

ORAL ARGUMENT – 09/28/04
03-0794
CHON TRI V. TRAN

HARPOLD: Let me start by looking at what the lower court has done in this case. And specifically look at some of their language. And if you go back to their opinion, they acknowledge what has been the law in this state, “that parties cannot engage in a conspiracy to be negligent.” And that’s following the long line of cases from this court which say the same thing.

But here is where they fall off the wagon. They go on to say in the very same paragraph, “this rule does not entail that parties cannot conspire to cause injury by their negligence”. It’s kind of a tongue twister. In fact for me it took a while to understand what they are saying. They are really just trying to get around what they just said in the preceding sentence.

And it’s interesting. They don’t cite in that opinion, in that statement, which is really the paramount of their opinion, a case to support that position that parties cannot conspire to cause injury by their negligence. So what they’ve done is, and they go on to say, still quoting from that same opinion, in this case, the case we’re talking about here today, “it was a conspiracy not to prevent.” And I guess what they are saying a conspiracy not to prevent negligence.

The court issued one opinion and withdrew it. And in their second opinion they found the Reed Tool case, out of this court, which directly disavowed this very position. In the Reed case they tried to get the worker’s comp statute that said employer can be sued for negligence. And so in Reed they argued that you can set up or perhaps conspire or create an environment that allows for a negligent accident. And you can do that by intentional conduct. So the first court said, okay we are going to take Reed and we are going to apply it to these set of facts, but they applied it to the wrong way. What they should have said is that even if we look at Reed, even though the other side didn’t argue this, even if we were to look at Reed as an application to this set of facts, this court, the SC has already decided you can’t do that. You can’t conspire, you can’t create a cause of action or suggest a cause of action by saying that the parties in effect intentionally set up a situation that allowed for negligent conduct.

So what they’ve done is, they’ve taken the Reed case, they cite the Reed case as their only authority, but the Reed case directly is opposite of their position in this case. Because Reed does not say that. Reed says you cannot have a basis for your claim by saying that there was an intentional conduct of the parties that set up this “negligent event.” In the Reed case it was a workplace. And in this case, our case here today, is a premise case. So the same application applies.

And so if you were to follow the court’s reasoning it would throw out 5 supreme court cases that have said that you cannot conspire to be negligent.

JEFFERSON: Can you have a conspiracy to further the criminal acts of sexual assault on

plaintiff's - their being a conspiracy to further other person's criminal acts?

HARPOLD: There might be if there was an underlying participating in that tort. For instance, in this case, my clients, if they participated in the underlying tort and had a finding against them of something intentional, whether it be a criminal statute violation, whether it be intentional infliction under emotional distress, or whether it be perhaps gross negligence. But there was no finding in this case by the jury that the petitioners participated in any underlying tort in the furtherance of a criminal act, or in the furtherance of an intentional tort which is what this court has said all along that is required. And that's what the pattern jury charge says. In this instance, the jury only found that the petitioners were negligent, ordinary negligence and assigned 5%, 5%, 10% collectably. The short answer to your question is no. Because there was no finding of participation in the underlying intentional tort. There was only a finding of simple and ordinary negligence.

What the court has essentially done below is created in effect perhaps a claim on the basis of simple conspiracy.

O'NEILL: It's difficult for me to understand how sexual assault can be negligence. Can you explain the underlying tort theory how that can be?

HARPOLD: It can be. In the TC there was no submission of a question against the petitioners on a participation in the assault, on a participation in any intentional conduct, whether it be intentional infliction of emotional distress...

O'NEILL: But it was negligence per se.

HARPOLD: Against the perpetrator, not against my client.

O'NEILL: I understand. But tell me how you can have negligence against the perpetrator. Why is that not an intentional act?

HARPOLD: What was stipulated at trial is that the perpetrator assaulted and was sent to prison in California for that, and that's a violation of the assault statute even here in Texas.

HECHT: I take it that's not in the record.

