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Notes and Comments

***435 NO BLOOD NO FOUL: THE STANDARD OF CARE IN TEXAS OWED BY PARTICIPANTS TO ONE AN-
OTHER IN ATHLETIC CONTESTS**

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***438 I. Introduction**

On October 1, 2006, during a football game between the Tennessee Titans and Dallas Cowboys, on a play in which running back Julius Jones scored a touchdown, Cowboys' offensive lineman Andre Gurode's helmet came off. [FN1] Titans' defensive lineman Albert Haynesworth first kicked and then stomped on Gurode's exposed and unguarded face. [FN2] Gurode required thirty stitches and complains of headaches and blurred vision. [FN3] The league suspended Haynesworth for a record five games, costing him an estimated \$190,000. [FN4]

On June 28, 1997, during the second round of a fight for the heavyweight championship of the world, Evander Holyfield inadvertently head butted Mike Tyson, opening a gash over Tyson's right eye. [FN5] The referee warned Holyfield but did not penalize him. [FN6] With forty seconds left in the third round, Tyson clinched with Holyfield, spit out his own mouthpiece, and bit off a piece of Holyfield's right ear. [FN7] Holyfield immediately reacted, pulling away and jumping up and down in agony while blood streamed from his now-deformed ear. [FN8]

On February 21, 2000, during a regular season game between the Vancouver Canucks and the Boston Bruins, Bruins' defenseman Marty McSorley hit Canucks' left wing Donald Brashear in the head with a "two-fisted stick attack." [FN9] Brashear's head hit the ice, he went unconscious, suffered a concussion, and later experienced memory loss. [FN10] McSorley claimed he intended to hit Brashear in the shoulder to induce him to fight, *439 an acceptable part of hockey. [FN11] A Vancouver criminal court disagreed and found McSorley guilty of assault with a weapon. [FN12]

On March 8, 1999, the Utah Jazz hosted the San Antonio Spurs in Salt Lake City. During the game, Jazz forward Karl Malone executed a vicious elbow to the face of Spurs' center David Robinson. [FN13] Robinson fell to the floor, unconscious, suffering both a concussion and a strained knee. [FN14] Robinson would miss three games to injury. [FN15] Malone, who later apologized, would miss one game to suspension by the NBA. [FN16]

Should any of the injuries suffered by these athletes at the hands of their opponents be compensable? Or, more broadly, should any injury suffered on the field (or court, or ring) of play be subject to compensation under theories of tort liability? The vast majority of American jurisdictions have answered this broader question in the affirmative. However, these jurisdictions are anything but uniform in how they approach the issue. Texas is no different.

Succinctly stated, this Comment examines the standard of care in Texas owed by participants in sporting contests to one another. The focus will primarily be on Texas law. Particularly helpful to the Texas practitioner is the in-depth survey of how the fourteen courts of appeals have addressed this subject. [FN17] Also, this Comment examines the many states in an effort to further inform the analysis. A brief survey of the general approach by each state should also prove to be of significant help to the Texas lawyer who encounters this issue in practice. [FN18]

This Comment is organized into four parts. First, it will address the public policies implicated by sports injuries

caused by participants. [FN19] Two important values in conflict are implicated by this issue and must be weighed and balanced accordingly. Second, this Comment offers a survey and summary of how the fifty states approach the issue. [FN20] This survey *440 reveals the national trend toward a standard of recklessness and gives the Texas practitioner an accurate overview of and resource for out-of-state case law. [FN21] Third, the Comment surveys, summarizes, and critiques standards applied and advocated for in Texas. [FN22] Texas has by no means settled her approach to this issue. The Supreme Court and the fourteen appellate courts are surveyed and helpfully organized to give as much clarity as possible. Finally, this Comment presents and analyzes a proposed standard with the help of test cases involving sports common to Texas: golf, football, baseball, and basketball. [FN23]

Importantly, there are inevitably sub-issues raised by this topic and this Comment cannot hope to address them all. Those left to others include criminal liability; [FN24] defining sport, game or recreation; defining participant; the standard of care owed by facility owners or operators; the standard of care owed by game organizers; [FN25] the standard of care owed by referees, [FN26] volunteers [FN27] or coaches; and the standard of care owed to non-participants. Where these sub-issues are encountered in analyzing this Comment's topic they are touched with only the slightest brush necessary to advance our study.

II. Public Policies Implicated

Conduct that would be considered tortious if performed outside the sporting arena is given special treatment when performed inside the sporting arena. [FN28] For example, just about every action taken by a boxer, *441 kickboxer, or Ultimate Fighter within the ring or octagon if performed on the street against a passerby would be a compensable tort.

“[C]ourts and commentators have attempted to strike a balance between protecting the free and vigorous participation in sports and recreational activities and ensuring the relative safety of participants.” [FN29] The oft-quoted language of Illinois Justice Thaddeus Adesko clearly states the competing policies at issue:

This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control. [FN30]

Essentially two policies are identified: the desire by the courts to both (1) prevent needless interference in our games, and (2) redress unjust and unreasonable wrongs perpetrated against our athletes.

Society values and seeks to encourage a robust and passionate pursuit of the game at hand. [FN31] A fear articulated by courts is that in attempting to regulate tortious conduct, they will interfere with, or worse, “chill vigorous and competitive participation.” [FN32] Additionally, one court has even gone so far as to suggest that participants ought not only to be free from liability for tortious conduct, but free from the fear of suit as well. [FN33]

The possible adverse impact of the civil justice system on a player's approach to his game is illustrated by the November 26, 2006 game between the New York Giants and Tennessee Titans. In the fourth quarter, on fourth down, Giants' defensive end Mathias Kiwanuka had Titans' quarterback Vince Young wrapped up for what would amount to a game *442 ending sack. [FN34] Instead of finishing him off, Kiwanuka relaxed his grip and released Young. [FN35] Why? The NFL has made a concerted effort to protect teams' quarterbacks from injury. [FN36] Concerned he might be called for a roughing-the-passer penalty, Kiwanuka granted mercy to a quarterback he is paid handsomely to crush. [FN37] Young continued down the sideline for a first down and ultimately led his team to an improbable victory. [FN38]

Kiwanuka's conduct, the outcome of the game, and perhaps the seasons of two teams were not decided on the field but rather by those intending to protect quarterbacks from a rough style of play. [FN39] This is illustrative of the kind of impact on games the courts rightly intend to avoid.

On the other hand, society also values redress for unjust wrongs committed. A fundamental precept of American [FN40] and Texas [FN41] jurisprudence is the provision of a remedy for an invaded legal right. [FN42] In Texas, “[t]he fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims.” [FN43] Participating in a sport should not be viewed as an exception to a history of tort law by granting carte blanche to any miscreant who inappropriately and physically vents his aggravations on an innocent victim. [FN44] Therefore, society and individual plaintiffs must have some *443 recourse against such actors to redress wrongs committed, and perhaps more importantly, to dissuade future conduct.

It is a tenuous balance that must be struck between these two good and competing ideals. On the one hand, we like our sports. We do not wish to see them as fruitful ground for litigation. On the other hand, we like our athletes. We do not wish to undervalue them by failing to protect them through the civil justice system.

III. The Law in Other States

A. Summarized

The various states have applied an assortment of standards in attempting to balance the two competing public policies at play in sports. [FN45] Some have failed to address the issue at all. [FN46] Sixteen states require reckless conduct to hold a defendant liable for injuries to a plaintiff in a sporting contest. [FN47] Six states apply simple negligence. [FN48] Two states completely bar any cause of action attempting to hold a participant in an athletic contest liable. [FN49] Eighteen states have courts incorporating some form of an implied assumption of the risk doctrine under certain circumstances. [FN50]

Twenty-six states have not yet clearly articulated what standard of care they will apply. [FN51] Of those twenty-six, seven have courts requiring recklessness, [FN52] twelve have courts requiring negligence, [FN53] one has a court *444 requiring intentional conduct, [FN54] ten have courts suggesting a no liability standard, [FN55] and two have remained completely silent as to what standard they will apply. [FN56]

Interestingly, some states have attempted to settle the issue by adopting statutes on point. [FN57] However, legislation has not been completely successful in settling the issue in every case. [FN58]

B. Survey of the 49 Other States

1. Alabama

Alabama has yet to announce a clear standard of care. However, the assumption of the risk doctrine is viable and may be applied in this context to bar a plaintiff from recovery. [FN59]

2. Alaska

Alaska has yet to announce a clear standard of care. However, the assumption of the risk doctrine is viable as a

strategy to reduce damages for which a defendant facility operator may be liable. [FN60]

3. Arizona

Arizona has yet to announce a clear standard of care. However, one *445 appellate court has required a finding of negligence and expressly rejected recklessness as the required standard for imposing liability as being unconstitutional under the Arizona Constitution. [FN61]

4. Arkansas

Arkansas has yet to announce a clear standard of care and offers no cases on point to give any guidance whatsoever.

5. California [FN62]

California requires a defendant's conduct to be reckless in order to impose liability. [FN63] As part of the analysis, California courts distinguish between contact and non-contact sports. [FN64]

6. Colorado

Colorado requires a defendant's conduct to be reckless in order to impose liability. [FN65] In an important and oft-cited case, a federal court applied Colorado tort law in considering an injury sustained during a professional football game. [FN66] In *Hackbart v. Cincinnati Bengals, Inc.*, Bengal's defensive back Dale Hackbart attempted to block Denver Broncos' wide receiver Charles "Booby" Clark. [FN67] After the play had passed *446 them by, Booby, "acting out of anger and frustration" struck the back of Hackbart's head with his forearm. [FN68] It was later discovered that Hackbart had suffered a career ending neck fracture. [FN69] Without ruling on Booby's liability, the court held that tort law is not inapplicable to sports and a finding of recklessness is required to impose liability. [FN70]

7. Connecticut

Connecticut requires a defendant's conduct to be reckless in order to impose liability. [FN71]

8. Delaware

Delaware has yet to announce a clear standard of care. However, one Delaware appellate court has required that a defendant's conduct be intentional, willful, or wanton to impose liability. [FN72]

9. Florida [FN73]

Florida requires a finding of negligence to impose liability on a defendant. [FN74] However, the assumption of the risk doctrine may bar a plaintiff's recovery even if the defendant would otherwise be negligent. [FN75]

*447 10. Georgia

Georgia has yet to articulate a clear standard. However, one appellate court held that hunters are held to a negligence standard in regard to the safety of other hunters. [FN76]

11. Hawaii

Hawaii requires a finding of reckless or intentional conduct to impose liability on a defendant. [FN77] Additionally,

the court ruled that a negligence action involving athletics is barred by the assumption of the risk doctrine. [FN78]

12. Idaho

Idaho has yet to articulate a clear standard. However, one appellate court held that a finding of reckless or intentional conduct is required to impose liability on a defendant. [FN79]

13. Illinois

Illinois has yet to articulate a clear standard. However, numerous appellate courts have held that reckless, deliberate, willful, or wanton conduct is required to impose liability on a defendant. [FN80] Additionally, some *448 courts distinguish between contact and non-contact sports in imposing liability. [FN81]

14. Indiana

Indiana has yet to articulate a clear standard. A recent decision by one court of appeals required reckless, malicious, or intentional conduct to impose liability on a defendant. [FN82] However, an older appellate case required only negligence and distinguished between contact and non-contact sports. [FN83]

15. Iowa

Iowa requires a finding of reckless conduct to impose liability on a defendant. [FN84] Additionally, Iowa applies the assumption of the risk doctrine. [FN85]

16. Kansas

Kansas has yet to announce a clear standard of care. However, Kansas does employ a negligence standard for imposing liability on providers of facilities for injuries suffered while engaging in sports activities at those facilities. [FN86]

*449 17. Kentucky

Kentucky requires a finding of reckless conduct to impose liability on a defendant. [FN87]

18. Louisiana

Louisiana has yet to announce a clear standard of care. However, appellate courts have required a finding of reckless conduct to impose liability on a defendant. [FN88] These courts also apply the assumption of the risk doctrine as part of their analysis. [FN89]

19. Maine

Maine has yet to announce a clear standard of care. However, the assumption of the risk doctrine is a viable defense. [FN90]

20. Maryland

Maryland has yet to announce a clear standard of care. However, one court imposed liability based upon a negligence standard, subject to the assumption of the risk doctrine. [FN91]

*450 21. Massachusetts

Massachusetts requires a finding of reckless conduct to impose liability on a defendant. [\[FN92\]](#)

22. Michigan [\[FN93\]](#)

Michigan requires a finding of reckless conduct to impose liability on a defendant. [\[FN94\]](#) Additionally, Michigan has a statute applying the assumption of the risk doctrine to skiing. [\[FN95\]](#)

23. Minnesota [\[FN96\]](#)

Minnesota requires a finding of negligent conduct to impose liability on a defendant. [\[FN97\]](#)

24. Mississippi

Mississippi has yet to announce an applicable standard of care. However, the assumption of the risk doctrine applies in suits against providers of facilities for injuries suffered when engaging in sports activities at those facilities. [\[FN98\]](#)

***451** 25. Missouri

Missouri requires a finding of reckless conduct to impose liability on a defendant. [\[FN99\]](#)

26. Montana

Montana has yet to announce a clear standard of care and offers no cases on point to give any guidance whatsoever.

