

Clarifying Duty: California's No-Duty-for-Sports Regime

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I. INTRODUCTION

The traditional doctrine of assumption of the risk was a potent defense that sheltered negligent defendants from liability to injured plaintiffs in a wide variety of settings ranging from injuries at sporting events¹ to employees injured on the job prior to the enactment of workers’ compensation legislation.² The focus of this consent-based defense was on whether there was a “voluntary acceptance [by the plaintiff] of a specific, known and appreciated risk.”³

That defense had been narrowed to the point of virtual extinction by the liberal California Supreme Court of the pre-1986 era.⁴ The lawmaking

1. See *Brown v. S.F. Baseball Club*, 222 P.2d 19 (Cal. Ct. App. 1950).

2. See *Lamson v. Am. Ax & Tool Co.*, 58 N.E. 585 (Mass. 1900).

3. *Knight v. Jewett*, 834 P.2d 696, 715 (Cal. 1992) (Kennard, J., dissenting).

4. See generally Neil M. Levy & Edmund Ursin, *Tort Law in California: At the Crossroads*, 67 CAL. L. REV. 497 (1979).

style of that court has been described by supporters and detractors as a “policy oriented judicial activism . . . remaking the entire body of tort law” by eliminating barriers to recovery for negligently injured plaintiffs.⁵ That lawmaking *style* is equally characteristic of the more conservative court of the post-1986 era, but the present-day court’s policy preference has been to limit these avenues to recovery. Nowhere is this more apparent than in the area of assumption of the risk.

In a series of cases, beginning in 1992, this more conservative court has reinvented the doctrine of assumption of the risk, replacing the traditional consent-based defense with a potentially far reaching regime of no-duty rules. The court’s major focus in this endeavor has been the development of no-duty rules applicable to sporting activities. On one level, these no-duty-for-sports rules are straightforward. As the court explained in a trilogy of decisions with opinions written by Chief Justice George, “as a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events.”⁶ Based on this policy, the court in its 1992 decision in *Knight v. Jewett* held that coparticipants in active sports breach a duty of care to each other only if they “intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”⁷ In *Knight* and in subsequent decisions expanding the reach of this “intentional injury/recklessness” rule, the court has been careful to point out that different categories of defendants play different roles in sports injury cases, “including owners of sports facilities, manufacturers of sports equipment, and coaches and instructors.”⁸ To determine whether the intentional injury/recklessness rule should be extended to relieve these categories of defendants from a duty of due care, courts are to focus on the “nature of the sport itself[,] . . . the defendant’s role in, or relationship to, the sport[,]” and the policy considerations that might justify relieving a defendant from a duty of reasonable care.⁹

5. Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820, 823 (1975); see also James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976).

6. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Cal. 2003).

7. *Knight*, 834 P.2d at 711.

8. *Kahn*, 75 P.3d at 39.

9. *Knight*, 834 P.2d at 709.

Unfortunately, things are not this simple. *Knight* and subsequent cases also appear to have endorsed a second no-duty rule that is analytically distinct from the sports participant intentional injury/recklessness rule and the framework and policies of that rule. As stated by *Knight*, “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself.”¹⁰ The only apparent criterion for the invocation of this no-duty rule appears to be a court’s determination that a risk posed by a defendant is an inherent risk of an activity in which the plaintiff is engaged. This is a true no-duty rule, not a “limited-duty” rule such as the intentional injury/recklessness rule. If the court finds a risk is inherent, summary judgment is appropriate.

We write that *Knight* and subsequent cases appear to endorse the inherent risk no-duty rule because, unlike the intentional injury/recklessness rule, the inherent risk no-duty rule has not been responsible for any of the California Supreme Court’s holdings exempting defendants from a duty of due care. These holdings have been based on the intentional injury/recklessness rule. The inherent risk no-duty rule, however, has figured in court of appeal decisions¹¹ and has been the central,¹² and at times exclusive,¹³ focus of highly critical academic commentary. Dylan Esper and Gregory Keating, for example, see these decisions as “abusing duty” by intruding on the traditional role of juries to make determinations of negligence.¹⁴ We share this concern. We also note that this inherent risk no-duty rule has been held by lower courts to relieve owners of sports facilities from a duty of due care, thus bypassing the analytic and policy framework carefully established under the intentional injury/recklessness rule. These courts have ignored the insistence by *Knight* and subsequent California Supreme Court decisions that before relieving defendants from a duty of due care, courts should focus on the “nature of the sport itself[,] . . . the defendant’s role in, or relationship to, the sport[,]” and whether imposing “a duty of care . . . would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events.”¹⁵

10. *Id.* at 708.

11. *See, e.g.*, *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855 (Cal. Ct. App. 1995).

12. *See, e.g.*, Dylan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265 (2006).

13. John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 334 (2006).

14. Esper & Keating, *supra* note 12.

15. *Knight*, 834 P.2d at 709; *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Cal. 2003).

The inherent risk no-duty rule, in addition, has been the source of confused, or at least confusing, analysis. In its 1997 decision in *Parsons v. Crown Disposal Co.*, for example, the court wrote:

[T]here are circumstances in which the relationship between defendant and plaintiff gives rise to a duty on the part of the defendant to use due care not to increase the risks inherent in the plaintiff's activity. For example, a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage. . . . Likewise, a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student.¹⁶

A person who is not well versed in the law in this area could well assume from this passage that purveyors of recreational activities and coaches or sports instructors owe a similar duty to injured persons and that this is a duty of due care. In fact, however, they may owe different duties. Coaches and instructors, as we will see, only owe a duty to refrain from intentionally injuring the athlete or engaging in reckless conduct totally outside the range of the ordinary activity involved in the sport. Purveyors of recreational activities, in contrast, may owe patrons a duty of due care—except with respect to risks that a court may determine are inherent in the sport. In cases where a risk is considered to be inherent in the sport, the defendant may not owe a duty of due care, but this is not because of the intentional injury/recklessness no-duty rule. Rather, it is because of the no-duty-for-inherent-risk rule. So, even in this situation, the duties owed by coaches or instructors and purveyors of recreational activities are not the same.¹⁷

But enough with this confusion. In this Article, we hope to untangle the confused no-duty-for-sports rules the court has created over the past decade and a half. We will argue that much of this confusion stems from the court's carrying over terminology and concepts of the traditional assumption of the risk defense. In Part II, we set forth the law of assumption of the risk as it stood prior to the court's decision in *Knight*. Parts III through V then carefully trace the adoption and elaboration of the no-duty-for-sports doctrine. These Parts attempt to expose the roots

16. *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 86–87 (Cal. 1997) (citations omitted).

