

5-1-1991

## Knight v. Jewett: Reasonable Implied Assumption of Risk as a Complete Defense in Sports Injury Cases

Ann K. Bradley

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Ann K. Bradley, *Knight v. Jewett: Reasonable Implied Assumption of Risk as a Complete Defense in Sports Injury Cases*, 28 SAN DIEGO L. REV. 477 (1991).

Available at: <https://digital.sandiego.edu/sdlr/vol28/iss2/9>

This Note is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

# ***Knight v. Jewett*: Reasonable Implied Assumption of Risk as a Complete Defense in Sports Injury Cases**

## I. INTRODUCTION

Americans love sports. They are avid sports spectators and participants. For example, annual Super Bowl football games account for nine of the ten most watched television programs of all time.<sup>1</sup> According to the Census Bureau, "the number of people taking part in recreation is greater now than in 1965, and it will continue to rise" as the population grows.<sup>2</sup> The trend is toward "more active participatory forms of recreation."<sup>3</sup> But who is responsible when a participant is injured during play? Is it the sponsor of the game? The teammate or opponent who accidentally injured the player? Or is it the individual player, who assumed the risk of injury when choosing to play?

The legal answer to this question is uncertain in California. The California Supreme Court has not clearly ruled whether reasonable implied assumption of risk<sup>4</sup> (hereinafter RIAR) remains a complete defense to an action for negligence under California's system of comparative fault.<sup>5</sup> The California Supreme Court may resolve this issue soon, because it has granted review in numerous assumption of risk

---

1. NATIONAL FOOTBALL LEAGUE, OFFICIAL 1990 NATIONAL FOOTBALL LEAGUE RECORD AND FACT BOOK 302 (1990). Over one million fans watched some portion of the game according to A.C. Nielsen figures. The only non-Super Bowl show in the top ten was the 1983 M\*A\*S\*H\* special.

2. Robinson, *Where's the Boom?*, AMERICAN DEMOGRAPHICS, March 1987, at 34, 56. Information from the National Recreation Surveys conducted by the Census Bureau in 1965 and 1982.

3. *Id.* at 36.

4. RIAR occurs when a plaintiff acts reasonably in encountering a known risk of injury. It differs from express assumption of risk, because the agreement is implied. It differs from unreasonable assumption of risk where a plaintiff acts negligently toward herself in confronting the risk of injury. RESTATEMENT (SECOND) OF TORTS § 496A, at 561-62 (2d ed. 1965) [hereinafter RESTATEMENT (SECOND)].

5. Comparative fault is a system whereby damages are apportioned according to each party's negligence. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). *Li* left open the question whether RIAR remains a complete defense. *See infra* note 15 and accompanying text.

cases.<sup>6</sup>

In the meantime, California's intermediate appellate courts grapple with the viability and application of the RIAR doctrine.<sup>7</sup> In a recent Fourth District decision, the Court of Appeal in *Knight v. Jewett*<sup>8</sup> "join[ed] the clear California trend . . . that — notwithstanding the adoption of comparative negligence — reasonable implied assumption of risk remains a viable defense."<sup>9</sup> In *Knight*, the plaintiff was injured in an impromptu game of touch football, during a Super Bowl half-time, when an opposing player accidentally stepped on her hand. Knight was familiar with touch football and voluntarily joined the game. The defendant prevailed on an assumption of risk defense.<sup>10</sup>

This Note will examine the controversy surrounding RIAR and discuss its likely outcome. Section II will review the divergence of opinion among California appellate courts and commentators. Section III will examine *Knight v. Jewett* which follows the majority position. Section IV will analyze the issues and arguments regarding the doctrine. Section V will recommend how the California Supreme Court should resolve the issue.

---

6. In addition to *Knight v. Jewett*, 232 Cal. App. 3d 1142, 275 Cal. Rptr. 292 (1990), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 804 P.2d 1300, 278 Cal. Rptr. 203 (1991), the California Supreme Court has granted review in *Hacker v. City of Glendale*, 228 Cal. App. 3d 1013, 279 Cal. Rptr. 371 (1991), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 1024, 282 Cal. Rptr. 840 (1991), *Krol v. Sampson*, 227 Cal. App. 3d 724, 278 Cal. Rptr. 164 (1991), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 10, 282 Cal. Rptr. 124 (1991), *Cohen v. McIntyre*, 233 Cal. App. 3d 201, 277 Cal. Rptr. 91 (1991), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 806 P.2d 842, 279 Cal. Rptr. 100 (1991), *Harrold v. Rolling J Ranch*, 228 Cal. App. 3d 260, 266 Cal. Rptr. 734 (1990), *modified*, 218 Cal. App. 3d 841a, *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990), and *Ford v. Gouin*, 227 Cal. App. 3d 1175, 266 Cal. Rptr. 870 (1990), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990). These cases are not citeable authority (see rules 976(d) and 977(a) Cal. Rules of Court), but are used in this Note for illustrative purposes.

The supreme court has already heard oral argument in *Ford*. The case has caught the interest of the popular press, which sees far-reaching effects: "The court's decision could effect not only participants in recreational sports but those who face risks on the job. The vigorous legal debate surrounding the [*Ford*] case has raised broad questions about freedom of choice and personal responsibility." Hager, *Court to Decide Who Pays for Taking a Risk*, Los Angeles Times, July 8, 1991, at A1, col. 4, A19, col. 1 (San Diego County ed.).

7. This Note will deal only with the viability and application of the doctrine in actions for negligence in sports injury cases like *Knight v. Jewett*. This Note will deal only tangentially with the doctrine in employment and strict liability cases.

8. 232 Cal. App. 3d 1142, 275 Cal. Rptr. 292 (1990), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 804 P.2d 1300, 278 Cal. Rptr. 203 (1991).

9. *Id.* at 1149, 275 Cal. Rptr. at 295.

10. *Id.* at 1150, 275 Cal. Rptr. at 296.

## II. BACKGROUND

## A. California Supreme Court

In 1975, the California Supreme Court decided *Li v. Yellow Cab Co.*<sup>11</sup> In *Li*, the court replaced the “‘all-or-nothing’ rule of contributory negligence”<sup>12</sup> with a system of comparative fault, “the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties.”<sup>13</sup> The court explained how the acceptance of comparative fault would impact other legal doctrines, such as assumption of the risk:

As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. “To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant’s negligence, plaintiff’s conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . . Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant’s duty of care.” We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.<sup>14</sup>

Despite the supreme court’s effort to clarify the status of assumption of risk under comparative fault, California appellate courts have debated the supreme court’s meaning and intent in the sixteen years since *Li* was decided.<sup>15</sup> All appellate courts generally agree that *unreasonable* implied assumption of risk was subsumed under the comparative negligence system as a form of contributory negligence.<sup>16</sup>

11. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

12. *Id.* at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875. Contributory negligence bars all recovery if the plaintiff in any way contributes to his own injury. *Id.* at 808, 532 P.2d at 1230, 119 Cal. Rptr. at 861.

13. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

14. *Id.* at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73. (quoting Grey v. Fibreboard Paper Products Co., 65 Cal. 2d 240, 418 P.2d 153, 53 Cal. Rptr. 545 (1966) (other citations omitted; emphasis in original)).