27. Nebraska

Nebraska requires a finding of reckless conduct to impose liability on a defendant. [\[FN100\]](#)

28. Nevada

Nevada requires a finding of negligence to impose liability on a defendant. [\[FN101\]](#)

29. New Hampshire

In order to impose liability on a defendant, New Hampshire requires a two part finding: (1) defendant's conduct is outside "the range of ordinary activity involved in the sport," and (2) is reckless or intentional. [\[FN102\]](#) New Hampshire also applies the assumption of the risk doctrine. [\[FN103\]](#)

***452** 30. New Jersey [\[FN104\]](#)

New Jersey requires a finding of reckless or intentional conduct to impose liability on a defendant. [\[FN105\]](#)

31. New Mexico

New Mexico has yet to announce an applicable standard of care. However, one appellate court has required reckless conduct in order to hold a defendant liable. [\[FN106\]](#)

32. New York [\[FN107\]](#)

New York courts are yet to announce a consistent standard of care. Some New York courts require a flagrant infrac-

tion unrelated to the normal method of play to attach liability. [FN108] Other courts apply a reckless or intentional conduct standard. [FN109] Still other courts apply a simple negligence standard. [FN110]

***453** 33. North Carolina

North Carolina requires a finding of reckless conduct to impose liability on a defendant. [FN111]

34. North Dakota

North Dakota has not yet articulated its standard of care. However, North Dakota courts have applied the assumption of the risk doctrine to protect operators of facilities when plaintiffs have been injured while engaged in sports related activities in those facilities. [FN112]

35. Ohio

Ohio requires a finding of reckless or intentional conduct to impose liability on a defendant. [FN113]

36. Oklahoma

Oklahoma courts are split on which standard of care should be applied. Some courts apply a negligence standard. [FN114] Other courts have applied a no-duty standard. [FN115]

***454** 37. Oregon

Oregon requires a finding of negligence to impose liability on a defendant. [FN116] Importantly, Oregon has abrogated by statute the assumption of the risk doctrine. [FN117]

38. Pennsylvania

Pennsylvania has not yet articulated the applicable standard of care. However, it has applied the assumption of the risk doctrine. [FN118]

39. Rhode Island

Rhode Island requires a finding of reckless or deliberate conduct to impose liability on a defendant. [FN119]

40. South Carolina

South Carolina has not yet articulated the applicable standard of care. However, the assumption of the risk doctrine applies to protect facility operators from suit by plaintiffs injured when engaged in athletic activity at their facilities. [FN120]

41. South Dakota

South Dakota has not yet articulated an applicable standard of care among participants.

***455** 42. Tennessee

Tennessee has not clearly articulated an applicable standard of care. However, Tennessee has applied the assumption of the risk doctrine to bar recovery for an injury sustained at a sporting event. [FN121] That doctrine has been defeated

by negligence committed outside of the usual and ordinary hazards of a sport. [FN122]

43. Utah

Utah has not clearly articulated an applicable standard of care. However, one appellate court held skiers to a negligence standard. [FN123]

44. Vermont

Vermont has a statutory no-liability standard based upon the assumption of the risk doctrine. [FN124] However, one Vermont Supreme Court case suggests that negligence may still be applicable to particular sports. [FN125]

45. Virginia

Virginia requires a finding of negligence to impose liability on a defendant. [FN126]

46. Washington

Washington has not clearly articulated an applicable standard of care. However, one criminal court ruled that consent can be a defense to an assault occurring during a game if the conduct of the defendant constituted foreseeable behavior in the play of the game and the injury occurred as a *456 by-product of the game itself. [FN127] However, consent is a defense only if the game is a lawful athletic contest, competitive sport or other concerted activity not forbidden by law. [FN128]

47. West Virginia

West Virginia requires a finding of willful, wanton, or reckless conduct to impose liability on a defendant. [FN129] Additionally, West Virginia will not consider the assumption of the risk doctrine in its analysis. [FN130]

48. Wisconsin

Wisconsin requires a finding of negligence to impose liability on a defendant. [FN131]

49. Wyoming

Wyoming has a statutory no-liability standard based upon the assumption of the risk doctrine. [FN132]

IV. The Current Law in Texas

Texas has not yet articulated a consistent applicable standard of care. [FN133] Instead, the lower courts have issued opinions applying recklessness, *457 negligence, and other standards. [FN134] Further complicating the issue is Texas' fairly unique approach to the assumption of the risk doctrine. [FN135]

A. The Assumption of the Risk Doctrine

Assumption of the risk is an affirmative defense in which a defendant contends that the plaintiff has previously consented to bear personal responsibility for injuries sustained from clearly risky conduct. [FN136] A risk may be assumed either expressly or impliedly. [FN137]

Texas is unique among the states. [FN138] In *Farley v. M M Cattle Co.*, the Supreme Court of Texas abolished the assumption of the risk doctrine when the assumption is implied. [FN139] Instead, that which is typically considered *458 under the assumption of the risk doctrine--a plaintiff's own consent contributing to his injury--is now considered as part of the comparative fault analysis. [FN140]

In explaining its holding, the Farley court cited the reasoning of the *Rosas v. Buddies Food Store* opinion. [FN141] The Rosas opinion stated:

The heart of the matter is that the volenti doctrines represent an attempt to impose the analysis of subjective intent on a behavioral tort rather than resolve liability or not on the basis of fault under traditional concepts of negligence. Put more simply, negligence is a measure of a party's conduct and the test is generally objective, whereas volenti is a subjective inquiry into a party's actual, conscious knowledge. The standards are different. . . . And we have recognized that the success of the volenti defense in Texas has turned on whether or not it is established that the plaintiff knew he was exposing himself to the danger which caused him harm. . . . This is but to say that he intended to encounter the risk. Even so, it was the view of this writer in his dissent in *Rabb v. Coleman* that the writing of the majority did not require that the injured party *459 know and appreciate the particular danger to which it was held he had given his consent. [FN142]

Importantly, in Texas a defendant can avoid liability by showing that an injured plaintiff voluntarily assumed the risks involved by the execution of an express release. [FN143] Therefore, without an express release, the assumption of the risk doctrine should not be considered in determining liability for injuries suffered by participants in sporting events under Texas law.

B. The Supreme Court of Texas: No Standard Adopted

No standard has yet been adopted by the Supreme Court of Texas. [FN144] In fact, the Texas Supreme Court has only issued one case even remotely on point. [FN145] In *Southwest Key Program, Inc. v. Gil-Perez*, a resident home for boys was sued by an injured resident for negligently allowing residents to play a game of tackle football without protective equipment. [FN146] Importantly, *Southwest Key Program* is not a participant-on-participant tort case. Instead, this case involves a suit by a participant against a facility operator. [FN147] Though similar, this scenario is not directly on point with this Comment's topic. The Court chose not to articulate the standard of care to which it will hold co-participants in sporting events. [FN148] Instead, the Court surveyed the various standards applied by lower courts in Texas, other states' courts, and suggestions from its own dicta. [FN149]

C. Supreme Court Dicta: Two Suggestions

Though not yet adopting a position, two members of Texas' highest court have weighed in by suggesting appropriate standards of care that *460 ought to be adopted. Neither suggestion has received much attention by later cases or courts, but they deserve mention.

1. Justice Gonzalez

Justice Gonzalez suggests the following rule: "By voluntarily participating in a competitive sport, a participant is deemed to have consented to and assumed the risk of all harmful contacts and foreseeable injuries that are inherent to that particular sport." [FN150]

Integral to Gonzalez's position is his concern to prevent frivolous lawsuits. [FN151] Concerned that participants in

sporting events are unjustly subjected to suit, Justice Gonzalez indicates that the recklessness standard applied by some lower courts in Texas may protect a defendant from liability, but fails to protect him from suit, and even prevents summary judgment. [FN152] Gonzalez proposes that by using his standard, “courts will no longer be required to determine the subjective state of the participant’s mind, but can instead concern themselves with the objective determination of whether the actions were foreseeable or expected in the course of the particular sporting event,” enabling the court to protect defendants with summary judgment. [FN153]

Gonzalez’s standard has two problems. First, the epidemic of participants being abused by frivolous lawsuits may not be quite as widespread in Texas as Gonzalez may have believed. Gonzalez’s proposed standard and concerns have only received minimal attention. [FN154] In the nine years since Gonzalez published his standard, only four Texas appellate court decisions have been published on point, [FN155] and the Texas Supreme *461 Court has only chosen to grant review to one case in which it declined to either adopt Gonzalez’s standard, adopt another standard, or create one of its own. [FN156] This lack of attention by both the fourteen appellate courts and the Texas Supreme Court undermines Gonzalez’s reasoning by suggesting that, in spite of the prevalence of sports and sports injuries, Texas courts have not been assaulted by participants in litigation.

Second, Gonzalez’s standard contains a fatal flaw: the incorporation of the implied assumption of the risk doctrine. Gonzalez points out that implied assumption of the risk is no longer viable in Texas. [FN157] However, he incorporates the analysis of *Connell v. Payne*, which ruled that participants in competitive sporting events have expressly assumed the risks the activity poses. [FN158] Gonzalez goes a step beyond the *Connell* court by stating in his standard that “a participant is deemed to have consented and assumed the risk.” [FN159] A court “deeming” consent is incompatible with “express” consent and is simply new language for “implied” consent. Gonzalez seeks to impose implied assumption of the risk by dressing it up with creative language. Therefore, his proposal is inconsistent with thirty years of Texas law and requires *Farley* to be overruled. [FN160]

2. Justice Enoch

Justice Enoch is joined by Justice Hecht in suggesting the following rule: “[A] defendant in a sports or recreational injury case does not owe a duty to protect a participant from risks inherent in the sport or activity in which the participant has chosen to take part.” [FN161] Under Enoch’s approach, “the nature of the sport” must be considered to determine which risks are “inherent” to the particular game being played. [FN162] Key to Enoch’s approach is a focus on the risk rather than the injury--“[T]here are no inherent injuries, only inherent risks.” [FN163] If the risk is found to be inherent to the *462 sport, then no duty would be owed as a matter of law. [FN164] Summary judgment would be appropriate. [FN165] However, if the risk is not inherent, the defendant is held to an ordinary negligence standard. [FN166]

The flaw in this proposed approach is that this “inherent risk” element, to be interpreted by the court, is not as simple as it seems. When a golfer is struck with a golf ball by another golfer, a court may well rule that, as a matter of law, being struck by a golf ball is a risk inherent to the sport of golf. [FN167] However, what if subsequent defendants have intentionally struck other golfers? Do they win on summary judgment because the risk of being struck by a golf ball is inherent as a matter of law?

