

ORAL ARGUMENT – 1/16/02
00-1324
SOUTHWEST KEY PROGRAM V. GIL-PEREZ

JEWELL: This case presents the court with an opportunity to address and define the standard of liability that applies when a participant in a sport or recreational activity sues over an injury suffered during play. The court has not previously addressed this topic.

At the TC level Mr. Gil-Perez argued his case as one involving ordinary negligence. And the TC submitted an ordinary negligence jury question over Southwest Key's objection.

The rule that we propose the court adopt in cases such as these is a rule similar to the inherent risk type standard proposed by former Justice Gonzalez in David v. Greer, and as proposed by Justice Enoch and Justice Hecht in their dissenting opinion in Moore v. Phi Delta case.

Alternatively, Southwest Key also argued in the TC and would urge the court here if it is not inclined to adopt an inherent risk standard to at least impose another sort of limited duty rule in the form of a reckless or intentional conduct type standard.

O'NEILL: And what would that alternative be if it weren't the inherent risk standard?

JEWELL: It would be similar to what the existing appellate court decisions have held in terms of a reckless or intentional type standard, such as Connell v. Payne, and...

O'NEILL: But doesn't that go hand in hand with the inherent risk rule?

JEWELL: There are portions that are overlapping. But an intentional or a reckless standard has a component of subjectivity and which I don't think is present in the inherent risk type standard. And basically the way that we think this would work would be for the court to examine the particular case and determine by an objective test on a case-by-case basis whether the complained of injury was suffered as a result of the risk that was inherent in the sport. And in such a case there would be no liability.

O'NEILL: So if an inherent risk of ice hockey, the skater is hit in the face with a puck, and someone puts a bunch of kids on the ice skating rink with no head gear and someone is injured, under your inherent risk rule there would be no cause of action?

JEWELL: I don't agree with that statement, because we are not arguing for a standard which would insulate defendants in all scenarios.

O'NEILL: How would it be otherwise under the standard you're advocating?

JEWELL: Because there is room for considerations such as that by exceptions. For instance, many jurisdictions that have discussed an inherent risk rule have acknowledge exceptions where the defendant, which in those cases was not a player but a non-participant in the game, engaged in some conduct which created a new risk or increased the risk that were inherent in the sport.

O'NEILL: Such as?

JEWELL: Such as, like in one of the New York cases...

O'NEILL: Failure to provide adequate equipment?

JEWELL: Well in some cases that has been held to increase the risk. But in those cases they involved the failure to provide a helmet to a person who suffered a head injury during a contact football drill, where some of the other players had helmets and he was not given a helmet. There was another case where the plaintiff suffered a shoulder injury where he was not provided with shoulder pads.

O'NEILL: But that goes to causation then as opposed to - it would be a defective equipment case and then the question is whether the alleged defective equipment caused the injury or the failure to provide the equipment.

JEWELL: And that would be relevant to the causation query that's true. I'm simply advocating a position where I think the court can reasonably adopt an inherent risk standard and yet leave room for cases where a defendant such as a school district or a field owner creates a premises hazard let's say that is not part and parcel to the sport. In one of the football cases a player had sued because he was injured when he had a collision with an object that was left on the side of the field.

O'NEILL: So you would carve out an exception for premise defects and for defective equipment. Anything else?

JEWELL: I think the court should examine those types of exclusions on a case-by-case bases. But I can see where a defendant creates a hazard that's not part of the sport or increases the risk. Or even I know one case had acknowledged an exception, I think it was the Klein case from Ohio, where a defendant allows a player to play a game that has a known propensity to violence or something to that nature that could allow for some sort of other type of liability standard. I think negligence was applied in that case.

PHILLIPS: This is a legal question?

JEWELL: Yes.

PHILLIPS: So the court under your scenario would decide that allowing a teenager to play

hockey without a helmet, or I suppose to be a catcher without some type of protection in a baseball game violates a duty but to play tackle football without any kind of padding does not and that's just something the judges can and should make a call on?

JEWELL: I think the determination of what risks are inherent in a sport would be a legal question. And I think that would be governed by factors such as the nature of the sport itself and the relationship of the defendant to the sport and the relationship of the defendant to the plaintiff. I know there's a couple of opinions that have discussed what factors play into that determination. One of them, I don't think is in the brief, a case from Hawaii called Feranda(?) Vol. 25 P.3d, 826. And that discusses factors that will be relevant to a determination of inherent risks.

