ORAL ARGUMENT — 11-4-97
97-0028
DALLAS COUNTY MHMR VS. BOSSLEY

LaBREC: I will address the tort claims issue about use of tangible property; Mr. Eady, counsel for the physicians in this case, will address the qualified immunity issue.

PHILLIPS: If you are to prevail on your issue, do we reach the present issue?

LaBREC: I don't believe you do because of the 101.106 rulings from this court previously, the judgment in favor of the MHMR would preclude any cause of action against the individual defendants.

Contrary to the way that this case was postured and presented to the CA, and contrary to some very, I think, capable arguments of counsel, this case does not involve use of tangible property. What this case involves is the failure of the defendants or the alleged failure to adequately supervise Mr. Bossley. That's what gave rise to his escape, that's what gave rise to his opportunity to flee. It wasn't a lock, and it wasn't a door that caused anything in this case.

ABBOTT: Why wouldn't the *Overton Memorial Hospital* case not be analogous?

LaBREC: The *Overton Memorial Hospital* case, I think it is not analogous simply because the facts in this case do not involve the use of a lock, do not involve anything defective in the lock or in the door itself. That was not the case in *Overton*, I do not believe.

I have three points. One, information as this court has ruled previously or lack thereof or faulty decisions are not tangible property. That's what's involved here. There were some faulty decisions that gave rise to this alleged cause of action. Not using a locking device is not sufficient to waive governmental liability, and this court in other rulings have been very clear. And, thirdly, and perhaps most importantly, that this door did not cause Mr. Bossley's death. Contrary to what the CA said: involvement is not sufficient. The statute clearly says: so caused by. And simply because a door or a lock is arguably involved does not give rise to a cause of action and, thereby, waive governmental immunity by implication.

As to the first point information or lack of it and faulty decisions are not tangible property, I think, the court needs to look at the third and fourth amended petitions as well as the resuscitations in the CA's opinion about the assertions that defendants "negligently failed to restrain Mr. Bossley from escaping," because of what? Those allegations assert that Mr. Bossley was left unattended near the front door, that Ms. Jones unlocked and opened the door without checking Bossley's location, that Ms. Jones didn't ensure that someone was monitoring Bossley, that Bossley ran through the door to I-30, that no staff was present to pursue and restrain him. Clearly, these

allegations on their face do not assert anything involving tangible property. Then the plaintiffs add that the door or lock caused him to escape. The simple fact of the matter is, by all accounts what caused him to escape were arguably these other failures to supervise as well as, and I think this gets glossed over by the CA and in plaintiff's argument, Mr. Bossley did not just walk out the door, Mr. Bossley overpowered Ms. Jones and broke through the door.

There was a suicide risk, and they had been alerted to the suicide risk. But there is nothing in the record to indicate that Ms. Jones or anyone else had any reason to believe that he would assault her. Nothing whatsoever in the record.

It was not the lock, it was not the opening of the lock that caused him to escape and allowed him to escape. It was a perhaps faulty decision to not have people there to not check with other people as they alleged in the petition. But that does not give rise to a cause of action under the Tort Claims Act and were a waiver of immunity.

ENOCH: Suppose A&M's got some sort of deep sea research vessel, and I suppose it's got some watertight doors on it, and it's out on the ocean and it starts taking on water. And one of the sailors forgets to lock the watertight door, and the water gets to that level and rushes through the door, floods the boat, and now someone is injured inside this compartment, because it's flooded. The boat survives, it doesn't sink, but it's flooded. Wouldn't the argument be that if the door had been used properly, that this person would not have been injured and wouldn't that be a very strong argument that that was the improper use of tangible property, and this door if it had been shut it would have protected me from my injury, and it was left simply unlocked, or simply open?

LaBREC: I think that is the case, and I can't argue with that. But carrying that to its ultimate extreme, and I think the decision that this court has to wrestle with once again in this case is "how far do you carry that?" And using the scenario in this case, as we have in our brief, do you include he used the telephone, if the telephone hadn't of been there, he wouldn't have been in the hallway? He walked in the hallway. The key that she used is that tangible property? And I can't tell the court how far you extend this. But what I can tell the court, and kind of leads into my third point, is the causation issue. There's got to be some causal nexus. In using your example, there is a connection clearly between the flooding of the compartment and the failure to lock the door. In this case is that causal nexus there? I think, as the court has said in other cases and some of the appellate courts have said, it's a little too attenuated in this case as a matter of law.