17. The confusion continues to this day. In the 2006 decision of *Avila v. Citrus Community College District*, for example, the court wrote that “coaches and instructors have a duty not to increase the risks inherent in sports participation . . . [and] those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks . . .” 131 P.3d 383, 392 (Cal. 2006).

of the confusion that surround this doctrine. In Part VI, we suggest ways in which the court could clarify duty analysis in this area while retaining the basic analytic and policy framework laid out in *Knight*. We will explain, for example, that employment of the inherent risk concept serves no analytic purpose. It can only lead to confusion, and that label should be abandoned. The concept of inherent risk has also been carried over from the older cases. We will explain that the court of appeal decisions that have employed this concept can be better understood as decisions in which the court has determined that, as a matter of law, the defendant was not negligent. California tort law would be well served if courts avoided the use of the inherent risk concept. Doing so would bring badly needed clarity to the law in this area. Our goal in this Article is to provide this clarity and to rein in the haphazard spread of this new no-duty rule to areas such as commercial premises, where the policy justifications for the rule are inapplicable. In Part VII, the conclusion, we briefly review the steps the court could take to achieve this goal.

II. *LI V. YELLOW CAB CO.*, COMPARATIVE NEGLIGENCE, AND ASSUMPTION OF THE RISK

The traditional doctrine of assumption of the risk was a formidable defense that sheltered negligent defendants from liability to injured plaintiffs. Its focus was on the plaintiff's knowledge and voluntary acceptance of risk.¹⁸ The doctrine applied to plaintiffs in a broad range of cases including persons injured on amusement park rides, spectators at sporting events,¹⁹ sports participants,²⁰ and employees injured on the job prior to workers' compensation legislation.²¹

However, this doctrine fell on hard times. Critics objected to the consequences of the doctrine: like contributory negligence it leaves injured plaintiffs to bear the consequences of defendant negligence. Critics also assailed the doctrine as a needless source of confusion and complexity in the law and as a doctrine that often led to unfair, harsh—even draconian—results.²² As a consequence, in 1963, the New Jersey Supreme Court abolished the doctrine.²³ In its view, the cases in which

18. See *Knight*, 834 P.2d at 715 (Kennard, J., dissenting).

19. See, e.g., *Brown v. S.F. Baseball Club*, 22 P.2d 19 (Cal. Ct. App. 1950).

20. See *Knight*, 834 P.2d at 700 for a discussion of the traditional application of the doctrine of assumption of the risk in these situations.

21. See *Lamson v. Am. Ax & Tool Co.*, 58 N.E. 585 (Mass. 1900).

22. See, e.g., Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141 (1952).

23. See *McGrath v. Am. Cyanamid Co.*, 196 A.2d 238, 240–41 (N.J. 1963) (completing the abolition of assumption of the risk by banishing primary assumption of the risk as well); see also *Meistrich v. Casino Area Attractions, Inc.*, 155 A.2d 90, 95–96

the doctrine had been employed were, in fact, cases in which the defendant was not negligent or in which the plaintiff was contributorily negligent, and “it was erroneous to suggest to the jury that assumption of the risk was still another issue.”²⁴ Experience had shown that “the term ‘assumption of risk’ is so apt to create mist [rather than aid comprehension] that it is better banished from the scene.”²⁵

California took a different path. In 1975, the California Supreme Court in *Li v. Yellow Cab Co. of California* abolished the doctrine of contributory negligence and adopted a system of pure comparative negligence.²⁶ The court thereby greatly increased the incidence of defendant liability. After *Li*, plaintiff negligence no longer completely bars recovery in negligence suits; rather, damages are only “diminished in proportion to the amount of negligence attributable to the person recovering.”²⁷ The court rejected modified comparative negligence—a system in which plaintiff fault, if great enough, totally bars recovery—to avoid merely shifting “the lottery aspect of the contributory negligence rule to a different ground.”²⁸ *Li* recognized that “fault determinations should not completely frustrate the policy of loss distribution.”²⁹

The court’s express disapproval in *Li* of doctrines that totally bar recovery due to plaintiff’s conduct led to a secondary holding dealing with assumption of the risk. The court had previously exhibited its antagonism toward this defense, and *Li* held that “the defense of assumption of risk [is merged] 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.”³⁰ These are cases “where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant’s negligence.”³¹

Li thus merged cases of unreasonable assumption of the risk into its comparative fault regime, leaving open the question of the status of reasonable assumption of the risk. Because of a perception that it would

(N.J. 1959) (subsuming secondary assumption of the risk into the doctrine of contributory negligence).

24. *McGrath*, 196 A.2d at 239–40.

25. *Id.* at 240–41.

26. 532 P.2d 1226 (Cal. 1975).

27. *Id.* at 1243.

28. *Id.* at 1242 (footnote omitted).

29. See Levy & Ursin, *supra* note 4, at 509.

30. *Li*, 532 P.2d at 1241.

31. *Id.* at 1240.

be anomalous to totally bar recovery of reasonable plaintiffs, many believed that *Li* would lead to a complete abolition of the traditional defense of assumption of the risk.