HANKINSON: If I understood your answer to the questions that Justice O'Neill just asked you, one of the exceptions is increasing the risk. And I would think that allowing a sporting event or a sporting activity to proceed without appropriate equipment would be something in _____. So that would be one of your exceptions.

JEWELL: I can see certain cases where that can be true. I don't think the evidence in this case supports that.

HANKINSON: Is that the kind of thing you're talking about like playing ice hockey without protective head gear would increase the risk and therefore that would be an exception _____ from a negligence standard?

JEWELL: I would agree that that can be an exception. Now I don't necessarily agree that negligence would apply to that.

HANKINSON: Well what would the duty be owed then if we're outside this - if we have an exception to their inherent risk test?

JEWELL: I think at that stage the court would have to or should apply traditional type factors that go into whether to recognize a duty such as risk foreseeability, weight against social utility and so forth.

HANKINSON: So even if you're outside inherent risk, you still may not owe a duty, so then you also have to get beyond that? So even in that kind of circumstance there might be no duty?

JEWELL: It's possible that could be. What I'm suggesting is if you encounter a case that involves an injury that results from a risk that was not inherent in the sport, then the court would have to apply some sort of liability standard to judge the defendant's conduct. It's been suggested that as a negligence standard. I don't think that should be a foregone conclusion to the court that it would be a negligence standard.

HANKINSON: So a reckless standard then?

JEWELL: I think it depends on the circumstances of the case. Like in the situation you were discussing before. If there's a premises hazard let's say, I don't think anyone would have a serious problem with...

HANKINSON: Let's do a failure to provide equipment kind of scenario. That's not a negligence standard?

JEWELL: I suppose in some cases it could be. If it is here, and ...

HANKINSON: My point is, based on what I understood you just said the test to be, that if there's an inherent risk rule unless there be the exception if the defendant increases the risk. So if there is a risk of getting hurt playing football because it's a contact sport, and tackle football is usually played with equipment because of that risk, then why hasn't the person who engages them in the game and fails to provide the equipment that increased the risk, and under your analysis we're outside the inherent risk analysis?

JEWELL: I don't think we would be outside that in this particular case.

HANKINSON: But based on the formulation of the test that you gave to Justice O'Neill that's exactly what I heard you say.

JEWELL: I can agree that as a general matter, let's say the YMCA allows 8 year old boys in a Pee-Wee league to play football without equipment, and I think I can agree that there is an increase of the risk there. But the evidence in this case does not show that Southwest Key's failure to provide any equipment to Gil-Perez or the other boys who were playing had any impact whatsoever in his injury.

HANKINSON: But that's the causation question. I'm back to trying to understand the legal standard that you want us to apply. And your legal standard was an exception for increase in risk. And I'm having a hard time understanding why if that's your test the claim that contact sport without equipment that protects you from the inherent risks does not fall within your test for the exception.

JEWELL: I understand your question. I guess I'm trying to explain it as best I can. I think that that issue is involved in the case-by-case determination that a court has to make.

O'NEILL: It sounds like you're confusing a legal standard with a factual standard. I mean if we were to apply an exception for defective equipment or failure to supply equipment the legal standard would be negligence. And I understand that in this case you're saying applying a negligence standard to an allegation of failure to provide proper equipment, there's no factual evidence of causation here.

JEWELL: Right. I am simply advocating the position where I think that the facts of the

particular case do have some sort of role in the determination of whether or not...

ENOCH: Rugby, a _____ of football, and there participants don't use equipment. Would there be a negligent activity to have failed to provide equipment if the play that's going on is a contact sport that doesn't use equipment?

JEWELL: Again, I think in the context of rugby everyone knows that we don't provide equipment. And that's the way the game is played.

ENOCH: Does that play into your role that the court has to study those particular sporting events to determine whether or not there was a duty to provide equipment before that sport is played?

JEWELL: I believe so.

ENOCH: Baseball, yes, in an organized little league chain sponsors are found, money is raised and equipment is purchased. But there are lots of organizations that provide an opportunity for exercising for their kids who go out and do a pickup baseball game or do a pickup touch football game. And the question is, should it just be measured by ordinary negligence if they allow them to have any sporting event at all, that there is just an ordinary negligence if someone gets hurt even by a risk that's recognized in any type of sporting activity?

JEWELL: I don't think that's the case. And I think what I am advocating here is for the court to examine the inherent risk on a case-by-case basis, taking into account primarily the nature of the sport in connection with the relationship of the defendant, the status of the defendant, and the relationship between the defendant and the plaintiff. And I think that analysis has to be done with some sort of reference to the facts of the particular case.