HARPOLD: That's not in the record. It was just a negligence per se of a criminal statute that was stipulated against the person that did it. It was undisputed...

O'NEILL: I'm just talking about in theory, in reality. Negligence per se doesn't seem to fit this analogy for me. Negligence per se, at least the context I've seen it in, has been in traffic statutes. You violate a traffic statute and they call that negligence per se. But it seems to me a penal statute that requires some level of intent, it's hard for me to see how violating a penal statute just can conceptionally be negligence per se. Are there cases that acknowledge that that is a viable

underlying theory, or are we just stuck with a weird stipulation here?

HARPOLD: I think we're stuck with a weird stipulation. Because he violated a state statute whether it be criminal or whatever, it was a violation of a state statute. And so it was just stipulated that there was a negligence per se...

O'NEILL: I understand what happened. Are there any cases that recognize negligence per se based on a criminal statute?

HARPOLD: I haven't seen any. And so that was a stipulation between them. Then the negligence that was found against the petitioners, my clients, was conditioned on the premises and it was just a straight premise liability question of negligence. In fact the instructions themselves speaks to that issue against Theravada Buddhist Corp., which was the owner of the premises. So the negligence per se and that particular issue really was isolated with respect to the perpetrator and...

O'NEILL: So you wouldn't have any problem with the conspiracy finding if in fact the underlying contention had been a criminal act? In other words, an intentional act.

HARPOLD: You're right.

O'NEILL: So they may have stipulated themselves out of the conspiracy piece is your argument?

HARPOLD: They may have by its simple stipulation and by the fact there wasn't a finding against the petitioners of any intentional act or any intentional conduct. In fact the jury specifically rejected malice and gross negligence which elements have specific intent in it. And so there was - the whole conspiracy theme requires this participation. Unless you go along with the lower court as it stands with now, there has to be - it's a derivative tort. There's got to be something that conspiracy ponies up to and rides along with in order for the conspiracy to be applied to whoever is found in violation of some specific intent tort finding. And that's not what occurred here. And so the TC properly did not apply or did not incorporate that finding into the judgment. Because it was in a sense a no finding.

What would happen if the court were to undo the Reed case and the other four cases that have been issued by this court in the last 20 years on this very issue. Here's what would be created. You would go back and allow a situation like they argued in Reed: you could conspire to create a negligent work place. You could conspire to create negligent premises. You could conspire to create a negligent intersection. You could conspire to create negligent manufacturing. You could conspire to create negligent services. Could conspire to create a negligent sale of goods. And that's really what they are saying here is that it's creating a whole body or whole issue of litigation that has never been created by this court. And we would argue that the court would be consistent and would be following what it has laid down pretty specifically in prior years with respect to this type of case and these types of facts and these types of findings.

JEFFERSON: Can you summarize your objection to the submission of conspiracy in questions 7 and 8 during the court's charge? And second, can you tell us how you preserve the error in a notice of appeal?

HARPOLD: Probably at the time, without the record on that, but at the time it would have been that there is no evidence and that...

JEFFERSON: Why is there not a record on that?

HARPOLD: Because it wasn't brought up as part of the appeal.

JEFFERSON: That's part of my question Would it be your responsibility to complain of a judgment that the court erred in submitting the charge as it was, or that the judgment was incorrect and provide the CA with the record from which to review that challenge?

HARPOLD: We didn't challenge the judgment. We had no problem with the court judgment that was entered. So there was nothing that we found with error with respect to the judgment as was entered. Because we believe the court properly applied the law to the findings that were found. And since there was no finding of a participation in the underlying tort, and specific intent tort as required by this court, the court properly did not incorporate the conspiracy finding in our judgment. So there was no reason for us to pursue that angle because the court properly applied this court's law presumably to that finding because it was almost a naked finding or a finding of no consequence because it was not conditioned or did not have an underlying tort to go along with it, the underlying intentional tort that I spoke about earlier.