III. *KNIGHT V. JEWETT*: THE ABOLITION OF ASSUMPTION OF THE RISK AND THE CREATION OF A NEW NO-DUTY REGIME

A. *The Abolition of Consent-Based Assumption of the Risk*

It was not until the 1992 companion cases of *Knight v. Jewett*³² and *Ford v. Gouin*³³ that the California Supreme Court resolved the question left open by *Li*. Recasting the issue thought to be left open in *Li*, now-Chief Justice George wrote in *Knight* that “the distinction in assumption of risk cases to which the *Li* court referred . . . was not a distinction between instances in which a plaintiff unreasonably encounters a known risk . . . and instances in which a plaintiff reasonably encounters such a risk.”³⁴ Instead, the distinction was between

(1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is “no duty” on the part of the defendant to protect the plaintiff from a particular risk . . . and (2) those instances in which the defendant does owe a duty . . . but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty³⁵

In the first category of cases—the no-duty cases—the plaintiff is barred from recovery whether or not he behaved reasonably. In the second category of cases, where the defendant does owe a duty but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty, the plaintiff may recover but the amount of recovery is determined by comparative fault principles.

At this analytical level, it is fair to say that *Knight* abolished the traditional defense of assumption of the risk, which was precisely how Justice Kennard characterized the decision in her dissent.³⁶ To maintain continuity with its *Li* decision, however, the *Knight* court retained the terminology of assumption of the risk. The court termed the first category of cases—the no-duty cases—“primary assumption of risk” cases.³⁷ The second category was termed “secondary assumption of risk.”³⁸ Despite the retention of this terminology, Justice Kennard’s characterization is accurate. If a plaintiff previously barred by recovery under assumption

32. 834 P.2d 696 (Cal. 1992).

33. 834 P.2d 724 (Cal. 1992).

34. *Knight*, 834 P.2d at 703.

35. *Id.*

36. *Id.* at 714 (Kennard, J., dissenting).

37. *Id.* at 703.

38. *Id.*

of the risk is still to be barred, it will be because the defendant's conduct did not breach a legal duty of care to the plaintiff. If a defendant breaches a duty owed to a plaintiff, the plaintiff will recover an amount determined by comparative fault principles.

Knight, however, created a more complex situation than this analysis has so far suggested because, in addition to introducing this new mode of analysis, *Knight* also introduced a new regime of no-duty rules. It will thus be necessary in the future to understand how this no-duty regime will be applied.

B. The Intentional Injury/Recklessness No-Duty Rule

1. The No-Duty Rule and Policy

Knight involved a touch football game in which one participant was injured by the rough play of another. Although the court in *Knight* abandoned the traditional, consent-based doctrine of assumption of the risk, it held that summary judgment for the defendant was proper because the defendant did not breach any duty of care owed to the plaintiff.³⁹ In reaching this result, the court created a new no-duty rule.

At its simplest level, *Knight* created a no-duty rule applicable to coparticipants in active sports. This no-duty rule was policy driven. In its subsequent decision in *Kahn v. East Side Union High School District*, the court explained that “as a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events.”⁴⁰ *Knight* “stressed the role of the participant in the sport and the likely effect on the sport of imposing liability on such persons.”⁴¹ In the court's view, to “impose liability on a coparticipant for ‘normal energetic conduct’ while playing—even careless conduct—could chill vigorous participation in the sport” and could “alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity.”⁴² Accordingly, the court created a no-duty rule: “[C]oparticipants breach a duty of care to each other only if they ‘intentionally injure[]

39. *Id.* at 712.

40. 75 P.3d 30, 38 (Cal. 2003).

41. *Id.*

42. *Id.* (citations omitted).

another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”⁴³

2. Knight's Policy Basis Assessed

The no-duty rule protecting participants in active sports followed from the court's view that to “impose liability on a coparticipant for ‘normal energetic conduct’ . . . while playing—even careless conduct—could chill vigorous participation in the sport” and could “alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity.”⁴⁴ In the dissent, Justice Kennard questioned whether “the policy basis for [the court's] duty limitation—that the law should permit and encourage vigorous athletic competition . . .”—justified the broad sweep of its no-duty rule.⁴⁵ In her view, a “no-duty rule [might be justified] as applied to organized, competitive, contact sports with well-established modes of play, [but] it should not be extended to other, more casual sports activities, such as the informal ‘mock’ football game . . .” involved in *Knight* itself.⁴⁶ In such situations, “the policy basis for the duty limitation . . . is considerably weakened or entirely absent.”⁴⁷

In a similar vein, Stephen Sugarman has written that “there may well be good policy reasons generally to prevent lawsuits by professional athletes for injuries suffered as part of the game through the fault of other participants.”⁴⁸ These include the presence of existing rulemaking bodies, penalty structures, and “reasonably generous injury insurance schemes that go well beyond what workers’ compensation would provide”⁴⁹ Thus, the “social objectives that tort law might serve by providing a remedy” may well already be served by alternative institutions.⁵⁰ This, however, is not the case with participants in nonprofessional recreational sports. In Sugarman's view, the broad no-duty rule adopted by *Knight* rests on “a dubious empirical judgment” regarding the chilling effect of liability based on normal negligence principles.⁵¹

43. *Id.* at 38–39 (quoting *Knight*, 834 P.2d at 711).

44. *Id.* at 38 (citations omitted).

45. *Knight*, 834 P.2d at 723 (Kennard, J., dissenting).

46. *Id.*

47. *Id.*

48. Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 848 (1997). Sugarman's article is the indispensable guide to the modern doctrine of assumption of the risk.

49. *Id.*

50. *Id.*

51. Stephen D. Sugarman, *Judges as the Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 DEPAUL L. REV. 455, 485 (1999).