Even so, Enoch’s standard is unique and attractive. It differs from Gonzalez’s in that it incorporates the unavoidable and acceptable risks of athletic competition into his analysis, but does so without harming the *Farley* holding by implying that a plaintiff has assumed them. Instead, his analysis of the particular game’s risk is objective without improperly considering the plaintiff at all. Additionally, Enoch then imposes a negligence standard on a defendant’s conduct that is outside those inherent risks. As this Comment’s surveys show, this is a minority position in both Texas [FN168] and the rest

of the states. [FN169] Enoch's standard, though unique, has not proved popular among courts, receiving little attention. [FN170]

D. A Survey of Texas Appellate Court Decisions.

Despite the silence from its highest court, Texas is moving toward application of a recklessness standard. Many of her lower courts have followed the national trend of requiring reckless conduct to support a recovery. [FN171]

*463 However, a glimmer of hope still exists (though perhaps weakening) for plaintiffs hoping for a less demanding standard. Three courts have applied a negligence standard. [FN172] First, the Austin court has stated that the recklessness standard is not applicable “for every recreational activity or sport that might be considered dangerous.” [FN173] Second, the San Antonio court applied a negligence standard to a defendant in a water-skiing accident. [FN174] Finally, in an unpublished opinion, the Fourteenth Court of Appeals also applied a negligence standard to a water-skiing accident. [FN175] Whether opinions applying negligence would still be followed today is certainly suspect considering the fairly uniform trend towards a recklessness standard.

1. Houston [1st Dist.]

The first district has issued no opinions to date on the standard of care owed by participants to one another. However, this Court did apply an ordinary negligence standard to a non-participant defendant who sponsored an athletic contest. [FN176]

2. Fort Worth

The Fort Worth court requires a finding of recklessness to hold a defendant liable. [FN177] In *Monk v. Phillips*, the defendant “shanked” a golf-shot to the right and struck his playing partner in the eye, blinding him. [FN178] The court found as a matter of law that the defendant's conduct did not rise to the level of recklessness and granted summary judgment in his favor, *464 therefore, was proper. [FN179] This court relied on the Dallas court's holding in *Connell v. Payne* [FN180] requiring reckless conduct to attach liability, but followed the Amarillo court's extension [FN181] from contact sports [FN182] to golf. [FN183]

3. Austin

The Austin court has issued no opinions to date on the standard of care owed by participants to one another. However, this court did state that the recklessness standard is not applicable “for every recreational activity or sport that might be considered dangerous.” [FN184] It then applied this rule to hold an owner of parasail equipment liable for injuries caused to a parasailor on a negligence theory for failing to instruct or supervise with ordinary care. [FN185]

4. San Antonio

In its only case remotely on point, the San Antonio court applied a negligence standard to participants in a waterskiing accident. [FN186] In *Brown v. Gonzales*, the defendant, who had been drinking during the day, attempted a sharp u-turn to pick up the plaintiff who had fallen while waterskiing. [FN187] In so doing, the defendant ran over the plaintiff with the plaintiff's stepfather's boat, causing substantial injury to plaintiff's chest wall, internal organs, arms and legs. [FN188] The jury determined that the plaintiff's failure to instruct the defendant adequately in how to operate the boat properly proximately *465 caused his injuries. [FN189] The jury applied a negligence standard and refused to find the defendant negligently liable for the plaintiff's injuries. [FN190]

5. Dallas

The Dallas court issued one of the most influential opinions on this topic. In *Connell v. Payne*, Connell was injured in a polo match when Payne swung his mallet and unintentionally hit him in the eye. [FN191] In its analysis, the court reasoned that a competitor is deemed to have “expressly consent[ed] to and assume[ed] the risk of the dangerous activity by voluntarily participating in the sport.” [FN192] In so reasoning, the Dallas court circumvents the Texas Supreme Court's abolishment of implied assumption of the risk in its *Farley* holding. [FN193]

The court then applied a recklessness standard but limited its application to “a competitive contact sport” only. [FN194] The court is silent as to what standard should be applied to non-contact sports and how to distinguish between contact and non-contact.

6. Texarkana

The Texarkana court has issued no opinions to date on the standard of care owed by participants to one another.

7. Amarillo

The Amarillo court applied the Dallas court's *Connell v. Payne* holding in *Hathaway v. Tascosa Country Club, Inc.* [FN195] In *Hathaway*, while practicing at a driving range, Barfield hit a golf shot that hooked. [FN196] He yelled, “fore,” but Hathaway was nevertheless struck in the left eye while *466 driving his cart near the range. [FN197] Hathaway sued both Barfield and the country club where the injury occurred. [FN198]

The Amarillo court ruled that a finding of at least recklessness was required, thereby extending Connell's rule to golf, foreshadowing what the Fort Worth court would do in *Monk v. Phillips* five years later. [FN199] Finding no evidence that Barfield acted recklessly, the court affirmed the summary judgment in his favor. [FN200]

8. El Paso

The El Paso court has issued no opinions to date on the standard of care owed by participants to one another.

9. Beaumont

The Beaumont court has issued no opinions to date on the standard of care owed by participants to one another.

10. Waco

The Waco court (like the Fort Worth [FN201] and Amarillo [FN202] courts) applied the Dallas court's holding in *Connell v. Payne* [FN203] requiring a finding of recklessness and extended it to injuries sustained while playing golf. [FN204]

In *Allen v. Donath*, after watching Donath hit his shot, Allen and the third member of their party stopped paying attention. [FN205] Donath, whose back was to his playing partners, hit a second tee shot which struck Allen in the temple, allegedly causing a fractured skull, concussion, loss of speech, *467 loss of memory, loss of hearing, loss of motor function and damage to his jaw. [FN206] The jury found that Donath's conduct was not reckless. [FN207]

The Waco appellate court walked through the Amarillo and Dallas courts' analysis, found it persuasive, and ultimately adopted the same standard. [FN208]

11. Eastland

The Eastland court has issued no opinions to date on the standard of care owed by participants to one another.

12. Tyler

The Tyler court has issued no opinions to date on the standard of care owed by participants to one another.

13. Corpus Christi

The Corpus Christi court has issued no opinions to date on the standard of care owed by participants to one another. [FN209]

14. Houston [14th Dist.]

The Fourteenth Court of Appeals has yet to decide which standard it will apply to suits involving participants in sporting events. While in an unpublished opinion, the court applied a negligence standard, [FN210] the case probably does not indicate which direction this court will rule in the future because its analysis relies on Gonzalez's Davis v. Greer dicta and incorrectly considers it binding authority that rejects the recklessness standard and instead applies negligence. [FN211] Therefore not only is holding *468 weak because this language is simply dicta and is not binding, [FN212] but also Gonzalez never actually rejects recklessness and certainly does not adopt negligence. [FN213]

V. A Proposed Standard for Texas: A Return to Negligence

The goal is to protect defendants and games from plaintiffs who sue for injuries incurred as a result of expected and accepted conduct during the course of a game. Conversely, when a plaintiff is injured by conduct that is outside the accepted manner of play, he ought not to bear that burden alone. But what standard is the best to apply? As referenced above and discussed below, assumption of the risk, intentional torts, and recklessness are simply not up to the task in Texas.

A. No Liability Through Implied Assumption of the Risk: Disqualified in Texas

It seems that an effective tool to accomplish both goals implicated by this issue is the implied assumption of the risk doctrine. Courts in other states have applied this doctrine by holding that by voluntarily playing a sport, participants have assumed the normal risks associated with that particular game. [FN214] However, as discussed above, [FN215] this doctrine is simply not an option in Texas. [FN216] Instead, “[n]ow, the fact that a plaintiff voluntarily encountered a known risk may act as a comparative defense only.” [FN217] Essentially, the implied assumption of the risk doctrine is considered and subsumed by Texas' comparative fault analysis.

Because this doctrine is not used in Texas, both Gonzalez's standard [FN218] and that applied by the Dallas Court of Appeals [FN219] are also untenable. As *469 discussed above, [FN220] “deeming” a participant to have expressly consented by voluntarily participating in a sporting event is nothing more than a veiled attempt to resurrect implied assumption of the risk and conflicts with Farley. [FN221]

Additionally, even if implied assumption of the risk were viable in Texas, it would not be the best option. At its core, this doctrine asks the question: Should the plaintiff have reasonably anticipated the injury causing conduct? [FN222] This analysis is deficient in two ways. First, it places the plaintiff on trial rather than the defendant. It is the plaintiff's

subjective state of mind that is considered rather than the defendant's objective conduct. [FN223] Second, as stated in the paragraphs above, the forum for questioning the plaintiff's contribution to his own injury is already efficiently and effectively established in Texas's comparative fault analysis. [FN224] If Texas applied this doctrine, essentially the same question would be asked twice, giving the defendant an unjustifiable and unfair procedural advantage.

B. Intentional Conduct: An Unbalanced Approach

Again, the goal is to protect defendants and games from unjust suit. However, the other policy to consider is the protection of participants from unnecessary injury and costs incurred. Adopting a requirement for intentional conduct will effectively protect defendants from liability and from suit. However, this standard also carves out a unique zone of our society in which the history of negligence theory no longer applies. This "safe zone" approves of, allows, and tacitly encourages conduct that is so unreasonable under the circumstances that no "ordinary prudent person" would ever engage in it. So long as a defendant does not intend to cause the harm, he is excused from liability. Should courts adopt such a standard, *Vaughan v. Menlove* may need to be revisited. [FN225]

*470 An intentional tort standard has wooed at least one jurisdiction. [FN226] The flaw with this standard is simply that it inappropriately ignores one of the values that must be considered and balanced: a remedy for unjust wrongs.

C. Recklessness: An Inconsistent Player

The Restatement of Torts defines "Recklessness" as follows:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. [FN227]

Texas courts have accepted and applied this definition without expressly adopting it. [FN228] However, this definition is unwieldy and intimidating. The Texas Litigation Guide attempts to simplify it as follows: "'Reckless' may be characterized as 'wanton or wilful.' It requires a conscious choice of a course of action, either with knowledge of the serious danger to others *471 involved or with knowledge of facts that would disclose this danger to any reasonable person." [FN229]

The Restatement anticipates our questions and offers two comments for clarity:

Intentional misconduct and recklessness contrasted.

Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results. [FN230]

Negligence and recklessness contrasted.

Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct re-

quires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that *472 his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind. [FN231]

Unfortunately, for all its words, the Restatement's comments offer little guidance. Basically, recklessness uncomfortably, vaguely and imprecisely straddles that morass that exists between negligence and intentional torts.

Look again at the definition offered by the Restatement. One phrase distinguishes recklessness from negligence: “[S]uch risk is substantially greater than that which is necessary to make his conduct negligent.” [FN232] Practically, if a jury is to find a defendant liable for recklessness, it must first imagine what conduct he could have committed that would be characterized as negligent, and then determine if the conduct he actually committed involved a risk “substantially greater” than that which the jury has imagined. [FN233] To determine if that risk is substantially greater, the Restatement instructs the jury that substantially greater “is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.” [FN234]

In an attempt to improve its definition, the American Law Institute (ALI) has proposed the following in its yet to be published Restatement (Third) of Torts:

A person acts recklessly in engaging in conduct if:

- (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and
- (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the *473 person's failure to adopt the precaution a demonstration of the person's indifference to the risk. [FN235]

This definition is an improvement on that of the Restatement (Second) in that more clarity is given as to what kind of risk is “a difference in kind” [FN236] from negligence. However, the ALI drafters admit that the ambiguous relationship with negligence still exists by offering this comment: “Taken at face value, this term simply means negligence that is especially bad.” [FN237]

For all the words offered, the jury is left with little real instruction. Furthermore, the jury is encouraged by both Restatements' definitions and comments to refrain from imposing liability for anything short of an intentional tort. Recklessness is an ambiguous standard that is impossible to apply accurately and consistently. Fortunately, a better, clearer standard exists.

