

NO BLOOD NO FOUL: THE STANDARD OF CARE IN TEXAS OWED BY PARTICIPANTS TO ONE ANOTHER IN ATHLETIC CONTESTS

Matthew G. Cole*

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.¹ Titans' defensive lineman Albert Haynesworth first kicked and then stomped on Gurode's exposed and unguarded face.² Gurode required thirty stitches and complains of headaches and blurred vision.³ The league suspended Haynesworth for a record five games, costing him an estimated \$190,000.⁴

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.⁵ The referee warned Holyfield but did not penalize him.⁶ 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.⁷ Holyfield immediately reacted, pulling away and jumping up and down in agony

*J.D. Candidate, 2008, Baylor Law School; B.S., M.A., Columbia International University; awful golfer and suffering Cowboys fan. I would like to thank Professor Matthew C. Cordon, Professor Rory Ryan, and Joanne Cole for their particularly helpful contributions.

¹Tom Weir, *Titan's Haynesworth Suspended Five Games for Stomping Incident*, USA TODAY, Oct. 2, 2006, available at http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm.

²*Id.*

³*Id.*

⁴*Id.*

⁵Grady Weinberg, 30: Tyson Bites Holyfield's Ear in Rematch, <http://sports.espn.go.com/espn/espn25/story?page=moments/30>.

⁶*Id.*

⁷*Id.*

while blood streamed from his now deformed ear.⁸

On February 21, 2000, during a regular season game between the Vancouver Canucks and the Boston Bruins, Bruins' defenseman Marty McSorely hit Canucks' left wing Donald Brashear in the head with "a two fisted stick attack."⁹ Brashear's head hit the ice, he went unconscious, suffered a concussion, and later experienced memory loss.¹⁰ McSorely claimed he intended to hit Brashear in the shoulder to induce him to fight, an acceptable part of hockey.¹¹ A Vancouver criminal court disagreed and found McSorely guilty of assault with a weapon.¹²

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.¹³ Robinson fell to the floor, unconscious, suffering both a concussion and a strained knee.¹⁴ Robinson would miss three games to injury.¹⁵ Malone, who later apologized, would miss one game to suspension by the NBA.¹⁶

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

⁸ *Id.*

⁹ CNN.com, Very major Penalty: McSorely Found Guilty of Assault, Avoids Jail Time (Oct. 7, 2000), http://sportsillustrated.cnn.com/hockey/nhl/news/2000/10/06/mcsorley_assault_ap/.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The Associated Press, Malone, Robinson Will Go Face to Face, USA Today, March 8, 1999, available at <http://www.usatoday.com/sports/basketba/98play/play063.htm>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

this subject.¹⁷ Also examined are 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.¹⁸

This comment is organized into four parts. First, it will address the public policies implicated by sports injuries caused by participants.¹⁹ 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.²⁰ This survey 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.²¹ Third, the comment surveys, summarizes and critiques standards applied and advocated for in Texas.²² 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.²³

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;²⁴ 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;²⁵ the standard of care owed by referees,²⁶

¹⁷ *Supra* part IV.D.

¹⁸ *Supra* part III.

¹⁹ *Infra* part II.

²⁰ *Infra* part III.

²¹ For a discussion of English law on point *see generally* Richard Caddell, *The Referee's Liability for Catastrophic Injuries – a UK Perspective*, 15 MARQ. SPORTS L. REV. 415 (2005).

²² *Infra* part IV.

²³ *Infra* part V.

²⁴ *See generally* Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641 (2003).

²⁵ *See generally* Nick White, *Taking One for the Team: Should Colleges Be Liable for Injuries Occurring During Student Participation in Club Sports?*, 7 VAND. J. ENT. L. & PRAC. 193 (2005); Daryll M. Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L.J. 263 (2002).

²⁶ *See generally* Richard Caddell, *The Referee's Liability for Catastrophic Injuries – a UK Perspective*, 15 MARQ. SPORTS L. REV. 415 (2005).

volunteers²⁷ 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.²⁸ For example, just about every action taken by a boxer, 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."²⁹ The oft-quoted language of Illinois Justice Thaddeus Adesko clearly states the competing policies at issue:

This court believes that 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.³⁰

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.³¹ A fear articulated by courts is that in attempting to regulate tortious conduct, they will interfere with, or worse, "chill vigorous and competitive participation."³² Additionally, one court has even gone so

²⁷ See generally Kenneth W. Biedzynski, *The Federal Volunteer Protection Act: Does Congress Want to Play Ball?*, 23 SETON HALL LEGIS. J. 319 (1999).

²⁸ *Hathaway v. Tascosa Country Club*, 846 S.W.2d 614, 616 (Tex. App.—Amarillo 1993, writ denied).

²⁹ *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 661 (Tex. 1999).

³⁰ *Nabozny v. Barnhill*, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975).

³¹ *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. denied).

³² *Moore v. Phi Delta Theta Co.*, 976 S.W.2d 738, 741 (Tex. App.—Houston [1st Dist.] 1998,

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.³³

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 ending sack.³⁴ Instead of finishing him off, Kiwanuka relaxed his grip and released Young.³⁵ Why? The NFL has made a concerted effort to protect teams' quarterbacks from injury.³⁶ Concerned he might be called for a roughing-the-passer penalty, Kiwanuka granted mercy to a quarterback he is paid handsomely to crush.³⁷ Young continued down the sideline for a first down, and ultimately led his team to an improbable victory.³⁸ 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.³⁹ 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 American⁴⁰ and Texas⁴¹ jurisprudence is the provision of a remedy for an invaded legal right.⁴² In

pet. denied).

³³Davis v. Greer, 940 S.W.2d 582, 582 (Tex. 1997) (opinion on denial of application for writ of error).

³⁴Bob Cohn, *Safe and Unsound*, THE WASHINGTON TIMES, Dec. 6, 2006, available at <http://www.washtimes.com/sports/20061206-124829-4814r.htm>.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹"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." Bob Cohn, *Safe and Unsound*, THE WASHINGTON TIMES, Dec. 6, 2006, available at <http://www.washtimes.com/sports/20061206-124829-4814r.htm>.

⁴⁰"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. 237, 163 (1803).

⁴¹*Westerman v. Mims*, 111 Tex. 29, 227 S.W. 178, 184 (Tex. 1921) (holding that the law does and must provide a legal remedy for the violation for every legal right).

⁴²"If a person has been wronged by a defendant, it is just that the defendant make compensation." 1 DAN B. DOBBS, *THE LAW OF TORTS* 17 (2001). "Courts leave a loss where it is unless they find good reason to shift it. A recognized need for compensation is, however, a

Texas, “[t]he fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims.”⁴³ 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.⁴⁴ Therefore, society and individual plaintiffs must have some recourse against such actors to redress wrongs committed, and, perhaps more important, 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.⁴⁵ Some have failed to address the issue at all.⁴⁶ Sixteen states require reckless conduct to hold a defendant liable for injuries to a plaintiff in a sporting contest.⁴⁷ Six states apply simple negligence.⁴⁸ Two states completely bar any cause of action attempting to hold a participant in an athletic contest liable.⁴⁹ Eighteen states have courts incorporating some form of an implied assumption of the risk doctrine under certain circumstances.⁵⁰

powerful factor influencing tort law.” PROSSER AND KEETON ON TORTS 20 (W. Page Keeton ed., 5th ed. 1984).