The Wisconsin Supreme Court has rejected *Knight*, concluding that “the rules of negligence govern liability for injuries incurred during recreational team contact sports.”⁵² The court found that the “negligence standard, properly understood and applied, accomplishes the objectives sought by the courts adopting the recklessness standard, objectives with which we agree.”⁵³ The objective the court referred to is striking “the proper balance between freeing active and vigorous participation in recreational team contact sports from the chilling effect of litigation and providing a right of redress to an athlete injured through the fault of another.”⁵⁴

The court found the negligence standard effective because it can adapt “to a wide range of situations. An act or omission that is negligent in some circumstances might not be negligent in others.”⁵⁵ To determine if conduct constitutes negligence, the fact finder must weigh

the sport involved; the rules and regulations governing the sport; the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; . . . and the facts and circumstances of the particular case, including the ages and physical attributes of the participants, the participants’ respective skills at the game, and the participants’ knowledge of the rules and customs.⁵⁶

By examining these factors, the negligence standard becomes “sufficiently flexible to permit the ‘vigorous competition’” desired.⁵⁷

On the other hand, the New Jersey Supreme Court has agreed with *Knight* and cited a concern that may underlie the *Knight* holding. It wrote that “[o]ne might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play—a traditional source of a community’s conviviality and cohesion—spur[] litigation.”⁵⁸ In its view, the recklessness standard “recognizes a commonsense distinction between excessively harmful conduct and the more routine

52. *Lestina v. W. Bend Mut. Ins. Co.*, 501 N.W.2d 28, 29 (Wis. 1993). In that case, a forty-five-year-old plaintiff claimed that he was “slide tackled” by a fifty-seven-year-old opponent during a soccer game, producing serious injury and violating league rules. *Id.*

53. *Id.* at 33.

54. *Id.* at 31.

55. *Id.* at 33.

56. *Id.*

57. *Id.*

58. *Crawn v. Campo*, 643 A.2d 600, 607 (N.J. 1994).

rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.”⁵⁹

Whether based on a perhaps dubious policy of not chilling vigorous participation or a desire to preclude unseemly litigation over “the most commonly-accepted aspects of play—a traditional source of a community’s conviviality and cohesion,” the *Knight* holding represents a rejection of the view that juries should be trusted to mediate disputes utilizing the “fundamental principle” that liability should be imposed on a defendant “for an injury occasioned to another by his want of ordinary care or skill.”⁶⁰ As such, it is part of a broader trend in California Supreme Court decisions of the past two decades limiting the discretion of juries to impose liability based on general negligence principles.⁶¹ But the question of primary concern in this Article is with the specific rules of the *Knight* no-duty regime, their policy bases, and how far this no-duty regime will spread beyond the specific no-duty rule adopted in *Knight* for participants in active sports.

3. *The Rowland Duty Framework and Knight*

Five years after *Knight*, in *Parsons v. Crown Disposal Co.*, the court, in an opinion by Chief Justice George, elaborated on the relationship between the *Knight* no-duty rule and the broader duty framework established by the court in its landmark decision in *Rowland v. Christian*.⁶² *Parsons*

59. *Id.*

60. *Rowland v. Christian*, 443 P.2d 561, 563 (Cal. 1968) (quoting CAL. CIV. CODE § 1714 (West 2008)).

61. *See, e.g.*, *Thing v. La Chusa*, 771 P.2d 814, 829 (Cal. 1989) (establishing more rigorous criteria for plaintiff recovery in negligent infliction of emotional distress bystander cases). Critics of the liability-expanding decisions of the Traynor and Bird eras had been critical of negligence decisions that expanded the discretion given juries to impose liability based on broad negligence principles. A paradigm case for these critics was *Rowland v. Christian*’s abandonment of tradition landowner rules in favor of a general duty of reasonable care. *Rowland*, 443 P.2d at 564. James Henderson, for example, wrote in 1976:

The reforms and changes in the law of negligence in recent years have, purportedly to advance identifiable social objectives, eliminated much of the specificity with which negligence principles traditionally have been formulated. We are rapidly approaching the day when liability will be determined routinely on a case by case, “under all the circumstances” basis, with decision makers (often juries) guided only by the broadest of general principles. When that day arrives, the retreat from the rule of law will be complete, principled decision will have been replaced with decision by whim, and the common law of negligence will have degenerated into an unjustifiably inefficient, thinly disguised lottery.

Henderson, Jr., *supra* note 5, at 468.

62. *Rowland*, 443 P.2d at 561; *see Parsons v. Crown Disposal Co.*, 936 P.2d 70, 82–84 (Cal. 1997).

involved a horseback rider thrown from his horse as a consequence of the horse having been frightened by noise from the defendant's garbage truck.⁶³ The court identified a traditional no-duty rule limiting the duty that operators of machinery owe to horseback riders. The court in *Parsons* pointed out that this machinery operator no-duty rule should not be confused with its *Knight* no-duty rule. The court wrote that not every case "in which a court concludes that a defendant has not breached a duty of care needs to be denominated a 'primary assumption of risk' case. Instead, 'primary assumption of risk' simply describes a subcategory of those cases in which the defendant has not breached a duty of care."⁶⁴

Parsons recognized that to assess the viability of the no-duty rule applicable to machinery operators—or other no-duty rules—courts should engage "in a traditional duty inquiry utilizing the policy considerations set out in *Rowland v. Christian* . . ."⁶⁵ In its 1968 landmark *Rowland* decision, the California Supreme Court established the framework for analyzing duty issues. In *Rowland*, the court wrote of the "fundamental principle" that liability should be imposed "for an injury occasioned to another by his want of ordinary care or skill."⁶⁶ Courts would depart from this principle only upon the "balancing of a number of considerations," the major ones of which are

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.⁶⁷

Thus, in *Parsons*, the court began with *Rowland*'s statement that as "a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances.'"⁶⁸ The determination "[w]hether a given case falls within an exception to this general rule . . . 'is a question of law to be determined on a case-by-case basis.'"⁶⁹ This assessment is to be based on the *Rowland*

63. *Parsons*, 936 P.2d at 72–73.

64. *Id.* at 87–88 n.25 (emphasis omitted).

65. *Id.* at 87.

66. *Rowland*, 443 P.2d at 563 (quoting CAL. CIV. CODE § 1714 (West 2008)).