Unlocking that door was one small piece in a whole string of facts that ultimately may have led or may have been involved in his suicide. But that's not the causative element here as a matter of law.

ABBOTT: Can we say if the door had been locked, that he would not have gotten out?

LaBREC: Yes. We can also say if there had been security there, he would not have

gotten out. He would not have gotten out had he not overpowered Ms. Jones.

ABBOTT: We can speculate about a bunch of things. But, if the door had been locked, he would not have gotten out?

LaBREC: I think I have to concede that point. Had the door remained lock, he would not have gotten out. But again, the distinction I am drawing is it is not the door that's the causal development, it's all of these other things in the progression that had he been properly supervised, and that's the plaintiff's argument. It's a lack of supervision, the lock just happened to be one small piece of that.

ABBOTT: Explain to me why this is not a but for causation issue if what you're saying if the door had been locked, he would not have gotten out, why wouldn't that mean but for a cause of action?

LaBREC: Because the statute in this case says: so caused by. I think had the door been locked, he would have not gotten out. But I don't think you can say air(?) go(?) his suicide was so caused by that lock being open. It is one small piece in the big puzzle.

Again, on my third point, that is the causation, the use of the doors did not cause Mr. Bossley's death. It's entirely too attenuated. In order to have foreseeability, there were no prior assaults, nothing in the record of any prior assaults, there were no threats of assault, there were no prior attempts to overpower, there's nothing in the record of any of that.

BAKER: But wasn't there information that Mr. Bossley was an elopement risk?

LaBREC: I think there's a vast distinction between believing that he is an elopement risk, ie, that he might elope if you leave doors open. That's a far cry from the criminal act of assaulting Ms. Jones as she's coming or going to lunch.

SPECTOR: Is it really? I mean someone trying to escape going back to a high security building, wouldn't that sort of follow that they would use all kinds of means to leave?

LaBREC: I think that that's the reason the door was locked, and that's very clear from the physician's testimony. But people do have to come in and out of doors. And the door was unlocked. And it's not in the locking of the door that gives rise to the causation, it's the fact that there wasn't adequate security around. And the problem that we have here if the court rules in this case that that was sufficient, you have effectively waived governmental immunity. Because in any case there's going to be a piece of property involved.

In addition, I would like counsel to explain how the condition of this lock or the open lock is somehow involved in this case, because quite candidly, I cannot understand that.

There is nothing defective about the lock. It was either locked, or it was unlocked. And in this case both locks were unlocked ultimately.

BAKER: Well does it have to be defective to be negligent use, or non-use?

LaBREC: I don't think non-use gets them there. If they are talking about a condition, I think it has to be defective or something about the condition the needs to be wrong. Just because a door is locked, or unlocked, I see that as use or non-use. That is not a condition. Counsel argues that it is, but I would submit that there is nothing about the particular condition of the lock itself that caused anything.

Justice Spector, getting back to your question. There were no prior attempts to escape. And I don't think Ms. Jones just because he was on a suicide risk, whether she knew or didn't know was called upon to assume that he would in fact assault her. That would be pure speculation on her part, and that again gets back to the failure to supervise or inadequate security.

SPECTOR: If he had been in his room and all the other facts are clear, that he is a suicide risk and the screen and the window were removed in some way or left open, and he jumped from the building and commits suicide, do you think there is any difference between that and what happened here?

LaBREC: I don't think there's any difference because I would make the same argument if that were the case. It's a failure to supervise. There's nothing about the screen that caused him to fall. It's the failing to provide...

SPECTOR: Or the lack of a screen?

LaBREC: Or a lack of a screen that caused him to fall. It's the failure to supervise. And that's what the plaintiffs allege in this case. I commend counsel because they have made a very artful argument to try and get around the tort claims act, but you can't do it. And if you do it in this case, you will open the door and totally by judicial decree, you waive governmental immunity. And as the court certainly understands, that's up to the legislature to do it.