15. “*Li* raised considerable doubt as to the survival of assumption of the risk as a tort defense, except for express contractual assumption.” *Knight*, 232 Cal. App. 3d at 1148, 275 Cal. Rptr. at 294. The language, “where plaintiff is held to agree,” may refer to only express assumption of risk situations, or to RIAR situations as well. *See infra* text accompanying note 100.

16. *See, e.g., Knight*, 232 Cal. App. 3d at 1149, 275 Cal. Rptr. at 295; Harrold v.

All courts further agree that *express* assumption of risk, when an oral or written contract exists between the parties, clearly survives as a defense.<sup>17</sup> The issue to be resolved is whether reasonable implied assumption of risk (RIAR) has been abolished or retained as a separate and complete defense to actions for negligence.

### B. Fifth and Second Districts Favor Abolition

The Fifth District Court of Appeal was the first court to rule on reasonable implied assumption of risk as a separate defense to an action for negligence in the post-*Li* era.<sup>18</sup> In its 1983 decision in *Segoviano v. Housing Authority*,<sup>19</sup> the court came out squarely against the doctrine, holding that RIAR “plays no part in the comparative negligence system of California . . . .”<sup>20</sup> Interestingly, the facts confronting the *Segoviano* court were very similar to those in *Knight*. The plaintiff, Segoviano, was injured while participating in a recreational flag football game sponsored by the defendant Housing Authority.<sup>21</sup> Segoviano was pushed out-of-bounds during a play by the defendant’s recreational coordinator who was playing on the opposing team. Segoviano fell and severely injured his shoulder.<sup>22</sup> Like Knight, Segoviano had prior knowledge of, and experience with the game.<sup>23</sup>

Unlike the *Knight* court, however, the *Segoviano* court refused to recognize the RIAR doctrine, and found for the plaintiff. In an opinion which has been repeatedly criticized by other courts,<sup>24</sup> the

---

Rolling J. Ranch, 228 Cal. App. 3d 260, 269-70, 266 Cal. Rptr. 734, 740 (1990), *modified*, 218 Cal. App. 3d 841a, *rev. granted*, \_\_\_\_ Cal. 3d \_\_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

17. See, e.g., *Knight*, 232 Cal. App. 3d at 1148, 275 Cal. Rptr. at 294; *Harrold*, 218 Cal. App. 3d at 269, 266 Cal. Rptr. at 740.

18. *Knight*, 232 Cal. App. 3d at 1148, 275 Cal. Rptr. at 294.

19. 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).

20. *Id.* at 164, 191 Cal. Rptr. at 579. However, in a very recent case, the Fifth District declined to follow *Segoviano* or the majority position of *Ordway v. Superior Court*, 198 Cal. App. 3d, 243 Cal. Rptr. 536 (1988), see *infra* text accompanying notes 36-39. In *Van Meter v. American Motor Sports Ass’n.*, 227 Cal. App. 3d 1198, 278 Cal. Rptr. 288 (1991), an official, as opposed to a participant, was injured during an off-road car race. Noting that “the status of assumption of risk has reduced itself to a battle of ‘*Segoviano*’ versus ‘*Ordway*’ . . . .” the court, nevertheless, chose a third alternative, adopting a view espoused by Frizell and other commentators. *Van Meter*, 227 Cal. App. 3d at 1205, 278 Cal. Rptr. at 292. Drawing a distinction between “primary” and “secondary” assumption of risk, the court held that it was for the jury to decide whether the hazards encountered in the activity were inherent (primary) or added (secondary), or both, and which proximately caused the injury. *Id.* at 1209, 278 Cal. Rptr. at 295. Only in the first case, primary assumption of risk, would the defense act as a complete bar. *Id.*

21. *Segoviano*, 143 Cal. App. 3d at 165, 191 Cal. Rptr. at 580.

22. *Id.*

23. *Id.*

24. See, e.g., *Ordway*, 198 Cal. App. 3d at 104, 243 Cal. Rptr. at 539 (“In our view, that opinion turned the law on its head.”); *Knight*, 232 Cal. App. 3d at 1148 and n.1, 275 Cal. Rptr. at 294 and n.1 (*Segoviano* “has found little support in subsequent

*Segoviano* court interpreted *Li* as abolishing RIAR except in cases of express assumption of risk.<sup>25</sup>

The *Segoviano* court had few allies until a Second District appellate court decided *Harrold v. Rolling J Ranch*<sup>26</sup> in 1990. Although recognizing the RIAR doctrine, the *Harrold* court contended abolition was the “[b]etter [r]easoned [v]iew.”<sup>27</sup> In *Harrold*, the plaintiff, a self-proclaimed experienced horseback rider, had looped the reins around the saddle horn and was taking off her jacket when the horse she was riding suddenly bucked and threw her to the ground. The stable failed to inform Harrold of a similar incident when this same horse spooked and threw a previous rider who had waved his hat.<sup>28</sup> The trial court granted summary judgment to the defendant stables on a RIAR defense, but the Court of Appeal reversed.<sup>29</sup>

The *Harrold* court reviewed the history of assumption of risk in California, both pre and post-*Li*, before concluding that “it is unclear” whether the doctrine of RIAR remains a complete defense to an action for negligence.<sup>30</sup> The court explained, even if the RIAR doctrine is viable, the defense was inapplicable in this case because Harrold did not have “actual knowledge of her horse’s propensity to spook.”<sup>31</sup> The court explained that a *general* knowledge that one can fall off a horse is insufficient; Harrold would have to have been warned of the prior incident in order for her to have assumed the *increased* risk of riding the particular horse.<sup>32</sup>

In contrast, other Second District courts have generally upheld the RIAR doctrine. In a case pre-dating *Harrold*, a Division Five court reached the same result as the *Harrold* court, but recognized the viability of RIAR.<sup>33</sup> In *Von Beltz*, a stuntwoman was held not to have assumed the increased hazards in a movie stunt when the scene

cases,” and “is also contrary to . . . Restatement Second of Torts, and a number of non-California authorities” (citations omitted)).

25. *Segoviano*, 143 Cal. App. 3d at 169-70, 191 Cal. Rptr. at 583.

26. 228 Cal. App. 3d 260, 266 Cal. Rptr. 736 (1990), *modified*, 218 Cal. App. 3d 841A (1990), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

27. *Id.* at 269, 272, 266 Cal. Rptr. at 735, 740.

28. *Id.* at 263, 266 Cal. Rptr. at 736.

29. *Id.* at 262, 266 Cal. Rptr. at 735.

30. *Id.* at 269, 266 Cal. Rptr. at 740.

31. *Id.* at 273, 266 Cal. Rptr. at 742.

32. *Id.* at 275, 266 Cal. Rptr. at 743.