⁴³ *Roberts v. Williamson*, 111 S.W.3d 113, 116 (Tex. 2003).

⁴⁴ *See Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 661 (Tex. 1999).

⁴⁵ *See also*, Stanley L. Grazis, Annotation, *Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant*, A.L.R.5th 529 (1998).

⁴⁶ Arkansas and Montana.

⁴⁷ California, Colorado, Connecticut, Hawaii, Iowa, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island and West Virginia.

⁴⁸ Florida, Minnesota, Nevada, Oregon, Virginia, and Wisconsin.

⁴⁹ Vermont and Wyoming.

⁵⁰ Alabama, Alaska, Florida, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas,

Twenty-six states have not yet clearly articulated what standard of care they will apply.⁵¹ Of those twenty-six, seven have courts requiring recklessness,⁵² twelve have courts requiring negligence,⁵³ one has a court requiring intentional conduct,⁵⁴ ten have courts suggesting a no liability standard,⁵⁵ and two have remained completely silent as to what standard they will apply.⁵⁶

Interestingly, some states have attempted to settle the issue by adopting statutes on point.⁵⁷ However, legislation has not been completely successful in settling the issue in every case.⁵⁸

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.⁵⁹

Vermont, and Wyoming.

⁵¹Alabama, 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.

⁵²Idaho, Illinois, Indiana, Louisiana, New Mexico, New York, and Texas.

⁵³Arizona, Georgia, Indiana, Kansas, Maryland, New York, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Washington.

⁵⁴Delaware.

⁵⁵Alabama, Alaska, Maine, Mississippi, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas.

⁵⁶Arkansas, and Montana.

⁵⁷*E.g.* Michigan, Vermont, and Wyoming. For a very helpful set of tables summarizing states with statutes on point see Terence J. Centner, *Simplifying Sports Liability Law Through a Shared Responsibility Chapter*, 1 VA. SPORTS & ENT. L.J. 54 (2001).

⁵⁸See *O'Connell v. Killington, Ltd.*, 665 A.2d 39 (Vt. 1995) (dicta articulating general negligence principles governing liability for skiing accident in spite of a no liability statute directly on point).

⁵⁹*Pittman v. United Toll Systems, 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).

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.⁶⁰

3. Arizona

Arizona has yet to announce a clear standard of care. However, one 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.⁶¹

4. Arkansas

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

5. California⁶²

California requires a defendant's conduct to be reckless in order to impose liability.⁶³ As part of the analysis, California courts distinguish between contact and non-contact sports.⁶⁴

6. Colorado

Colorado requires a defendant's conduct to be reckless in order to

⁶⁰*Hübschman v. City of Valdez*, 821 P.2d 1354, 1363 (Alaska 1991) (ski area operator is free to argue that skier voluntarily and unreasonably assumed negligently created risk and skier's negligence would then reduce recovery under doctrine of comparative negligence).

⁶¹*Estes v. Tripson*, 932 P.2d 1364, 1365-66 (Ariz. Ct. App. 1997) (participant in company softball game was injured while playing catcher when baserunner for opposing team accidentally stepped on, and broke, his leg while attempting to score).

⁶²See generally Glenn Anaiscort, *Fine Tuning California's Approach to Injured Participants in Active Sports*, 37 LOY. L.A. L. REV. 1273 (2004); Amanda M. Winfree, *Increasing the Inherent Risks of Baseball: Liability for Injuries Associated with High-Performance Non-Wood Bats in Sanchez v. Hillerich & Briansby Co.*, 11 VILL. SPORTS & ENT. L.J. 77 (2004); Teri Brummet, *Looking Beyond the Name of the Game: A Framework For Analyzing Recreational Sports Injury Cases*, 34 U.C. DAVIS L. REV. 1029 (2001).

⁶³*Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (participant injured in game of co-ed touch football brought action for negligence and assault and battery).

⁶⁴*Id.*

impose liability.⁶⁵ In an important and oft-cited case, a federal court applied Colorado tort law in considering an injury sustained during a professional football game.⁶⁶ In *Hackbart v. Cincinnati Bengals, Inc.*, on an interception, Bengal's defensive back Dale Hackbart attempted to block Denver Broncos' wide receiver Charles "Booby" Clark.⁶⁷ After the play had passed them by, Booby, "acting out of anger and frustration" struck the back of Hackbart's head with his forearm.⁶⁸ It was later discovered, that Hackbart had suffered a career ending neck fracture.⁶⁹ 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.⁷⁰

7. Connecticut

Connecticut requires a defendant's conduct to be reckless in order to impose liability.⁷¹

8. Delaware

Delaware has yet to announce a clear standard of care. However, one Delaware appellate court has required that a defendant's conduct must be intentional, willful or wanton to impose liability.⁷²

9. Florida⁷³

Florida requires a finding of negligence to impose liability on a

⁶⁵ *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524-25 (10th Cir. 1979) (professional football player sustained substantial injury when defendant player intentionally struck him on back of the head during a game, out of the course of play).

⁶⁶ *Id.* at 523-24.

⁶⁷ *Id.* at 519.

⁶⁸ *Id.* at 519.

⁶⁹ *Id.* at 520.

⁷⁰ *Id.* at 524-35

⁷¹ *Jaworski v. Kiernan* 696 A.2d 332, 338 (Conn. 1997) (female participant in coed recreational soccer league brought action against male participant to recover for injuries sustained when he came in contact with her during course of play).

⁷² *Taylor v. Young Life*, No. 93-C-07-27, 1995 WL 413400, at *2 (Del. Super. Ct. June 9, 1995) (unpublished opinion) (plaintiff sued summer camp for injuries suffered when she fell after being tossed in the air as part of a cheerleading exercise called a "basket toss").

⁷³ See generally Teri Brummet, *Looking Beyond the Name of the Game: A Framework For Analyzing Recreational Sports Injury Cases*, 34 U.C. DAVIS L. REV. 1029 (2001).

defendant.⁷⁴ However, the assumption of the risk doctrine may bar a plaintiff's recovery even if the defendant would otherwise be negligent.⁷⁵

10. Georgia

Georgia is 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.⁷⁶

11. Hawaii

Hawaii requires a finding of reckless or intentional conduct to impose liability on a defendant.⁷⁷ Additionally, the court ruled that a negligence action involving athletics is barred by the assumption of the risk doctrine.⁷⁸

12. Idaho

Idaho is 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.⁷⁹

13. Illinois

Illinois is 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.⁸⁰ Additionally, some

⁷⁴ *Kuehner v. Green*, 436 So.2d 78, 80 (Fla. 1983) (participant in karate sparring match sued the other participant to recover for injuries sustained in takedown maneuver in form of a "leg sweep").

⁷⁵ *Id.*

⁷⁶ *Seabolt v. Cheesborough*, 193 S.E.2d 238, 242 (Ga. Ct. App. 1972) (hunters are bound to exercise ordinary care to prevent shooting other hunters).

⁷⁷ *Yoneda v. Tom*, 133 P.3d 796, 808-09 (Haw. 2006) (plaintiff golfer was injured upon being struck in the eye by an errant golf ball hit by another golfer).

