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Legislative Changes in the Law: Victims-Witnesses Young and Old

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LEGISLATIVE CHANGES IN THE LAW:

VICTIMS-WITNESSES

YOUNG AND OLD

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ASSAULTS ON THE YOUNG AND OLD

This paper will survey the development of law concerning assaults on the young and the elderly with special emphasis on recently enacted and amended statutory provisions. Specifically, this discussion of assaultive conduct focuses on Penal Code Section 22.04, Injury to a Child or an Elderly Individual, and related provisions in the Texas Penal Code and Code of Criminal Procedure. Not addressed will be the recodified but familiar sections of the Penal Code dealing with Sexual Assault of a child (Section 22.011) or Aggravated Sexual Assault of a child (Section 22.021). Also not included in this paper are materials dealing with the new crime of Violation of Court Order, a distinct offense created to criminalize violation of protective orders issued under Section 71.11 of the Texas Family Code. For more information on this subject, see the article entitled "Legal Remedial Alternatives for Spouse Abuse in Texas" included in these course materials.

Many of the statutory provisions considered here are in whole or in part the product of recent legislation. Some of what follows is, therefore, necessarily conjecture based on legislative history, trends, and decisions under similar provisions in current or prior law.

I. Generally

A. Prior Law.

As regards children, this offense was previously codified in Article 1148a of the Penal Code, a provision that was not added until 1971. The original statute prohibited the intentional maiming, disfiguring, or battering of a child 14 years of age or younger by any person, including the parent of the child. The prohibition extended to engaging in conduct by omission or commission which was intended to cause any physical injury or deformity or deficiency to such a child. In essence, the inclusion of omissions with intent to cause the proscribed result established a special duty of care standard with respect to those 14 years and younger.

Violation of Article 1148a was the equivalent of a third degree felony, and no distinction was made in levels of culpability or degree of injury in ascertaining the punishment. It was, however, a defense that the assault was committed by a parent, guardian, master (over an apprentice), or teacher and was "done in the exercise of the right of moderate restraint or correction. . . ." See TEX. PENAL CODE art. 1148a (Vernon 1971).

The elderly were not protected by a specific article in the former code, but the aggravated assault statute did recognize a category of assault involving the elderly and infirm. See TEX. PENAL CODE art. 1147(4) (Vernon 1971). Under that provision, assault (as defined in article 1138) became aggravated under a

variety of circumstances, one of which was "[w]hen committed by a person of robust health or strength upon one who is aged or decrepit." TEX. PENAL CODE art. 1147(4) (Vernon 1971). The punishment range for aggravated assault under the prior Code was by fine of $25 to $1,000 or imprisonment from one month to two years, or both. TEX. PENAL CODE art. 1148 (Vernon 1950).

When the present Penal Code was enacted, assaults to children were covered by Section 22.04, but assaults on the elderly were covered only under the general provisions pertaining to all adults. The look of Section 22.04, had, however, changed dramatically. The offense was now tied to all four levels of culpability resulting in either serious bodily injury, serious physical or mental deficiency or impairment, or deformity to a child 14 years of age or younger. Responsibility by omission or failure to act was retained, and the offense was punished much more severely, as a second degree felony. TEX. PENAL CODE ANN. Sec. 22.04 (Vernon 1974).

B. The Present Code.

One of the most striking historical features of the current section dealing with assaults to children and the elderly is its ephemeral nature. Since its adoption, it has been amended (often substantially) repeatedly. In 1977, the format of the level of injury sustained was altered by listing "serious bodily injury;" "serious physical or mental deficiency or impairment;" and "disfigurement or deformity" as distinct categories of injury. Also, very importantly, the 1977 amendment distinguished

the level of punishment by relating it to the level of culpability employed in commission of the crime. If it was done with recklessness or criminal negligence, the punishment dropped to the third degree felony range. TEX. PENAL CODE ANN. Sec. 22.04 (Vernon Supp. 1978).

The Section was further amended in 1979 by adding "bodily injury" to the list of injury levels proscribed by the statute. With this addition came a separate punishment provision for infliction of this least serious resulting harm. TEX. PENAL CODE ANN. Sec. 22.04 (Vernon Supp. 1980).