OWEN: In this case you asked for a jury instruction that would have set the standard at least the jury was supposed to judge this by the intentional or reckless conduct. Why wouldn't that take care of these touch football games, rugby, pickup baseball, because why wouldn't that concept cover all of this?

JEWELL: Well I think it would. And as I said, I think if the court were not inclined to adopt the inherent risk type of analysis, I certainly think that a recklessness standard as applied by some of the intermediate appellate courts would protect the defendant here. It's just my belief that an inherent risk type analysis is a preferable view I think in terms of all of the cases that might...

OWEN: So we go case-by-case, sport-by-sport and say, okay, if it's a fraternity playing football or a school letting kids play kick ball or baseball, it's not an organized sport. As a matter of law, you're not required to provide equipment?

JEWELL: I think it would be a case-by-case analysis. Because the court would have to

examine whether it's a reckless or intentional standard, or an inherent risk standard the court has to examine the nature of the sport.

BAKER: What about what the CA said in response to what you are arguing to the court this morning, that your client already had an affirmative duty to supervise what was going on to protect from physical harm, so that we're not even going to be concerned with the duty question in this case in the first place?

JEWELL: I think the court has to be concerned with the duty question.

BAKER: Well but if you already had an affirmative duty don't we then look to the traditional because doesn't that establish what the nature of the duty is here?

JEWELL: The CA was wrong in my view in applying the administrative code and relying upon the policy manual that was at play here. As to the administrative code provision, which it cites, Gil-Perez had never relied on that or asserted that as a basis for a legal remedy(?) in this case. Moreover with respect to both the administrative code and the policy manual neither one of those provisions contains any articulation of what the standard should be for liability, and doesn't even mention civil liability.

HANKINSON: But it imposes an affirmative - I mean you're asking us to say that there is no duty here. And what we've got are various documents and laws that allows your client to even be in the position of having the responsibility for this young man, be it its relationship with the Texas Youth Commission. And those duties and obligations were imposed by law either by statute or by contract or via the policies that they were required to follow. And you're asking us to just say that none of that matters and let's look at this in a different light. Now how can we ignore duties that have been set out, and there's an affirmative duty in terms of relating to the physical safety and well being of this young man as well as the others who were living in the residential facilities that your client owned and supervised? How in the world can we walk away from that and say that doesn't matter?

JEWELL: The court needn't be concerned about the administrative code provision because first, the plaintiff has never relied on that. But irrespective of that, the administrative code provision by its language simply does not articulate a standard of care. While it mentions in a general sense that youth have the right to be protected from physical injury it seems to me like the language in the administrative code and the policy manuals are more geared towards the prevention of abuse or neglect.

HANKINSON: Let's look at what the contract, the relationship between your client and the TYC is. It says, every TYC staff member has an affirmative obligation to take every reasonable precaution to protect youth from harm. The agency's obligation is to ensure that it does nothing which contributes to or causes such injury. I mean why isn't that a duty in setting out exactly what they need to do?

JEWELL: It's not a duty because the obligations of defendants such as Southwest Key are governed by legal principles, not policy manuals. This is not even part of the contract. It's between the youth commission and Southwest Key. This is a policy manual...

HANKINSON: TYC has the obligation by law to be doing these things and they contract with your client to do that. Why don't those obligations run to your client under the law? I know you don't want us to look at them, but I'm having a hard time understanding why that's not the threshold question in the case.

JEWELL: I suppose I'm just disagreeing with the interpretation of the language as to whether or not it imposes a duty of ordinary care.

HANKINSON: Affirmative(?) obligation does not mean a duty?

BAKER: How about if you read the two sentences before that, that the form of what this is talking about is coverage in the dorm or providing a qualified lock guard at the pool side which indicates recreation. Some youth will suffer injury. That is an inevitable part of growing up, which is "the assumption of the risk". But the agency's obligation is to ensure that it does nothing which contributes to or causes such injury. And the allegations here are failure to properly supervise, failure to properly give them equipment and a third allegation that I can't remember right now.

JEWELL: There was only one: the failure to provide equipment. The plaintiff has argued a negligence supervision case, but he has articulated only one way that Southwest Key did anything wrong, and that was by failure to provide equipment.

O'NEILL: I thought they were also saying that he should have done _____ play touch football and not allow tackle football.