⁷⁸ *Id.*

⁷⁹ *Galloway v. Walker*, 99 P.3d 625, 629-30 (Idaho Ct. App. 2004) (softball player brought personal injury action against opponent for injuries sustained when opponent slid into player).

⁸⁰ *E.g.*, *Zurla v. Hydell*, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997) (plaintiff sued golfer for personal injuries, alleging that golfer negligently hit golf ball which struck him as they played round of golf); *Savino v. Robertson*, 652 N.E.2d 1240, 1245 (Ill. App. Ct. 1995) (amateur hockey player who was hit in the eye with a puck during warm-up brought suit against player whose shot at open net struck him); *Landrum v. Gonzalez*, 629 N.E.2d 710 (Ill. App. Ct. 1994) (first baseman

courts distinguish between contact and non-contact sports in imposing liability.⁸¹

14. Indiana

Indiana is 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.⁸² However, an older appellate case required only negligence, and distinguished between contact and non-contact sports.⁸³

15. Iowa

Iowa requires a finding of reckless conduct to impose liability on a defendant.⁸⁴ Additionally, Iowa applies the assumption of the risk doctrine.⁸⁵

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 when engaging in sports activities at those facilities.⁸⁶

injured during informal softball game sued baserunner who had run into him); *Keller v. Mols*, 509 N.E.2d 584, 585 (Ill. App. Ct. 1987) (player injured while playing goalie in floor hockey game brought action against another player and his parents, whose patio was site of game); *Nabozny v. Barnhill*, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975) (goal tender of a soccer team brought a tort action for injury sustained at the hands of an opposing forward during a soccer match).

⁸¹ E.g., *Zurla*, 681 N.E.2d at 152; *Keller*, 509 N.E.2d at 585.

⁸² *Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004) (university baseball player filed suit against university, coach, and another player for personal injuries sustained during team drill).

⁸³ *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983) (plaintiff sued for loss of an eye from being struck by a golf ball at a country club).

⁸⁴ *Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76, 79-80 (Iowa 1999) (fifteen-year-old participant in paintball game and his mother brought negligence action against another participant for injuries sustained when first participant removed his goggles and was shot in the eye).

⁸⁵ *Id.*

⁸⁶ *Goldman v. Bennett*, 371 P.2d 108, 112 (Kan. 1962) (a skater at a public ice-skating rink for hire 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).

17. Kentucky

Kentucky requires a finding of reckless conduct to impose liability on a defendant.⁸⁷

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.⁸⁸ These courts also apply the assumption of the risk doctrine as part of their analysis.⁸⁹

19. Maine

Maine has yet to announce a clear standard of care. However, the assumption of the risk doctrine is a viable defense.⁹⁰

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.⁹¹

21. Massachusetts

Massachusetts requires a finding of reckless conduct to impose liability

⁸⁷ *Hoke v. Cullinan*, 914 S.W.2d 335, 338 (Ky. 1996) (plaintiff alleged negligence against defendant for injuries allegedly sustained during tennis match).

⁸⁸ *E.g.*, *Picou v. Hartford Ins. Co.*, 558 So.2d 787, 791 (La. Ct. App. 1990) (held 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) (held 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).

⁸⁹ *E.g.*, *Picou*, 558 So.2d at 791; *Richmond*, 298 So.2d at 122.

⁹⁰ *Merrill v. Sugarloaf Mountain Corp.*, 698 A.2d 1042, 1044 (Me. 1997) (if skier's injuries were not caused by inherent risk, there must be a determination whether injuries were actually caused by negligent operation or maintenance of ski area).

⁹¹ *Kelly v. McCarGrady*, 841 A.2d 869, 875-76 (Md. Ct. Spec. App. 2004) (plaintiff brought negligence action against Catholic school, Catholic Archbishop and others, arising out of incident that occurred during fast pitch softball game, when player from opposing team slid into second base, colliding with plaintiff, severely fracturing her ankle).

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on a defendant.⁹²

22. Michigan⁹³

Michigan requires a finding of reckless conduct to impose liability on a defendant.⁹⁴ Additionally, Michigan has a statute applying the assumption of the risk doctrine to skiing.⁹⁵

23. Minnesota⁹⁶

Minnesota requires a finding of negligent conduct to impose liability on a defendant.⁹⁷

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.⁹⁸

25. Missouri

Missouri requires a finding of reckless conduct to impose liability on a defendant.⁹⁹

⁹²Kavanagh v. Trs. of Boston Univ., 795 N.E.2d 1170, 1179 (Mass. 2003) (basketball player brought action against university and coach of opposing basketball player who punched him in a basketball game).

⁹³See also Thomas F. Miller, Torts and Sports: Has Michigan Joined the Wrong Team with Ritchie-Gamster?, 48 WAYNE L.REV. 113 (2002).

⁹⁴Ritchie-Gamster v. City of Berkley, 597 N.W.2d 517 (Mich. 1999) (ice skater brought action against city, which owned ice arena, its employee, and 12-year-old skater, who allegedly ran into plaintiff, knocking her down and causing serious injury to her knee).

⁹⁵Mich. Comp. Laws Ann. S408.342 (West 1999) (Ski Area Safety Act).

⁹⁶See also Michael K. Steenson, The Role of Primary Assumption of Risk in Civil Litigation in Minnesota, 30 WM. MITCHELL L. REV. (2003); Marshall H. Tanick and Brian Dockendorf, Links, Lutefisk, and Litigation, 60 BENCH & BAR OF MINN. 21 (2003).

⁹⁷Hollinbeck v. Downey, 113 N.W.2d 9, 11 (1962) (action for injuries sustained by caddy who was struck by golfer while on practice fairway).

⁹⁸Blizzard 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).

⁹⁹Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982) (plaintiff brought action to recover

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.¹⁰⁰

28. Nevada

Nevada requires a finding of negligence to impose liability on a defendant.¹⁰¹

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 ordinary activity of the sport," and (2) is reckless or intentional.¹⁰² New Hampshire also applies the assumption of the risk doctrine.¹⁰³

30. New Jersey¹⁰⁴

New Jersey requires a finding of reckless or intentional conduct to impose liability on a defendant.¹⁰⁵

damages for personal injuries sustained when plaintiff was knocked down during play in softball game).

¹⁰⁰Dotzler v. Tuttle, 449 N.W.2d 774, 779 (Neb. 1990) (participant injured in collision with another player during a pickup basketball game filed action for personal injuries against other player).

¹⁰¹Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1043-44 (Nev. 1994) (horse rider brought negligence action arising out of injuries she sustained when another rider's horse kicked her).

¹⁰²Allen v. Dover Co-Recreational Softball League, 807 A.2d 1274, 1283 (N.H. 2002) (softball player who was hit in the head by an errantly thrown softball during co-recreational, slow-pitch softball tournament brought negligence action softball league, its sponsor, team sponsors, softball field owner, and their insurer).

¹⁰³Id. at 1281.

¹⁰⁴See 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).