33. *Von Beltz v. Stuntman, Inc.*, 207 Cal. App. 3d 1467, 1477, 255 Cal. Rptr. 755, 760 (1989). The court agreed with *Ordway* that RIAR is “‘only another way of stating that the defendant’s duty of care has been reduced in proportion to the hazards attendant to the event.’” *Id.* See also *infra* text accompanying notes 36-39.

was changed on the second take without her knowledge or consent.<sup>34</sup> In related cases, Second District courts (including *Harrold's* Division Seven) had no difficulty affirming summary judgments based on assumption of risk.<sup>35</sup>

### C. First and Fourth Districts Favor Retention

A 1988 Fourth District Court of Appeal opinion best defines the majority position in favor of the continued viability of RIAR. In *Ordway v. Superior Court*,<sup>36</sup> Judy Casella, a professional jockey, was thrown from her horse and injured during a horse race when another jockey "crossed over" without sufficient clearance.<sup>37</sup> The court held: "Thus, our reading of *Li* and the authorities discussed convinces us that the doctrine of reasonable implied assumption of risk remains viable and, where applicable, provides a complete defense to a cause of action for personal injuries."<sup>38</sup>

The *Ordway* court explained:

The correct analysis is this: The doctrine of reasonable implied assumption of risk is only another way of stating that the defendant's duty of care has been reduced in proportion to the hazards attendant to the event. Where no duty of care is owed with respect to a particular mishap, there can be no breach; consequently as a matter of law, a personal injury plaintiff who has voluntarily — and reasonably — assumed the risk cannot prevail. Or stated another way, the individual who knowingly and voluntarily assumes a risk, whether for recreational enjoyment, economic reward, or some similar purpose, is deemed to have agreed to reduce the defendant's duty of care.<sup>39</sup>

The court rejected Casella's contention that she did not consider the sport dangerous. The court found her knowing and voluntary participation in the race constituted an implied assumption of its inherent

---

34. *Id.* at 1479, 255 Cal. Rptr. at 761. Von Beltz was severely injured when the stunt car in which she was a passenger collided with another vehicle during the filming of the movie "Cannonball Run." The first take of the stunt was performed without mishap; however, unbeknownst to Von Beltz, the director told the stunt driver to double his speed on the second take in order to heighten the effect of the scene. *Id.* at 1475-76, 255 Cal. Rptr. at 759.

35. See *Neinstein v. Los Angeles Dodgers*, 185 Cal. App. 3d 176, 229 Cal. Rptr. 612 (1986) (spectator hit with foul ball while sitting in unscreened seat at baseball game); *King v. Magnolia Homeowners Ass'n.*, 205 Cal. App. 3d 1312, 253 Cal. Rptr. 140 (1988) (repairman injured climbing a ladder he knew was unsafe); *Nunez v. R'Bibo*, 211 Cal. App. 3d 559, 260 Cal. Rptr. 1 (1989) (experienced gardener injured in fall while using obviously rickety ladder); *Hacker v. City of Glendale*, 228 Cal. App. 3d 1013, 279 Cal. Rptr. 371 (1991) (experienced tree trimmer electrocuted when high voltage wires touched branch of tree he was trimming), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 1024, 282 Cal. Rptr. 840 (1991).

36. 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988).

37. *Id.* at 109, 243 Cal. Rptr. at 542-43. The offending jockey violated a rule which the court termed "the equine equivalent of an unsafe lane change." *Id.* at 109, 243 Cal. Rptr. at 543.

38. *Id.* at 107, 243 Cal. Rptr. at 541.

39. *Id.* at 104, 243 Cal. Rptr. at 539.

risks, thus barring her suit.<sup>40</sup>

Although *Ordway* involved a professional athlete, the case embodied attributes that are also present in recreational sports injury cases: (1) the injury sustained was one that was inherent in the sport; (2) no intent to injure was proven; (3) the plaintiff had knowledge of and experience with the activity; and, (4) the plaintiff voluntarily decided to participate. These factors, taken together, create the implied assumption that the plaintiff reasonably confronted known hazards, thereby relieving the defendant of the duty to take precautions. Moreover, the *Ordway* court specifically included recreational injury situations in its analysis when it listed "recreational enjoyment" in addition to "economic reward" among the benefits of participating in a sport.<sup>41</sup>

The First District has followed *Ordway* in recreational injury cases.<sup>42</sup> In *Ford v. Gouin*,<sup>43</sup> an appellate court joined "[t]he clear California trend . . . toward validating RIAR as a defense."<sup>44</sup> An experienced waterskier was injured when he collided with overhanging tree branches while skiing barefoot and backwards through a narrow channel. The court cited "policy reasons" for its decision:

[T]he defense of RIAR survives in California . . . for the policy reason that it is deemed fair and useful to maintain. In our contemporary and litigious society, where fault of the parties is compared to resolve liability for injury, one who is relieved of fault because he owes no duty should continue to escape liability entirely. . . . Thus, courts in appropriate circumstances can apply this doctrine and expeditiously resolve cases through motions for sum-

---

40. *Id.* at 111-12, 243 Cal. Rptr. at 544. The court observed that the accident in *Ordway* was a

classic case of negligence, i.e., a failure to exercise due care. But by participating in the horse race, she relieved others of any duty to conform their conduct to a standard that would exempt her from the risks inherent in a sport where large and swift animals bearing human cargo are locked in close proximity under great stress and excitement.

*Id.* at 109, 243 Cal. Rptr. at 543.

41. *Id.* at 104, 243 Cal. Rptr. at 539. See also *infra* note 96 and accompanying text.

42. First District courts have also affirmed the doctrine in non-sports-injury cases. See, e.g., *Cohen v. McIntyre*, 233 Cal. App. 3d 201, 277 Cal. Rptr. 91 (1991), (veterinarian voluntarily encountered the known risk of being bitten when he removed the muzzle from a dog that had previously snapped at him) *rev. granted*, \_\_\_\_ Cal. 3d \_\_\_\_, 806 P.2d 842, 279 Cal. Rptr. 100 (1991); *Donohue v. San Francisco Hous. Auth.*, 230 Cal. App. 3d 635, 281 Cal. Rptr. 446 (1991), (fire fighter assumed the risk of injury when he slipped on wet concrete stairs during a fire safety inspection), *rev. granted*, \_\_\_\_ Cal. 3d \_\_\_\_, 814 P.2d 289, 284 Cal. Rptr. 510 (1991).

43. 227 Cal. App. 3d 1175, 266 Cal. Rptr. 870 (1990), *rev. granted*, \_\_\_\_ Cal. 3d \_\_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

44. *Id.* at 1188, 266 Cal. Rptr. at 878.