JEWELL: If you read the record, you will see that the plaintiff's articulation of what Southwest Key did wrong at the TC level was not that Southwest Key should not have allowed them to play tackle, but that if Southwest Key was going to let them play tackle they should have given equipment.

O'NEILL: Isn't that two sides to the same coin? You either could go with touch football, or if you're going to do tackle provide equipment. I mean don't see how one is exclusive of the other.

JEWELL: I think the focus of Gil-Perez's theory throughout the entire case has been on the failure to provide equipment. In his brief to this court, he mentions it numerous times by emphasizing the _____ provision.

O'NEILL: Write for me the opening paragraph of this opinion as you would have it written. I would like for you to state the rule with the exception and how you think it should be

applied in this case. On rebuttal, I would like to hear that.

HANKINSON: You started off saying we should adopt this legal principle for all sports and recreational activities. And when you listed your exceptions you made no reference to negligent supervision and particularly involving children. Why is it good public policy for this state in the context, recreational activity is pretty broad, and in terms of sporting activities that we are not going to hold people responsible who supervise activities for our children? How is your principle going to work when we've got a 7 year old out playing in a sport or perhaps being under the supervision in a day camp of someone and engaging in recreational activity, and we're going to say that the inherent risk is that kids can get hurt while they play or get hurt playing little league baseball or whatever and, therefore, but we are not going to hold those who supervise and sponsoring the event responsible for doing so in a way that indicates an exercise of reasonable care?

JEWELL: I think the rule that we are proposing would apply in any case where the plaintiff suffers an injury while playing an activity.

HANKINSON: Are you or are you not saying that this rule as you have proposed it does apply when children are injured and they are under the supervision of adults, are or you making this a rule that would just apply to adults who voluntarily engage in this kind of activity?

JEWELL: I think the position of the plaintiff has to be evaluated in the context of...

HANKINSON: But I need to know does this rule apply to children who are being supervised in either sporting or recreational activities such that we would not hold those who are supervising children and sponsoring recreational sporting activities that we are not going to hold them to a duty of reasonable care?

JEWELL: No. I would not apply that type of situation - apply this rule to a situation where you have children and people are not providing equipment like someone who doesn't provide any football gear to children.

HANKINSON: So then do we have an exception then to your rule when children are the people who are engaged in the sport or recreational activity?

JEWELL: I think that's part of what can be considered in determining whether or not the rule would apply.

HANKINSON: You're asking us to make a very, very important public policy determination in this case. And to me it's a very, very important one. And now we're back to well I'm not really sure whatever, but I have to understand what the consequences of what you're asking us to do and to me if you're _____ setting up a legal principle, we need to know whether it would apply to children or not. You want us to include children in that rule or not?

JEWELL: I suppose in this particular case I would say no children would not be.

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RESPONDENT

PLETCHER: I would like to address first why this case is not an appropriate vehicle to change the existing law regarding nonparticipants. And there are essentially three reasons, two of which have been touched on. The first is, the plaintiff in this case, my client Carlos, was a minor. And Justice Hankinson just touched on the importance of that distinction and the effect that adopting an inherent risk standard of care in this case that is going to apply to minors. I think that's inappropriate and I will come back to that in a minute. Second, the petitioner in this case voluntarily and contractually undertook the exclusive care, custody, control and supervision of Carlos Perez. In addition to that, they had a contractual duty that they voluntarily undertook. And I want to address that real quickly.

There was a claim that that was not a part of the contract. That's not true. It was a part of the contract, and the defendants stipulated at trial. And you can find that on page 108 and 109. The defendants stipulated at trial that his clients were responsible to live up to those obligations.

RODRIGUEZ: But as that argument applies, they also had a contractual duty to affirmatively provide for recreational activities for these children.

PLETCHER: Absolutely.

RODRIGUEZ: So how do they do that and still face risk at the same time?

PLETCHER: There are dozens of ways to provide recreational and physical activity for children and still in the exercise of ordinary care don't do anything that causes them harm.

ENOCH: The kids come to the supervisor and says we want to play some rugby. Would we be here today if Gil-Perez had his knee injured as a result of a rugby collision?

PLETCHER: It would depend on the exercise of ordinary care. Because if...

ENOCH: Well all that your argument would be that the ordinary care would be violated by allowing them to play a contact sport.

PLETCHER: I don't believe that. If under the circumstances there was proper training given regarding how you play a game of rugby verses how you play a game of football, if proper training was given and proper supervision of the rugby game...