Finally, in 1981 the Legislature reshaped the coverage of the statute to cover assaults on the elderly, defined as those 65 years of age or older, and continued the development of its punishment scheme based on a combination of culpability and level of injury. TEX. PENAL CODE ANN. Sec. 22.04 (Vernon Supp. 1982-83). The result of this reliance on various factors to define punishment is a convoluted and often confusing set of elements of proof and a jury charge that may be truly baffling.

II. Elements of the Offense

A person commits the offense of Injury to a Child or Elderly Individual if he:

[1] (a) intentionally;

(b) knowingly;

(c) recklessly; or

(d) criminally negligently

[2] by act or omission engages in conduct that causes

[3] (a) serious bodily injury;

(b) serious physical or mental deficiency or impairment;

(c) disfigurement or deformity; or

(d) bodily injury

[4] (a) to a child who is 14 years or younger or

(b) to an individual who is 65 years or older.

a. Proof of Culpability

Section 22.04 is one of the few sections of the Penal Code to employ all four levels of culpability in defining an offense. Indeed, it is one of the few to base criminal responsibility on negligence. As might be expected, a number of cases decided since the introduction of culpability as the primary determinator of punishment have explored the evidence of culpability and interpreted its application to this statute. [The general definitions of culpability relating to criminal offenses are found in Penal Code Section 6.03.]

One of the more instructive cases involving intent to injure a child is Beggs v. State, 597 S.W.2d 375 (Tex. Crim. App. 1980). In Beggs, the defendant requested a mistake of fact instruction on evidence that, in placing her granddaughter in scalding hot bathwater, she operated under the reasonable mistaken belief that the water was of a normal temperature. The trial court refused her requested charge, and the State argued on appeal that she was not

entitled to the charge since the wording of the statute that the actor "engages in conduct that causes . . . serious bodily injury; . . . " should be read as requiring only a showing that defendant intentionally or knowingly engaged in the conduct; not that she did so intending to cause the resulting injury. 597 S.W.2d at 376.

Noting that the real difference between Section 22.04 and the general assault provisions of Section 22.01 and 22.02 is that Section 22.04 adds a stiffer penalty for assaults against children, the Beggs Court rejected the State's contention. 597 S.W.2d at 377. The Court equated the "intentionally or knowingly" allegation of culpability in the indictment to be the equivalent of an allegation ". . . (1) that it was her conscious objective or desire to cause serious bodily injury and (2) that she was aware that her conduct was reasonably certain to cause serious bodily injury." 597 S.W.2d at 377.

After this holding in Beggs, it was anticlimactic for the Court to find the requested charge required if the evidence demonstrated a reasonable mistaken belief on the part of the defendant concerning a matter of fact (the temperature of the water) which belief negated a conscious objective or desire to cause serious bodily injury or an awareness that her conduct was reasonably certain to cause serious bodily injury. 597 S.W.2d at 378. In other words, if a reasonable mistake about the water's temperature would have negated defendant's culpability, here intent or knowledge, the trial court was obliged to give the requested charge under Penal Code Section 8.02.

The deceased, a 37 month-old child, was brought to the hospital severely bruised with no pulse or respiration. At the time of the death, the child was having a period of visitation with her father, the defendant. In holding the evidence sufficient to establish the intent of the defendant to cause serious bodily injury, the Court relied on testimony by the mother that the child had no bruises when she was picked up by the defendant for the visitation and the testimony by the treating physicians and medical examiner that some of the many bruises found on the body were less than seventy-two hours old. 635 S.W.2d at 795.

The Whitely Court also considered an extrajudicial confession in which the defendant admitted having hit the deceased child on the side of her head at least four times. Since the medical examiner's testimony was that the cause of death was blunt trauma to the head which could have been caused by a hand, the Court held the statement adequately corroborated and the evidence sufficient, notwithstanding the physical evidence contradicting the mother's testimony that the child was previously unmarked. 635 S.W.2d at 796-97.