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EADY: My name is Mike Eady. I represent Drs. Kamphaus and Urschel. The question of official immunity is a question that must be decided in a context atmosphere. And the context here is against several different factual backgrounds. The first one is the type of patient population the psychiatrist employed by the State of Texas must treat. This is a legislatively defined population of people. If you're involuntarily committed to the custody of the State of Texas, there has to be a judge who makes that determination. It's a determination that you're mentally ill, and

that your mental illness is such that you are a danger to yourself or to others. By the virtue of the fact that you're involuntarily committed means that you don't want to be there in the first place. So the population that the state psychiatrists are asked to treat is a population of the very high risk patients who don't want to be treated.

Next, you must treat those patients within the context of only certain available governmental resources. This case is a prime example: Dallas County, there's only 9 state hospitals in this state. If you live in the Dallas area, the state hospital in that area is Terrell State Hospital. If you're committed in that area, you would start off with what's called the MDC, which is the Medical Diagnostic Clinic. And they have a mental illness court inside the clinic itself. That's a triage point. You go into that center, a judge hears the case, and if he finds on fair convincing evidence that you have a mental illness and you should be committed, then he will commit you to the custody of the State of Texas. Then he must decide also upon hearing evidence what facility that you are going to go to. There's just two choices: Terrell State Hospital; and the Hillside Center. Now the Hillside Center is operated by the Dallas County MHMR. It's a very small facility. It's a 20-patient facility. It's mainly for a 2-week stabilization period. Most of the patients there are voluntary, and it's not staffed like Terrell State Hospital. They are not accustomed to dealing with the same type of people that are in Terrell State Hospital. That's the resources that are available.

Now the state is even more involved in the actual treatment than just that. In this case, the probate judge put Roger Bossley in the Hillside Center. He made that decision against the recommendation of every psychiatrist whoever saw Roger. He sent him there because that was his determination. And if the psychiatrist have any big complaint it's that they were faced with a patient here who was put in a facility that they didn't agree with that being the proper facility. They thought he should go to the Terrell State Hospital in the first place. But once he's there, they don't have any choice but to treat Roger Bossley, and they don't even have a choice on how to transfer him. That's has to be approved by the mental illness board again.

They can release him, but if they want to send him to a more secure environment, because he's within the custody of the State of Texas, they can just make a recommendation. And that's exactly what happened here. And that's the proof that's attached to the response to the Motion for Summary Judgment, plaintiff's response, the actual motion itself for a modification of the in-custody protective order.

GONZALEZ: Do you agree with CJ's initial question about if there's a favorable ruling as to MHMR, we don't reach the issue about your client?

EADY: Yes, that's my sincere hope.

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RESPONDENT

OAKE: I represent Albert and Elaine Bossley, the respondents in this case. There are three issues: official immunity; governmental immunity; and the relationship between official and governmental immunity. I would like to respond to them in that order.

First, with regard to official immunity, this court laid down the rules in the medical context on official immunity in the case of *Kassen v. Hatley*.

PHILLIPS: You do agree that we have to affirm the CA on their decision on governmental before we ever get to _____?

OAKE: Only with regard to Angela Jones, possibly not with regard to the other defendants. Because the other defendants in the petition were never alleged to be involved in the cause of action, which gave rise to the action against MHMR. If you look at the petition, the actions of Angela Jones are kept separate from the actions of the other employees. So you would still reach the official immunity question with regard to the other defendants.

In *Kassen v. Hatley*, this court held that in order for a medical personnel to receive official immunity they must conclusively prove that they were exercising governmental discretion in connection with the acts complained of, or that their medical discretion is somehow colored by governmental factors and concern.

Now in this particular case, the defendants attempted to meet that burden by filing affidavits. But they filed their affidavits *pre-Kassen*, and they filed them under the old uniquely governmental standard of _____ Because of that, their affidavits have failed. All the defendants in their affidavits indicated that they were exercising professional judgment, and professional discretion. However, they did not indicate that they were exercising governmental discretion. And more importantly, they never linked up any supposed exercise of governmental discretion or factors or concerns with their medical discretion. The doctors indicated in their affidavits that they had to treat each patient that was involuntarily committed, and that they had limited treatment options, and that they could only refer the patients to a governmental facility.

Now this latter fact was contradicted by Dr. Kamphaus in his deposition where he admitted that they could indeed refer to a private institution, and the standard was the same. So there's a fact issue with regard to that.