D. Negligence: A Winner Every Time

Applying a simple negligence standard of ordinary care is the best option available. This is true for three reasons.

First, negligence, simply put, holds a defendant liable for unreasonable conduct. Under Texas law, “negligence is the doing of that which an ordinarily prudent person would not have done under the same or similar circumstances.” [FN238] Our familiarity with the simple logic of this time-honored standard may have bred undeserved contempt: the jury is considering whether the defendant's conduct is reasonable--not perfect or otherwise extraordinary. If, considering

all relevant circumstances, a defendant's conduct is considered to be that which a normal member of our society would be unwilling to engage in, why not hold him liable?

Under a negligence theory of liability, testimony from those familiar with a sport can establish what is reasonable in the situation at hand. Expert testimony would be required to establish what is reasonable in special *474 situations, such as involving professional sports, especially violent professional sports (such as wrestling), or obscure professional sports with which jurors may not be familiar (such as curling). [FN239]

Second, ordinary care is broad enough to include and consider factors other courts and commentators deem important. For example, negligence can adequately function considering whether the sport was contact or non-contact, [FN240] professional or amateur, [FN241] and organized or informal. [FN242] Ordinary care can consider whether a defendant caused injury by violating a so called "safety-based rule." [FN243] Justice Enoch's concern with whether a risk is "inherent" to the game [FN244] is also sufficiently contemplated by a negligence analysis.

Third, by granting the jury the right to ask the question, "would a reasonably prudent participant under the same or similar circumstances have acted or failed to act in the same manner," all relevant factors are included, and all other proposed standards are surpassed in utility. Negligence is an easier and clearer standard to apply--granting better direction to juries--than recklessness. Negligence does a better job of considering the values of our society--protection of the games, and of their participants--than either an intentional tort [FN245] requirement, or a no-liability standard [FN246]. Importantly, the ordinary prudent or reasonable conduct standard of care is flexible enough to apply to each particular sport and circumstance without impacting the way a game is played or unreasonably ignoring a participant's compensable injury. [FN247]

*475 Concededly, by placing these cases in the hands of the jury, a measure of uncertainty is added as to the effect the judicial system will have on sports. [FN248] However, as these cases are litigated, the courts can guide juries by determining conduct that is not actionable per se. For example, as case law develops, Texas courts may be unwilling to allow injuries caused by baseball players coming in "spikes high" [FN249] to get to juries. Additionally, the legislature can remedy any untoward effect through legislation modifying the duty analysis. This guidance by the courts and legislature will serve to further protect sports from unnecessary and unwelcome judicial interference while at the same time sufficiently allowing the jury to respond to unreasonable conduct.

E. Hypotheticals

In the following hypothetical situations, assume all participants are professionals and that all games are significant. In other words, the context for each game is the most vigorous and competitive as could be reasonably anticipated.

1. Golf: A Good Walk Spoiled [FN250]

It is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the *476 sport would be lost. It is common knowledge, at least among players, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatever. [FN251]

a. Facts

After confirming he has a clear fairway, Happy lines up at the tee box at the first hole. Unfortunately, Happy inadvertently shanks his shot, the ball strikes a tree, ricochets into the adjacent fairway and smacks Shooter (another golfer)

in the face, knocking out three teeth.

Later, Happy lines up for a drive down the very narrow fairway of hole number two. Before hitting his drive, Happy sees Shooter about a hundred yards away on the edge of the adjacent fairway to his right, attempting to purchase something from the beverage cart that will ease his pain. Happy is fully aware that Shooter is within his driving range. Happy also is fully conscious of his own propensity to hit what he describes as a “wicked slice.” Happy, feeling a breeze at his back and unwilling to chance losing it, strikes his ball with his new oversized number one driver. Predictably, the drive cuts sharply to the right, strikes Shooter in the leg, breaking his tibia.

Happy is now set up for his approach shot to the third green. But, he is delayed by Shooter taking his time sinking a putt. Happy is irritated because Shooter has been limping around, slowing up the pace of play. Happy decides to “send him a message” and hits an eight iron, attempting to drop it between Shooter's legs. Instead, Happy's ball strikes Shooter in the face, breaking his jaw.

Now, Happy is at the tee box on the fourth. Shooter is receiving medical attention off to the side of the fairway. Happy is irritated with Shooter who can only be described as his arch nemesis. On principle, Happy takes aim and strikes his ball, intending to hit Shooter. The ball, as though fired by a musket, strikes Shooter in the back, and his spinal column is shattered.

b. Analysis

Under the reasonable standard of care, Happy would incur no liability for his shanked shot at the first hole. Even the best golfer inadvertently hits *477 an errant shot from time to time. This risk is simply an inherent part of the game for which the reasonable defendant should not be punished.

Happy's conduct at the second is a different question. His failure to compensate for his wicked slice, his failure to consider Shooter's welfare, and his overvaluing a breeze that might contribute to the length of his drive could reasonably be considered outside that conduct that a reasonably prudent golfer under the same or similar circumstances would engage in. A jury holding Happy liable for negligently causing Shooter's injuries would be justified. Such liability protects golfers from others' disregard, and has virtually no impact on the game: hitting another player with an ill-considered drive is already considered bad etiquette.

Happy's conduct at the third green is inexcusable, indefensible, and unnecessary. Would a reasonably prudent golfer under the same or similar circumstances attempt to hit a golf ball to such a small spot, putting another golfer at such great risk, knowing how unpredictable golf shots can be? Again, a jury would do no harm to the game of golf and would effectively protect golfers by finding Happy negligent. [\[FN252\]](#)

Happy's intentional tort at the fourth hole is easily dealt with. In every jurisdiction, indications are that courts are unwilling to give a “pass” to intentional torts in sports. Happy should clearly be found liable for his tortious conduct resulting in Shooter's injuries.

However, the intentional tort standard does not fit so nicely in every sport. What if virtually every action taken in pursuit of a particular game could be considered an intentional tort? Consider . . .

2. Football: The Battle on the Gridiron [\[FN253\]](#)

[In] the game of football, there are eleven players arranged on one side against eleven players on the other and there are violent physical contacts throughout that game, from the beginning to the end, and sometimes some of

the players get hurt. It's a rare occasion if any of them would escape *478 some bruises and bumps as a result of such games. Sometimes they have rather serious injuries. [FN254]

a. Facts

On first down, Brad catches a pass across the middle. Leah, in an attempt to save the first score of the game, delivers a vicious (but legal) hit to Brad's upper body, successfully tackling him short of the goal line. Unfortunately, Leah hit him with such force that Brad suffered a severe, grade three concussion.

Now it is second down. Leah is upset with her team's field position and is determined to personally save Brad's next attempt at a score. However, as Brad carries the ball up the middle, Leah is only able to grab hold of his facemask. She turns him around completely, saving the score, but causing substantial soft tissue damage to Brad's neck and shoulders.

Leah has now decided that she has had enough. She resolves to keep Brad's team from scoring at all costs. When the ball snaps on third down, Leah slips and falls and Brad attempts to run over her. But Leah, ever vigilant, performs an illegal trip as Brad passes, causing him to wrench his knee, completely destroying both his ACL and MCL, but preventing what would otherwise be a sure touchdown.

Now Leah is coming apart with the realization that all hope of winning is lost. After tackling Brad on a successful score on his fourth down attempt, Leah vents her frustrations. In one fell swoop, she rips off his helmet and stomps on his face with her cleats, causing damage eventually requiring thirty stitches, and resulting in blurred vision, and headaches. [FN255]

b. Analysis

Football is a violent sport that expects and requires the regular performance of what would otherwise be intentional torts. The reasonable care standard considers this in its analysis.

Leah's conduct on first, second and third down, though malicious, dangerous and injurious is all within the conduct a reasonably prudent football player would have engaged in under the same or similar *479 circumstances. Vicious hits like Leah's on first down are an important part of football. Her illegal conduct, the facemask and tripping, are both subject to penalties and are generally undesirable, but are still not outside the conduct a reasonably prudent football player would have engaged in. When considering this conduct with the sport of football, its accepted conduct and inherent risks, no liability for negligence should attach.

Leah's stomping of Brad on fourth down would be either an intentional tort or negligence. Even though intentional torts and negligence are not ordinarily interchangeable, [FN256] a proper consideration of the context of how football is played makes this situation extra-ordinary. Again, nearly every act on the football field would be tortious if engaged in off the field. How is liability properly discerned then on the field? It is the consideration of the reasonable person standard (common both to intentional tort [FN257] and negligence analysis) that gives the correct result. In this case, would a reasonably prudent football player under the same or similar circumstances stomp on an opponent's helmet-less face? Certainly not. Under a negligence theory, liability should attach. Under an intentional tort analysis (battery), considering all the circumstances, would a reasonable person find the conduct harmful or offensive? Of course. Liability under an intentional tort theory should also attach.

Even more difficult to analyze are "contact" sports with very little contact between players. For example, consider . . .

3. Baseball: America's National Pastime

Not only is the game familiar to almost everyone in this nation but the danger from baseballs flying through the air is obvious and patent to anyone sitting as a spectator at a baseball game. The players are far removed from the spectators, the balls as they are hit are easily discernible as they go on their course, and it would be difficult to imagine that anyone in the seats at a game could fail to *480 instantaneously perceive the danger of being struck by a baseball . . . [FN258]

a. Facts

Lisa is up to lead off the first inning. She successfully gets around on a wicked fastball thrown by Grady and drives it right back up the middle at him. The ball flies straight and true and smashes into Grady's right side, breaking his sixth and seventh ribs.

In the second inning after walking Lisa, an unhappy manager has moved Grady to play shortstop. On the next pitch, Lisa, the fastest player on the field, takes off for second base. Grady moves to apply the tag, but in Lisa's steal attempt, she comes in "spikes high" and rakes her cleats across Grady's left arm, causing four deep lacerations that will require a total of twenty-three stitches.

In the third inning, Grady is up to bat. Lisa is pitching because she has what can only be described as a rocket arm. During the second inning, Grady hit a 506-foot homerun. Lisa, true to her reputation, retaliates. Her first pitch is a three digit, four seam fastball at Grady's left ear "to brush him back." Though typically very nimble, Grady is unable to avoid the pitch, which strikes him in the left temple, rendering him unconscious and permanently brain damaged.

In the fourth inning, Grady hits a broken-bat single up the middle. Part of the broken bat ends up on the pitcher's mound. Lisa, being an old-school pitcher and, therefore, offended on principle, picks up the shard of bat and hurls it at Grady, cracking his sternum. [FN259]

b. Analysis

Grady's being hit by the ball in the first inning is not compensable. Lisa's hitting Grady's pitch, though unfortunate in result, was well within conduct an ordinary prudent baseball player would have engaged in. *481 However, coming in spikes high in the second inning is conduct that may not be within that which an ordinary prudent baseball player would have engaged in. In determining what reasonable conduct is, a jury should hear expert testimony about what the accepted practice is in Grady and Lisa's league.