Recklessness was the level of culpability alleged in Hooker v. State, 621 S.W.2d 597 (Tex. Crim. App. 1980). Again, the evidence was circumstantial, consisting of a peculiar pattern of burns apparently caused by placing the child in very hot water for a long period and the somewhat ambiguous excited utterance of the defendant, "It's my fault, I did it." 621 S.W.2d at 599-600.

Recklessness, of course, requires only an awareness on the part of the actor that a substantial and unjustifiable risk exists

that a result will occur or that circumstances exist. TEX. PENAL CODE ANN. Sec. 6.03(c) (Vernon 1974). The Court had no trouble finding in Hooker that the circumstantial evidence excluded all reasonable hypotheses other than the guilt of the accused, and that the jury was justified in finding that the conduct was engaged in recklessly. 621 S.W.2d at 601-02.

Criminal negligence differs from recklessness in that the actor need not actually be aware of the substantial and unjustifiable risk; it is sufficient if he "ought to be aware" of the risk. TEX. PENAL CODE ANN. Sec. 6.03(d) (Vernon 1974). Although the defendant in Phillips v. State, 588 S.W.2d 378 (Tex. Crim. App. 1979), did not challenge the sufficiency of the evidence of his criminal negligence, he did attack the standard of care imposed on a defendant by the statutory definition of criminal negligence as unconstitutionally vague. 588 S.W.2d at 380.

Citing Lewis v. State, 529 S.W.2d 550 (Tex. Crim. App. 1975), a case upholding the criminally negligent homicide statute against similar attack, and Nabors v. State, a case upholding the constitutionality of the predecessor of Section 22.04 (Article 1148a(c)), the Court of Criminal Appeals rejected appellant's claim. The Court in Phillips noted that the law could not possibly anticipate all situations in which an actor's conduct would be a gross deviation from the standard of care expected of an "ordinary person" under the circumstances. 588 S.W.2d at 381. Criminal negligence as defined by Section 6.03(d) provides adequate notice of the requirements of law and the conduct forbidden.

b. The Act Requirement

In Texas, every offense requires voluntary conduct together with the required level of culpability. TEX. PENAL CODE ANN. Sec. 6.01 (Vernon 1974). This voluntary conduct may be an act, an omission, or possession. TEX. PENAL CODE ANN. Sec. 6.01(a) (Vernon 1974). Where an omission to act is the basis for the offense, one is criminally responsible only when a statute provides that the omission is an offense or otherwise establishes a duty to act. TEX. PENAL CODE ANN. Sec. 6.01(c) (Vernon 1974).

It will be remembered that one of the peculiar features of Section 22.04 is its specific reference to commission of the offense with the requisite mental state "by act or omission," resulting in one of the levels of injury to a child or elderly person. TEX. PENAL CODE ANN. Sec. 22.04(a) (Vernon Supp. 1982-83). It is easy to hypothesize situations in which the defendant, whether he be parent, babysitter, or teacher, injures the child or elderly person (especially where the elderly are under the care of a professional care-giver as in a nursing home) by failing to do that which is required. The difficulty often comes in determining just what duty is established by law.

The duties of a parent are established by statute with some specificity. See TEX. FAM. CODE ANN. Sec. 12.04 (Vernon 1974). Among these are the provision of medical care, food, shelter, clothing, and education. Id. In an Injury to a Child case involving the failure of a parent to provide medical care to a child, the Court of Criminal Appeals addressed responsibility by omission. Ronk v. State, 544 S.W.2d 123 (Tex. Crim. App. 1976).

The Court held in Ronk that since an omission does not form the basis for criminal responsibility unless a statute so provides, the omission reference of Section 22.04 is operative only when a specific statute creating a duty exists. 544 S.W.2d at 125. Of course, the parents' duty to provide medical care is well established by the Family Code, but in Ronk the indictment contained no allegation that the defendant stood in that relationship with the injured child. 544 S.W.2d at 124. Failure to allege a relationship which places the accused under a statutory duty to act is a fundamental defect in a charging instrument for Injury to a Child or Elderly Individual. 544 S.W.2d at 125.