67. *Id.* at 564.

68. *Parsons*, 936 P.2d at 80 (quoting *Rowland*, 443 P.2d at 564).

69. *Id.*

policy considerations, to which the court added “the social value of the interest which the actor is seeking to advance.”⁷⁰ In the court’s view, these considerations, on balance, supported the traditional limited common law duty regarding machinery operators frightening horses.⁷¹

As the court recognized, the *Knight* no-duty-for-sports rule is a “subcategory of those cases in which the defendant has not breached a duty of care.”⁷² The *Knight* framework can be seen to truncate the *Rowland* analysis to focus on considerations that are especially relevant to sports participants. The *Knight* policy of not chilling vigorous participation by sports participants to avoid altering fundamentally the nature of the sport can be seen to focus on *Rowland*’s “extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care,” and perhaps the “moral blame attached to the defendant’s conduct.”⁷³

4. Extensions of Knight’s Intentional Injury/Recklessness No-Duty Rule Beyond Participants?

Knight raises the question of how courts are to determine when careless conduct in other situations will fall within its new no-duty rule. Because *Knight* abolished the traditional consent-based defense of assumption of the risk, defendants previously protected from liability by that doctrine may now seek shelter under *Knight*’s new no-duty regime. This may be the case in suits against hockey arena owners by spectators injured by pucks that fly into the stands.⁷⁴ Similarly, ski resorts will claim to owe no duty when skiers are injured on their slopes.⁷⁵ And amusement parks will do likewise when patrons are harmed by what they allege to be the negligent design of “thrill” rides. In the well known *Murphy* (Flopper) case, for example, Judge Cardozo held that assumption of the risk applied to a patron of an amusement park ride in his suit against the park owner.⁷⁶ Such defendants will now seek protections under *Knight*’s no-duty (primary assumption of the risk) rule. In fact,

70. *Id.* (emphasis omitted) (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 171 (5th ed. 1984)).

71. *Id.* at 84.

72. *Id.* at 88 n.25 (emphasis omitted).

73. *Rowland*, 443 P.2d at 564.

74. *See, e.g.*, *Nemarnik v. L.A. Kings Hockey Club, L.P.*, 127 Cal. Rptr. 2d 10, 18 (Cal. Ct. App. 2002) (holding that hockey arena owner owed no duty to eliminate the inherent risk of injury to spectators caused by flying pucks).

75. *See, e.g.*, *Souza v. Squaw Valley Ski Corp.*, 41 Cal. Rptr. 3d 389, 395 (Cal. Ct. App. 2006); *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 859 (Cal. Ct. App. 1995).

76. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

Disneyland and Knott's Berry Farm have done precisely this in litigation involving severe injuries occurring on high speed rides such as the Indiana Jones attraction.⁷⁷ These cases might seem a far cry from touch football, but such defendants often had avoided the need to litigate negligence claims because of the traditional assumption of the risk defense. *Knight* raises the question of how these and other cases will be resolved now. Fortunately, the *Knight* court provides a framework for developing a new no-duty regime.

5. *The Knight Framework*

As the *Knight* court recognized, the question is “how courts are to determine when careless conduct of another [falls within the *Knight* no-duty rule].”⁷⁸ The answer to this question is not “dependent on the knowledge or consent of the particular plaintiff.”⁷⁹ Rather, it “turns on whether the defendant had a legal duty to avoid such conduct or to protect the plaintiff against a particular risk of harm.”⁸⁰ In the sports context, a defendant's duty “depends heavily on the nature of the sport itself.”⁸¹ In anticipation of the prospect that its *Knight* ruling might be argued to extend to nonparticipants, the court wrote, “[a]dditionally, the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport.”⁸²

Sports injury cases, the court wrote, involve “diverse categories of defendants whose alleged misconduct may be at issue”⁸³ These include “owners of sports facilities such as baseball stadiums and ski resorts[,] . . . manufacturers and reconditioners of sporting equipment[,] . . . sports instructors and coaches[, and] . . . coparticipants”⁸⁴ In the “sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue”⁸⁵

77. See *Bolia-Schutt v. Cedar Fair, L.P.*, No. G033685, 2006 WL 401306, at *3 (Cal. Ct. App. Feb. 22, 2006).

78. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).

79. *Id.* at 709.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 710.

84. *Id.*

85. *Id.* The focus is on “the nature of the defendants' activities and the relationship of the plaintiffs and the defendants to that activity to decide whether, as a matter of public

The same event thus can involve different duties owed by different defendants. To illustrate this point, the court used the example of a baseball spectator injured by a thrown bat. In suits against the player who threw the bat and the stadium owner

two different potential duties [are] at issue—(1) the duty of the ballplayer to play the game without carelessly throwing his bat, and (2) the duty of the stadium owner to provide a reasonably safe stadium with regard to the relatively common (but particularly dangerous) hazard of a thrown bat. Because each defendant’s liability rest[s] on a separate duty, there [would be] no inconsistency in the jury verdict absolving the batter of liability but imposing liability on the stadium owner for its failure to provide the patron “protection from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected.”⁸⁶

Thus, the duty of the owner of a ballpark—or a ski resort—would be defined “not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport.”⁸⁷

C. The “Inherent Risk” Duty Rules

As described, the *Knight* no-duty analysis is straightforward. In the sports context, the focus is on the “nature of the sport itself[,] . . . the defendant’s role in, or relationship to, the sport,” and the policy considerations that might justify a no-duty-role.⁸⁸ Post-*Knight* duty analysis is complicated, however, by the fact that *Knight* can also be read to create a second, separate no-duty rule and also to create new duties of care where none had previously existed. This complexity is a consequence of the court’s use of the “inherent risk” concept, which is carried over from traditional assumption of the risk cases.⁸⁹

In explaining its policy-driven sports participants duty holding, the court employed the inherent risk concept. A long line of cases, including the court’s 1968 landmark decision in *Rowland v. Christian*, had established that “[a]s a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person.”⁹⁰ In the sports setting, however, the *Knight*

policy, the defendants should owe the plaintiffs a duty of care.” *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 354 (Cal. 1994).