#### D. Third and Sixth Districts Signal Approval

Although the Third and Sixth Districts have not had an opportunity to express their views in a sports injury case since the adoption of comparative negligence, both have recognized the RIAR doctrine. In *Nelson v. Hall*,<sup>46</sup> a Third District Court of Appeal held that reasonable implied assumption of risk is a viable defense to strict liability imposed by California's "Dog Bite Statute."<sup>47</sup> The court explained the veterinarian assistant who was bitten by a dog under treatment had voluntarily assumed a known risk by virtue of her chosen profession.<sup>48</sup>

The Sixth District recently assumed the viability of the doctrine for purposes of its decision in *Maehl v. O'Brien*,<sup>49</sup> but held it inapplicable under the facts of the case. In this work-related injury case, an independent contractor's helper was seriously hurt when the redwood tree he was helping remove fell more quickly than he had anticipated, catching him before he could run to safety. Following the reasoning of the Second District decisions of *Von Beltz* and *Harrold*,<sup>50</sup> the court held the injured plaintiff had not assumed the risk, as a matter of law, because he was not specifically aware of the speed at which a tree stripped of branches would fall.<sup>51</sup> The court explained that Maehl's admitted knowledge and appreciation of the general

---

45. *Id.* at 1187-88, 266 Cal. Rptr. at 877-78. A year after *Ford*, another First District court upheld the RIAR defense as a complete bar to a negligence action following a recreational softball game injury. In *Krol v. Sampson*, 227 Cal. App. 3d 724, 278 Cal. Rptr. 164 (1991), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 10, 282 Cal. Rptr. 124 (1991), the plaintiff lost an eye as the result of being hit by a thrown ball as he ran toward second base. Rejecting the plaintiff's argument that RIAR had been eliminated by California's adoption of comparative fault, the court adopted the *Ordway* analysis and held that the doctrine "survives as a defense which can negate the duty element of a negligence cause of action." *Krol*, 227 Cal. App. 3d at 727, 730, 278 Cal. Rptr. at 166, 169.

46. 165 Cal. App. 3d 709, 211 Cal. Rptr. 668 (1985).

47. *Id.* at 710-11, 211 Cal. Rptr. at 670 (referring to CAL. CIV. CODE § 3342 (West 1989) which specifies that a dog owner is liable for any injury even in the absence of evidence or knowledge of vicious propensity).

48. *Nelson v. Hall*, 165 Cal. App. 3d at 714, 211 Cal. Rptr. at 672. "This is a case of 'true' or 'primary' assumption of the risk whereby the defendant is impliedly relieved of any duty of care by the plaintiff's acceptance of employment involving a known risk or danger." *Id.*

49. 231 Cal. App. 3d 674, 283 Cal. Rptr. 23 (1991).

50. See *supra* notes 31-34 and accompanying text. The *Maehl* court specifically cited similarities to the facts of *Von Beltz* involving a stuntperson who had assumed the risks inherent in a stunt where a car was driven at one speed, but not when the director increased the speed of the car on a second take. *Maehl*, 231 Cal. App. 3d at 672, 283 Cal. Rptr. at 31.

51. *Id.*

danger inherent in falling trees was not enough.<sup>52</sup>

Thus, most California appellate courts favor the continued viability of RIAR, although some do so reluctantly. With the exception of the *Segoviano* court, all seem to accept RIAR as a complete defense when the hazards encountered are those that are clearly inherent in the activity such that the plaintiff, by participation, can be held to have assumed them.

### E. Commentators Are Divided

Legal commentators have engaged in a significant, if limited, debate over the continued vitality of assumption of risk. This debate has sharpened with the coming of comparative negligence.<sup>53</sup> In part, the debate appears to arise from confusion surrounding the precise meaning of the doctrine<sup>54</sup> and its application to different situations.<sup>55</sup>

Unlike most California appellate courts, the commentators frequently divide reasonable implied assumption of risk into two categories: primary and secondary.<sup>56</sup> Primary assumption of risk involves a duty analysis. According to Prosser, in the primary context, the "plaintiff voluntarily enters into some relation with the defendant; with knowledge that the defendant will not protect him against . . . future risks."<sup>57</sup> Because of the plaintiff's decision, the defendant has no duty to plaintiff and cannot be negligent.<sup>58</sup>

Secondary assumption of risk involves a situation in which the plaintiff is presented with a known risk, created by the defendant's negligence, but proceeds voluntarily to encounter it.<sup>59</sup> The *Restate-*

52. *Id.*

53. See W. KEETON, D. DODDS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 481 n. 10 (5th ed. 1984) [hereinafter PROSSER AND KEETON]; Fleming, *The Court of California 1974-1975, Foreword: Comparative Negligence At Last — By Judicial Choice*, 64 CAL. L. REV. 239, 260 (1976); 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 21.0, at 187 n.1 (1986) [hereinafter HARPER, JAMES & GRAY]; Frizell, *Assumption of Risk in California: It's Time To Get Rid Of It*, 16 W. ST. U.L. REV. 627, 628 (1989); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.1, at 153 (2d ed. 1986).

54. See PROSSER AND KEETON, *supra* note 53, § 68, at 480; HARPER, JAMES & GRAY, *supra* note 53, § 21.0, at 187; V. SCHWARTZ, *supra* note 53, § 9.1, at 154.

55. See RESTATEMENT (SECOND), *supra* note 4, § 496A-496G; James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 185 n.4 (1968).

56. See, e.g., Frizell, *supra* note 53, at 630.

57. PROSSER AND KEETON, *supra* note 53, § 68, at 481 (The *Knight* court adopts this position); see also Fleming, *supra* note 53, at 264; HARPER, JAMES & GRAY, *supra* note 53, § 21.0, at 188-89; Frizell, *supra* note 53, at 630.

58. PROSSER AND KEETON, *supra* note 53, § 68, at 481.

59. *Id.*

ment (*Second*) of Torts notes that in such a situation the plaintiff's recovery is barred if the plaintiff has discovered the danger and chosen to encounter it.<sup>60</sup> Professors Harper, James and Gray describe this secondary form of assumption of risk as a variation of negligence.<sup>61</sup> Dean Prosser, by contrast, states such conduct is in the "intersection" of assumption of risk and contributory negligence, but:

[w]here they have been distinguished, the traditional basis has been that assumption of risk is a matter of knowledge of the danger and voluntary acquiescence in it, while contributory negligence is a matter of fault or departure from the standard of conduct of the reasonable person, however unaware, unwilling, or even protesting the plaintiff may be.<sup>62</sup>

Secondary assumption of risk has been almost universally criticized. Under comparative negligence principles, an anomaly is created whereby the *unreasonable* plaintiff is permitted to recover some damages, but the plaintiff whose conduct is *reasonable* is barred from recovering anything.<sup>63</sup> Professor Fleming describes the use of assumption of risk to completely defeat a reasonable-acting plaintiff as "whimsical," when compared to permitting an unreasonable plaintiff to recover.<sup>64</sup> Even Prosser notes: "[W]here the defendant's negligence has forced the plaintiff into a situation where he must reasonably choose to undergo the risk, there seems to be a fundamental flaw in reasoning that the plaintiff should thereby be held to have forfeited any right to charge the defendant for his resulting injuries."<sup>65</sup>

Professor Schwartz, in his leading work on comparative negligence, also criticizes the retention of assumption of risk. He argues, "[a] vigorous application of implied assumption of risk as an absolute defense could serve to undermine seriously the general purpose of a comparative negligence [system] to apportion damages on the basis of fault."<sup>66</sup>

In the sports or recreation context, primary assumption of risk — not secondary — is most frequently involved. Prosser refers to the spectator at a baseball game who sits "in an unscreened seat, and so consent[s] that the players may proceed with the game without taking precautions to protect him from being hit by the ball."<sup>67</sup> John Fleming concurs that a spectator or participant in a sport, who is familiar with the rules, assumes the inherent risks thereby eliminat-

---

60. RESTATEMENT (SECOND), *supra* note 4, § 496C, comment f.

61. HARPER, JAMES & GRAY, *supra* note 53, § 21.0, at 189.

62. PROSSER AND KEETON, *supra* note 53, § 68, at 481-82.

63. See, e.g., PROSSER AND KEETON, *supra* note 53, § 68, at 498; Segoviano v. Hous. Auth., 143 Cal. App. 3d 162, 170, 191 Cal. Rptr. 578, 583-84 (1983).