In a more recent case in which the parental relationship was properly alleged in the indictment, the Court of Criminal Appeals explored the sufficiency of the evidence in an Injury to a Child case charging failure to provide food and medical treatment resulting in the death of a four and half month old baby. Ahearn v. State, 588 S.W.2d 327 (Tex. Crim. App. 1979). The indictment alleged that the defendants acted with recklessness or criminal negligence and that "serious physical deficiency" resulted. 588 S.W.2d at 329.

The defendants in Ahearn had apparently sought no medical care for their deceased child although it was available at no cost. Also, there was ample evidence that they had left the child unattended for long periods of time in filthy conditions while his condition deteriorated. 588 S.W.2d at 337. Since it was alleged that the physical condition was caused recklessly or with criminal negligence, the Court held that it was not neces-

sary for the State to prove either the specific causes of the ailments or that the defendants specifically intended the results. 588 S.W.2d at 337.

c. Proof of Resulting Injury

The third element of Injury to a Child or Elderly Individual is the measurement of the injury involved in terms of its seriousness. TEX. PENAL CODE ANN. Sec. 22.04(a) (Vernon Supp. 1982-83). Language from the previous Code has been retained, but "bodily injury" will now also suffice to establish criminal responsibility. Id.

"Serious bodily injury" is perhaps the highest level of injury contemplated by the statute. The term is defined by the Penal Code as, "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE ANN. Sec. 1.07(a)(34) (Vernon 1974).

Since the second and third injury levels are, respectively, "serious physical or mental deficiency or impairment" and "disfigurement or deformity," it might be thought that these resulting injuries are already described within the term "serious bodily injury." But in Morter v. State, 551 S.W.2d 715 (Tex. Crim. App. 1977), the Court of Criminal Appeals drew a sharp distinction between the kinds of injury to which the statute is addressed. In Morter, the indictment alleged that the defendant caused the child victim "serious bodily injury," while the trial

court, in applying the law to the facts, permitted a conviction if the jury found that the defendant caused either "serious physical deficiency or impairment" or "deformity." 551 S.W.2d at 718.

Acknowledging that the Penal Code does not define deficiency, impairment, or deformity, the Court held in Morter that no presumption of redundancy arises simply because there is no statutory definition. 551 S.W.2d at 718. Further, the Court concluded that the Legislature must have intended some purpose for every word of its enactment and, therefore, Section 22.04 proscribes three types of conduct (now four types). 551 S.W.2d at 718. Permitting the jury to convict on any level of injury found when serious bodily injury was alleged in the indictment was therefore fundamental error. 551 S.W.2d at 718-19.

Unquestionably, there is some overlap in any ordinary reading of the injuries proscribed. For example, "serious physical . . . impairment" seems virtually the same as "protracted . . . impairment of the function of any bodily member or organ." Compare TEX. PENAL CODE ANN. Sec. 22.04(a) (Vernon 1982-83) with TEX. PENAL CODE ANN. Sec. 1.07(a)(34) (Vernon 1974). Only the requirement that serious bodily injury involve "protracted" impairment separates the two in any meaningful way. In short, the serious bodily injury definition is actually a bit more restrictive in this regard than the language of Section 22.04 suggests.

In a proper case, it would seem, therefore, that notwithstanding the holding in Morter, an indictment alleging "serious bodily injury" should support a conviction where the proof was of "serious physical impairment." And perhaps more important

than these semantic subtleties is the obvious fact that proof of either level of injury would result in precisely the same punishment under Section 22.04. See "Punishment," infra.

If "serious bodily injury" has been alleged, numerous cases exist construing the meaning of the statutory definition and the sufficiency of proof on this point. Many of these cases arise in other contexts, such as aggravated assault, aggravated robbery, simple assault, murder, and even terroristic threat.

While cases testing the sufficiency of evidence of serious bodily injury under Section 22.04 or its predecessor are less common, a general sense of the term may be had from a review of some of them. For instance, death clearly constitutes serious bodily injury, Whitely v. State, 635 S.W.2d 791, 792 (Tex. App. - Tyler 1982, no pet.), as does loss of an eye, hand and wrist. Phillips v. State, 588 S.W.2d 378, 379-80 (Tex. Crim. App. 1979).