The judgment ultimately was against Theravada Buddhist Corp, not against Reverend Tri. Reverend Tri is a petitioner here in this case because the CA reversed that part of the judgment also and put personal liability on him. Even though the TC, and it's incorporated into the judgment and that is in the record, the TC before the jury ever got the charge found as a matter of law that Rev. Tri was acting in the course and scope of his employment for Theravada Buddhist Corp. And so what we've argued and what we've said is that now without a finding at trial of any piercing of the corporate veil by the litigants, the CA has gone back and said, No, he needs to be individually responsible for this negligent conduct of the corporation. And if you go back and look at the questions that were submitted to the jury they were premise liability questions and they speak specifically about Theravada Buddhist Corp. failed to exercise care to protect, failed to adequately warn, and failed to make a condition reasonably safe. All premise liability questions, all conditioned and instructed to the jury about Theravada Buddhist Corp. The point is, and as this court has said in the past is that there was no independent duty of...

HECHT: But we don't know that because we don't have a record.

HARPOLD: We do have the record about what the court said in the judgment. If you look at the judgment, the court found as a matter of law that Chon Tri was acting within the course and

scope of his employment with Theravada Buddhist Corp. She did incorporate that in the judgment. That is a record in front of you. And there was no finding anywhere, and we do have the jury charge, there was no finding of any independent tort or negligent conduct on behalf of Rev. Tri.

OWEN: There could have been evidence. We just don't know that he knew that there had been sexual assaults many times before and did nothing to prevent it. And that could have been in the course and scope and he could have been liable for that independently for premises liability couldn't he. We just don't know because we don't have a record.

HARPOLD: We do know because of the jury charge itself and the judgment. We have the judgment that says he acted in the course and scope. We have the jury charge that has specific instructions as to who had the duty for the care and watch of the premises. And that was Theravada Buddhist Corp. There was no finding of a separate relationship. There was no finding of him acting outside of the course and scope because that would be in direct conflict with the record you do have, which is that the court said as a matter of law, he is in the course and scope of his employment with Theravada Buddhist Corp.

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RESPONDENT

MCEVILY: I would like to begin first with the focus on two points. One is, with response to your question CJ Jefferson and yours J. O'Neill. This case was predicated upon the felony conviction of Dung Khuat for the rape of the two plaintiffs. CJ Jefferson poses the question, can you have a conspiracy to further a sexual assault? The petitioners forced to acknowledge, well of course you can. And then J. O'Neill asks. Well how does that get to be mere negligence? That really is an intentional tort that seems to be apart from negligence.

J. O'Neill, I believe the answer to that is, the anomaly is created by the fact that alternate theories were pled against the defendants other than Dung Khuat. Dung Khuat was the perpetrator of the rape. At trial he did not appear, did not contest the allegations against him. Nevertheless, his conviction was proved. It was acknowledged. The petitioners themselves in their brief before the CA referred to him as a convicted felon, convicted and serving time for sexual assault.

The answer to the question, is that in the record? It most certainly, definitely is, the fact that Dung Khuat was a rapist, convicted of several sexual assaults.

O'NEILL: Is it your contention that then because he's a convicted felon we should just presume it was an intentional act that supports the conspiracy theory?

MCEVILY: I don't think it takes a presumption. The answer to it is, this really wasn't a stipulation. The judge directed a verdict on that. And the anomalous situation is, that one of the things that was going to be required of the court if only negligence were found against the other

defendants, was to divide up their proportional responsibility in accordance with the statute. So there had to be a question submitted to them that inquired of the conduct of Dung Khuat. The way the court worded that was, whether or not all the parties were negligent? And she instructed that Dung Khuat's negligence was a proximate cause so that he would be included in the proportional responsibility statute.

OWEN: It seems to me what the judge was telling you was, Yes you've got a finding on conspiracy, but you never tied it to any damages from a conspiracy. The only damages she had before her were jury findings on negligent damages. And she said, I can't translate that to conspiracy damages.