64. Fleming, *supra* note 53, at 262.

65. PROSSER AND KEETON, *supra* note 53, § 68, at 497.

66. V. SCHWARTZ, *supra* note 53, § 9.5, at 180.

67. PROSSER AND KEETON, *supra* note 53, § 68, at 481.

ing the defendant's duty of care.<sup>68</sup> Harper, James and Gray also agree that players have no duty to protect other participants from normal play activities.<sup>69</sup> This theme is echoed by Professor Frizell who wrote: "Participation [in a sporting event] is implied consent to whatever is permitted by the rules, or to be expected within the customs of the game."<sup>70</sup>

Primary assumption has been criticized because it is simply "the counterpart of the defendant's lack of duty" and "a confusing way of stating certain no duty rules."<sup>71</sup> In this context, commentators' concern is not with the result, but with the confusion they claim occurs between assumption of risk and traditional duty issues.<sup>72</sup>

Recently, Professor Frizell argued that RIAR, in its primary form, is not a defense to negligence because it deals with the issue of duty. Frizell maintains when no duty exists, there can be no breach, and therefore no negligence that requires a defense.<sup>73</sup> Nonetheless, Prosser and Fleming refer to the doctrine as the assumption of risk defense.<sup>74</sup>

While Dean Prosser acknowledges that primary assumption of risk can be a duty issue, he generally supports retention of a separate doctrine. "[B]y entering freely and voluntarily into any relation or situation where the negligence of the defendant is obvious, the plaintiff may be found to accept and consent to it, and to undertake to look out for himself . . ."<sup>75</sup>

Professor Schwartz distinguishes the consent analogy, pointing out that one consents to what is known, but assumption of risk infers a "consent" to what might be - i.e., the unknown.<sup>76</sup> He concludes that "facts constituting assumption of risk are as close to contributory negligence as they are to consent."<sup>77</sup> When a person voluntarily encounters a known risk, "this is a form of responsibility or fault. . ."<sup>78</sup> He explains: "The true meaning of comparative negli-

68. Fleming, *supra* note 53, at 264.

69. HARPER, JAMES & GRAY, *supra* note 53, § 21.3, at 223.

70. Frizell, *supra* note 53, at 640 (emphasis added).

71. HARPER, JAMES & GRAY, *supra* note 53, § 21.0, at 189-90; *See also* V. SCHWARTZ, *supra* note 53, § 9.1, at 157.

72. *See* HARPER, JAMES & GRAY, *supra* note 53, § 21.0, at 189.

73. Frizell, *supra* note 53, at 627, 630.

74. PROSSER AND KEETON, *supra* note 53, § 68, at 486; Fleming, *supra* note 53, at 239, 264.

75. PROSSER AND KEETON, *supra* note 53, § 68, at 485 (emphasis added).

76. V. SCHWARTZ, *supra* note 53, § 9.5, at 179.

77. *Id.* at 179-80.

78. *Id.* at 180.

gence is comparative responsibility. When a plaintiff engages in classic assumption of risk conduct, he is *in part* responsible for his injury.”<sup>79</sup> Thus, Schwartz would abolish assumption of risk as a complete and separate defense and merge it with comparative negligence.

Thus, the legal commentators have an important point of agreement, despite their theoretical differences. Even those who criticize the use of primary assumption of risk as an analysis of duty, seem to agree the defendant is relieved of exercising due care when the risks are inherent in the activity. Disagreement arises when the defendant has acted negligently and has exposed the plaintiff to the risk (secondary assumption of risk). However, those who oppose the doctrine under this circumstance seem to agree that the plaintiff’s recovery should be reduced (although not barred), because the plaintiff’s unreasonable conduct constitutes contributory negligence. The point of greatest contention is whether a plaintiff who reasonably encounters a known risk should be barred from recovery or permitted full recovery.

### III. KNIGHT V. JEWETT

#### A. Facts

In January 1987, Kendra Knight joined a group of men and women to watch the annual Super Bowl football game at a home in Vista, California.<sup>80</sup> During half-time, Knight and Jewett, among others, decided to play a “pick-up” game of co-ed touch football.<sup>81</sup> Shortly after they had begun to play, Knight warned Jewett to play less roughly.<sup>82</sup> Nevertheless, on the next play, Jewett knocked her down and stepped on the little finger of her right hand.<sup>83</sup> After three unsuccessful surgeries, Knight’s finger was amputated.<sup>84</sup>

The specific facts of how the accident happened are in dispute.<sup>85</sup> However, Knight did not contest that she was familiar with football (having played the game and watched it on television),<sup>86</sup> and that

---

79. *Id.* (emphasis in original).

80. *Knight v. Jewett*, 232 Cal. App. 3d 1142, 1146, 275 Cal. Rptr. 292, 293 (1990), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 804 P.2d 1300, 278 Cal. Rptr. 203 (1991).

81. *Id.*

82. *Id.*

83. *Id.* at 1147, 275 Cal. Rptr. at 293.

84. *Id.*

85. Jewett claims he “jumped up to intercept a pass and as he came down he knocked Knight over. When he landed, he stepped back and onto Knight’s hand.” *Id.* Knight’s version has Jewett knocking her down from behind as they both ran down the field. *Id.* at 1147, 275 Cal. Rptr. at 293-94. She claims she “put her arms out to break the fall and Jewett ran over her, stepping on her hand.” *Id.* at 1147, 275 Cal. Rptr. 294.

86. Knight was “an avid television watcher of Monday night professional football and sometime touch football player. . . .” *Id.* at 1150, 275 Cal. Rptr. at 296.

she voluntarily participated in the half-time game.<sup>87</sup> The court also found "Jewett did not intend to step on Knight's hand and did not intend to hurt her."<sup>88</sup>

Knight sued Jewett for negligence and assault and battery.<sup>89</sup> The trial court granted summary judgment in favor of Jewett based on the defense of reasonable implied assumption of risk.<sup>90</sup> Knight appealed.

### B. Fourth District Appellate Opinion

The Fourth District Court of Appeal affirmed the lower court's decision holding that RIAR is a complete defense to an action for negligence.<sup>91</sup> The court also held that the facts did not support a claim for assault and battery because no evidence established the requisite intent.<sup>92</sup>

After a brief review of the decisional history since *Li*, the *Knight* court asserted that *Ordway* contains "the definitive statement of the law" of RIAR.<sup>93</sup> The doctrine implies a prior agreement between plaintiff and defendant that the defendant is relieved of the duty of due care because the plaintiff is knowingly and voluntarily assuming the risk of injury inherent in the activity.<sup>94</sup>

Knight asserted that the defense was "inapplicable because Jewett's conduct was outside the reasonable expectations of the participants"; but the Court of Appeal found this contention unpersuasive.<sup>95</sup> The court also rejected Knight's argument that *Ordway* applied only to professional athletes, not amateurs.<sup>96</sup> In essence, the opinion looked to the very nature of the activity and determined "*in the context of sports, it is always unrealistic to expect a narrow range of conduct among the participants.*"<sup>97</sup> The court explained: "It

87. *Id.* at 1146, 275 Cal. Rptr. at 293.