Serious bodily injury was also established by second degree burns that caused a serious threat of death. Hooker v. State, 621 S.W.2d 597, 600-01 (Tex. Crim. App. 1980). Of course, not all burns, even those creating scars, will necessarily constitute serious bodily injury. Cf. Morter v. State, 551 S.W.2d 715, 717 (Tex. Crim. App. 1977) [physician testified on direct and cross examination that burns inflicted on the child did not amount to serious bodily injury as it was defined for him].

In Pickering v. State, 596 S.W.2d 124 (Tex. Crim. App. 1980), the Court held that bruises that healed without medication and that were not symptomatic of injuries causing future medical problems would not be classified as serious bodily injury. 596 S.W.2d at 128. Also, burns on the child's back apparently caused by a

cigarette which formed the letters "i-c-r-y" were held not to be serious bodily injury absent evidence that the child's skin would be scarred sufficiently to cause protracted loss or impairment of the function of a bodily member or organ. 596 S.W.2d at 128. One wonders whether the Pickering case would have had a different result with respect to the proof of injury if the State had alleged "disfigurement or deformity" instead of serious bodily injury.

"Serious physical or mental deficiency or impairment," the second category of injury in Section 22.04, is not defined in the Penal Code. The Court of Criminal Appeals, in Ahearn v. State, 588 S.W.2d 327 (Tex. Crim. App. 1979), noted in considering the meaning of the term that "[a] deficiency does not have to cause or contribute to death before a jury is warranted in finding it 'serious.'" 588 S.W.2d at 336. In finding evidence of serious physical deficiency sufficient, the Court considered the severely emaciated condition of the deceased child's body together with the "nature, extent and variety" of his injuries. Id.

Appellants also contended in Ahearn that the phrase "serious physical deficiency" should be defined for the jury in the court's charge, and that its inherent vagueness rendered it unconstitutional. 588 S.W.2d at 337. Citing King v. State, the Court held that the term "serious physical deficiency" was the sort of simple, common language used in its ordinary meaning that jurors are supposed to know without further definition by the trial court. 588 S.W.2d at 337-38.

Nor did the Court find the term vague. The appellants in Ahearn were adequately apprised of the meaning of the term since persons

of ordinary intelligence need not necessarily guess at its meaning and differ as to its application. 588 S.W.2d at 338; see Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

The same result may be expected to obtain from consideration of the mental deficiency or impairment segment of the statute. In Vaughn v. State, 530 S.W.2d 558 (Tex. Crim. App. 1975), the Court held evidence that the defendant had kissed and licked the back of the child sufficient to establish mental deficiency or impairment on testimony from a psychologist that the victim could reasonably be expected to suffer psychological damage in the future. 530 S.W.2d at 561. Vaughn's willingness to consider sufficient highly speculative evidence of possible future mental impairment clearly demonstrates the latitude the Court is willing to allow in these cases.

The third kind of injury supporting a conviction under Section 22.04 is "disfigurement or deformity," another term not statutorily defined. As previously noted, these injuries would seem included within the definition of serious bodily injury, and in some cases they may be treated in that way. For example, if the disfigurement is not permanent, it is not serious bodily injury but may be "disfigurement" within the meaning of the Section 22.04 term. See Pickering v. State, 596 S.W.2d 124 (Tex. Crim. App. 1980) [holding that burns on the back of the child were not serious bodily injury since they would not cause permanent disfigurement].

Presumably, "disfigurement or deformity" needs no definition in the court's charge. Cf. Ahearn v. State, 588 S.W.2d 327, 337-38 (Tex. Crim. App. 1979). And if the Court follows its own

lead in Ahearn, it will also reject claims that the phrase is unconstitutionally vague. Id.

Of course, all of this bodes ill for those defending persons accused of assaulting children or the elderly since the jury is left without guidance in applying these terms, and the Court has been reluctant to find, as a matter of law, that the evidence in such cases, no matter how slight, is insufficient. None of this is particularly surprising in light of the distasteful nature of these prosecutions and the often egregious circumstances involved. But it is in precisely such cases that the jury should be given as little leeway as possible in bringing emotional reaction to bear on findings of fact. Moreover, even if a definition is given the jury, the breadth of the three most serious levels of injury described in Section 22.04 arguably provide more than adequate opportunities for application of the harshest penalty provided by the statute.