MCEVILY: I think that was one of the things that was troubling the trial judge. But the findings were tied to the damages that were caused by Dung Khuat which she directed.

OWEN: We don't have a record. We don't have the trial transcript. The trial judge, a lot of the evidence cited for conspiracy was things that happened after the sexual assaults. For example, in the arguments to the TC, you said, well look at the evidence of the conspiracy. These people came in and accused the women of lying. They showed up at preliminary hearings and made fun of them and were disparaging of her. After the sexual assault they spirited the perpetrator out of the country. So a lot of the evidence that you were telling the TC went to the conspiracy issues had nothing to do with the sexual assault itself. So it seems to me the TC was saying you don't have damages that correspond to your finding of a conspiracy.

MCEVILY: In discussing whether or not there was evidence, what we were dealing with was whether or not the court would disregard the issue, which she could only do if it shouldn't have been submitted in the first place, or if there were no evidence of it. And the court specifically did not disregard.

OWEN: That's what I was trying to figure out what she had done. It seems to me like what she was telling you at the post-judgment, post-verdict hearing was, I'm not going to disregard the conspiracy finding. But she said, I gave you the issue you asked for, and you didn't ask for damages. And so she said, I'm not going to un-find the conspiracy theory finding, but since there are not damages to go with it I'm not going to give you anything on the conspiracy finding.

MCEVILY: I don't believe that's what she said, because remember the conspiracy question was predicated upon the finding of damages in the earlier question where she directed a verdict against my client. So I don't think that was what was troubling her. I think it's probably impossible to say from the words that were spoken. I think what we do need to say is from what happened in the case.

OWEN: But we don't have a record of what happened in the case.

MCEVILY: We do have a record and the record is an abbreviated record because the fact

that they were co-conspirators was something that was a fact that was found by the jury and not objected to.

HECHT: But there has to be predicate intent someplace. Right?

MCEVILY: Absolutely.

HECHT: So all we have is a negligence finding. So where do we look to find it?

MCEVILY: I think we look in the charge, and the charge that we got in the case on conspiracy came directly from the Texas pattern jury charges. And that requires that for you to find that a party was a part of a conspiracy, you have to find that they had knowledge or agreed to or intended the common objective or course of action that resulted in damages to the plaintiff.

OWEN: But the pattern jury charge says you have to have as a predicate the finding of an intentional tort or unlawful act.

MCEVILY: I don't think you have to have a finding of that.

OWEN: That's what the pattern jury says.

MCEVILY: Well the pattern jury charge says, condition on the findings of a tort or statutory violation that proximately caused the damages. And the judge did say that there was a statutory violation. That's why she called it negligence per se.

OWEN: She didn't say negligence per se. She just said I instruct you that while it was negligence. That's all she told the jury.

MCEVILY: I think you are right about that. That's all she did say. But as J. O'Neill says, there wasn't any question about that what Dung Khuat did was, he raped these girls. If you called it negligence in order to allow the portion of responsibility to be worked out, I don't know if that's an error that you can hold against the plaintiffs. But it was clear that that was the damage that was alleged and that was the only damage that was found.

OWEN: That's where I have the problem. We don't have a record. And the argument to the judge was look at all of these mental anguish damages that these women were put through because of this conspiracy that occurred after the sexual assault. I'm having a hard time with no record and the arguments that were made to the court post-judgment. And she is saying you don't have any damages to go with this.

MCEVILY: I think that's answered by the law of conspiracy. It doesn't make any difference when these damages occurred. Because they were damages that were occasioned by the work of a co-conspirator, all the members of the conspiracy are responsible for that.

OWEN: But the damages found by the jury were for premises liability and negligence, not on conspiracy.

MCEVILY: Premises liability and negligence, but they were all tied to this same act. There wasn't anything else that happened other than that they were raped by Dung Khuat. Nobody alleged and there wasn't any proof that they fell or had anything else happen to them. They were raped by one of the _____.