Lisa's conduct in the third inning is particularly interesting. The dangers of being struck in the head by a hundred mile per hour fastball are severe and obvious. [FN260] However, throwing baseballs "high and tight" is a part of the game. [FN261] Pitchers hitting batters is an accepted risk and strategy of the game. [FN262] A jury should not find that Lisa failed to act as a reasonably prudent pitcher under the same or similar circumstances would have acted. A finding of liability would protect batters, but would unfortunately and irrevocably change the way the game of baseball is played. This is the exact sort of foray into game-play governance the courts wish to avoid. Again, the reasonable standard of care found in negligence theory accommodates this.

Lisa's flinging the barrel of Grady's bat at him is easily dispensed with as negligent. Would a reasonably prudent pitcher (even an "old-school pitcher") under the same or similar circumstances have engaged in the same conduct? Certainly not. Lisa should be held negligently liable for Grady's broken sternum.

Baseball, because it is a contact sport, but not as violent as football, provides for some challenging an interesting applications of negligence theory. Another sport with such challenging application is . . .

4. Basketball: I Love This Game!

He did assume the risk of being hit in the face by a flying elbow in the course of defending against an opponent's jump shot, suffering a painful insult to his instep by a size-16 foot descending with a rebound, or even being knocked to the court by the sheer momentum of a seven-footer *482 driving home a slam dunk. But the scope of his consent did not extend to an intentional blow considerably beyond the expected risks inherent in basketball. Intentional fouls are part of that game. But where the intent is to injure and the force used is far greater than necessary to accomplish a legitimate objective within the scope of play, a defendant may not prevail . . . [FN263]

a. Facts

In the first quarter, Brian drives the lane only to be met by Kathy. As Brian pulls up for a jump shot, Kathy attempts to block the shot and inadvertently knocks Brian off balance. Brian falls awkwardly on his ankle, causing a sprain.

In the second quarter, Brian has decided that going "hard at the hole" is the best way to overcome Kathy's terrific defense. Kathy decides to show Brian her motto: "It costs pain to come down the lane." As Brian attempts what he calls "the Illinois Black Bear dunk," Kathy commits a hard foul by smashing into his chest, knocking Brian to the floor, breaking his left wrist.

In the third quarter, Kathy decides to teach Brian a lesson. This time, as Brian comes down the lane, Kathy doesn't jump to meet him, but instead goes underneath causing Brian to summersault and land hard on his backside. Brian's coccyx is completely shattered.

Despite her valiant efforts, Kathy's team is losing by thirty points in the fourth quarter. In an attempt to at least secure a moral victory, Kathy decides on a new defensive technique. As Brian brings the ball up the court in the waning seconds of the game, Kathy executes a flawless roundhouse kick to his chin, pulverizing his jaw.

b. Analysis

Kathy's conduct in the first and fourth quarters is easily dispensed with. Kathy is not liable for Brian's first quarter injury, her attempt at blocking Brian's shot being reasonable but with unfortunate results. Kathy is clearly liable to compensate Brian for his fourth quarter injury resulting from her battery.

It is again the middle two injuries suffered in this hypothetical which prove challenging. Kathy's conduct in the second (hard foul to Brian's *483 chest) and third (going underneath and causing Brian to summersault) quarters would both be considered intentional (even flagrant) fouls, and both result in substantial injury. Her foul in the third quarter is not conduct that a reasonably prudent basketball player under the same or similar circumstances would have engaged in. She should be held negligently liable.

But what about Kathy's hard foul in the second quarter? Perhaps more facts are needed. Did she go for the ball? What part of Brian did she collide with? These fact questions and perhaps others should be considered by the jury in its consideration of whether Kathy acted with the care a reasonably prudent basketball player would have exercised under the same or similar circumstances. Again, the negligence standard provides the jury with the framework and opportunity to decide whether or not the actor engaged in reasonable conduct and should, therefore, escape liability.

V. Conclusion.

In defining the applicable standard of care owed by participants in sporting contests, the trend in Texas mirrors that of the rest of the nation. Courts are generally making a concerted move toward the application of a recklessness standard. [FN264] However, the debate is not over. A significant minority of jurisdictions applies a negligence standard, some require an intentional tort, and others have adopted a no-liability standard. [FN265] Many courts employ implied assumption of the risk in their analysis, [FN266] but the Supreme Court has abolished this doctrine in Texas. [FN267]

Of all theories of liability proposed for sports injuries by and to participants, negligence is the best option for three reasons. [FN268] First, negligence holds a defendant liable by employing a workable standard: reasonable care. Second, the ordinary care standard is broad enough to include and consider factors other courts and commentators deem important. Third, unlike other proposed standards, with negligence juries are provided with a workable framework that allows them to decide whether to attach liability based upon whether or not the actor's conduct was reasonable given the circumstances.

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[FN29]. [Phi Delta Theta Co. v. Moore](#), 10 S.W.3d 658, 661 (Tex. 1999) (Enoch, J., dissenting) (dissenting to improvident grant of review).

[FN30]. [Nabozny v. Barnhill](#), 334 N.E.2d 258, 260 (Ill. App. Ct. 1975).

[FN31]. [Marchetti v. Kalish](#), 559 N.E.2d 699, 703 (Ohio 1990); [Moore v. Phi Delta Theta Co.](#), 976 S.W.2d 738, 741 (Tex. App.--Houston [1st Dist.] 1998), *pet. dism'd improvidently granted*, 10 S.W.3d 658 (Tex. 1999).

[FN32]. [Moore](#), 976 S.W.2d at 741.

[FN33]. [Davis v. Greer](#), 940 S.W.2d 582, 582 (Tex. 1997) (denying application for writ of error).

[FN34]. Bob Cohn, [Safe and Unsound](#), *The Washington Times*, Dec. 6, 2006, at C1, available at ht-

[tp://www.washtimes.com/sports/20061206-124829-4814r.htm](http://www.washtimes.com/sports/20061206-124829-4814r.htm).

[FN35]. Id.

[FN36]. Id.

[FN37]. Id.

[FN38]. Id.

[FN39]. Id. (“It wasn't so much a rookie mistake...as it was being naturally cautious in an environment in which quarterbacks have become increasingly protected. Or overprotected.”).

[FN40]. “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 237, 163 (1803).

[FN41]. *Westerman v. Mims*, 111 Tex. 29, 227 S.W. 178, 184 (Tex. 1921) (Phillips, J., concurring) (noting that the law does and must provide a legal remedy for the violation for every legal right).

[FN42]. 1 Dan B. Dobbs, *The Law of Torts: Practitioner Series* 17 (2001) (“If a person has been wronged by a defendant, it is just that the defendant make compensation.”); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §4, at 20 (5th ed. 1984) (“Courts leave a loss where it is unless they find a good reason to shift it. A recognized need for compensation is, however, a powerful factor influencing tort law.”).

[FN43]. *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003).

[FN44]. See *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 661 (Tex. 1999) (Enoch, J., dissenting) (dissenting to improvident grant of review).

[FN45]. See Stanley L. Grazis, Annotation, [Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant](#), 55 A.L.R.5th 529 (1998) (discussing cases adopting an ordinary negligence standard, cases adopting a recklessness standard, and cases involving intentional torts).

[FN46]. Arkansas and Montana.

[FN47]. California, Colorado, Connecticut, Hawaii, Iowa, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island and West Virginia.

[FN48]. Florida, Minnesota, Nevada, Oregon, Virginia, and Wisconsin.

[FN49]. Vermont and Wyoming.

[FN50]. Alabama, Alaska, Florida, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, and Wyoming.

[FN51]. Alabama, Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Washington.

[FN52]. Idaho, Illinois, Indiana, Louisiana, New Mexico, New York, and Texas.

[FN53]. Arizona, Georgia, Indiana, Kansas, Maryland, New York, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Washington.

[FN54]. Delaware.

[FN55]. Alabama, Alaska, Maine, Mississippi, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas.

[FN56]. Arkansas and Montana.

[FN57]. E.g., Michigan, Vermont, and Wyoming.

[FN58]. See generally *O'Connell v. Killington, Ltd.*, 665 A.2d 39 (Vt. 1995) (articulating in dicta the general negligence principles governing liability for skiing accident in spite of a no liability statute directly on point).

[FN59]. *Pittman v. United Toll Sys., LLC*, 882 So.2d 842, 845 (Ala. 2003) (“A defendant relying on the affirmative defense of assumption of the risk bears the burden of presenting substantial evidence indicating that the plaintiff assumed the risk that gave rise to the injury.”).

[FN60]. *Hiibschman v. City of Valdez*, 821 P.2d 1354, 1363 (Alaska 1991) (stating that a “ski area operator is free to argue that skier voluntarily and unreasonably assumed a negligently created risk. The skier’s negligence would then reduce recovery under the doctrine of comparative negligence.”).

[FN61]. *Estes v. Tripson*, 932 P.2d 1364, 1365-66 (Ariz. Ct. App. 1997) (noting that a softball player who was injured when a baserunner stepped on and broke his leg while attempting to score must show negligence in order to recover).

[FN62]. See generally Glenn Anaiscourt, Comment, *Fine Tuning California's Approach to Injured Participants in Active Sports*, 37 Loy. L.A. L. Rev. 1273 (2004); Teri Brummet, Comment, *Looking Beyond the Name of the Game: A Framework for Analyzing Recreational Sports Injury Cases*, 34 U.C. Davis L. Rev. 1029 (2001); Amanda M. Winfree, Note, *Increasing the Inherent Risks of Baseball: Liability for Injuries Associated with High-Performance Non-Wood Bats in Sanchez v. Hillerich & Bradsby Co.*, 11 Vill. Sports & Ent. L.J. 77 (2004).

[FN63]. *Knight v. Jewett*, 834 P.2d 696, 710-11 (Cal. 1992) (holding that a participant injured in game of coed touch football must prove either intentional or reckless conduct that is totally outside the range of ordinary activity involved in the sport).

[FN64]. *Id.* at 710.

[FN65]. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524-25 (10th Cir. 1979) (requiring that a professional football player who sustained substantial injury when defendant player intentionally struck him on back of the head during a game, out of the course of play, must show recklessness to recover).

[FN66]. *Id.* at 523-24.

[FN67]. *Id.* at 519.

[FN68]. *Id.*

[FN69]. *Id.*

[FN70]. *Id.* at 524-25

[FN71]. *Jaworski v. Kiernan*, 696 A.2d 332, 339 (Conn. 1997) (stating that a female participant in coed recreational soccer league who brought action against male participant to recover for injuries sustained when he came in contact with her during course of play must show reckless or intentional conduct).

[FN72]. *Taylor v. Young Life*, No. 93-C-07-27, 1995 WL 413400, at *3 (Del. Super. Ct. June 9, 1995) (stating that a plaintiff suing a summer camp for injuries suffered when she fell after being tossed in the air as part of a cheerleading exercise called a “basket toss” must show intentional, willful, or wanton conduct).

[FN73]. See generally *Brummet*, supra note 62 (discussing a hybrid standard between California's objective standard and Florida's subjective standard).

[FN74]. *Kuehner v. Green*, 436 So.2d 78, 80 (Fla. 1983) (requiring that a participant in karate sparring match who sued the other participant to recover for injuries sustained in takedown maneuver in form of a “leg sweep” show negligence to recover).

[FN75]. *Id.*

[FN76]. *Seabolt v. Cheesborough*, 193 S.E.2d 238, 242 (Ga. Ct. App. 1972) (requiring hunters to exercise ordinary care to prevent shooting other hunters).

[FN77]. *Yoneda v. Tom*, 133 P.3d 796, 808-09 (Haw. 2006) (requiring plaintiff golfer who was injured upon being struck in the eye by an errant golf ball, hit by another golfer, to show reckless or intentional conduct).

[FN78]. *Id.*

[FN79]. *Galloway v. Walker*, 99 P.3d 625, 629-30 (Idaho Ct. App. 2004) (holding that a softball player who brought a personal injury action against opponent for injuries sustained when opponent slid into player must show reckless or intentional conduct).