¹⁰⁵Schick v. Ferolito, 767 A.2d 962, 968 (N.J. 2001) (plaintiff golfer sued defendant golfer,

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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.¹⁰⁶

32. New York¹⁰⁷

New York courts are yet to announce a consistent standard of care. Some New York courts require a flagrant infraction unrelated to the normal method of play to attach liability.¹⁰⁸ Other courts apply a reckless or intentional conduct standard.¹⁰⁹ Still other courts apply a simple negligence standard.¹¹⁰

33. North Carolina

North Carolina requires a finding of reckless conduct to impose liability on a defendant.¹¹¹

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

alleging that defendant's errant, unannounced second tee-shot struck plaintiff in the eye).

¹⁰⁶Kabella v. Bouschelle, 672 P.2d 290, 294 (N.M. Ct. App. 1983) (held that participant lacked cause of action predicated on negligence against another minor for injuries sustained in an informal game of tackle football).

¹⁰⁷See generally Lura Hess, Sports and the Assumption of Risk Doctrine in New York, 76 ST. JOHN'S L. REV. 457 (2002).

¹⁰⁸Glazier v. Keuka College, 713 N.Y.S.2d 381, 381 (N.Y. App. Div. 2000) (college student who was injured while participating in tackle football game organized and played by students of competing residence halls sued college for injuries sustained); Barton v. Hapeman, 674 N.Y.S.2d 188, 189 (N.Y. App. Div. 1998) (participant in organized youth hockey game, who was injured when she was allegedly "charged" and "cross-checked" from behind by opposing player, brought action against opposing player, league, and national organization which sponsored league).

¹⁰⁹Gahan v. Mineola Union Free School Dist., 660 N.Y.S.2d 144, 146 (N.Y. App. Div. 1997) (high school softball player sued school districts to recover for injuries sustained from stepping into hole while batting).

¹¹⁰Duncan v. Kelly, 671 N.Y.S.2d 841, 842-43 (N.Y. App. Div. 1998) (downhill skier who was injured in collision with second skier sued second skier).

¹¹¹Everett v. Goodwin, 161 S.E. 316, 318 (N.C. 1931) (golf player must exercise ordinary care to prevent injuring others in playing game).

protect operators of facilities when plaintiffs have been injured while engaged in sports related activities in those facilities.¹¹²

35. Ohio

Ohio requires a finding of reckless or intentional conduct to impose liability on a defendant.¹¹³

36. Oklahoma

Oklahoma courts are split on which standard of care should be applied. Some courts apply a negligence standard.¹¹⁴ Other courts have applied a no-duty standard.¹¹⁵

37. Oregon

Oregon requires a finding of negligence to impose liability on a defendant.¹¹⁶ Importantly, Oregon has abrogated by statute the assumption of the risk doctrine.¹¹⁷

38. Pennsylvania

Pennsylvania has not yet articulated the applicable standard of care.

¹¹²Filler v. Stenvick, 56 N.W.2d 798, 802 (N.D. 1953) (“One who, knowing the necessary and obvious risks which are inherent in and incidental to the sport of skating and 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.”).

¹¹³Thompson v. McNeill, 559 N.E.2d 705, 707 (Ohio 1990) (player brought negligence action against fellow golfer after player was struck in eye by golf ball); Marchetti v. Kalish, 559 N.E.2d 699, 703-04 (Ohio 1990) (child who broke her leg while playing game of “kick the can” sued playmate who knocked her down, causing the injury).

¹¹⁴E.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).

¹¹⁵E.g., Taylor v. Hesser, 991 P.2d 35, 37-38 (Okla. Civ. App. 1998) (defendant who shot Plaintiff in the eye during paintball game, resulting in loss of vision, did not owe a duty to Plaintiff and therefore was not negligent, where Plaintiff voluntarily agreed to participate in paintball game in which he was injured).

¹¹⁶Blair v. Mt. Hood Meadows Development Corp., 630 P.2d 827, 832 (Or. 1981) (plaintiff brought an action in negligence against operator of ski facility after he had been injured in a fall while skiing).

¹¹⁷Or. Rev. Stat. § 31.620(2) (2004).

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However, they have applied the assumption of the risk doctrine.¹¹⁸

39. Rhode Island

Rhode Island requires a finding of reckless or deliberate conduct to impose liability on a defendant.¹¹⁹

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.¹²⁰

41. South Dakota

South Dakota has not yet articulated an applicable standard of care among participants. However, the South Dakota Supreme Court has held skiers to a negligence standard in respect to controlling their speed and direction.¹²¹

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.¹²² That doctrine has been defeated by negligence committed outside of the usual and ordinary

¹¹⁸Benjamin v. Nernberg, 157 A. 10, 11 (Pa Super. Ct. 1931) (golfer on public links, struck while not standing in line of play in other foursome held to have assumed risk and could not recover against such player).

¹¹⁹Kiley v. Patterson, 763 A.2d 583, 586 (R.I. 2000) (second baseman brought action seeking to recover damages for the injuries she suffered as a result of collision with base runner during recreational softball game).

¹²⁰Huckaby v. Confederate Motor Speedway, Inc., 281 S.E.2d 223, 223 (S.C. 1981) (where person injured while participating in race at speedway voluntarily participated in race, person's negligence suit against speedway was barred by assumption of the risk).

¹²¹Rantapaa v. Black Hills Chair Lift Co., 633 N.W.2d 196, 200-01 (S.D. 2001) (skiers are under a duty to exercise reasonable control).

¹²²Perez v. McConkey, 872 S.W.2d 897, 900 (Tenn. 1994) (Implied assumption of the 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).

hazards of a sport.¹²³

43. Utah

Utah has not clearly articulated an applicable standard of care. However, one appellate court held skiers to a negligence standard.¹²⁴

44. Vermont

Vermont has by statute, a no liability standard based upon the assumption of the risk doctrine.¹²⁵ However, one Vermont Supreme Court case suggests that negligence may still be applicable to particular sports.¹²⁶

45. Virginia

Virginia requires a finding of negligence to impose liability on a defendant.¹²⁷

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 by-product of the game itself.¹²⁸ However, consent is a defense only if the game is a lawful athletic contest, competitive sport or other concerted activity not forbidden by law.¹²⁹

¹²³Pieraccini 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).

¹²⁴Ricci v. Schoultz, 963 P.2d 784, 786-87 (Utah. Ct. App. 1998) (skier does have a duty to other skiers to ski reasonably and within control).

¹²⁵Vt. Stat. Ann. Tit 12, § 1037 (2005).

¹²⁶See O'Connell v. Killington, Ltd., 665 A.2d 39 (Vt. 1995) (dicta articulating general negligence principles governing liability for skiing accident).

¹²⁷Alexander v. Wrenn, 164 S.E. 715, 717 (Va. 1932) (Golf player has duty to exercise ordinary care to prevent injury to others by driven ball).

¹²⁸State v. Hiott, 987 P.2d 135, 136 (Wash. Ct. App. 1999) (held 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).

¹²⁹Id.