If by chance the evidence in a case does not prove any of the three most debilitating varieties of injury, an offense is nevertheless committed upon infliction of "bodily injury," the fourth level of injury in Section 22.04. This term is, of course, statutorily defined and used throughout the Penal Code.

"Bodily injury" means physical pain, illness, or any impairment of physical condition. TEX. PENAL CODE ANN. Sec. 1.07(a)(7) (Vernon 1974). It is difficult to imagine any level of injury so slight that it would not be encompassed by this definition unless it amounts to no more than an offensive touching, a minor assault in its own right. See TEX. PENAL CODE ANN. Sec. 22.01(a)(3)

(Vernon 1974). For instance, a conviction for injury to a child was had on evidence that the defendant choked and struck his child. Skelton v. State, 626 S.W.2d 589 (Tex. App. - Texarkana 1981, no pet.). Indeed, it is difficult to find any cases where appellants complain about sufficiency of the evidence to prove that bodily injury was done.

If the use of bodily injury as a predicate for criminal responsibility seems redundant in light of the simple assault statute, bear in mind that the punishment range for injury to a child or elderly individual involving bodily injury falls in either the third degree felony or Class A misdemeanor range. In Skelton v. State, the Court of Appeals refused a claim that the defendant was entitled to a charge on the lesser included offense of simple assault, pointing out that the distinguishing factor involved is the age of the victim. If a child is involved, the simple assault becomes "aggravated." Skelton v. State, 626 S.W.2d 589 (Tex. App. - Texarkana 1981, no pet.).

d. Age of the Victim

Since it is the youth or advanced age of the victim that renders the assault "aggravated" and susceptible of a harsher punishment, proof of the age of the victim is an important element under Section 22.04. See TEX. PENAL CODE ANN. Sec. 22.04(a) (Vernon Supp. 1982-83). For purposes of the statute, a "child" is one 14 years of age or younger, and an "elderly individual" is one 65 years of age or older. Id.

The phrase "14 years of age of younger" has been construed to include all children who have not attained their fifteenth birthday. Phillips v. State, 588 S.W.2d 378, 380 (Tex. Crim. App. 1979). This interpretation is based on the rule of construction codified in the Penal Code that "[a] person attains a specified age on the day of the anniversary of his birthdate." TEX. PENAL CODE ANN. Sec. 1.06 (Vernon 1974). One assumes that application of this rule to the elderly is markedly simpler; an individual who has attained his sixty-fifth birthday is covered by the statute.

In an interesting case involving the age of the victim in a prosecution under Section 22.04, the Court of Appeals held that knowledge of the age of victim was not a requisite element and need not be pled or proved. Huff v. State, 660 S.W.2d 635, 638 (Tex. App. - Corpus Christi 1983). The Huff Court also upheld a denial of jury instruction on mistake of fact defense because there was no evidence before the trial court that the defendant had formed a mistaken belief regarding the complainant's age. Id.

While it is true that Section 22.04 does not, on its face, require knowledge of the age of the victim by the accused, refusal of a mistake of fact instruction would seem to be improper in a case in which the evidence properly raised a reasonable mistaken belief as to the victim's age. See TEX. PENAL CODE ANN. Sec. 8.02 (Vernon 1974); Lynch v. State, 643 S.W.2d 737 (Tex. Crim. App. 1983). The Huff case is a good example of the kind of situation giving rise to the defense. The complainant, although a "child," was 6'1" tall, weighed 195 pounds and owned his own shrimp boat. 660

S.W.2d at 638. It is not hard to imagine that a reasonable mistaken belief concerning age might have been shown by defendant and believed by the jury. If so, he could still have been convicted of any lesser included offense of which he would be guilty if the fact were as he believed. TEX. PENAL CODE Sec. 8.02(b) (Vernon 1974).

The question would then turn on whether assault is a lesser included offense of Injury to a Child or Elderly Individual. While proof of assault is established by the same or less than all the facts required to establish an offense under Section 22.04, it is arguably not true that assault differs from Injury to a Child only in a lesser injury being required, a lesser culpable mental state sufficing, or in one constituting an attempt to commit the other. See TEX. CRIM. PRO. ANN. art. 37.09 (Vernon 1981).