[FN80]. See *Savino v. Robertson*, 652 N.E.2d 1240, 1245 (Ill. App. Ct. 1995) (holding that an amateur hockey player who was hit in the eye with a puck during warm-up must show conduct is willful or wanton or in reckless disregard for safety); *Landrum v. Gonzalez*, 629 N.E.2d 710, 715 (Ill. App. Ct. 1994) (stating that a first baseman injured during informal softball game must show reckless or wanton conduct); *Keller v. Mols*, 509 N.E.2d 584, 585 (Ill. App. Ct. 1987) (stating that a player injured while playing goalie in floor hockey game must show conduct was deliberate or willful or done with reckless disregard for safety); *Nabozny v. Barnhill*, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975) (holding that a player is liable for injury if his conduct is either deliberate, willful, or done with reckless disregard for the safety of other players).

[FN81]. See, e.g., *Zurla v. Hydell*, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997); *Keller*, 509 N.E.2d at 585.

[FN82]. *Geiersbach v. Frieje*, 807 N.E.2d 114, 122 (Ind. Ct. App. 2004) (holding that a university baseball player cannot recover absent proof of intentional injury or malicious or reckless behavior).

[FN83]. *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983) (holding that a plaintiff who lost an

eye from being struck by a golf ball at a country club is entitled to a jury instruction regarding negligence).

[FN84]. [Leonard ex rel. Meyer v. Behrens](#), 601 N.W.2d 76, 81 (Iowa 1999) (stating that a participant in a paintball game is engaged in a contact sport implicating the recklessness standard).

[FN85]. *Id.* at 79-80.

[FN86]. [Goldman v. Bennett](#), 371 P.2d 108, 112 (Kan. 1962) (holding that a skater at a public ice-skating rink assumes all ordinary and normal hazards incident to sport but not negligence of the proprietor in failing to provide adequate and proper supervision of skating session).

[FN87]. [Hoke v. Cullinan](#), 914 S.W.2d 335, 338 (Ky. 1995) (stating that a plaintiff who sustained injuries during a tennis match must show at least a reckless disregard for the safety of others).

[FN88]. See, e.g., [Picou v. Hartford Ins. Co.](#), 558 So.2d 787, 791 (La. Ct. App. 1990) (holding that softball base runner could not be held liable in negligence to second base player who suffered ankle injury in collision); [Richmond v. Employers' Fire Ins. Co.](#), 298 So.2d 118, 122 (La. Ct. App. 1974) (holding that the assistant student baseball coach was not negligent and that the player assumed the risk of injury inherent in a baseball practice session and was barred from recovery).

[FN89]. See, e.g., [Richmond](#), 298 So.2d at 122; see also [Picou](#), 558 So.2d at 791.

[FN90]. [Merrill v. Sugarloaf Mountain Corp.](#), 698 A.2d 1042, 1044 (Me. 1997) (stating that when a skier's injuries were not caused by inherent risk, there must be a determination that injuries were actually caused by negligent operation or maintenance of ski area).

[FN91]. [Kelly v. McCarrick](#), 841 A.2d 869, 875-76 (Md. Ct. Spec. App. 2004) (stating that a plaintiff who brought a negligence action arising out of an incident that occurred during a fast-pitch softball game, when player collided with plaintiff, severely fracturing her ankle, assumed all risks incidental to the game which were foreseeable).

[FN92]. [Kavanagh v. Trs. of Boston Univ.](#), 795 N.E.2d 1170, 1179 (Mass. 2003) (stating that a basketball player who was punched in the throat by opposing basketball player must show that the other player's conduct amounted to recklessness).

[FN93]. See generally Thomas F. Miller, Note, [Torts and Sports: Has Michigan Joined the Wrong Team with Ritchie-Gamester?](#), 48 Wayne L. Rev. 113 (2002).

[FN94]. [Ritchie-Gamester v. City of Berkley](#), 597 N.W.2d 517, 525 (Mich. 1999) (stating that an ice skater, who brought action against ice arena owner, its employee, and 12-year-old skater who ran into plaintiff, must show reckless conduct).

[FN95]. Mich. Comp. Laws Serv. §408.342 (LexisNexis 2001).

[FN96]. See generally Michael K. Steenson, [The Role of Primary Assumption of Risk in Civil Litigation in Minnesota](#), 30 Wm. Mitchell L. Rev. 115 (2003); Marshall H. Tanick & Brian Dockendorf, [Links, Lutefisk, and Litigation](#), 60 Bench & B. of Minn. 21 (2003).

[FN97]. [Hollinbeck v. Downey](#), 113 N.W.2d 9, 11-12 (Minn. 1962) (stating that a golfer must exercise ordinary care to prevent injury to others).

[FN98]. [Blizzard v. Fitzsimmons](#), 10 So.2d 343, 344 (Miss. 1942) (“[A] person who participates in the diversion afforded by an amusement or recreational device accepts, and assumes the risk of, the dangers that adhere in it so far as they are obvious and necessary.”).

[FN99]. [Ross v. Clouser](#), 637 S.W.2d 11, 13-14 (Mo. 1982) (holding that a plaintiff who brought an action to recover damages for personal injuries sustained during a softball game must show recklessness).

[FN100]. [Dotzler v. Tuttle](#), 449 N.W.2d 774, 779 (Neb. 1990) (stating that a participant injured in collision with another player during a pickup basketball game can only recover if the misconduct is willful or reckless).

[FN101]. [Auckenthaler v. Grundmeyer](#), 877 P.2d 1039, 1043-44 (Nev. 1994) (stating that a horse rider must show negligence to recover for injuries sustained when another rider's horse kicked her).

[FN102]. [Allen v. Dover Co-Recreational Softball League](#), 807 A.2d 1274, 1285 (N.H. 2002) (stating that a softball player who was hit in the head by an errantly thrown softball during co-recreational, slow-pitch softball tournament must show the conduct is either reckless or intentional and outside the ordinary activity of the sport).

[FN103]. [Id.](#) at 1281-82.

[FN104]. See generally [Carla N. Palumbo, New Jersey Joins the Majority of Jurisdictions in Holding Recreational Sports Co-Participants to a Recklessness Standard of Care](#), 12 *Seton Hall J. Sport L.* 227 (2002).

[FN105]. [Schick v. Ferolito](#), 767 A.2d 962, 968 (N.J. 2001) (stating that a plaintiff golfer who sued defendant golfer, alleging that defendant's errant, unannounced second tee-shot struck plaintiff in the eye, must show reckless or intentional conduct to recover).

[FN106]. [Kabella v. Bouschelle](#), 672 P.2d 290, 294 (N.M. Ct. App. 1983) (holding that participant lacked cause of action predicated on negligence against another minor for injuries sustained in an informal game of tackle football).

[FN107]. See generally [Lura Hess, Note, Sports and the Assumption of Risk Doctrine in New York](#), 76 *St. John's L. Rev.* 457 (2002).

[FN108]. [Glazier v. Keuka Coll.](#), 713 N.Y.S.2d 381, 381 (App. Div. 2000) (stating that a college student who was injured while participating in tackle football game organized and played by students of competing residence halls must show a flagrant infraction of the rules unrelated to normal game play); [Barton v. Hapeman](#), 674 N.Y.S.2d 188, 189 (App. Div. 1998) (stating that a participant in organized youth hockey game who was injured when she was allegedly “charged” and “cross-checked” from behind by opposing player must show a flagrant infraction unrelated to normal methods of playing the game).

[FN109]. [Gahan v. Mineola Union Free Sch. Dist.](#), 660 N.Y.S.2d 144, 146 (App. Div. 1997) (stating that a high school softball player must show negligence to recover for injuries sustained from stepping into hole while batting).

[FN110]. [Duncan v. Kelly](#), 671 N.Y.S.2d 841, 842-43 (App. Div. 1998) (stating that a downhill skier who was injured in collision with second skier must show negligence to recover).

[FN111]. [Everett v. Goodwin](#), 161 S.E. 316, 318 (N.C. 1931) (stating that a golf player must exercise ordinary care to prevent injuring others in playing game).

[FN112]. [Filler v. Stenvick](#), 56 N.W.2d 798, 799, 801-02 (N.D. 1953) (“One who, knowing the necessary and obvious risks inherent in and incidental to the sport of skating which reasonable care by the proprietor cannot prevent, freely and voluntarily chooses to participate therein, cannot recover damages from the proprietor for injuries sustained on account of such inherent risks.”).

[FN113]. [Marchetti v. Kalish](#), 559 N.E.2d 699, 703-04 (Ohio 1990) (stating that a child who broke her leg while playing game of “kick the can” must show reckless or intentional conduct to recover); [Thompson v. McNeill](#), 559 N.E.2d 705, 707 (Ohio 1990) (stating that a player struck in the eye by a golf ball must show intentional or reckless misconduct).

[FN114]. See, e.g., [Thomas v. Wheat](#), 143 P.3d 767, 770 (Okla. Civ. App. 2006) (applying an ordinary negligence analysis holding that a golfer is required to exercise ordinary care for the safety of persons reasonably within the zone of risk or danger).

[FN115]. See, e.g., [Taylor v. Hesser](#), 991 P.2d 35, 37-38 (Okla. Civ. App. 1998) (stating that a defendant who shot plaintiff in the eye during paintball game did not owe a duty to plaintiff and therefore was not negligent; here, plaintiff voluntarily agreed to participate in paintball game in which he was injured).

[FN116]. [Blair v. Mt. Hood Meadows Dev. Corp.](#), 630 P.2d 827, 832 (Or. 1981) (holding a plaintiff who brought an action in negligence against operator of ski facility after he had been injured in a fall while skiing must show negligence to recover).

[FN117]. Or. Rev. Stat. §31.620(2) (2005).

[FN118]. [Benjamin v. Nernberg](#), 157 A. 10, 11 (Pa. Super. Ct. 1931) (holding that a golfer on public links was presumed to have assumed risk and could not recover against another player).

[FN119]. [Kiley v. Patterson](#), 763 A.2d 583, 586 (R.I. 2000) (holding that a second baseman who brought action seeking to recover damages for the injuries she suffered as a result of collision with base runner during recreational softball game must show intentional or reckless misconduct).

[FN120]. [Huckaby v. Confederate Motor Speedway, Inc.](#), 281 S.E.2d 223, 223-24 (S.C. 1981) (holding that an individual injured while voluntarily participating in race at speedway, after signing an exculpatory contact, is barred by assumption of the risk from bringing a negligence action against speedway).

[FN121]. [Perez v. McConkey](#), 872 S.W.2d 897, 900 (Tenn. 1994) (“Implied assumption of risk, in its primary sense, applies to bar recovery when a plaintiff has assumed known risks inherent in a particular activity, such as observing a baseball game from an unscreened seat.”).

[FN122]. See [Pieraccini v. Crenshaw](#), 321 S.W.2d 546, 548 (Tenn. 1959) (“[A] patron of a skating rink assumes the usual and ordinary hazards incurred in the sport of skating.”).

[FN123]. [Ricci v. Schoultz](#), 963 P.2d 784, 786-87 (Utah. Ct. App. 1998) (stating that a skier does have a duty to other skiers to ski reasonably and within control).

[FN124]. Vt. Stat. Ann. tit. 12, §1037 (2002).

[FN125]. See [O'Connell v. Killington, Ltd.](#), 665 A.2d 39, 42-43 (Vt. 1995) (articulating general negligence principles governing liability for skiing accident).

[FN126]. *Alexander v. Wrenn*, 164 S.E. 715, 717 (Va. 1932) (stating that a golf player has duty to exercise ordinary care to prevent injury to others by driven ball).

[FN127]. *State v. Hiott*, 987 P.2d 135, 136-37 (Wash. Ct. App. 1999) (holding that victim's consent to game in which he and juvenile shot at each other with BB guns did not constitute a defense to assault charge).