However, in the affidavits there is a complete failure to relate any governmental discretion with the acts complained of. In this particular case, the acts complained of are a failure to give suicide precautions and elopement precautions and to enforce those precautions. There is no evidence in this case, in the affidavits, that the suicide and elopement precautions were not given because they had to treat each patient, or that there were limited treatment options, or that there were scarce state resources, such as, not enough people, not enough staff, that there was not a room available at the mental diagnostic clinic, or any other governmental factor or concern. So

this case is very similar to *Kassen v. Hatley* and various CA's opinions, including *Gross v. Enns*, which this court heard about 1 month ago, where there was a complete disconnect between any supposed governmental factor and concern and the medical discretion.

Now, in their brief the petitioners have made the additional argument that because they were required to treat Roger Bossley under the mental health code, that this somehow colored their medical discretion. However, there is absolutely nothing that is contained in their affidavits indicating that the mental health code in anyway changed the standard of care with regard to how to treat Roger Bossley. In fact, the deposition testimony is to the contrary, where Dr. Urschel testified that patients receive the same quality of care at Hillside as at any private institution. He wasn't taught anything differently about suicide peculations at Hillside than at other institutions, one of which included a private institution. And Dr. Comfiest testified that people are at Hillside Center both voluntarily and by court order, and there is no difference in the standards of care on how they are treated.

Two additional quick arguments why that argument must fail. The Mental Health Code, the purpose is not to alter the standards of care, but to ensure that doctors that are treating patients that have been committed adhere to standards of care. It's a safeguard. And the petitioner's argument is apparently that this court should use these safeguards as a basis for official immunity, which would in effect remove all the safeguards. And that is certainly not what the legislature intended through the mental health code.

GONZALEZ: How did the door or the lock cause the death to the deceased?

OAKE: We have two doors in this case. We have an outer door and we have an inner door.

GONZALEZ: How did either door or either lock cause the death of the deceased?

OAKE: On the morning of the 12th, Friday, Roger Bossley had been diagnosed as being suicidal and he was also considered to be an elopement risk because he didn't want to go to Terrell State Hospital. The very piece of property that the doctors and the nurses decided would protect Roger Bossley, keep him out of harms way, were the doors. They decided that they would keep him inside the facility through the use of the locked doors. This had a double door locking system. They recognized and in fact that was their policy to lock the two doors whenever anybody wanted to be transferred back to Terrell, because generally people did not want to go back. So this was the very property designed to protect Roger Bossley. When the doors were taken away it was very similar to this court's case in *Lowe v. Texas Tech*, where originally a knee brace was given for protection of the football player, and then the knee brace was taken away. It's very similar to this case. Originally, the doors were given as protection to Roger Bossley to keep him inside the facility. And at some point during that morning, the inner door, self-locking door was opened, and left in an open condition. And then Angela Jones without checking the position of Roger Bossley, or making

sure that somebody was looking after him negligently unlocked and opened the front door, thereby, allowing him to escape the facility. So that is the causal connection.

GONZALEZ: Why is that not an adequate security or supervision? Once you've answered that question if we were to write an opinion the way that you are inviting this court to do does that end sovereign immunity or official immunity?

OAKE: No.

GONZALEZ: There will always be some use of property in dealing with patients?

OAKE: I understand that there is a line drawing issue here for the court. First of all, there may well be negligence supervision issues in this case. And we've also alleged that they should have been watching Roger Bossley more closely in this case, and should have been monitoring him. However, we have specifically alleged the use of the doors as triggering the Texas Tort Claims Act provision. This court has, although the section has caused problems and continues to cause problems, this court has established various general rules, one of which there must be a use - there cannot be a non-use - must be tangible property...

GONZALEZ: Why is this non-use of a lock?

OAKE: Because Angela Jones affirmatively used the door by unlocking it and opening it. There's an affirmative use.

GONZALEZ: But as to the deceased, the non-use of a lock caused the accident?

OAKE: Because there is an affirmative use of this tangible property. The medical decision was to use the doors as the protective device, that is similar to *Lowe v. Texas Tech*. And so what Angela Jones did, is she affirmatively used the door. Use of the door is not non-use of a door.

GONZALEZ: If we grant you that, what about the intervening cause: He overpowered the nurse or the lady that opened the door? Does that enter the equation or should it enter into our analysis?