OWEN: All I have is the transcript of the hearing. Somebody was arguing well all these post-assault things that were so bad that were part of the conspiracy had nothing to do with the jury's finding of premises liability, or negligence in the sexual act itself. So that is where I am having the disconnect.

MCEVILY: I think it's all bound up in the law of conspiracy that each one of these co-conspirators is responsible for every act of the other conspirators. And the acts of the conspirators particularly and most effectively the act of Dung Khuat was what caused the damages to these women. I don't think that was really a question that was in dispute. Certainly nobody disputed that they had been raped. Dung Khuat wasn't in a position to. He wasn't there, and his conviction was absolutely proved. And that underlies everything about this case. The fact that these people were victims of a sexual assault. And I don't think that we need a finding to say, Well was the sexual assault an intentional act? I don't think there was any question about it and there wasn't any question about it in the CA.

O'NEILL: That gets back to my question. Do we have to find that? Do we have to say, although it was termed negligence per se it really is in the nature of intentional tort, and, therefore, it will support the conspiracy theory in order to rule your way?

MCEVILY: I think all we have to do to rule my way is rule as I urged the court to rule, that the finding of a conspiracy in connection with an intentional act. And there's no question that there is an intentional act involved here.

O'NEILL: And the intentional act here is negligence per se?

MCEVILY: And the way that question is framed on this paper that we got when we came in here, yes. I think that by definition that contemplates negligence per se. Any violation of a statute constitutes just by definition negligence per se.

OWEN: They were simply instructed that Khuat was negligent. There wasn't even negligent per se in the jury charge. So you're asking us to go from common law negligence to an intentional tort it seems to me.

MCEVILY: I think it wasn't in the jury charge because it wasn't an issue in dispute. What Dung Khuat did was something that was acknowledged by everybody at all times. It just wasn't in

dispute.

O'NEILL: But your argument is sort of a continuum. Whether it's put in the charge as negligence or negligence per se, it was stipulated to be negligence per se. And you're saying on the continuum of negligence, an intentional act, negligence per se we must deem to be on the intentional side?

MCEVILY: I'm not going to go as far as that. I don't know everything that would be considered negligence per se. And I heard your honor say speeding could be negligence per se. I'm not willing to go as far as that, but certainly a felony rape can be the intentional act that underlies the finding of a conspiracy.

O'NEILL: What if the TC had not submitted this as negligence?

MCEVILY: I think your honor is helping me, because I was going to say that. I don't think she needed to submit - given the fact that the issue about whether or not Dung Khuat had committed these crimes, I don't believe they had to submit anything. In other words, if we weren't trying to hold these defendants responsible for negligence or conspiracy. If we had just asked them, Do you find that these people are involved in a conspiracy with Dung Khuat? I think certainly would be enough.

HECHT: But you've got to have intent to be part of a conspiracy. You can't be negligent. So somebody says you know, you better be careful about that friend of yours. He might commit rape. And I don't ever ask him and I don't ever talk to him, and I don't ever do anything. I'm not part of a conspiracy. He goes and rapes somebody, I'm not part of a conspiracy.

MCEVILY: Absolutely right.

HECHT: But if somebody says, he might commit rape. And I say are you going to commit rape? And he says, yeah maybe over there. And I say, well here's the key. Then I am part of a conspiracy.

MCEVILY: I think that's exactly right.

HECHT: Where do we have that finding about like Tri and the others?

MCEVILY: If they had not found intent, they could not answer the conspiracy question yes. The conspiracy question required knowledge of agreement to an intention which is approved in the pattern jury charges and amounts to all the elements of a conspiracy under the Massey case which sets the elements of conspiracy out.

OWEN: If she had submitted damages, they are negligent damages. They are based on premises liability in common law. Where are the conspiracy damages that match up with the

_____?

MCEVILY: There's no difference. They were the same damages.

OWEN: You say there's no difference, but that's not what you were telling the TC when you argued post-judgment for your mental anguish damages and all this other. You were talking about post-sexual assault actions by these defendants.