PHILLIPS: Anytime a child is injured in a sporting or athletic event under your standard

somebody has bought themselves a jury trial.

PLETCHER: I think that there is going to be a question as to whether or not the appropriate ordinary care apply.

PHILLIPS: That's frequently like a bankrupting event with our concept of discovery and docket meetings and so on. Isn't that going to get a little _____?

PLETCHER: I hear those concerns and read them in the dissent in the Moore case. But what I know as a fact is that in the last two decades youth sports activities have blossomed to the point where soccer moms are a political force in this country. All in the setting of people being responsible to exercise only ordinary care.

ENOCH: I'm not talking about organized sporting events. So let's not think in terms of organized sporting events. I'm talking about the pickup games. And I'm going to concede that any adult who has been given the responsibility for caring for a child has a duty to see that the child is not injured. So let's accept for the moment contract, no contract, whatever this supervisor had the responsibility to see that these children are not injured. Every adult has that kind of duty for every child that's in their care. So I'm going to talk about a birthday party. We get the kids together. They could be 12 years old. They could be 5 years old. They could be 15 years old. They could be 17 years old. It's a birthday party, and we're out at the park, and the kids pickup a baseball and a bat. A parent brings the bases and the kids get out there and they start playing baseball. They start playing whatever game they play. And one of the kids is hit in the head with a swung bat. Is the parent responsible for failing to have trained in the proper playing of baseball? Is the parent responsible for having failed to provide batting helmets and a chest protector for the catcher and appropriate gloves and shoes? What is a parent expected to be prepared to be responsible for when there's an injury at the pickup game at the park at the birthday party that the parent is responsible for the health and welfare of all the children under the parent's control?

PLETCHER: Those are different facts in this case. But that being said, it may be that as it does in...

ENOCH: Well the facts are the same. This child lives with this organization and the organization says we've got to allow the children to have an opportunity to go out and play and exercise. And the children go out there and the children have a pickup game of football. And the question is, what should this adult reasonably understand their expectations to be? And you told me well if it's a contact sport that doesn't ordinarily have equipment, then their responsibility is to train them in the game of rugby. If training is not it maybe they should not have allowed them to play rugby. So maybe that's their negligence. They allowed them to do what they wanted to do on the playground.

PLETCHER: And that's been the gist of this case from the beginning was that Mr. Garcia knew and acknowledged he didn't have any of the appropriate equipment to allow a game of full

contract tackle football to be played. And nonetheless he set it up. And he established the rules. That is not ordinary care. And to allow him to escape his common law and contractual or policy duties by saying, well this is a sporting event and we know that getting injured, being tackled is inherent in football, so there is no _____.

ENOCH: So it arises to the level of reckless disregard or recklessness?

PLETCHER: I don't know whether it does or not. Because the way that we submitted it was ordinary negligence.

OWEN: What if he didn't set it up, but he just failed to stop it once it began?

PLETCHER: I think in this case because they have this responsibility of exclusive control care and supervision, that if he sees that these kids are out there, he's on the watch and he's out there and they are starting that full contact game of tackle football, I think ordinary care on his part would say, guys we've got to start, you've got to play tag or let's get back to the Olympics, which didn't include football.

OWEN: So I'm a parent and I see my 10 year son playing tackle football below the waist. I should stop it before he injures my neighbor's son?

PLETCHER: The difference is, you don't have the exclusive care and control of your neighbor's child.

OWEN: But I do of my son.

PLETCHER: You do of your son, but you're not responsible legally for an isolated act of negligence that your son commits. Now sure enough if I get kids over everyday and say okay we're going to have a tackle football game in my backyard, and it's on my property, or a hardball game with no gloves and no equipment, yes, I think I'm going to be responsible for that. Now it may be you guys want to carve something out, kind of like a social host with drinking. I'm not advocating that. But I think that a reasonably prudent person has to take those steps.

JEFFERSON: Did you answer Justice Enoch's hypothetical on the baseball game, swung the bat, or the missing equipment at a birthday party? What is your _____ liability under that circumstance?

PLETCHER: I think that if you have brought these children - once again you don't have this exclusive care, custody control and supervision. But I think if you're bringing these kids together and I have the bat and I have the ball and I don't have any gloves and I don't have any other equipment, and we say batter up. Yes I think me and any other parent in that situation ought to be at least placed in the position where a jury can determine if we have exercised ordinary care. I think that's the least we owe our children, that we ought not abandon them to the neglectful or ignorant

people that might put them in that situation. That's the public policy that we ought to be looking at when we're talking about...