[FN128]. *Id.* at 136.

[FN129]. *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 518 (W. Va. 1989) (stating that a diver who was injured by diving into an above-ground pool must show willful, wanton or reckless conduct to recover).

[FN130]. *Id.* (rejecting assumption of the risk doctrine in assessing an athlete's liability for injuring fellow participant, and stating an athlete duty should be analyzed in terms of a limited duty not to willfully, wantonly, or recklessly injure fellow participant).

[FN131]. *Lestina v. W. Bend. Mut. Ins. Co.*, 501 N.W.2d 28, 33 (Wis. 1993) (stating that a soccer player injured during a game organized by an adult recreational league must show negligence to recover).

[FN132]. Wyo. Stat. Ann. §1-1-123(a) (2005).

[FN133]. See Sw. *Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 271-72 (Tex. 2002).

[FN134]. See *infra* Part IV.D.

[FN135]. See *infra* Part IV.A.

[FN136]. *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 659-60 (Tex. 1999) (Enoch, J., dissenting to the improvident grant).

[FN137]. *Id.*

[FN138]. At least sixteen states expressly apply some form of implied assumption of the risk in their analysis of sports injury cases. See discussion *supra* Part III.A. However, Oregon abolished assumption of the risk by statute, *Or. Rev. Stat. §31.620(2)* (2005), and West Virginia does not apply the doctrine in its analysis of these cases, see *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 518 (W. Va. 1989).

[FN139]. 529 S.W.2d 751, 758 (Tex. 1975). The court stated:

We therefore hold that for this trial, and henceforth in the trial of all actions based on negligence, *volenti non fit injuria*--he who consents cannot receive an injury--or, as generally known, voluntary assumption of risk, will no longer be treated as an issue. Rather, the reasonableness of an actor's conduct in confronting a risk will be determined under principles of contributory negligence. Unaffected will be the current status of the defense in strict liability cases and cases in which there is a knowing and express oral or written consent to the dangerous activity or condition.

Farley, 529 S.W.2d at 758); As the court further explained in *Phi Delta Theta Co.*:

Traditionally, there were two basic variations of the affirmative defense of assumption of the risk--express and implied. "Express assumption of the risk" arose when the plaintiff explicitly consented, through written or oral agreement, before engaging in risky conduct to take personal responsibility for potential injury-causing risks. "Implied assumption of the risk" arose when the plaintiff's willingness to personally accept responsibility for risks was not evidenced by an oral or written agreement, but rather implied by conduct such as voluntary participation in a risky activity. In *Farley*, we re-

tained “voluntary assumption of risk” only in cases in which there is “express oral or written consent.” In other words, we abolished the affirmative defense of “implied assumption of the risk” and retained the affirmative defense of “express assumption of the risk.”

10 S.W.3d at 659-60 (citing *Restatement (Second) of Torts* §§496B, 496C (1965)).

Unavoidably, this comment makes certain assumptions. Here, I assume that the courts will follow what has been the law in Texas for more than thirty years under Farley. Both Justice Gonzalez, see *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1996) (denying application for writ of error), and Justice Enoch, see *Phi Delta Theta Co.*, 10 S.W.3d at 659-60 (Tex. 1999), assume that the Farley holding applies in the sports context. Furthermore, the Texas appellate courts have also recognized the Farley holding in their analyses. See, e.g., *Moore v. Phi Delta Theta Co.*, 976 S.W.2d 738, 741 (Tex. App.--Houston [1st Dist.] 1998), pet. dism'd improvidently granted, 10 S.W.3d 658 (Tex. 1999); *Allen v. Donath*, 875 S.W.2d 438, 441-42 (Tex. App.--Waco 1994, writ denied); *Connell v. Payne*, 814 S.W.2d 486, 488 (Tex. App.--Dallas 1991, writ denied).

It is, however, reasonable to postulate that the Texas Supreme Court may at some point overrule Farley, create an exception to Farley for sports injuries, or find that Farley does not apply to a particular set of facts involving sports injuries. This possibility I leave to another author in another article. This Comment will proceed under the reasonable assumption that the Farley holding is sound and will remain unmolested. But see *infra* Part V.A.

[FN140]. *Farley*, 529 S.W.2d at 758.

[FN141]. *Id.* (citing *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 538-39 (Tex. 1975)).

[FN142]. *Rosas*, 518 S.W.2d at 538-39 (citations omitted).

[FN143]. *Willis v. Willoughby*, 202 S.W.3d 450, 453 (Tex. App.--Amarillo 2006, pet. denied) (student injured by instructor in self-defense class was unable to recover because of an executed express release); *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 717-19 (Tex. App.--San Antonio 1994, writ denied) (estate of deceased student was unable to recover from diving instructor because of an executed express release).

[FN144]. See *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 271-72 (Tex. 2002).

[FN145]. See *id.* at 269-72.

[FN146]. *Id.* at 269-70.

[FN147]. *Id.*

[FN148]. *Id.* at 272 (noting that because the plaintiff failed under the negligence standard, it was unnecessary for the court to adopt a different approach).

[FN149]. *Id.* at 271-72.

[FN150]. *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1996) (denying application for writ of error).

[FN151]. See *id.* (“Nonetheless, the potential for lawsuit abuse in the context of sports injuries calls for a better standard than the one adopted by the court of appeals.”).

[FN152]. *Id.*

[FN153]. *Id.* at 583.

[FN154]. See e.g., *Sw. Key Program, Inc.*, 81 S.W.3d at 272; *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 663 (Tex. 1999); *Matthews v. Ingham*, No. 03-96-00548-CV, 1997 WL 774544, at *1 (Tex. App.--Austin Dec. 18, 1997, no pet.) (not designated for publication); *McClain v. Baker*, No. 14-96-00487-CV, 1997 WL 412532, at *2 (Tex. App.--Houston [14th Dist.] July 24, 1997, no writ) (not designated for publication).

[FN155]. See generally *Willis v. Willoughby*, 202 S.W.3d 450 (Tex. App.--Amarillo 2006, pet. denied); *Sw. Key Program, Inc.*, 79 S.W.3d 571; *Monk v. Phillips*, 983 S.W.2d 323 (Tex. App.--Fort Worth 1998, pet. denied); *Moore v. Phi Delta Theta Co.*, 976 S.W.2d 738 (Tex. App.--Houston [1st Dist.] 1998), pet. dismissed improvidently granted, 10 S.W.3d 658 (Tex. 1999).

[FN156]. *Sw. Key Program, Inc.*, 81 S.W.3d at 271-72.

[FN157]. *Davis*, 940 S.W.2d at 582.

[FN158]. *Id.* (quoting *Connell v. Payne*, 814 S.W.2d 486, 488-89 (Tex. App.--Dallas 1991, writ denied)).

[FN159]. *Id.* (emphasis added).

[FN160]. See *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 659-60 (Tex. 1999) (Enoch, J., dissenting to the improvident grant).

[FN161]. *Id.* at 658.

[FN162]. *Id.* at 662.

[FN163]. *Id.*

[FN164]. *Id.*

[FN165]. *Id.*

[FN166]. *Id.*

[FN167]. See generally *Monk v. Phillips*, 983 S.W.2d 323 (Tex. App.--Fort Worth 1998, pet. denied).

[FN168]. See *infra* Part IV.D.

[FN169]. See *supra* Part III.

[FN170]. Only three courts have cited Justice Enoch's dissenting opinion in *Phi Delta Theta Co.*, 10 S.W.3d at 658: *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 272 (Tex. 2002); *Shaw ex rel. Shaw v. Martin*, No. 0100729, 2003 WL 21246198, at *6 (Mass. Super. Mar. 10, 2003); *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 151 (Minn. Ct. App. 2002).

[FN171]. See, e.g., *Monk*, 983 S.W.2d at 325; *Phi Delta Theta Co.*, 976 S.W.2d at 741; *Allen v. Donath*, 875 S.W.2d 438, 440 (Tex. App.--Waco 1994, writ denied); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614, 616-17 (Tex. App.--Amarillo 1993, no writ); *Connell v. Payne*, 814 S.W.2d 486, 488-89 (Tex. App.--Dallas 1991, writ denied)

(limited to competitive sports only).

[FN172]. Additionally, five appellate courts are yet to weigh in at all on the issue. No opinions have been issued from Texarkana, El Paso, Beaumont, Eastland, or Tyler.

[FN173]. [Bangert v. Shaffner](#), 848 S.W.2d 353, 356 (Tex. App.--Austin 1993, writ denied) (plaintiff rendered a paraplegic due to use of defendant's parasail).

[FN174]. See [Brown v. Gonzalez](#), 653 S.W.2d 854, 860 (Tex. App.--San Antonio 1983, no writ).

[FN175]. [McClain v. Baker](#), No. 14-96-00487-CV, 1997 WL 412532, at *2 (Tex. App.--Houston [14th Dist.] July 24, 1997, no writ) (not designated for publication).

[FN176]. [Phi Delta Theta Co.](#), 976 S.W.2d at 741-42 (plaintiff sued his fraternity for injuries received during a paintball game from another participant when plaintiff's goggles were accidentally removed).

[FN177]. [Monk v. Phillips](#), 983 S.W.2d 323, 325 (Tex. App.--Fort Worth 1998, pet. denied).

[FN178]. *Id.* at 324.

[FN179]. *Id.* at 326.

[FN180]. 814 S.W.2d 486, 489 (Tex. App.--Dallas 1991, writ denied). Discussed *infra* Part IV.D.5.

[FN181]. [Hathaway v. Tascosa Country Club, Inc.](#), 846 S.W.2d 614, 616-17 (Tex. App.--Amarillo 1993, no writ).

[FN182]. [Connell](#), 814 S.W.2d at 489.

[FN183]. [Monk](#), 983 S.W.2d at 325.

[FN184]. [Bangert v. Shaffner ex rel. Shaffner](#), 848 S.W.2d 353, 356 (Tex. App.--Austin 1993, writ denied).

[FN185]. *Id.* at 354, 356.

[FN186]. [Brown v. Gonzales](#), 653 S.W.2d 854, 860 (Tex. App.--San Antonio 1983, no writ) (holding defendant liable for injuring plaintiff by driving over him with a boat while waterskiing).

[FN187]. *Id.* at 856.

[FN188]. *Id.*

[FN189]. *Id.* at 856-57.

[FN190]. *Id.* at 856.

[FN191]. 814 S.W.2d 486, 488 (Tex. App.--Dallas 1991, writ denied).

[FN192]. *Id.* at 488-89.

[FN193]. See *id.*; [Farley v. M M Cattle Co.](#), 529 S.W.2d 751, 758 (Tex. 1975); see also discussion *supra* Part IV.C and

infra Part V.A.

[FN194]. *Connell v. Payne*, 814 S.W.2d 486, 489 (Tex. App.--Dallas 1991, writ denied)

[FN195]. 846 S.W.2d 614, 616 (Tex. App.--Amarillo 1993, no writ) (defendant not liable on a negligence theory for hitting plaintiff with an errant golf shot).

[FN196]. *Id.* at 615.

[FN197]. *Id.*

[FN198]. *Id.*

[FN199]. *Id.* at 617.

[FN200]. *Id.*

[FN201]. *Monk v. Phillips*, 983 S.W.2d 323, 324-25 (Tex. App.--Fort Worth 1998, pet. denied).

[FN202]. *Hathaway*, 846 S.W.2d at 616.

[FN203]. 814 S.W.2d 486, 488-89 (Tex. App.--Dallas 1991, writ denied).

[FN204]. *Id.*; see also *Allen v. Donath*, 875 S.W.2d 438, 439-40 (Tex. App.--Waco 1994, writ denied) (defendant struck a second tee shot without warning which inadvertently struck plaintiff in the left temple, causing serious injuries).