86. *Knight*, 834 P.2d at 709.

87. *Id.*

88. *Id.*

89. *See, e.g.*, *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

90. *Knight*, 834 P.2d at 708.

court wrote, “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself”⁹¹ Moreover, “[i]n some situations . . . the careless conduct of others is treated as an ‘inherent risk’ of a sport, thus barring recovery by the plaintiff.”⁹² For the policy reasons previously discussed, the court held that this was the case for sports participants who thus would be liable only in cases of intentional injury or conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport. Although the inherent risk concept did no actual work in establishing *Knight*’s sports participants holding, its use by the court suggests that *Knight* established duty rules in addition to the recklessness rule.

1. No Duty for Inherent Risks?

After noting that “[a]s a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person,” the court wrote that a property owner, for example, “ordinarily is required to use due care to eliminate dangerous conditions on his or her property.”⁹³ However, “[i]n the sports setting, . . . conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.”⁹⁴ To illustrate this point, the court used the example of moguls on a ski run. The risks posed by moguls are an “inherent risk” of the sport of skiing. Although “moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them.”⁹⁵

The statement that the resort has no duty to eliminate moguls raises the question of what no-duty rule is being invoked by the court. It is possible that the court meant that a ski resort owes a duty not to intentionally injure its patrons or engage in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport. But this seems unlikely. At the point in the court’s opinion that it discussed the mogul example, it had not introduced the intentional

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

injury/recklessness rule. Moreover, the ski resort is an owner of a sports facility—not a participant. *Knight* laid out a clear analytic and policy framework to be employed to decide whether categories of defendants other than participants would be protected by its intentional injury/recklessness rule. This framework was not utilized by the court in reaching its conclusion that a ski resort has no duty to eliminate moguls. That no-duty rule came into play because, in the court’s view, the risks posed by moguls are an “inherent risk” of the sport of skiing.

This analysis suggests that *Knight* established a second no-duty rule that is analytically distinct from the sports participant/recklessness rule and the framework and policies of that rule. As stated by *Knight*, “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself.” The only apparent criterion for the invocation of this no-duty rule appears to be a court’s determination that a risk posed by a defendant is an inherent risk of an activity in which the plaintiff is engaged.⁹⁶ This is a true no-duty rule, not a limited-duty rule such as the intentional injury/recklessness rule. If the court finds a risk is inherent, summary judgment is appropriate. Moreover, this no-duty rule can be invoked without the usual *Rowland* analysis and the weighing of its policy considerations and without utilizing the *Knight* framework and policies. Thus the ski resort, a sport facility, is protected by this no-duty rule in disregard of *Knight*’s insistence that “the applicable duty . . . varies with the role of the defendant whose conduct is in issue.”

2. A Duty Not to Increase Risk Over Inherent Risk?

The court in *Knight* wrote that although “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.”⁹⁷ Returning to the ski resort example, the court wrote that “although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an

96. The court placed its sports participant/recklessness rule within this inherent risk analysis. The court wrote that “[i]n some situations . . . the careless conduct of others is treated as an ‘inherent risk’ of a sport, thus barring recovery by the plaintiff.” *Id.* The “question [that *Knight* answers is] how courts are to determine when careless conduct of another properly should be considered an ‘inherent risk’ of the sport that (as a matter of law) is assumed by the injured participant.” *Id.* at 708–09. The *Knight* analytic framework and policy analysis provided the methodology for answering this question—for determining when defendants are protected by *Knight*’s recklessness rule.

97. *Id.* at 708.

increased risk of harm.”⁹⁸ In the towrope example, the “risk, posed by a ski resort’s negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.”⁹⁹ This analysis suggests that a broad general duty might exist for persons who would otherwise not owe a duty of care and who have no relationship to a sports participant or to a sporting activity “to use due care not to increase the risks to a participant over and above those inherent in the sport.”¹⁰⁰

IV. EXTENSIONS OF *KNIGHT*’S INTENTIONAL INJURY/ RECKLESSNESS RULE

A. *Extension of the Intentional Injury/Recklessness Rule to Golf*

In *Knight* the court expressly left open the question whether a limited duty of care comparable to its *Knight* no-duty rule should be applied to “less active sports, such as archery or golf.”¹⁰¹ In 2007 the court in *Shin v. Ahn* answered this question, holding that “the primary assumption of risk doctrine does apply to golf and that being struck by a carelessly hit ball is an inherent risk of the sport.”¹⁰² Thus “golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport.’”¹⁰³ The court found court of appeal decisions that had previously reached this conclusion convincing. One of these, *Dilger v. Moyles*, had found *Knight*’s policies applicable to golf:

While golf may not be as physically demanding as . . . basketball or football, risk is nonetheless inherent in the sport. Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. . . .

Holding participants liable for missed hits would only encourage lawsuits and deter players from enjoying the sport. . . . Social policy dictates that the law should not discourage participation in such an activity whose benefits to the individual player and to the community at large are so great.¹⁰⁴

The court in *Shin* agreed with this conclusion.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 711 n.7.

102. *Shin v. Ahn*, 165 P.3d 581, 583 (Cal. 2007).

103. *Id.* at 590.

104. *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 593 (Cal. Ct. App. 1997).