PHILLIPS: You would have a different rule for children than adults? I can be stupid even if it's in a league.

PLETCHER: I can see where an adult that - you see kids can't contract away their rights. Kids can't legally do that. I suppose that an adult does at least have the concept of a risk that he is involved in. I still think if the organizers of - again I still don't see any reason not to hold the organizers who do have the duty to reflect and say okay these are our risks and these are our benefits and we want to do this or we don't want to do this. I still think they ought to have a duty of ordinary care. If you're going to establish as inherent risk analysis, I think it ought be only for adults.

OWEN: Not 16 year olds? What's the difference between a 16 year and an 18 year old as a practical matter in a touch football game?

PLETCHER: And what's the difference between an 18 year old and a 20 year old for a practical matter? We sort of have to draw the line somewhere and kids at a certain level they can't even be negligent.

OWEN: But a 16 year old is entrusted with a car under state law.

PLETCHER: I agree. But I think that we've got to have - if you're going to have different standards, which I don't think you should, I think you ought to go ahead and draw your bright line at majority. I don't think there's any need for that. I think that the organizers of these events have the ability to reflect, to look at the risks that are involved, which is different from the combatants or the participants themselves.

RODRIGUEZ: Let's assume the ordinary negligence standard applies. I'm having difficulty with the proximate cause here. Can you address that for me?

PLETCHER: Absolutely. The case they wanted me to try from the beginning was that because they didn't give him equipment it caused his injury. And that's not the case I tried. If there's any question about me limiting my allegations in this case, what he's talking about in the record was the hearing on motions in limine. The court was asked to not allow me to talk about equipment at all. He asked what does equipment have to do with this? And I said, the only time I want to talk about equipment is Mr. Garcia knew he didn't have equipment necessary to play this game appropriately, safely, and he chose to set it up anyway. And having done so, if you're going to have people playing contact sports, like football, then you need to give them proper equipment.

RODRIGUEZ: But with regard to this injury in this case, you have a dislocated knee. And what kind of protective equipment?

PLETCHER: Look at my first allegation, which is Mr. Garcia should never have allowed a game of full contact tackle football to take place knowing there was no protective equipment. Doing that, having set that in motion, clearly that was a cause in fact of Carlos' injury. Now the difference in this case from the Union Pump v. Albritton case and those kind of cases are that this court has said when either the defective equipment or the negligent acts, when the forces put in play by them have come to a stop and then something else comes along, that's the distinction between those cases and this case. The forces that were brought to play by Mr. Garcia in his decision to organize this game and set the rules as he did were still out there.

OWEN: What was the equipment that would have prevented the knee injury?

PLETCHER: This court talked in *Lowe v. Texas Tech* about the fact that the standard equipment in football is designed to protect injury and...

OWEN: What evidence was there in this case that what equipment would have prevented this knee injury?

PLETCHER: I don't have evidence that this injury would not have happened if he had had some kind of protective equipment.

OWEN: Helmet and pads, would that have stopped it?

PLETCHER: Helmet and pads is very helpful in these kind of injuries. I think a jury is entitled to infer that.

OWEN: What evidence is there on the knee injury? How would that have prevented the injury?

PLETCHER: I think because the basic equipment allows you to take a blow to lower your head and shoulders and take an oncoming blow rather than get hit without anyway to...

RODRIGUEZ: Let's go back to what the record states. And I think the question that was asked of your doctor was, If Mr. Perez would have been wearing some form of protective equipment could this injury still have occurred? The answer was, perhaps. Speculation. There's a lot of work on knee braces protecting from sports injuries. It's very controversial as to whether that's true. Do you have any evidence in the record to support your position?

PLETCHER: The evidence that I have is this. One, had they not been playing the full contact game, he wouldn't have been injured. First off they shouldn't have been doing that. Secondly, what the doctor said was, you know - they asked him well is this the kind of injury - dislocated knee - that you see all the time in football games? And he said, no. This is an unusual kind of injury in contact sports that are played with equipment. I don't see this like that very much. So we have that that the jury can infer from.

I will make a concession. You can write a note Justice Baker that the causation on that element of negligence is tougher for me than the causation on my allegation and the way I tried this case, which is these boys should never have been playing this game because Mr. Garcia knew they didn't have the equipment that would allow them to play it safe.