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47. West Virginia

West Virginia requires a finding of willful, wanton or reckless conduct to impose liability on a defendant.¹³⁰ Additionally, West Virginia will not consider the assumption of the risk doctrine in its analysis.¹³¹

48. Wisconsin

Wisconsin requires a finding of negligence to impose liability on a defendant.¹³²

49. Wyoming

Wyoming has a statutory no liability standard based upon the assumption of the risk doctrine.¹³³

IV. THE CURRENT LAW IN TEXAS

Texas has not yet articulated a consistent applicable standard of care.¹³⁴ Instead, the lower courts have issued opinions applying recklessness, negligence and other standards.¹³⁵ Further complicating the issue is Texas' fairly unique approach to the assumption of the risk doctrine.¹³⁶

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.¹³⁷ A risk

¹³⁰King v. Kayak Mfg. Corp., 387 S.E.2d 511, 518 (W. Va. 1989) (diver brought products liability action against manufacturer to recover for significant injury caused by diving into above-ground pool).

¹³¹Id. (athlete's liability for injuring fellow participant should be analyzed in terms of limited duty not to willfully, wantonly, or recklessly injure fellow participant, rather than assumption of the risk).

¹³²Lestina v. W. Bend. Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (soccer player filed personal injury action against opposing team's player and homeowner's insurer seeking to recover for leg injuries suffered during game organized by adult recreational league).

¹³³Wyo. Stat. Ann. § 1-1-123(a) (1996).

¹³⁴Sw. Key Program v. Gil-Perez, 81 S.W.3d 269, 271-72 (Tex. 2002).

¹³⁵*Infra* part IV.D.

¹³⁶*Infra* part IV.A.

¹³⁷Phi Delta Theta Co. v. Moore, 10 S.W.3d 658, 659 (Tex. 1999).

may be assumed either expressly or impliedly.¹³⁸

Texas is fairly unique among the states.¹³⁹ In *Farley v. M.M. Cattle Co.* the Supreme Court of Texas abolished the assumption of the risk doctrine when the assumption is implied.¹⁴⁰ Instead, that which is typically considered under the assumption of the risk doctrine – a plaintiff’s own consent contributing to his injury – is now considered as part of the

¹³⁸ *Id.*

¹³⁹ At least sixteen states expressly apply some form of implied assumption of the risk in their analysis of sports injury cases. *Supra* part III.A. However, Oregon has abrogated assumption of the risk by statute, Or. Rev. Stat. § 31.620(2) (2004), and West Virginia does not apply the doctrine in its analysis of these cases, *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 518 (W. Va. 1989).

¹⁴⁰ “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 v. M.M. Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975), overruled on other grounds by *Parker v. Highland Park*, 565 S.W.2d 512 (Tex. 1978).

“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 retained ‘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.’” *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 659-60 (Tex. 1999).

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, *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1997), and Justice Enoch, *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 659-60 (Tex. 1999), assume that the *Farley* holding applies to the sports context. Furthermore, the Texas Appellate courts have also recognized the *Farley* holding in their analysis. *See, e.g.* *Moore v. Phi Delta Theta Co.*, 976 S.W.2d 738, 742 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Allen v. Donath*, 875 S.W.2d 438, 440, 441 (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.

comparative fault analysis.¹⁴¹

In explaining its holding, the *Farley* court cited the reasoning of *Rosas v. Buddie's Food Store*:

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 know and appreciate the Particular danger to which it was held he had given his consent.¹⁴²

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.¹⁴³ 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.¹⁴⁴ In fact, the Supreme Court has only issued one case even remotely on point.

¹⁴¹Farley, 529 S.W.2d at 758.

¹⁴²*Rosas v. Buddie's Food Store*, 518 S.W.2d 534, 538-39 (Tex. 1975), cited by Farley, 529 S.W.2d 758 (internal citations omitted).

¹⁴³*Willis v. Willoughby*, 202 S.W.3d 450, 453 (Tex. App.—Amarillo 2006, no pet h.) (student injured by instructor in self-defense class unable to recover because of 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 unable to recover from diving instructor because of executed express release).

¹⁴⁴*Sw. Key Program v. Gil-Perez*, 81 S.W.3d 269, 271-72 (Tex. 2002).

In *Southwest Key Program 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.¹⁴⁵ 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.¹⁴⁶ Though similar, this scenario is not directly on point with this comment’s topic. Accordingly, the Court chose not to articulate the standard of care to which it will hold co-participants in sporting events.¹⁴⁷ Instead, the Court surveyed the various standards applied by lower courts in Texas, other states’ courts, and suggestions from its own dicta.¹⁴⁸

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 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.”¹⁴⁹

Integral to Gonzalez’s position is his concern to prevent frivolous lawsuits.¹⁵⁰ Concerned participants in sporting events are unjustly subject to suit, he points out that the recklessness standard applied by some lower courts in Texas may protect a defendant from liability, but it does not protect him from suit, and even prevents summary judgment.¹⁵¹ 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

¹⁴⁵ *Id.* at 269-70.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 272.

¹⁴⁸ *Id.* at 271-72.

¹⁴⁹ *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1997) (opinion on denial of application for writ of error).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

were foreseeable or expected in the course of the particular sporting event,” enabling the court to protect defendants with summary judgment.¹⁵²

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.¹⁵³ In the nine years since Gonzalez published his standard, only four appellate court decisions have been published on point,¹⁵⁴ and the Supreme Court has only chosen to grant review to one case in which it declined to either adopt his standard, adopt another standard, or create one of its own.¹⁵⁵ This lack of attention by both the fourteen appellate courts and the 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: Gonzalez incorporates the implied assumption of the risk doctrine into his proposed standard. Gonzalez points out that implied assumption of the risk is no longer viable in Texas.¹⁵⁶ However, he incorporates the analysis of *Connell v. Payne*¹⁵⁷ which ruled that participants in competitive sporting events are “deemed” to have expressly assumed the risks the activity poses.¹⁵⁸ A court’s “deeming” is incompatible with “express” and is simply new language for “implied.” 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

¹⁵² *Id.*

¹⁵³ See *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 369, 272 (Tex. 2002); *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) (not intended for publication); *McClain v. Baker*, No. 14-96-00487-CV, 1997 WL 412532, at *2 (Tex. App.—Houston [14th Dist.] July 24, 1997) (not intended for publication).

¹⁵⁴ *Willis v. Willoughby*, 202 S.W.3d 450 (Tex. App.—Amarillo 2006, no pet. h.); *Sw. Key Program In. v. Gil-Perez*, 79 S.W.3d 571 (Tex. App.—Corpus Christi), rev’d, 81 S.W.3d 369 (Tex. 2002); *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. denied).

¹⁵⁵ *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 271-72 (Tex. 2002).

¹⁵⁶ *Davis*, 940 S.W.2d at 582.

¹⁵⁷ *Connell v. Payne*, 814 S.W.2d 486, 488-89 (Tex. App.—Dallas 1991, writ denied).

¹⁵⁸ *Davis*, 940 S.W.2d at 582.

overruled.¹⁵⁹

2. Justice Enoch

Justice Enoch is joined by Justice Hecht in suggesting the following rule: “[A] defendant in a sports 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.”¹⁶⁰ Under Enoch’s approach, “the nature of the sport” must be considered to determine which risks are “inherent” to the particular game being played.¹⁶¹ Key to Enoch’s approach is a focus on the risk rather than the injury: “there are no inherent injuries, only inherent risks.”¹⁶² If the risk is found to be inherent to the sport, then no duty would be owed as a matter of law.¹⁶³ Summary judgment would be appropriate.¹⁶⁴ However, if the risk is not inherent, the defendant is held to an ordinary negligence standard.¹⁶⁵

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 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. 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 her analysis, but does so without harming the *Farley* holding by implying that a plaintiff has assumed them. Instead, her 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

¹⁵⁹ See *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 659-60 (Tex. 1999) (dissenting to improvident grant).