No court seems to have addressed this point, although two cases have discussed similar problems. In Sanford v. State, 634 S.W.2d 850 (Tex. Crim. App. 1982), the Court refused to reverse a conviction for aggravated assault on the grounds that the victim was 14 years of age or younger. Appellant relied on the rule that a specific statute will control a general one, but the Court, after recognizing that proof of a Section 22.04 violation was present, refused to reverse, noting that the offense of which appellant was found guilty was of a lesser grade and involved a lesser punishment than Injury to a Child or Elderly Individual. 634 S.W.2d at 851-52.

In Skelton v. State, 626 S.W.2d 589 (Tex. App. - Texarkana

1981, no pet.), the Court rejected appellant's contention that the trial court should have charged on the "lesser included offense of assault." Id. at 592. Since evidence of the victim's age was adduced, the assault proven was "aggravated" under Section 22.04 and no charge on a lesser included offense was required. Id.

Regardless of whether assault is held to be a lesser included offense of Injury to a Child or Elderly Individual, the mistake of fact defense remains a viable and increasingly important defensive option in these cases. The oversized "child" in Huff may appear again, but more common will be the youthful appearing elderly person. If Section 22.04 is not to become a strict liability offense, mistake of fact concerning age must be recognized as a valid defensive issue without regard to whether knowledge is an element of the offense. See Lynch v. State, 643 S.W.2d 737 (Tex. Crim. App. 1983). The reasonableness of a mistaken belief about age, especially of an elderly individual, will probably be far less difficult to prove than the reasonableness of many other "mistakes" affecting culpability.

III. Procedural Considerations

To aid in obtaining evidence for the prosecution of cases under Section 22.04, the Legislature enacted Article 18.021 of the Code of Criminal Procedure in 1981. See TEX. CODE CRIM. PRO. ANN. art. 18.021 (Vernon Supp. 1982-83). This provision specifically permits the obtaining of a search warrant to search for and photograph a child alleged to be the victim of any of

the following: (a) injury to a child [Section 22.04]; (b) sexual assault of a child [Section 22.011(a)] or aggravated sexual assault of a child [Section 22.021]. Session Laws, 68th Legislature, Ch. 977, p. 5311, 5319 (1983).

The purpose of this special warrant is to obtain access to the injured child while the injuries are still of evidentiary value. Of course, where a parent or guardian brings the child forth to report the abusive conduct of another, no warrant is required. It is worth noting at this point that a parent willing to testify against the abuser will not be foreclosed from doing so by the husband-wife privilege. One of the few exceptions permitting voluntary testimony by one spouse against another is "in any case for an offense involving any grade of assault or violence committed by one . . . against the child of either under 16 years of age . . . ." TEX. CODE CRIM. PRO. ANN. art. 38.11 (Vernon 1979).

Similarly, when the injury is discovered by a treating physician, teacher or babysitter, nothing prevents that person from photographing the injury and giving it to the police or testifying at trial. The application of Article 18.021 is therefore limited in practice to those cases in which abuse is alleged and no one brings the child forth.

Probable cause is required for such a warrant as in other cases. TEX. CODE CRIM. PRO. ANN. art. 18.01(f) (Vernon Supp. 1982-83). Additionally, the affidavit supporting the warrant must set forth facts showing: (a) that a specific offense has been committed; (b) that a specifically described person has

been a victim of the offense; (c) that evidence of the offense or evidence that a particular person committed the offense can be detected by photographic means; and (d) that the person to be searched for and photographed is located at the particular place to be searched. Id.

A warrant issued must in turn identify the child to be located and photographed, specify the place or thing to be searched, and command any peace officer of the proper county to search for and cause the child to be photographed. TEX. CODE CRIM. PRO. ANN. art. 18.021(c) (Vernon Supp. 1982-83). In executing the warrant, the officer may be accompanied by a photographer acting at the direction of the officer. This photographer has the right of access to the child under authority of the warrant. TEX. CODE CRIM. PRO. ANN. art. 18.021(b) (Vernon Supp. 1982-83).