MCEVILY: I don't really remember the argument. I would be surprised if anybody from the plaintiff's side argued that the damages were any different for the conspiracy because the conspiracy damages encompassed all the damages that were done to these girls. They couldn't be divided out.

OWEN: The premises liability issue - the record is what it is I guess.

JEFFERSON: Would your argument had been easier if there was a question submitted that says, Did the parties named below engage in a conspiracy to sexual assault the plaintiffs?

MCEVILY: I think it would have been different. The reason that we see it this way is because we submitted it exactly the way the pattern jury charge said, was the defendant a part of conspiracy to damage the plaintiff? So we submitted it in an effort to avoid difficulty at anytime after trial. We submitted it in the way that was instructed for us.

I want to get to the question and I think we may have covered it, the question about whether or not the CA's opinion raises the issue of whether or not conspiracy is a standalone tort? I think it depends on what you mean by standalone tort. Certainly if standalone tort means or by whoever uses that term "standalone" tort if they mean well they can have a conspiracy and it doesn't need to be any underlying, unlawful conduct. An intentional act? No. Then it can't be a standalone tort. But if the question means do you have to find that the coconspirators themselves, in this case the petitioners, were themselves guilty of another tort? Well the answer is clearly that they don't have to - they can stand alone from that. The conspirators don't have to be guilty of any tort other than negligence.

JEFFERSON: Just assume with me that all the court had was the charge with the findings on negligence and apportioned responsibility. How could a court say, there is a finding of an underlying intentional act that is separate and part from negligence? I think we all agree that Texas law doesn't recognize a conspiracy to be negligent. And the only time intent is mentioned is in question 7 and 8 on conspiracy. But it doesn't tell us what the underlying act is. So if we had only this court's charge, how could we form an opinion that says this judgment stands?

MCEVILY: I think that gets back to the question that you posed to Mr. Harpold, which was what was your objection to that charge? And the answer is that I don't believe they objected on the basis that the court suggests. And they did not carry forward into the CA any complaint that there

was anything wrong with the charge or actually anything wrong with the finding. But the answer to your question I think is how would you find out the allegations against Dung Khuat were absolutely taken as confessed? And so that's where you find the intentional conduct in that he was accused of rape and he essentially confessed to it. Everybody conceded it at trial. It wasn't an issue that was in dispute. It was contained within the briefs. Nobody disputed it in both briefs.

OWEN: You say he was conditioned. I kind of hear you arguing from both sides, because you say, well it was conditioned on an answer to question 3, which was damages. And the damages question had to do with following the negligence. And the occurrence in question which was the negligence. So it seems like it was all tied to negligence, not an intentional act.

MCEVILY: It was tied to damages, because I think you have to tie it to damages. If there weren't any damages it wouldn't make any difference. There was a finding of damages. And because there was a conspiracy, the damages were the same. Every act of the coconspirators is chargeable against each of them.

OWEN: It uses the occurrence in question which is the same language throughout.

MCEVILY: Which was the rape.

OWEN: But the findings of the jury was not rape. The finding was general premises liability, and negligence.

MCEVILY: I don't want to quarrel with the court about it. Those were the findings of the jury to the disputed facts. The rape wasn't a disputed fact.

O'NEILL: You're relying on footnote 2 of the CA's opinion.

MCEVILY: I saw footnote 2 at the CA, and I think footnote 2 is the one that Mr. Harpold wants to talk about. I don't think footnote 2 goes far enough. I think the court is right to say, Look this finding of conspiracy doesn't say that the conspirators were guilty of negligence or negligence per se. It means that they were conspirators and that they intended the harm that resulted to this plaintiff.

I think the way footnote 2 is worded is a little peculiar but I think that's all they are saying there that the particular conspirators, these petitioners particularly, don't need to be guilty of negligence or negligence per se to be conspirators. It has to be conspirators with a person that was responsible for the illegal act.