¹⁶⁰ *Phi Delta Theta Co.*, 10 S.W.3d at 658.

¹⁶¹ *Id.* at 662.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Texas¹⁶⁶ and the rest of the States¹⁶⁷. Enoch's standard, though unique, has not proved popular among courts, receiving little attention.¹⁶⁸

D. A Survey of Texas Appellate Court Decisions.

Despite the silence from her 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.¹⁶⁹

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.¹⁷⁰ First, the Austin court has stated that the recklessness standard is not applicable "for every recreational activity or sport that might be considered dangerous."¹⁷¹ Second, the San Antonio court applied a negligence standard to a defendant in a water-skiing accident.¹⁷² Finally, in an unpublished opinion, the Fourteenth Court of Appeals also applied a negligence standard to a water-skiing accident.¹⁷³ Whether opinions applying negligence would still be followed today is certainly suspect considering the fairly uniform trend towards a recklessness standard.

¹⁶⁶*Infra* part IV.D.

¹⁶⁷*Supra* part III.

¹⁶⁸Only cited by Sw. Key Program v. Gil-Perez, 81 S.W.3d 269, 272 (Tex. 2002); Leonard ex rel. Meyer v. Behrens, 601 N.W.2d 76, 81 (Iowa 1999); Schneider v. EGradyson, 654 N.W.2d 144, 151 (Minn. Ct. App. 2002); Shaw v. Martin, No. 0100729, 2003 WL 21246198, at *6 (Mass. Super. Mar. 10, 2003).

¹⁶⁹Moore v. Phi Delta Theta Co., 976 S.W.2d 738, 741 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Monk v. Phillips, 983 S.W.2d 323, 325 (Tex. App.—Fort Worth 1998, pet. denied); Allen v. Donath, 875 S.W.2d 438, 440 (Tex. App.—Waco 1994, writ denied); Hathaway v. Tascosa Country Club, 846 S.W.2d 614, 616-17 (Tex. App.—Amarillo 1993, writ denied); Connell v. Payne, 814 S.W.2d 486, 489 (Tex. App.—Dallas 1991, writ denied) (limited to competitive sports only).

¹⁷⁰Additionally, six appellate courts are yet to weigh in at all on the issue. No opinions have been issued from Texarkana, El Paso, Beaumont, Eastland, Corpus Christi, or Tyler.

¹⁷¹Bangert v. Shaffner, 848 S.W.2d 353, 356 (Tex. App.—Austin 1993, writ denied) (plaintiff rendered a paraplegic during use of defendant's parasail).

¹⁷²Brown v. Gonzalez, 653 S.W.2d 854, 860 (Tex. Civ. App.—San Antonio 1983, no writ).

¹⁷³McClain v. Baker, 1997 WL 412532, at *2 (Tex. App.—Houston [14th Dist.] July 24, 1997) (not designated for publication).

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.¹⁷⁴

2. Fort Worth

The Fort Worth Court requires a finding of recklessness to hold a defendant liable.¹⁷⁵ In *Monk v. Phillips*, the defendant “shanked” a golf shot to the right and struck his playing partner in the eye, blinding him.¹⁷⁶ The Court found as a matter of law that defendant’s conduct did not rise to the level of recklessness and summary judgment in his favor, therefore, was proper.¹⁷⁷ This court relied on the Dallas Court’s holding in *Connell v. Payne*¹⁷⁸ requiring reckless conduct to attach liability, but followed the Amarillo Court¹⁷⁹ in extending its application from contact sports¹⁸⁰ to also include golf.¹⁸¹

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.”¹⁸² It then applied this rule to hold an owner of parasail equipment liable for injuries caused to a parasailer on a negligence theory for failing to instruct or supervise with

¹⁷⁴*Moore v. Phi Delta Theta Co.*, 976 S.W.2d 738, 741 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (plaintiff sued his fraternity for injuries received during a paintball game from another participant when plaintiff’s goggles were accidentally removed).

¹⁷⁵*Monk v. Phillips*, 983 S.W.2d 323, 326 (Tex. App.—Fort Worth, 1998, pet. denied).

¹⁷⁶*Id.* at 324.

¹⁷⁷*Id.* at 326.

¹⁷⁸*Connell v. Payne*, 814 S.W.2d 486 (Tex. App.—Dallas 1991, writ denied). Discussed *infra* part IV.D.5.

¹⁷⁹*Hathaway v. Tascosa Country Club*, 846 S.W.2d 614 (Tex. App.—Amarillo 1993, no writ).

¹⁸⁰*Connell*, 814 S.W.2d at 489.

¹⁸¹*Monk* 983 S.W.2d at 325.

¹⁸²*Bangert v. Shaffner*, 848 S.W.2d 353, 356 (Tex. App.—Austin 1993, writ denied).

ordinary care.¹⁸³

4. San Antonio

In its only case remotely on point, the San Antonio Court applied a negligence standard to participants in a waterskiing accident.¹⁸⁴ In *Brown v. Gonzalez*, plaintiff was struck in the head while waterskiing by a boat owned by his stepfather but driven by defendant.¹⁸⁵ Defendant, who had been drinking during the day, attempted a high speed U-turn to pick up plaintiff who had fallen while skiing.¹⁸⁶ In so doing, defendant ran over plaintiff, causing substantial injury to plaintiff's chest wall, internal organs, arms and legs.¹⁸⁷ The jury determined that plaintiff's failure to adequately instruct defendant in how to properly operate the boat proximately caused his injuries.¹⁸⁸ The jury applied a negligence standard and refused to find defendant negligently liable for plaintiff's injuries.¹⁸⁹

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.¹⁹⁰ In its analysis, the Court reasoned that a competitor is deemed to have "expressly" consented to and assumed "the risk of the dangerous activity by voluntarily participating in the sport."¹⁹¹ In so reasoning, the Dallas Court circumvents the Supreme Court's abolishing of implied assumption of the risk in its *Farley* holding.¹⁹²

The Court then applies a recklessness standard, but limits its application

¹⁸³ *Id.*

¹⁸⁴ *Brown v. Gonzalez*, 653 S.W.2d 854, 860 (Tex. Civ. App.—San Antonio 1983, no writ) (holding defendant liable for injuring plaintiff by driving over him with the boat while waterskiing).

¹⁸⁵ *Id.* at 856.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Connell v. Payne*, 814 S.W.2d 486, 488 (Tex. App.—Dallas 1991, writ denied).

¹⁹¹ *Id.* at 488-89.

¹⁹² *Farley v. M.M. Cattle Co.* 529 S.W.2d 751, 758 (Tex. 1975). *See supra* IV.C. and *infra* V.A.

to “a competitive contact sport” only.¹⁹³ 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*.¹⁹⁴ In *Hathaway*, when practicing at a driving range, Barfield hit a golf shot that hooked.¹⁹⁵ He yelled, “fore,” but Hathaway was nevertheless struck in the right eye while driving his cart near the range.¹⁹⁶ Hathaway sued both Barfield and the country club where the injury occurred.

