohibited by and defined in Tex. Penal Code § 49.07. The definition of “public place” is based on Tex. Penal Code § 1.07(a)(40). The definition of “intoxicated” is based on Tex. Penal Code § 49.01(2). The definition of “alcohol concentration” is based on Tex. Penal Code § 49.01(1).

Definition of Serious Bodily Injury. Tex. Penal Code § 49.07(b) provides an offense-specific definition for the term serious bodily injury that differs from the general definition in Tex. Penal Code § 1.07(a)(46) in two ways. First, section 49.07(b) omits the term bodily with reference to the nature of the injury. Second, it omits the term death as a potential form of serious bodily injury, which makes sense because intoxicated conduct causing death would be prosecutable as intoxication manslaughter. Because of the omission of the term bodily, a divided Committee concluded that the term should not be included in the definitions unit in the charge. Some members believed that the term serious bodily injury as defined by section 49.07(b) necessarily includes and is limited to “bodily injury.” Some courts may choose to include the Tex. Penal Code § 1.07(a)(8) definition of “bodily injury” and even to include the term bodily in the definition of serious bodily injury. (For example, “‘Serious bodily injury’ means bodily injury that creates a substantial risk ….”)

By Accident or Mistake. It has long been settled law that the requirement that the person have caused the death or injury of another “by accident or mistake” means that the person need not have had criminal intent or any culpable mental state.

Under pre-1974 law, the court of criminal appeals explained:

[T]he terms “accident” and “mistake” . . . not having been defined in the statute . . . are there used in the sense ordinarily understood and mean “unintentional.” They are often used in conjunction with each other and interchangeably. The phrase “mistake or accident” is found [elsewhere in the statutes], and it seems that it has never been found necessary to further define the meaning of such phrase, the words composing the phrase being common and ordinary ones the meaning whereof being easily and readily understood.

Johnson v. State, 216 S.W.2d 573, 578 (Tex. Crim. App. 1949) (citation omitted). Under Johnson, a trial court’s failure to define the terms is not error. Cave v. State, 274 S.W.2d 839, 842 (Tex. Crim. App. 1955). See also Druery v. State, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007). (“Where terms used are words simple in themselves, and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms and under such circumstances such common words are not necessarily to be defined in the charge to the jury.”) (quoting King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977)).

The Committee has for some time taken the view that these terms add nothing to the state's burden of proof but simply reflect what is not required, and thus the Committee has historically chosen to omit these terms from the application section.

Appellate courts consistently characterize these terms as “statutory elements” of the offense. See, e.g., Aldrich v. State, 296 S.W.3d 225, 230–31 (Tex. App.—Fort Worth 2009, pet. ref’d); Wooten v. State, 267 S.W.3d 289, 294–95 (Tex. App.—Houston [14th Dist.] 2008, pet. ref’d); accord Ex parte Watson, 306 S.W.3d 259, 263 (Tex. Crim. App. 2009) (construing section 49.07). As such, they should arguably be included in both the statutory definition and the application paragraph. See Curry v. State, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000) (a hypothetically correct jury charge states “the statutory elements of the offense . . . as modified by the charging instrument”). The Committee recommends no definition or further explanation of these terms be included except as required by statute.

Necessity Defense Language. The necessity defense language is included in the instruction at CPJC 49.16 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 49.10 and chapter 9.