OAKE: No. First of all there is no evidence that there is an assault involved. Apparently he waited for his opportunity and then he ran by Angela Jones. I think there might have been some physical contact. But understand the context that this occurs in, because Roger Bossley had been diagnosed as being with major depression. And a person that is suffering from major depression is not in control of their mind or their facilities. They do, the medical personnel have testified, that they do very irrational things, unpredictable things like try to run out of a door and escape and commit suicide when they are faced with the prospect of going to Terrell State Hospital,

which Roger Bossley was very scared of.

The last section would be 57.019, which specifically preserves liability for negligence except in limited circumstances that are not applicable here, and that statute recognizes the difference between negligence that is preserved and quasi judicial activity, which is granted immunity. And those circumstances are not applicable here. So, therefore, official immunity is not available to the individual defendants because there is no evidence that they were exercising governmental discretion.

Now we have gotten into the issue of governmental immunity. The specific allegations in this case are that Angela Jones unlocked and opened the front door to the center when the condition of the inner door was open, which allowed Roger to elope.

If I could repeat and strengthen my argument with regard to the use. These facts fall squarely within the established rules on use of property. It has always been the rule from this court that when property is affirmatively used or property is used and then taken away, or property is used in a defective condition, then the standard is met. And that line of cases is *Lowe*, with the knee brace; *Overton* with the bed rails; and *Robinson* with the life preserver. And it was recently restated in *Kerrville State Hospital v. Clark*. These facts fall squarely within the present. And as I've stated they are very similar to *Lowe* in that the doors were given and then the doors were affirmatively taken away. This case is actually stronger than *Overton* and *Robinson*, because in those cases, the property was never first given in the first place, or the portion of the property was not given.

This case is not similar to the non-use cases that this court has recently struggled with, *Kerrville State Hospital v. Clark* and *Kassen v. Hatley*, because it in fact does involve an affirmative non-use.

Now with regard to the causation issue. Apparently the petitioners in this case are arguing for direct causation. And that is simply not the law. The clause that are we dealing with, the "so-caused by language," has been interpreted by this court as referring back to the causation language in the earlier section, which involves proximate causation involving the negligent act or omission or the negligence of an employee. This property meets the causation standard because it in fact was the very piece of equipment that the doctors were trying to protect Roger Bossley by. So it is a proximate cause.

GONZALEZ: You admit though that this was not the instrumentality that caused the death?

OAKE: In this case, the truck caused the death. And in the *Lowe* case, it was the football player's collision that caused the injury, not the knee brace. In the *Robinson* case it was the water that caused the death, not the lack of a life preserver. In *Overton* it was the floor that caused the injury, and not the bed rail. But that is not a problem under the classic law of proximate

causation. It need not be the instrumentality of harm. It need only be a proximate cause or involved in a proximate cause chain.

GONZALEZ: If that's the case, if there had been (let's change the facts), and the fact that he was using that phone, placed in that situation given all the other facts, placed him in a situation where he could flee once the doors opened for any reason, the use of the phone, do you make the same argument by the mere fact that the phone is there in that place under those circumstances?

OAKE: Well Roger Bossley would be using the phone in that situation.

GONZALEZ: But that waived immunity. Is that enough to trigger the waiver of immunity?

OAKE: That would be closer to, I believe, a condition of property rather than a use of property. Because the defendants would have placed the phone in a certain condition and it would have been there on a permanent basis. And there would be no contemporaneous use of the phone by the defendants. And so, it wouldn't fall under the use provision. It may fall under a condition analysis.

We clearly have a use here that triggers the waiver of immunity. Now, the Bossleys have also alleged that a condition of property also triggered the waiver of immunity. They have specifically alleged that the inner door was left open and in an unlocked condition allowing Roger to escape.

Now the causation argument on the inner door is the same as the causation on the outer door. It has to refer back to the earlier paragraph, proximate causation involving a act or omission of negligence by the employee. And we would contend in this case that the condition is also satisfied because it was the act or omission or negligence of an employee of the center, which resulted in the condition of the inner door being left open. And also, it is connected with, connected to the use of the outer door by Angela Jones. Part of what makes Angela Jones' use of the outer door negligence is the fact that the inner door was in an open condition. And it was Angela Jones' use of the outer door that brought the condition of the inner door into the causal chain in this case. And so, we believe you do have the causation standard met under the earlier paragraph.