O'NEILL: I've asked this question of Mr. Jewell. And obviously we're struggling with policy choices of how to protect. I coach basketball. We all want to encourage that type of activity and if anything that happens on the court and a child is injured, it's a fact question for the jury, that's not a real good policy. How would you accommodate those concerns in drafting an opinion and a legal standard?

PLETCHER: I believe that the organizers of these events have the duty to exercise ordinary care in the way they put these events together and allow them to be played.

O'NEILL: But in terms of coaching, I put a little kid to guard a big tough kid, and she's injured. Am I subject to being sued for negligence for that choice to pair up these two? I think that's sort of some of the concerns we're struggling with. Is there any safe harbor other than a jury trial in every case?

PLETCHER: And I've got to tell you that I think in that setting you're not responsible but all of us in the civilized society have certain responsibilities.

O'NEILL: You say in that setting I'm not responsible. But give me a legal analysis that I can use to say as a matter of law I'm not responsible?

PLETCHER: That being that you hold practices. That this child knows the fundamentals of the game. That you have taken...

O'NEILL: But that's a factual matter. That's not a legal standard. So I'm still subject to a lawsuit and a jury trial in every case.

PLETCHER: Yes, that's exactly true. The reason being, I don't think any of us ought to be insulated from liability for our negligent actions. I just don't think that ought to be the law. I don't think it's good policy. If you want to see the programs dry up, let the moms get the word that there is nothing that can be...

O'NEILL: I'm trying to draw a middle ground here. Instead of all or nothing it seems there ought to be some sort of protection in that regard. But you can't think of any. It's either going to have to be an all or nothing.

JEFFERSON: In Justice Enoch's example, why would a parent ever organize a baseball game or basketball or soccer or anything if the parent knows that if any child is injured out there that there is a possibility of a lawsuit, and at least a long defense and maybe adverse jury verdict?

PLETCHER: All I can tell you is that for as long as this has been the law those activities have continued. Parents have tried to do the best they can do to supervise those activities. Sometimes they do a good job. Sometimes they don't. And the question is, do we place all the burden of those that don't do a good job on the kids that get hurt instead of on the adults that have the experience and the foresight to recognize the risks and say, you know I think this is acceptable and I think this is not. And I believe that that responsibility ought to be placed on the parents rather than on the kids.

OWEN: If this had been a parent instead of an institution supervising this child could he sue his parents for negligence?

PLETCHER: Under my standard had the parents taken a group of kids to the park and organized a game against adults in the park, yes, I think so. Because I think as a parent you assume that responsibility. Taking those kids down there, organizing the game, setting the rules, yes. I think that that is something that you have chosen to do and that you have a responsibility to exercise ordinary care in doing.

RODRIGUEZ: You were giving us a listing of why the inherent risk standard should not apply. You said plaintiff was a minor. There was a contractual duty to care for the plaintiff. What are the others quickly?

PLETCHER: We have the voluntary assumption of his exclusive custody, care, control and supervision by this entity, which we don't have in - for instance in the Moore case...

RODRIGUEZ: I don't want an argument. Just give me the list.

PLETCHER: I think the last reason is that there wasn't an appropriate outfitting with equipment and gear in this case. And that also takes it out of any of the Moore dissent considerations.

* * * * *

REBUTTAL

JEWELL: In response to Justice O'Neill's assignment, I would phrase it I guess in this way. That a defendant does not owe a duty to protect a participant from risk inherent in the sport or activity in which the participant has chosen to take part. The determination of inherent risk is a legal question to be made on a case-by-case basis taking into consideration the nature of the activity, the status of the defendant, and the relationship of the defendant to the activity and to the plaintiff.

Because in this case Mr. Gil Perez was injured as a result of a risk inherent in a game he had chosen to take part, Southwest Key is not liable.

In cases of dispute I concede there might be summary judgments that are

denied, and in those cases _____ to the jury. There simply must be some way to acknowledge the policy concerns in favor of protecting defendants from lawsuits when persons who play sporting activities are injured as a result of conduct that is not only tolerated but encouraged.

O'NEILL: Is that the end of your articulation, because I didn't hear an exception for defective equipment. I didn't hear an exception for a child.

JEWELL: I don't think an exception applies here. If the court feels it's necessary to articulate exceptions in this case...

BAKER: She wants you to say whether you included those in your articulation.

O'NEILL: We have to deal with them in this case. This opening paragraph that ignores the allegation of defective equipment and it ignores the allegation of supervising a child.