88. *Id.* at 1147, 275 Cal. Rptr. at 294.

89. *Id.* at 1146, 275 Cal. Rptr. at 293.

90. *Id.*

91. *Id.* at 1153, 275 Cal. Rptr. at 297-98.

92. *Id.*

93. *Id.* at 1149, 275 Cal. Rptr. at 295. By relying on *Ordway*, the *Knight* court assumed the viability of RIAR as a complete and separate defense.

94. *Knight v. Jewett*, 232 Cal. App. 3d at 1153, 275 Cal. Rptr. at 297-98.

95. *Id.* at 1150, 275 Cal. Rptr. at 296.

96. *Id.* at 1150 n.3, 275 Cal. Rptr. at 296 n.3. Although *Ordway* involved a professional jockey, the *Knight* court explained RIAR also applies to amateurs because the benefits of assuming a risk enumerated by the *Ordway* court included recreational pleasure as well as economic gain. *Knight*, 232 Cal. App. 3d at 1150 n.3, 275 Cal. Rptr. at 296 n.3.

97. *Id.* at 1150, 275 Cal. Rptr. at 296 (emphasis added).

is axiomatic that those who engage in or follow competitive sports know physical conduct causing injuries is routinely caused by both the acts of adversaries and of collaborators by reason of the very nature of the activity in which all participate."<sup>98</sup> Thus, Knight's participation, itself, amounted to a knowing and voluntary assumption of the risk.<sup>99</sup>

#### IV. ANALYSIS

##### A. *Did the Supreme Court Eliminate RIAR?*

As previously discussed, California's appellate courts disagree on whether the supreme court eliminated the assumption of risk defense in its decision in *Li v. Yellow Cab Co.* The *Segoviano* court interpreted the *Li* language, "held to agree,"<sup>100</sup> to mean "expressly" agrees and thus concluded the court had abolished implied assumption of risk.<sup>101</sup> Other courts believe that the *Li* court's reliance on *Grey v. Fibreboard Paper Products, Co.* in discussing assumption of risk "implicitly recognized the continuing validity of [the doctrine]. . . ,"<sup>102</sup> because *Grey* was dealing only with the distinction between "reasonable" and "unreasonable," not "express" and "implied."<sup>103</sup> The majority of courts, including the *Knight* court, believe the supreme court left the question open.<sup>104</sup> The fact that the supreme court has accepted *Knight* for review (along with numerous other assumption of risk cases) strongly suggests that, if it has not resolved the issue, it soon will.

##### B. *Should RIAR Be Abolished?*

###### 1. Logic

Both courts and commentators have questioned the logic of maintaining RIAR after adoption of comparative negligence. As the

---

98. *Id.* at 1150, 275 Cal. Rptr. at 295-96.

99. *Id.* at 1150, 275 Cal. Rptr. at 296.

100. *Li*, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. 872-73 (1975).

See *supra* text accompanying note 14 for full quote.

101. *Segoviano v. Hous. Auth.*, 143 Cal. App. 3d 162, 168-69, 191 Cal. Rptr. 578, 583 (1983).

102. *Krol v. Sampson*, 227 Cal. App. 3d 724, 728 n.3, 278 Cal. Rptr. 164, 167 n.3 (1991), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 10, 282 Cal. Rptr. 124 (1991).

103. *Id.* In *Grey*, the court found that an experienced machinist acted unreasonably in encountering a known risk when he was injured while repairing the defendant's paper cutting machine. *Grey v. Fibreboard Paper Products Co.*, 65 Cal. 2d 240, 242, 245-46, 418 P.2d 153, 154, 156, 53 Cal. Rptr. 545, 546, 548 (1966).

104. See, e.g., *Ford v. Gouin*, 227 Cal. App. 3d 1175, 1179, 266 Cal. Rptr. 870, 872 (1990), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990); *Harrold v. Rolling J Ranch*, 228 Cal. App. 3d 260, 272, 266 Cal. Rptr. 734, 742 (1990), *modified*, 218 Cal. App. 3d 841a, *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

question is frequently put: "Why should someone who acts unreasonably be allowed to recover under comparative negligence while someone who acts reasonably is barred from any recovery?"<sup>105</sup> *Ordway* provides an explanation of this seeming anomaly: "[T]he problem is not of law but semantics. If the 'reasonable-unreasonable' labels were simply changed to 'knowing and intelligent' versus 'negligent or careless,' the concepts would be more easily understood."<sup>106</sup> Commentators have criticized this explanation, but have not agreed on an explicit solution.<sup>107</sup>

The options are three: (1) maintain RIAR as a complete bar, (2) allow the plaintiff full recovery, or (3) apportion damages by comparing the plaintiff's reasonable action with the defendant's unreasonable (i.e., negligent) conduct. *Knight v. Jewett* exemplifies this conundrum. If the doctrine is maintained as a complete defense, Knight receives nothing for her serious injuries despite her reasonableness. If the doctrine is abolished, Jewett is charged with a duty to protect Knight, even though Jewett himself was exposed to the same risks. And, if their conduct is compared, Knight's reasonable (non-negligent) action becomes the basis for recovery (if Jewett is found to be negligent toward her). The first option appears to punish reasonableness, the second is unfair from the defendant's perspective, and the third creates a new anomaly that flies in the face of almost 400 years of negligence, or fault-based, law.<sup>108</sup>

## 2. *A Useful Doctrine*

Proponents of the doctrine argue RIAR remains viable and necessary, because it is not part of comparative negligence. When a plaintiff is acting reasonably (i.e., not negligently), it is illogical to consider her contributorily negligent in order to apportion 100 percent of the fault to her.<sup>109</sup> Thus, dealing with a plaintiff's reasonable actions in assuming known risks requires a separate doctrine. In such

105. See *supra* text accompanying notes 63-65. This is the basis of the *Segoviano* court's reasoning that: "Elimination of RIAR as a separate defense avoids punishing reasonable conduct." *Segoviano*, 143 Cal. App. 3d at 170, 191 Cal. Rptr. at 584.

106. *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 105, 243 Cal. Rptr. 536, 540 (1988).

107. See, e.g., Frizell, *supra* note 53, at 646 (favors abolition of RIAR); PROSSER AND KEETON, *supra* note 53, § 68, at 497 (favors maintenance of doctrine as a complete bar).

108. *Weaver v. Ward*, Hobart 134, 80 Eng. Rep. 284 (King's Bench 1616) (cited by Prosser as earliest known case recognizing fault requirement for liability. W. PROSSER, CASES AND MATERIALS ON TORTS 5-6 (8th ed. 1988)).