The Amarillo Court ruled that a finding of 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.¹⁹⁷ Finding no evidence that Barfield acted recklessly, the Court granted summary judgment in his favor.¹⁹⁸

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.

¹⁹³ *Connell*, 814 S.W.2d at 489.

¹⁹⁴ *Hathaway v. Tascosa Country Club*, 846 S.W.2d 614 (Tex. App.—Amarillo 1993, no writ) (defendant not liable on a negligence theory for hitting plaintiff with an errant golf shot).

¹⁹⁵ *Id.* at 615.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 617.

¹⁹⁸ *Id.* at 614.

10. Waco

The Waco Court (like the Fort Worth¹⁹⁹ and Amarillo²⁰⁰ Courts) applied the Dallas Court's holding in *Connell v. Payne*²⁰¹ requiring a finding of recklessness, and extended it to injuries sustained while playing golf.²⁰²

In *Allen v. Donath*, after watching Donath hit his shot, Allen and the third member of their party stopped paying attention.²⁰³ Donath, whose back was to his playing partners, hit a second tee shot which struck Allen in the eye causing a fractured skull, concussion, loss of speech, loss of memory, loss of hearing, loss of motor function and damage to his jaw.²⁰⁴ The jury found that Donath's conduct was not reckless.²⁰⁵

The Waco Appellate Court walked through the Amarillo and Dallas Courts' analysis, found it persuasive, and ultimately adopted the same standard.²⁰⁶

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.²⁰⁷

¹⁹⁹ *Monk v. Phillips*, 983 S.W.2d 323 (Tex. App.—Fort Worth, 1998, pet. denied).

²⁰⁰ *Hathaway v. Tascosa Country Club*, 846 S.W.2d 614 (Tex. App.—Amarillo 1993, no writ).

²⁰¹ *Connell v. Payne*, 814 S.W.2d 486, 488 (Tex. App.—Dallas 1991, writ denied).

²⁰² *Allen v. Donath*, 875 S.W.2d 438, 440 (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).

²⁰³ *Id.* at 439.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 438.

²⁰⁶ *Id.*

²⁰⁷ The Corpus Christi Court did issue the *Southwest Key* case. *Sw. Key Program Inc. v. Gil-*

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. However, in an unpublished opinion, the Court applied a negligence standard.²⁰⁸ This 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 applies negligence.²⁰⁹ First, this language is simply dicta and is not binding.²¹⁰ Second, Gonzalez never actually rejects recklessness and certainly does not adopt negligence.²¹¹

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 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.²¹² However, as discussed above,²¹³ this doctrine is simply not an

Perez, 79 S.W.3d 571 (Tex. App.—Corpus Christi), *rev'd*, 81 S.W.3d 369 (Tex. 2002). However, this case was not directly on point and was reversed by the Supreme Court.

²⁰⁸ McClain v. Baker, 1997 WL 412532, at *2 (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).

²⁰⁹ McClain, 1997 WL 412532, at *2.

²¹⁰ Davis, 940 S.W.2d at 582.

²¹¹ *Id.*

²¹² For a concise and helpful survey of this doctrine applied to sports *see generally* 30A C.J.S. *Entertainment and Amusement* § 84 (2006).

²¹³ *Supra* part IV.A.

option in Texas.²¹⁴ Instead, “[n]ow, the fact that a plaintiff voluntarily encountered a known risk may act as a comparative defense only.”²¹⁵ 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,²¹⁶ and that applied by the Dallas Court of Appeals,²¹⁷ is also untenable. As discussed above,²¹⁸ “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 is in conflict with *Farley*.²¹⁹

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?²²⁰ 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.²²¹ 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’ comparative fault analysis.²²² 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

²¹⁴ *Farley v. M.M. Cattle Co.* 529 S.W.2d 751, 758 (Tex. 1975).

²¹⁵ *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 660 (Tex. 1999) (Enoch’s dissent).

²¹⁶ *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1997).

²¹⁷ *Connell v. Payne*, 814 S.W.2d 486, 488-89 (Tex. App.—Dallas 1991, writ denied).

²¹⁸ *Supra* part IV.C.1.

²¹⁹ *See Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 659-60 (Tex. 1999) (Enoch’s dissent).

²²⁰ *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).

²²¹ *Rosas v. Buddie’s Food Store*, 518 S.W.2d 534, 538 (Tex. 1975).

²²² *Phi Delta Theta Co.*, 10 S.W.3d 660.

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.²²³

An intentional tort standard has wooed at least one jurisdiction.²²⁴ 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.²²⁵

Texas has accepted and applied this definition without expressly adopting it.²²⁶ However, this definition is unwieldy and intimidating. The

²²³*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).

²²⁴*Taylor v. Young Life*, No. 93-C-07-27, 1995 WL 413400, at *2 (Del. Super. Ct. June 9, 1995) (unpublished opinion).

²²⁵Restatement (Second) of Torts § 500 (1965).

²²⁶*Standard Fruit and Vegetable Co., v. Johnson*, 985 S.W.2d 62, 66 (Tex. 1998) (citing comments a and d); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 71-73 (Tex. 1997) (concurring opinion cited comment g); *Twyman v. Twyman*, 855 S.W.2d 619, 624, 630 (Tex. 1993) (cited to in concurring and dissenting opinions); *Karnes City v. Kendall*, 172 S.W.3d 624, 628, 629 (Tex. App.—San Antonio 2005, pet. denied) (citing comment f); *Monk v. Phillips*, 983 S.W.2d 323, 325 (Tex. App.—Fort Worth 1999, pet. denied) (quoted definition and comment g); *Allen v. Donath*, 875 S.W.2d 438, 440, 443 (Tex. App.—Waco 1994, writ denied) (quoted definition and cited comment g); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614, 616 (Tex. App.—Amarillo 1993, writ denied) (cited generally); *Motsenbocker v. Potts*, 863 S.W.2d 126, 132, 135 (Tex. App.—Dallas 1993, writ denied) (partially quoted comment a); *Connell v. Payne*, 814 S.W.2d 486, 487, 489 (Tex. App.—Dallas 1991, writ denied) (cited definition); *Olin Corp. v. Dyson*, 709 S.W.2d 251, 254-256 (Tex. App.—Houston [14th Dist.] 1986, no writ).

Texas Litigation Guide attempts to simplify it as follows: “‘Reckless’ may be characterized as ‘wanton or willful.’ It requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved or with knowledge of facts that would disclose this danger to any reasonable person.”²²⁷

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.²²⁸

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 requires 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 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.²²⁹

Unfortunately, for all its words, the Restatement’s comments offer little

(quoted in dissenting opinion).

²²⁷ 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 290.02[3][b][ii] (2000).

²²⁸ RESTATEMENT (SECOND) OF TORTS § 500, cmt. f (1965).