B. Extension to Some Intentional Torts

In 2006 the court expanded the protection of the *Knight* rule to cover what would otherwise be an intentional tort by a participant.¹⁰⁵ In *Avila v. Citrus Community College District*, it held that a community college whose baseball team is engaged in intercollegiate competition owes “no duty to [an opposing batter at the plate] to prevent [its] pitcher from hitting batters, even intentionally.”¹⁰⁶ The court wrote that “in the sporting context, [primary assumption of the risk] precludes liability for injuries arising from those risks deemed inherent in a sport”¹⁰⁷ *Knight*, it will be recalled, had held that a participant’s careless conduct is to be treated as an inherent risk of a sport, precluding liability for such conduct. In contrast, a breach of a legal duty of care would exist in two types of situations: (1) if the participant “intentionally injures another player”; or (2) if the participant “engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”¹⁰⁸ In *Avila* the court conflated these two categories: “an athlete does not assume the risk of a coparticipant’s intentional or reckless conduct ‘totally outside the range of the ordinary activity involved in the sport.’”¹⁰⁹ Having made this move, the court ruled that “even if the . . . pitcher intentionally threw at [the plaintiff], his conduct did not fall outside the range of ordinary activity involved in the sport.”¹¹⁰ It thus held that the plaintiff’s action was barred by primary assumption of the risk. *Avila*, therefore, can be seen to convert *Knight*’s two prong inquiry into a single inquiry: whether conduct—intentional or reckless—is “totally outside the range of the ordinary activity involved in the sport.”

Avila, however, is best read as a holding limited to the well-entrenched practice of pitchers occasionally throwing at batters. This reading of *Avila* is certainly consistent with the court’s treatment of the recklessness/intentional injury rule in its other decisions¹¹¹ and with the court’s discussion in *Avila* of the well-established practice of pitchers occasionally throwing at batters. After surveying a variety of authorities, the court took judicial notice of the fact that, despite official disapproval, “pitchers have been throwing at batters for the better part of baseball’s century-plus history.”¹¹² It noted that pitchers “intentionally throw at

105. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383 (Cal. 2006).

106. *Id.* at 394.

107. *Id.* at 391.

108. *Knight*, 834 P.2d at 711.

109. *Avila*, 131 P.3d at 394.

110. *Id.*

111. *See, e.g.*, *Shin v. Ahn*, 165 P.3d 581 (Cal. 2007); *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30 (Cal. 2003).

112. *Avila*, 131 P.3d at 394 n.12.

batters to disrupt a batter's timing or back him away from home plate, to retaliate after a teammate has been hit, or to punish a batter for having hit a home run."¹¹³ Indeed, the practice is "so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: 'brushback,' 'beanball,' 'chin music.'"¹¹⁴ Based on these considerations, the court concluded that "[f]or better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball. It is not the function of tort law to police such conduct."¹¹⁵ Under this reading, *Avila* simply creates an exception, specific to baseball, to *Knight*'s general rule that participants owe a duty not to intentionally injure other participants.

C. Categories of Defendants

1. Coaches and Sports Instructors: *Kahn* v. East Side Union High School District

In 2003 the court in *Kahn* extended *Knight*'s no-duty/recklessness rule to coaches and sports instructors. At the same time, it created confusion regarding future applications of this no-duty rule.

In *Kahn* the court reaffirmed *Knight*'s analytic and policy framework and extended its intentional injury/recklessness no-duty rule to coaches.¹¹⁶ In an opinion for the court, Chief Justice George wrote that "the question of duty depends not only on the nature of the sport, but also on the 'role of the defendant whose conduct is at issue . . .'"¹¹⁷ Crucial to the *Knight* holding was the "role of the participant in the sport and the likely effect on the sport of imposing liability on such persons."¹¹⁸ As a "matter of policy"—to not "discourage vigorous participation"—the *Knight* court had adopted a no-duty rule to be applied to protect participants in active sports.¹¹⁹

In *Kahn* the court again pointed to the different roles played by different defendants, "including owners of sports facilities, manufacturers of sports equipment, and coaches and instructors."¹²⁰ Indeed, "[d]uties with respect to the same risk may vary according to the role played by

113. *Id.* at 393.

114. *Id.*

115. *Id.* at 394.

116. *Kahn*, 75 P.3d at 30.

117. *Id.* at 38.

118. *Id.* (emphasis omitted).

119. *Id.*

120. *Id.* at 39.

particular defendants involved in the sport.”¹²¹ The court again used the thrown baseball bat example. The “batter would not have a duty to avoid carelessly throwing the bat after getting a hit”¹²² The fear is that a full duty of care might chill “vigorous deployment of a bat in the course of the game” In contrast, “a stadium owner . . . may have a duty to take reasonable measures to protect spectators from carelessly thrown bats.”¹²³ In the cases of the stadium owner, “reasonable steps may minimize the risk without altering the nature of the sport.”¹²⁴

When the court in *Kahn* turned to the question of whether *Knight*’s no-duty rule should be extended to a new category of defendants—coaches—it concluded that although the coach’s role is different from a participant, an analogous policy was involved: the policy of not having a “chilling effect on the enterprise of teaching [by challenging a student] and learning skills that are necessary to the sport. At a competitive level, especially, this chilling effect is undesirable.”¹²⁵ The court wrote that “[t]o impose a duty to mitigate the inherent risks of learning a sport by refraining from challenging a student . . . could have a chilling effect on the enterprise of teaching and learning skills that are necessary to the sport.”¹²⁶ In the sports setting the “object to be served by the doctrine of primary assumption of risk . . . is to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity.”¹²⁷ Since this “concern applies to the process of learning to become competent or competitive in such a sport,” the “standard set forth in *Knight* . . . as it applies to coparticipants, generally should apply to sports instructors”¹²⁸ Thus a plaintiff must allege and prove that “the instructor acted with intent to cause a student’s injury or that the instructor acted recklessly in the sense that the instructor’s conduct was ‘totally outside the range of the ordinary activity’ . . . in teaching or coaching the sport.”¹²⁹

121. *Id.* at 38 (emphasis omitted).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 40.

126. *Id.*

127. *Id.* at 43.

128. *Id.*

129. *Id.* (quoting *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992)).