[FN205]. *Id.* at 439.

[FN206]. *Id.*

[FN207]. *Id.*

[FN208]. *Id.* at 440.

[FN209]. The Corpus Christi court did issue Sw. *Key Program Inc. v. Gil-Perez*, 79 S.W.3d 571 (Tex. App.--Corpus Christi 2000), rev'd, 81 S.W.3d 269 (Tex. 2002). However, this case was not directly on point and was reversed by the Texas Supreme Court.

[FN210]. *McClain v. Baker*, No. 14-96-00487-CV, 1997 WL 412532, at *2-3 (Tex. App.--Houston [14th Dist.] July 24, 1997) (not designated for publication) (no evidence was found sufficient to hold defendant liable for injuries caused to plaintiff while plaintiff was waterskiing).

[FN211]. *Id.*

[FN212]. See *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1996) (denying application for writ of error).

[FN213]. *Id.* at 582-83.

[FN214]. For a concise and helpful survey of this doctrine applied to sports, see generally 30A C.J.S. *Entertainment and Amusement* §84 (1992 & Supp. 2006).

[FN215]. See *supra* Part IV.A.

[FN216]. See *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975).

[FN217]. *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 660 (Tex. 1999) (Enoch, J., dissenting to the improvident grant).

[FN218]. *Davis*, 940 S.W.2d at 582.

[FN219]. *Connell v. Payne*, 814 S.W.2d 486, 488-89 (Tex. App.--Dallas 1991, writ denied).

[FN220]. See *supra* Part IV.C.1.

[FN221]. See *Phi Delta Theta Co.*, 10 S.W.3d at 659-60.

[FN222]. See, e.g., *Blizzard v. Fitzsimmons*, 10 So. 2d 343, 344 (Miss. 1942) (“[A] person who participates in the diversion afforded by an amusement or recreational device accepts, and assumes the risk of, the dangers that adhere in it so far as they are obvious and necessary.”).

[FN223]. *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 538 (Tex. 1975).

[FN224]. See *Phi Delta Theta Co.*, 10 S.W.3d at 660.

[FN225]. See generally *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (where Menlove was liable for negligently burning down two of Vaughan's cottages because of a failure to exercise reasonable care).

[FN226]. *Taylor ex rel. Taylor v. Young Life*, No. 93C-07-27, 1995 WL 413400, at *3 (Del. Super. Ct. June 9, 1995) (unpublished opinion).

[FN227]. *Restatement (Second) of Torts* §500 (1965).

[FN228]. See *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 66 (Tex. 1998) (citing *Restatement (Second) of Torts* §500 cmt. d (1965)); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 71-73 (Tex. 1997) (Hecht, J., concurring) (citing *Restatement (Second) of Torts* §500 (1965)); *Twyman v. Twyman*, 855 S.W.2d 619, 624, 630 (Tex. 1993) (Hecht, J., concurring and dissenting) (citing *Restatement (Second) of Torts* §500 pamph. 2 (1965)); *Karnes City v. Kendall*, 172 S.W.3d 624, 628-29 (Tex. App.--San Antonio 2005, pet. denied) (citing *Restatement (Second) of Torts* §500 (1965)); *Monk v. Phillips*, 983 S.W.2d 323, 325 (Tex. App.--Fort Worth 1998, pet. denied) (quoting *Restatement (Second) of Torts* §500 and §500 cmt. g (1965)); *Allen v. Donath*, 875 S.W.2d 438, 440, 443 (Tex. App.--Waco 1994, writ denied) (quoting *Restatement (Second) of Torts* §500 (1965)); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614, 616 (Tex. App.--Amarillo 1993, no writ); *Motsenbocker v. Potts*, 863 S.W.2d 126, 132, 135 (Tex. App.--Dallas 1993, no writ) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 624 (Tex. 1993)) (partially quoting *Restatement (Second) of Torts* §500 cmt. a (1965)); *Connell v. Payne*, 814 S.W.2d 486, 489 (Tex. App.--Dallas 1991, writ denied) (holding that “for a plaintiff to prevail in a cause of action for injuries sustained while participating in a competitive contact sport, the plaintiff must prove the defendant acted ‘recklessly’ or ‘intentionally’ as the *Restatement of Torts* defines those terms.”).

[FN229]. 19 William V. Dorsaneo III, *Texas Litigation Guide* §290.02[3][b] [ii] (2006).

[FN230]. *Restatement (Second) of Torts* §500 cmt. f (1965).

[FN231]. *Restatement (Second) of Torts* §500 cmt. g (1965).

[FN232]. [Restatement \(Second\) of Torts §500 \(1965\)](#).

[FN233]. See *id.*

[FN234]. [Restatement \(Second\) of Torts §500 cmt. g \(1965\)](#).

[FN235]. [Restatement \(Third\) of Torts §2 \(Proposed Final Draft 2005\)](#), available at [REST 3d TORTS-PH §2 \(Westlaw\)](#).

[FN236]. [Restatement \(Second\) of Torts §500 cmt. g \(1965\)](#).

[FN237]. [Restatement \(Third\) of Torts §2 cmt. a \(Proposed Final Draft 2005\)](#), available at [REST 3d TORTS-PH § 2 \(Westlaw\)](#).

[FN238]. [Buchanan v. Rose, 138 Tex. 390, 159 S.W.2d 109, 110 \(1942\)](#).

[FN239]. See, e.g., [19 William V. Dorsaneo III, Texas Litigation Guide §290.02\[2\]\[a\] \(2006\)](#) (“Expert testimony is required to establish the standard of care and its violation if the alleged negligence is not within the experience of the layperson [[Turbines, Inc. v. Dardis, 1 S.W.3d 726, 738 \(Tex. App.--Amarillo 1999, pet. denied\)](#) (repair of turbine aircraft engines is not within experience of layperson)].”).

[FN240]. See, e.g., [Connell v. Payne, 814 S.W.2d 486 \(Tex. App.--Dallas 1991, writ denied\)](#).

[FN241]. See generally [Heidi C. Doerhoff, Note, Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go, 64 Mo. L. Rev. 739 \(1999\)](#).

[FN242]. See, e.g., [Thompson v. McNeill, 559 N.E.2d 705 \(Ohio 1990\)](#).

[FN243]. See generally [Erica K. Rosenthal, Note, Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play, 72 Fordham L. Rev. 2631 \(2004\)](#).

[FN244]. [Phi Delta Theta Co. v. Moore, 10 S.W.3d 658, 658 \(Tex. 1999\)](#) (Enoch, J., dissenting) (dissenting to improvident grant). See *supra* Part IV.C.2.

[FN245]. *Supra* Part V.B.

[FN246]. *Supra* Part V.A.

[FN247]. See [Prather v. Brandt, 981 S.W.2d 801, 811 \(Tex. App.--Houston \[1st Dist.\] 1998, pet. denied\)](#); [Anderson ex rel. Anderson v. Mkt. St. Developers, Ltd., 944 S.W.2d 776, 779-80 n.1 \(Tex. App.--Eastland 1997, writ denied\)](#) (ordinary care is elastic enough to meet all emergencies, and amount of care varies depending on circumstances); [Wendell v. Cent. Power & Light Co., 677 S.W.2d 610, 620 \(Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.\)](#) (citing [W. Tex. Utils. v. Renner, 53 S.W.2d 451, 453-54 \(Tex. Comm'n App. 1932, holding approved\)](#)) (common law meaning of ordinary care is elastic enough to meet all emergencies and requires a person to act as a person of ordinary prudence would under similar circumstances); [Winborn v. Mayo, 434 S.W.2d 207, 208 \(Tex. Civ. App.--San Antonio 1968, no writ\)](#).

[FN248]. Every theory has a flaw, and perhaps this uncertainty is mine. However, the history of negligence law in every jurisdiction is one of successful employ due in large part to its flexibility and adaptability to the variety of fact patterns courts encounter. The weakness of uncertainty in the sports injury context is no more fatal to the application of negli-

gence theory than uncertainty would be in other contexts.

[FN249]. *Infra* Part V.E.3.a.

[FN250]. See generally Marshall H. Tanick & Brian Dockendorf, Links, Lutefisk, and Litigation, 60 *Bench & B. of Minn.*, May-June 2003, at 21; Daniel E. Lazaroff, [Golfers' Tort Liability--A Critique of an Emerging Standard](#), 24 *Hastings Comm. & Ent. L.J.* 317 (2002); John J. Kircher, [Golf and Torts: An Interesting Twosome](#), 12 *Marq. Sports L. Rev.* 347 (2001).

[FN251]. *Benjamin v. Nernberg*, 157 A. 10, 11 (Pa. Super. Ct. 1931).

[FN252]. Also, this conduct by Happy could very well be considered substantially greater than negligence “as to amount substantially to a difference in kind,” justifying a finding of recklessness. [Restatement \(Second\) of Torts §500 cmt. g](#) (1965).

[FN253]. See generally Darryll M. Halcomb Lewis, [An Analysis of Brown v. National Football League](#), 9 *Vill. Sports & Ent. L.J.* 263 (2002).

[FN254]. *Mikesell v. Robb*, 8 Pa. D. & C.2d 25, 30 (Pa. Com. Pl. 1957).

[FN255]. For a real, similar story, see [Gurode Accepts Haynesworth's Apology but Still Doesn't Understand](#), ESPN.com, Oct. 6, 2006. [http:// sports.espn.go.com/espn/wire?section=nfl&id=2615570](http://sports.espn.go.com/espn/wire?section=nfl&id=2615570).

[FN256]. “[I]t is not possible to prove intent, waive the intentional tort, and elect to proceed on a theory of negligence.” 19 *William V. Dorsaneo III*, *Texas Litigation Guide* §290.01[3] (2006); see [Fulmer v. Rider](#), 635 S.W.2d 875, 883 (Tex. App.--Tyler 1982, writ ref'd n.r.e.).

[FN257]. See, e.g., *Comm. on Pattern Jury Charges, State Bar of Tex.*, *Texas Pattern Jury Charges* PJC 6.6 (2006).

[FN258]. *Morris v. Cleveland Hockey Club*, 105 N.E.2d 419, 426 (Ohio 1952).

[FN259]. A similar incident (but without injury) occurred during game two of the 2000 World Series. New York Yankees' pitcher Roger Clemens threw part of a broken bat in the general direction of New York Mets' batter, Mike Piazza. [Jim Litke, Rizzuto Blames Piazza's Bat, CBC Sports](#) Oct. 23, 2000, [http:// cbc.ca/cgi-bin/templates/sportsView.cgi?news/2000/10/23/Sports/rizzuto001023](http://cbc.ca/cgi-bin/templates/sportsView.cgi?news/2000/10/23/Sports/rizzuto001023).

[FN260]. When Orioles pitcher Adam Loewen hit Red Sox batter Mike Lowell in the head, he commented, “That was pretty scary. I was praying for him.” [Howard Kussoy, Lowell Shows His Determination to Win](#), MLB.com, Aug. 12, 2006, [http:// mlb.mlb.com/news/article.jsp?ymd=20060812&content_id=1605653&vkey=news_mlb&fext=.jsp&c_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20060812&content_id=1605653&vkey=news_mlb&fext=.jsp&c_id=mlb).

[FN261]. See Paul Reddick, [Throwing Inside](#), [http:// www.baseballtips.com/throwinginside.html](http://www.baseballtips.com/throwinginside.html) (last visited Mar. 1, 2007).

[FN262]. See *id.*

[FN263]. *Ordway v. Superior Court*, 243 Cal. Rptr. 536, 543-44 (Cal. Dist. Ct. App. 1988).

[FN264]. *Supra* Parts III and IV.

[FN265]. Supra Parts III and IV.

[FN266]. Supra Part III.

[FN267]. Supra Part IV.

[FN268]. Supra Part IV.D.
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