Interestingly, a warrant obtained under Article 18.021 must be executed by an officer of the same sex as the alleged victim or the officer must be assisted by such an officer. TEX. CODE CRIM. PRO. ANN. art. 18.021(e) (Vernon Supp. 1982-83). If an assistant is used, he or she must be present during the photographing of the child. Id. Presumably, this limitation is designed to insure no inappropriate behavior on the part of the officer executing the warrant, although the statute does not elaborate on what the role of the assistant should be in such cases.

Return of a search warrant issued under Article 18.021 is made by the officer taking possession of the exposed film and delivering it "forthwith" to the magistrate. TEX. CODE CRIM.

PRO. ANN. art. 18.021(d) (Vernon Supp. 1982-83). Curiously, the officer executing the warrant is not thereby authorized to remove the child from the premises except under Section 17.03 of the Family Code. Id. Once the child is found and photographed, the purposes of the warrant have been served and other action to protect the interests of the child must be taken under proper authority of law other than that of Article 18.021. Although no cases have been decided construing this article, one supposes that all of these provisions will be held directory and not mandatory as has been done in other warrant execution cases. See, e.g., Barnes v. State, 504 S.W.2d 450 (Tex. Crim. App. 1974).

IV. Punishment

The punishment for Injury to a Child or an Elderly Individual is determined by the level of culpability involved in committing the crime and the degree of harm inflicted on the victim. See generally, TEX. PENAL CODE ANN. Sec. 22.04(b)-(d) (Vernon Supp. 1982-83). For purposes of punishment, the three highest levels of injury are treated without distinction. If the actor causes serious bodily injury, serious physical or mental deficiency or impairment, or disfigurement or deformity, the offense is a first degree felony if the act is committed intentionally or knowingly. Reckless infliction of any of these levels of injury is a third degree felony. TEX. PENAL CODE ANN. SEC. 22.04(b) (Vernon Supp. 1982-83).

Where the lowest level of injury, bodily injury, results, the offense is a third degree felony if the conduct was intentional or knowing. Reckless infliction of bodily injury on a child or elderly individual is a Class A misdemeanor. TEX. PENAL CODE ANN. Sec. 22.04(c) (Vernon Supp. 1982-83). If criminal negligence, the lowest level of culpability, is shown, the offense is a Class A misdemeanor regardless of the level of injury inflicted. TEX. PENAL CODE ANN. Sec. 22.04(d) (Vernon Supp. 1982-83).

In light of the punishment scheme for Injury to a Child or Elderly Individual, definitions of culpability and degrees of injury take on increased importance. These cases are not like others in which the culpability inquiry is a limited threshold one which, once met by proof that some acceptable level of culpability exists, ceases to be relevant. Rather, the precise level of culpability has meaning since it is by this means that punishment is determined.

The punishment scheme of Section 22.04 is less affected by variations in the proof of degrees of injury. Even so, a significant difference in punishment exists between proof of bodily injury and the other, higher levels of injury. It is therefore critical that unusual care be taken in the charging of these crimes; introducing evidence at trial going to culpability and degree of injury; instructing the jury on relevant definitions; and structuring the punishment phase to properly address elements usually thought to be only important on guilt or innocence.

Prosecutions brought under Section 22.04 seem especially

susceptible of a form of special issue submission as is found in civil practice in Texas. Of course, general verdicts are now required in criminal cases. TEX. CODE CRIM. PRO. ANN. art. 37.07 (Vernon 1979). It is therefore incumbent on the State to allege culpability and injury level with particularity in these cases; failure to do so should entitle the defendant to have the indictment quashed.

Yet another peculiarity found in Section 22.04 case lies in the unavailability of one defense common to assaults. Consent is apparently not a defense as in assault, aggravated assault, or reckless conduct. See TEX. PENAL CODE ANN. Sec. 22.06 (Vernon 1974).

In many respects then, Injury to a Child or Elderly Individual remains a new, unusual and largely unknown crime. Its peculiar structure and continually changing contours suggest that its future lies as much in the hands of appellate lawyers and the courts as in the legislature.