JEWELL: Then the court could say that there are exceptions where a defendant creates a new risk or increases a risk that is inherent in the sport and that in such cases an ordinary negligence standard would apply.

O'NEILL: And they've made that allegation here. So we would then apply...

JEWELL: Right, and then you could conclude, although I'm not conceding that negligence applies. I'm just saying that if the court were to conclude that the ordinary negligence principle applied, the court would then affirm this admission of a negligence submission by the TC. But, yet, I would suggest the court would have to reverse and render the judgment because the plaintiff failed to present legally sufficient evidence of foreseeability and cause and fact. And therefore failed in the causation prong in this case.

BAKER: Was that your final answer? If it is, then it includes an exception for supervising children. And is Mr. Gil-Perez a child under Texas law in this case?

JEWELL: He was under 18.

BAKER: Then does that make him a child?

JEWELL: I don't believe so.

BAKER: And why not?

JEWELL: Because he is of a sufficient age to understand and appreciate the risks of the game in which he is playing.

BAKER: We're going to have to draw a line somewhere. Why not follow our law that

defines somebody 18 or 17 or under is a child?

JEWELL: I think the court can conclude that exceptions to...

BAKER: _____ suggest that we use 21, which is the age of majority.

O'NEILL: You're asking us to take judicial notice that teenagers appreciate risk.

JEWELL: I think that small children are too young.

ENOCH: It becomes a closer question it seems to me when 16 year olds play rugby all the time, and there is no equipment to that game, and that's full contact sport. But there's football that through culture has become equipment dominated game. It's a full contact sport. Where the choices they want to play football as opposed to rugby and then it's a closer question of whether or not allowing them to play "football without equipment" is reckless when they could have chosen to play rugby which doesn't have equipment, and maybe it's not reckless to have not stopped that game. That's a closer question. But letting a minor child play without equipment might be reckless. It might not be reckless. Should that be even with minor children an ordinary negligence standard or could that be _____?

JEWELL: No. Again I think if the case falls out of the realm of what's an inherent risk or so, the court should look to see whether it should apply ordinary negligence or recklessness. And that I think will vary by case. I'm not sure there's any way to get around the fact that each case is going to be different because all the sports are different.

HANKINSON: You're asking for a change in the law. There's been obviously a lot of questions from the court indicating _____ considerations and concern and the court trying to decide where it falls in the public policy issue. And I know that you all have cited to us every Texas case that you can find that touches on this issue, so that we would know the current state of Texas law. And there really aren't that many cases. Can you give us any indication. Have we had problems in this? Are we having a flood of litigation over this? Do we have some difficulty? I've not seen anything anywhere and I don't see that anyone in the briefing has pointed it out to us. Where are we in the State of Texas with respect to how our present law is working? Is it causing a rash of litigation? Is it not? Do you have any idea?

JEWELL: I'm not personally aware of a rash of litigation. I do think that the question is one that comes up, maybe not x number of times a year...

HANKINSON: Well it could come up a whole lot because we've got lots of sporting activities going on around the state of Texas.

JEWELL: I know we do. And I think if the court does not address it, it's going to continue to come up, maybe not as often as to declare an emergency right now.

HANKINSON: The reason why I asked the question is do we really have a problem with the way the current law is working?

JEWELL: I think that we do because I think that some of the opinions are inconsistent. Like for instance, the cases that distinguish between participants and nonparticipants is...

HANKINSON: But do we have a lot of cases being filed against the nonparticipant, so that we've got _____ problem - I don't see that many cases that you all have cited to us.

JEWELL: But most of the cases probably will expect to be filed against nonparticipants just based on the perception at least that there may be the money there as opposed to the...I agree that there's not a flood of cases.

O'NEILL: Under the standards you just articulated, I could see how that would easily become a fact issue in every case. You adopt inherent risk unless defendant did something or failed to do something that increased the inherent risk in the game. And an allegation could be: didn't properly train, didn't properly supervise which, therefore, increased the risk inherent in the game. And aren't we back where we started?

JEWELL: I don't see it creating a fact question in every case. However, I am just trying to make room for those cases where there is let's say a premises hazard or something of that sort that is not part of the game. And I think in those types of cases, it wouldn't necessarily rise to a fact question.

O'NEILL: But you've acknowledged under the standard that you've articulated, the legal standard would still have a fact question?

JEWELL: I suppose that in some cases it could be.

OWEN: Is plaintiff's age in the record?

JEWELL: He was I believe 17.