GONZALEZ: Under your argument would the pen that was used by the probate judge to send this individual to that facility be the property that triggered the waiver of sovereign immunity?

OAKE: First of all, I believe the probate judge would be entitled to immunity.

GONZALEZ: We're focusing on the property that's used and there's a connection. But for the judge signing the order with that particular tangible piece of property, we wouldn't be here?

OAKE: I believe that under proximate causation there is some point where it cuts off.

That would be too attenuated, I believe. Again, in this particular case, it is because it is the doctors themselves that chose the doors to be the property to protect Roger. Because the doors were not properly used, that allowed Roger to escape, and it falls right in and satisfies the proximate causation.

SPECTOR: I don't understand. The doctors' liability comes from what decisions they make?

OAKE: Yes. The way that the case has been pled, and if you look at the jurisdictional statement in their 4th amended petition, only Angela Jones and the center got notice under the Tort Claims Act. And in the petition, it is the acts of Angela Jones, the affirmative use of the door that triggers the Tort Claims Act. All of the other defendants, the pleadings involve a failure to order and a failure to do things, which we admit do not trigger the rise of the cause of action under the Tort Claims Act. And so we are pursuing the doctors and the other staff members on their individual basis for medical negligence. We are not seeking to base governmental waiver by MHMR on any act of the doctor or the other staff members.

The final issue is the relationship between official immunity and governmental immunity. And I would say first of all, that this court need not reach this issue because sovereign immunity is not appropriate in this case. And so there will not be a judgment against MHMR, which will protect Angela Jones under 101.106. But assuming for the sake of argument that there was, under 101.106 it states that "the immunity is limited to the employee whose acts gave rise to the cause of action." And we have alleged that only Angela Jones' acts have given rise to the cause of action against MHMR.

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REBUTTAL

PHILLIPS: Would you address his last point first?

LaBREC: I can't concede that point simply because I think there, and this has not been argued, but I think there's a distinction between the medical decisions that were made and the carrying out of those decisions, which the carrying out is what's involved here once the physicians make the decisions. The governmental matters involved are the actual carrying out of providing the security. I don't think there's anything medical about actually providing the security once the physicians have made their decisions. So I think the employees, certainly Ms. Jones is involved as well as the other employees would be entitled to that protection under qualified immunity.

I want to get back to a question that Justice Abbott asked earlier, and it was probably obvious that I couldn't think of which case *Overton* was, and _____ that is the _____ case. I think that ties right in with the *Lowe* decision, and the *Robinson* decision. All of those cases I distinguish and this court has distinguished them in the *Kerrville v. Clark* case. Those cases

specifically involved situations where a bed rail was clearly not provided, that caused the injury. No question about it. The life preserver was not provided. Different issue here judge. This is a different issue because had the lock been there, who's to say that he still would not have figured out a way to get out the door.

It's the causation issue that I focus on in this case. I think it's entirely too attenuated and that's how I distinguish this case. And the problem that I have, and this is not an easy issue as you certainly can tell by your questions, the problem that we have is if you waive immunity in this situation every case you will have waived, you will have effectively waived sovereign immunity, and I don't know exactly where you draw the line, but I don't think this is the case to do it.

I think the *Kerrville* case is a closer issue than we have in this case, because that actually was a decision of which drug to administer. I think that's more of an abuse case than here.

I get back to my real basic common sense issue, the door was locked or it wasn't. And there's nothing defective about a lock, and there's no allegation that there was anything defective, the CA concluded that. They said it was defectively something or other. But there's nothing in the record to indicate that there was anything defective. It was simply misused arguably and this court has clearly said that that's not sufficient. As to the causation issue, I need not go back over that. But clearly if he had gotten on a bus while hitchhiking and it was a city bus, that's the negligent use of the tangible property, that's a whole lot closer in proximity to the door; therefore, the use of the bus would have given rise to his liability as well, and it goes on and on from there, and that's not what the legislature intended.

This is not a fairness issue unfortunately for the Bossleys. There's nothing fair about sovereign immunity I've never contended and those of us that practice in this area have never contended that it was. Nothing fair about it at all. It's simply that's what the law says.