109. V. SCHWARTZ, *supra* note 53, § 9.5, at 179.



cases, detractors generally do not dispute the result of no liability to the defendant. They contend, however, that reasonable implied assumption of risk is superfluous — just another way of stating no duty rules.<sup>110</sup> Indeed, a majority of appellate courts appear to agree that primary RIAR results in no duty and, therefore, no negligence on the part of the defendant.<sup>111</sup> Yet RIAR has value as a separate defense, because it focuses attention on the *plaintiff's* conduct, where the traditional duty analysis focuses on the *defendant's* conduct.<sup>112</sup>

Again, *Knight v. Jewett* provides an appropriate illustration. In evaluating Jewett's RIAR defense, the *Knight* court explained that the dispute about how the accident happened was "immaterial."<sup>113</sup> The defendant's conduct was important only to the extent that it was "within the ordinary expectations of the participants in the particular sport."<sup>114</sup> The focus of the inquiry was rightly on the plaintiff's conduct to determine whether she knew and appreciated the risks and voluntarily assumed them.<sup>115</sup>

### 3. Policy Considerations

Policy arguments exist on both sides of the debate. The personal, social, economic or other benefits derived by sports participants are generally cited as the primary reasons for maintaining an assumption of risk defense. As explained by the court in *Krol v. Sampson*:<sup>116</sup>

Finally, we note that precluding liability for simple negligence in sporting contests, where the participants have actual knowledge of a sport's inherent risks, furthers the policy that active and vigorous participation in athletic endeavors should not be discouraged by the threat of litigation. Participation in recreational team sports is a socially desirable activity offering benefits to the participants and society as a whole. When an accidental injury . . . occurs, it is unfortunate that the victim and family must bear the loss; but the alternative is to turn recreational sports into grist for the mills of litigation.<sup>117</sup>

Even the *Segoviano* court, while it rejected the doctrine, recognized this justification for reasonable implied assumption of risk.<sup>118</sup> Indeed,

---

110. See *supra* text accompanying notes 71-72.

111. See *supra* text accompanying notes 37-39.

112. See *Lopez v. McDonald's Corp.*, 193 Cal. App. 3d 495, 505, 238 Cal. Rptr. 436, 441 (1987).

113. *Knight*, 232 Cal. App. 3d at 1151, 275 Cal. Rptr. at 297.

114. *Id.*

115. *Id.*

116. 227 Cal. App. 3d 724, 278 Cal. Rptr. 164 (1991), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 10, 282 Cal. Rptr. 124 (1991).

117. *Id.* at 738, 278 Cal. Rptr. at 174.

118.

Flag football is usually beneficial to all the participants and to society as a whole. Such activity should be encouraged. . . . Anyone who participates in an organized, socially approved recreational activity is fully aware of the possibil-

the California Supreme Court has expressed concern about the impact abolition of RIAR might have on recreational sports: "If every person helping someone enjoy recreation . . . is subject to litigation, we will ultimately put everyone out of business, won't we?"<sup>119</sup>

As a corollary, at least one court has cited judicial efficiency as a reason to maintain the RIAR doctrine.<sup>120</sup> Reasonable implied assumption of risk as a complete defense allows the court to find no duty on the part of the defendant as a matter of law and thus dispose of meritless cases at the summary judgment stage.<sup>121</sup>

Opponents of RIAR contend the doctrine is inconsistent with the purpose of tort law, which is to compensate injured plaintiffs.<sup>122</sup> As Justice Kline of the First District frequently points out in his dissents: RIAR is a "defendant's doctrine that . . . cuts down the compensation of accident victims."<sup>123</sup> Retaining the doctrine, according to the president of the California Trial Lawyers Association, "would allow a wrongdoer to get off scot-free, even though he was partially or totally at fault."<sup>124</sup>

The controversy on this point can be resolved to some extent by making the distinction that most commentators make between primary and secondary assumption of risk. In sports cases, when an injury is sustained by a knowledgeable and voluntary participant as the result of a hazard inherent in the sport, *primary* reasonable implied assumption of risk should be applied. By his participation, the plaintiff has assumed those risks and must bear the burden of injury to obtain the benefits of play. In such situations, a sports participant is not a "victim" of another's "fault" because the participant has relieved the defendant of any duty toward him. On the other hand, when another's negligence has created a hazard that is not inherent in the sport, the doctrine is arguably inapplicable unless the evidence shows the plaintiff knowingly and voluntarily assumed the new or increased risk.

ity of injury due to violation of the rules of play, yet the decision to play may be perfectly reasonable.

*Segoviano*, 143 Cal. App. 3d at 175, 191 Cal. Rptr. at 587-88.

119. Hager, *supra* note 6, at A19, col. 3 (quoting Justice Armand Arabian hearing argument in *Ford v. Gouin*).

120. *Ford*, 227 Cal. App. 3d at 1188, 266 Cal. Rptr. at 878.

121. *Id.*

122. See HARPER, JAMES & GRAY, *supra* note 53, § 21.8, at 259.

123. *Ford*, 227 Cal. App. 3d at 1197, 266 Cal. Rptr. at 884 (Kline, J. dissenting, quoting HARPER, JAMES & GRAY, *supra* note 53).

124. Hager, *supra* note 6, at A19, col. 1 (quoting Ian Herzog).

## V. RECOMMENDED SUPREME COURT ACTION

### A. Affirmation of RIAR Doctrine

The California Supreme Court should follow its previous orders and precedents by affirming reasonable implied assumption of risk as a viable defense. The court has already given a "strong signal" in favor of the doctrine in the procedural history of *Ordway*.<sup>125</sup> The defendants in *Ordway* sought a writ of mandate from the denial of their motion for summary judgment by the trial court. At first, the Fourth District Court of Appeal refused to hear the petition, and defendants requested review by the California Supreme Court. While the supreme court did not itself hear the petition, it remanded the matter to the Fourth District with directions to grant the writ in light of the New York case of *Turcotte v. Fell*.<sup>126</sup> On similar facts, *Turcotte* held that the doctrine of RIAR barred an action for negligence.<sup>127</sup> "Taking its cue from our supreme court, the *Ordway* court held that reasonable implied assumption of risk is still a complete defense in California."<sup>128</sup> Significantly, the supreme court subsequently denied review of the *Ordway* decision.<sup>129</sup>

The supreme court's reaffirmation of the Fireman's Rule in the post-*Li* case of *Walters v. Sloan*<sup>130</sup> is also indicative of the court's approval of the RIAR doctrine. "The 'fireman's rule' is based primarily upon the principle of assumption of risk."<sup>131</sup>

The reasons for affirming RIAR as a complete and separate defense are several and significant. First, RIAR provides a necessary defense under California's system of comparative fault when contrib-

---

125. *Krol v. Sampson*, 227 Cal. App. 3d 724, 739, 278 Cal. Rptr. 164, 174-75 (1991) (White, J., concurring), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 811 P.2d 10, 282 Cal. Rptr. 124 (1991). *But see* Kline, J., dissenting in *Ford*, questioning the procedural posture of *Ordway* as a precursor of the Supreme Court's view of RIAR:

[T]he Supreme Court did not call public attention to its order or require its publication . . . ; it is therefore doubtful that the Supreme Court itself ever intended or expected that its administrative order would exert precedential effect in subsequent cases. Moreover, the order did not require the Court of Appeal to reach any particular result, the appellate court was directed only to consider the *Turcotte* opinion in the process of evaluating *Ordway's* petition.