²²⁹ RESTATEMENT (SECOND) OF TORTS § 500, cmt. g (1965).

help. 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: “such risk is substantially greater than that which is necessary to make his conduct negligent.”²³⁰ 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.²³¹ 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.”²³²

In an attempt to improve its definition, the 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 person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.²³³

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”²³⁴ from negligence. However, the ALI drafters identify the ambiguous relationship with negligence still exists by offering this comment: “Taken at face value, this term simply means negligence that is

²³⁰RESTATEMENT (SECOND) OF TORTS § 500 (1965).

²³¹*Id.*

²³²RESTATEMENT (SECOND) OF TORTS § 500, cmt. g (1965).

²³³RESTATEMENT (THIRD) OF TORTS (Proposed Final Draft) § 2 (2005), *available at* REST 3d TORTS-PH § 2 (Westlaw).

²³⁴RESTATEMENT (SECOND) OF TORTS § 500 (1965).

especially bad.”²³⁵

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 accurately and consistently apply. 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 four 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.”²³⁶ 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 situations, such as involving professional sports, or especially violent (such as wrestling) or obscure sports with which jurors may not be familiar (such as curling).²³⁷

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-

²³⁵RESTATEMENT (THIRD) OF TORTS (Proposed Final Draft) § 2, cmt. a (2005), *available at* REST 3d TORTS-PH § 2 (Westlaw).

²³⁶*Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109, 110 (1942).

²³⁷“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].” 10 William V. Dorsaneo III, *Texas Litigation Guide* § 290.02[2][a] (2000).

contact,²³⁸ professional or amateur,²³⁹ and organized or informal²⁴⁰. Ordinary care can consider whether a defendant caused injury by violating a so called “safety based rule.”²⁴¹ Justice Enoch’s concern with whether a risk is “inherent” to the game²⁴² 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 tort²⁴³ requirement, or a no-liability standard²⁴⁴. 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.²⁴⁵

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.²⁴⁶ However, as these cases are litigated, the courts can guide juries

²³⁸ See, e.g., *Connell v. Payne*, 814 S.W.2d 486 (Tex. App.—Dallas 1991, writ denied).

²³⁹ See generally Heidi C. Doerhoff, *Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go*, 64 MO. L. REV. 739 (1999).

²⁴⁰ See, e.g., *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990)

²⁴¹ See generally Erica K. Roenthal, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 FORDHAM L. REV. 2631 (2004).

²⁴² *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 658 (Tex. 1999) (dissenting to improvident grant); see supra part IV.C.2.

²⁴³ *Supra* part V.B.

²⁴⁴ *Supra* part V.A.

²⁴⁵ See, *Prather v. Brandt*, 981 S.W.2d 801, 811 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Anderson v. Market St. Developers, Ltd.*, 944 S.W.2d 776, 779 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. Central Power & Light Co.*, 677 S.W.2d 610, 620 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.) (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).

²⁴⁶ 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

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”²⁴⁷ 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 allow 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 Spoiled²⁴⁸

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 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 whatsoever.²⁴⁹

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

the sports injury context is no more fatal to the application of negligence theory than uncertainty would be in other contexts.

²⁴⁷ *Infra* part V.E.3.

²⁴⁸ See generally Marshall H. Tanick and Brian Dockendorf, *Links, Lutefisk, and Litigation*, 60 BENCH & BAR OF MINN. 21 (2003); Daniel E. Lazaroff, *Golfers' Tort Liability*, 24 HASTINGS COMM. & ENT. L.J. 327 (2002); John J. Kircher, *Golf and Torts: An Interesting Twosome*, 12 MARQ. SPORTS L. REV. 347 (2001).

²⁴⁹ *Benjamin v. Nernberg*, 157 A. 10, 11 (Pa.Super.Ct. 1931).

number two. Before hitting his drive, Happy sees Shooter about a hundred yards away on the edge to his right of the adjacent fairway, 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 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.²⁵⁰

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 Gridiron²⁵¹

[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 some bruises and bumps as a result of such games. Sometimes they have rather serious injuries.²⁵²

a. Facts

On first down, Brian 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 Brian's upper body, successfully tackling him short of the goal line. Unfortunately, Leah hit him with such force that Brian suffered a severe, grade three concussion.

Now second down. Leah is upset with her team's field position and is determined to personally save Brian's next attempt at a score. However, as Brian 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 Brian's neck and shoulders.

Leah has now decided that she has had enough. She resolves to keep

²⁵⁰ 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).

²⁵¹ See generally Daryll M. Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L.J. 263 (2002).

²⁵² *Mikesell v. Robb*, 8 Pa. D. & C.2d 25, 30 (Pa. Com. Pl. 1957) (quoting the trial judge).

Brian's team from scoring at all costs. When the ball snaps on third down, Leah slips and falls and Brian attempts to run over her. But Leah, ever vigilant, performs an illegal trip as Brian 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 Brian 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.²⁵³

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 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 Brian on fourth down would be either an intentional tort or negligence. Even though intentional torts and negligence are not ordinarily interchangeable,²⁵⁴ 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 tort²⁵⁵ and

²⁵³For real similar story, see ESPN.com's Automated News wire, Gurode Accepts Haynesworth's Apology but Still Doesn't Understand (Oct. 6, 2006), <http://sports.espn.go.com/espn/wire?section=nfl&id=2615570>.

²⁵⁴"[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] (2000); see Fulmer v. Rider, 635 S.W.2d 875, 883 (Tex. App.—Tyler 1982, ref. n.r.e.).

²⁵⁵TEX. PEN. CODE § 22.01(a)(3) (2006).

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 instantaneously perceive the danger of being struck by a baseball.²⁵⁶

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, 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

²⁵⁶Morris v. Cleveland Hockey Club, 105 N.E.2d 419, 426 (Ohio 1952).

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.²⁵⁷

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.

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 is reasonable conduct, 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.²⁵⁸ However, throwing baseballs "high and tight" is a part of the game.²⁵⁹ Pitchers hitting batters is an accepted risk and strategy of the game.²⁶⁰ 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

²⁵⁷A 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 (Oct. 23, 2000), <http://www.cbc.ca/sports/story/2000/10/23/rizzuto001023.html>.

²⁵⁸When 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 and MLB.com, Lowell Shows His Determination to Win (Aug. 12, 2006), http://mlb.mlb.com/NASApp/mlb/news/article.jsp?ymd=20060812&content_id=1605653&vkey=news_mlb&fext=.jsp&c_id=mlb.

²⁵⁹Paul Reddick, Throwing Inside, <http://www.baseballtips.com/throwinginside.html>.

²⁶⁰*Id.*

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 and 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 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.²⁶¹

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

²⁶¹Ordway v. Superior Court, 243 Cal. Rptr. 536, 543-44 (Cal. Dist. Ct. App. 1988).

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 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.²⁶² 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.²⁶³ Many courts employ implied assumption of the risk in their analysis,²⁶⁴ but the

²⁶² *Supra* parts III and IV.

²⁶³ *Supra* parts III and IV.

²⁶⁴ *Supra* part III.

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Supreme Court has abolished this doctrine in Texas.²⁶⁵

Of all theories of liability proposed for sports injuries by and to participants, negligence is the best option for three reasons.²⁶⁶ First, negligence holds a defendant liable by employing a workable standard: reasonable care. Second, “ordinary care” 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.

²⁶⁵ *Supra* part IV.

²⁶⁶ *Supra* part IV.D.