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REBUTTAL

HECHT: If all I know, and we have trouble in this case because we have to put on

blindness and just look at the charge, is that the definition in question 7 is true as found by the jury, then why isn't that enough to establish the intentional conduct required for a conspiracy?

HARPOLD: Because conspiracy is a derivative tort. It has to be conditioned on an underlying finding or some other finding of tort conduct. What they are arguing and the question if I understood it is, taking conspiracy in a standalone situation...

HECHT: No. I am asking a different question. Rape is a tort?

HARPOLD: Right.

HECHT: So we've got an actor and he committed a tort. And the question is, did anybody else intentionally join with him in doing that? Isn't that right?

HARPOLD: Right.

HECHT: So the definition in question 7 says, you can't answer this question unless you find knowledge or agreed to or intended, a common objective, which was the rape. And certainly if somebody intended to help somebody else rape somebody, that would be a conspiracy. Don't you agree? Then why don't we have that finding here?

HARPOLD: That is a finding in and of itself by itself. It's not conditioned or it's not derivative of the underlying tort. The participating tort, the tort that the conspiracy feeds off for lack of a better word. Meaning that you can have that finding, I think is what the TC did. Yeah, you had that finding but it wasn't conditioned as the pattern jury charge says on any other underlying tort perhaps other than negligence as J. Owen said. And so it can't on its own be a finding that stands up because it's not derivative of some other finding against these petitioners. And that's what happened here.

HECHT: But is the - do you take it on the record that is before us that the conduct by the perpetrator is established or not?

HARPOLD: What he did?

HECHT: Yes.

HARPOLD: Yes.

HECHT: The problem is from this record we don't know whether these defendants were accused of not paying enough attention, and that's all the evidence was, or if they gave Khuat the key. And said, here go and do what - we know what you are going to do. Go ahead and do it. And all we have is this finding.

HARPOLD: I think this charge gets us there. And I think this charge supports the judgment that the TC entered. And here's why. Because within this charge the jury was asked the question about specific intent and malice. And perhaps something that somebody might be able to argue that is derivative with the conspiracy, and that was the question about malice and gross negligence. And the jury rejected it and said no. And we can also read from the jury charge that since there was not a question of intentional infliction of emotional distress, there wasn't for half a question a civil assault. Not in this case but another analogy would be fraud, a conspiracy to defraud somebody. You would have find people involved in the underlying tort of fraud in order to...

O'NEILL: I think they are saying there is. I think they are saying that the finding against the perpetrator here, although termed negligence it clearly was stipulated to be an intentional act. I mean it was stipulated to be a violation of the penal statute. Why would that be different from an underlying finding of fraud?

HARPOLD: There is no finding that the petitioners participated in that.

JEFFERSON: But think of it in a different way. Say the first question was, did this defendant, Khuat, rape the plaintiffs? And then the next question conditioned on an affirmative answer to that says, did these defendants conspire with the rapist to harm the plaintiffs? If you have those two together, the key example as J. Hecht gave, would that be enough for there to be a conspiracy that would cause all the co-conspirators to share in the damages?

HARPOLD: If it identified the tort that they participated in, then perhaps. This question in and of itself...

JEFFERSON: You don't submit questions where there is no dispute in the evidence, so there is no question that the defendant, the perpetrator here, committed the sexual assault. That's undisputed. So you don't have to submit that. It would be wrong to submit a question that everyone agrees on. So you don't submit that and you submit the conspiracy and in the conspiracy you have this element of intent. Why is that not right?

HARPOLD: In this case it wasn't done that way. But if the conspiracy question was set up with the specific guidelines and with it being conditioned back to that derivative tort, or to that underlying tort or participating in the underlying tort, then you would be right. But this question in this case was not set up that way. This question was not asked that way. The only condition that this question was tied to was a question of negligence and negligence damages. And for premise liability which in the TC, I think properly, applied the law to a finding that she had based on the jury charge in front of her. She did that with respect to the conspiracy question.