*Ford v. Gouin*, 227 Cal. App. 3d 1196, 1627 n.5, 266 Cal. Rptr. 870, 883 n.5 (1990) (Kline, J., dissenting), *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

126. 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986).

127. *Id.* at 441, 502 N.E.2d at 969, 510 N.Y.S.2d at 54.

128. *Krol*, 227 Cal. App. 3d at 739, 278 Cal. Rptr. at 175 (White, J., concurring).

129. *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 112 (1988) (no parallel citation in Cal. Rptr.).

130. 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977). "The fireman's rule provides that negligence in causing a fire furnishes no basis for liability to a professional fireman injured fighting the fire." *Id.* at 202, 571 P.2d at 610, 142 Cal. Rptr. at 153.

131. *Nelson v. Hall*, 165 Cal. App. 3d 709, 714, 211 Cal. Rptr. 668, 672 (1985) (citations omitted).

utory negligence does not apply. In many respects, assumption of risk begins where contributory negligence leaves off. In the situation where sports participants impliedly consent to take their chances, a faultless or reasonable-acting plaintiff should not be able to hold a co-participant defendant (who was exposed to the very same risks) liable.

Second, RIAR levels the playing field by focusing on the plaintiff's conduct. The successful RIAR defense results in no duty on the part of the defendant, but it does so by examining what the plaintiff knew and appreciated. Be it Judy Casella, the professional jockey in *Ordway*, or Kendra Knight, the recreational touch football player, the correct analysis is whether the plaintiff's actions amounted to a knowing and voluntary assumption of risk. As the *Knight* court correctly pointed out, the defendant's behavior is only germane to the extent that it is within the normal range of conduct for the sport.

Third, RIAR serves important public policies. Appellate courts agree that sports activities are socially desirable and rewarding to the individual participants. The decision to engage in such activities, thereby encountering inherent or known and appreciated hazards, is an exercise in choice that should not be limited by the threat of litigation. The benefits of engaging in sports — whether for excitement, recreational pleasure, competitive challenge, health and fitness, personal satisfaction, or monetary compensation — should be freely available to those who wish to participate. Neither society nor individual sports participants are served by substituting the lawyer, judge and jury for the teammate, opponent and referee.

RIAR as a separate and complete defense also achieves important public policy goals by conserving scarce judicial resources. A finding of RIAR as a matter of law results in no duty and, therefore, no negligence, so courts can dispose of appropriate cases at the summary judgment stage.

### *B. Scope of the Doctrine*

Although the California Supreme Court should validate RIAR as a complete and separate defense in actions for negligence, it may wish to circumscribe the doctrine in some respects. Both case law and commentators demonstrate ways to limit the doctrine. The commentators draw a meaningful distinction between primary and secondary assumption of risk, which the court is urged to adopt. The primary version, where risks inherent in the activity are impliedly assumed through voluntary participation, should be explicitly re-

tained in the area of sports for the policy reasons previously discussed.<sup>132</sup> In contrast, the secondary form of reasonable implied assumption of risk, involving hazards created by the defendant's negligence, should be clarified and limited. If the plaintiff's actions are deemed unreasonable in encountering the risk, then the doctrine is subsumed under comparative negligence as a variation of contributory negligence. If the plaintiff acted reasonably (knowingly and voluntarily) in assuming the negligence, the doctrine should justifiably apply. As the *Knight* court noted, citing Prosser, one who knowingly and voluntarily confronts a danger is "regarded as tacitly or *impliedly* consenting to the negligence, and agreeing to take his own chances."<sup>133</sup> Affirmation of the doctrine, even in this secondary context, supports the public policy of encouraging sports activities.

However, the court can still fulfill other public policies (e.g., compensating injured plaintiffs) by narrowly defining the terms "knowing and voluntary."<sup>134</sup> For the RIAR doctrine to be applied to a particular fact situation, the court should make clear that the plaintiff must have "actual knowledge of the *specific* danger involved and the magnitude of the risk involved."<sup>135</sup> This does not mean, however, that the plaintiff must have "prescience that the particular accident and injury which in fact occurred was going to occur."<sup>136</sup> Nevertheless, as illustrated in *Harrold*, even if the injury sustained (falling off a horse) is of the type inherent in the sport (horseback riding), the plaintiff should not be deemed to have assumed the risk unless he or she has full knowledge and appreciation of the all the hazards involved — including those which may be created by the defendant's negligence.<sup>137</sup>

Finally, the court can make the doctrine more flexible by holding that RIAR is not always a matter of law for the court to decide. The supreme court can direct trial courts to involve the jury when questions arise regarding the nature of the inherent risks, the actual knowledge of the plaintiff, or the voluntariness of the participa-

---

132. See *supra* notes 116-21 and accompanying text.

133. *Knight*, 232 Cal. App. 3d at 1149, 275 Cal. Rptr. at 295 (emphasis in original). Although *Knight* is an example of primary assumption of risk, the court appears to recognize the possibility of assuming the risk of negligence (a concept generally associated with secondary assumption of risk).

134. See, e.g., PROSSER AND KEETON, *supra* note 53, § 68, at 486-90; *Harrold v. Rolling J. Ranch*, 228 Cal. App. 3d 260, 269, 266 Cal. Rptr. 736, 745 (1990), *modified*, 218 Cal. App. 3d 841a, *rev. granted*, \_\_\_ Cal. 3d \_\_\_, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

135. *Harrold*, 228 Cal. App. 3d at 274, 266 Cal. Rptr. at 743 (citations omitted, emphasis in original). See also *supra* text accompanying note 49.

136. *Tavernier v. Maes*, 242 Cal. App. 2d 532, 543, 51 Cal. Rptr. 575, 582 (1966) (pre-*Li* recreational injury case in which plaintiff was severely injured when a runner slid into second base during a softball game at a family picnic).

137. PROSSER AND KEETON, *supra* note 53, § 68, at 486-92.

tion.<sup>138</sup> Thus RIAR will only be applied as a complete bar in appropriate cases.

## VI. CONCLUSION

With *Knight v. Jewett* (and other RIAR cases) before the California Supreme Court, California courts will soon learn whether reasonable implied assumption of risk remains a separate and complete defense under the state's comparative negligence system. In sports injury cases, the supreme court should affirm primary RIAR as an elimination of a defendant's duty. Strong policy reasons argue for maintaining RIAR as a bar to recovery when a plaintiff voluntarily encounters risks inherent in a sport. However, when a defendant's negligence creates the risk (secondary RIAR), the doctrine should be carefully applied. For policy reasons, the court should uphold the bar when knowing and voluntary assumption is proved. When the evidence is less certain, however, the court may well be advised to leave it to a jury. The jury then will evaluate the reasonableness of the plaintiff's action by determining her knowledge and appreciation of the dangers involved and the voluntariness of her participation.

ANN K. BRADLEY

---

138. This approach has been suggested by Prosser, Fleming, Frizell and several courts. See, e.g., PROSSER AND KEETON, *supra* note 53, §68, at 487; *Harrold*, 228 Cal. App. 3d at 265-66, 266 Cal. Rptr. at 742.