2. Kahn's Policy Assessed

Despite the similarities between participants and coaches or sports instructors, the *Knight* policies become more attenuated in the latter situation. Justice Kennard in a dissenting opinion and Justice Werdegar in a concurring opinion pointed to significant differences in the two situations. Justice Kennard criticized the majority for its failure to recognize “the significant difference between the two groups.”¹³⁰ Although “[p]ersons participating in active sports have to expect that a coparticipant may play too roughly[,] . . . coaches of student athletes teach them the skills necessary to perform their sport of choice safely and effectively.”¹³¹

Looking back on his experience on a high school baseball team, a *New York Times* writer has recounted how the coach holds an almost god-like position for a young inexperienced athlete.¹³² The student will do almost anything the coach asks without question. In this vein, Justice Kennard noted that “[b]ecause student athletes, particularly minors, often consider their coach a mentor or role model, they trust the coach not to carelessly and needlessly expose them to injury.”¹³³ In her view, “[t]he majority’s decision puts an end to that trust.”¹³⁴ Rather than affirming that societal expectation and imposing a corresponding legal duty, the “standard the majority imposes is dangerously lax; it puts concern for the physical safety of children far down on a secondary school coach’s list of priorities.”¹³⁵ In contrast, the negligence standard “would leave coaches free to challenge or push their students to advance their skills level as long as they do so without exposing the student athletes to an unreasonable risk of harm.”¹³⁶

In a similar vein, Justice Werdegar wrote that unlike a competitor, “a coach . . . stands somewhat apart from the fray, . . . observing and directing the competition, . . . keep[ing] a cooler head than the competitors.”¹³⁷

130. *Id.* at 52 (Kennard, J., dissenting); *see also id.* at 49 (Werdegar, J., concurring) (arguing that the court should recognize a greater duty on the part of instructors than participants owe to each other).

131. *Id.* at 52 (Kennard, J., dissenting).

132. Michael Lewis, *Coach Fitz's Management Theory*, N.Y. TIMES MAG., March 28, 2004, § 6 (Magazine), at 42.

133. *Kahn*, 75 P.3d at 52 (Kennard, J., dissenting).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 49 (Werdegar, J., concurring).

As such, a coach is uniquely situated to anticipate potential problems and protect students from unnecessary harm. “Society expects . . . more from . . . coaches than merely that they will refrain from harming a student intentionally or with wanton disregard for safety.”¹³⁸ Although school sports “are certainly valuable, . . . they are not more important than, for example, emergency cardiac care . . . and . . . require no greater immunity than the law grants such highly useful activities.”¹³⁹

3. *Owners of Sports Facilities and Manufacturers of Sporting Equipment?*

If an extension of no-duty rules to manufacturers of sports equipment or owners of sports facilities were to be proposed, the *Knight/Kahn* framework counsels that a court should first examine the category of defendant seeking the protection of a no-duty rule and the role played by that defendant. Then it should examine the policies applicable to the category and role. And in doing this, it should acknowledge the different role and policies applicable to commercial enterprises, such as manufacturers or sports facility owners, as opposed to individual sports participants and coaches or instructors.

Sports participants and coaches make individual—often split-second—choices. *Knight* and *Kahn* were concerned that liability for ordinary negligence might have a chilling effect on vigorous participation or teaching and learning skills necessary to a sport. This concern gives special prominence to the *Rowland* policy consideration of the “extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care” and perhaps to the “moral blame attached to the defendant’s conduct.”¹⁴⁰

In contrast, manufacturers and owners of sports facilities make conscious

138. *Id.*

139. *Id.* at 50. While the court expanded the reach of *Knight*’s inherent injury/recklessness rule, it may also have adopted a relaxed definition of recklessness. In sending the case back to the court to determine whether or not the coach was reckless, the court implies that the standard for recklessness in primary assumption of risk cases may become closer to negligence. In Justice Wedegar’s concurring opinion, she points out that while the majority applies a recklessness standard, she does not understand that standard to be equivalent to recklessness as it is sometimes understood, i.e., as the “willful or wanton misconduct” shown when an actor has “intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it” *Id.* at 48 (quoting WILLIAM L. PROSSER, LAW OF TORTS § 34 (4th ed. 1971)).

Justice Kennard seems to agree with Justice Wedegar in this assessment, as, in her view, the allegations in *Kahn* state “a cause of action for negligence, not recklessness.” *Id.* at 53 (Kennard, J., dissenting).

140. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

design—and, in the case of sports facilities owners, maintenance—decisions affecting the safety of the many who, over time, use their products or facilities. With respect to these commercial enterprises, other *Rowland* considerations and policies assume greater prominence. Of particular significance in the case of these commercial enterprise defendants are “the policy of preventing future harm” and “the availability, cost, and prevalence of insurance for the risk involved.”¹⁴¹ These commercial enterprises are more responsive than individual actors to the safety incentives created by liability rules,¹⁴² and negligence liability—as well as strict liability in the case of manufacturers—is thought to be desirable precisely because of its potential to create incentives for safety.¹⁴³ Also, these commercial entities will treat liability costs as part of their overall business costs, eventually reflected in the prices charged for their products and services and thus distributed to the public.¹⁴⁴ A full duty of reasonable care in these circumstances thus will have the desirable effect of preventing future harm and distributing the burden of accident costs.

The Vermont Supreme Court reflected this perspective when it refused to relieve a ski resort of a duty of due care in the case of a skier who collided with a ski maze whose location and design were alleged to pose an unreasonable risk of harm to skiers.¹⁴⁵ The court wrote that the “major public policy implications [were] those underlying the law of premises liability.”¹⁴⁶ It explained:

The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. Defendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the cost of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct risks of harm, and they cannot insure against the ski area's negligence.¹⁴⁷

141. *Id.*

142. *See* Sugarman, *supra* note 48, at 867; Ursin, *Business Premises*, *supra* note 5, at 829.

143. Ursin, *Business Premises*, *supra* note 5, at 829.

144. *Id.*

145. *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 796 (Vt. 1995) (holding a release from negligence liability void).

146. *Id.* at 799.

147. *Id.*

The Vermont Supreme Court thus refused to relieve the sport facility owner of a duty of reasonable care toward its patrons, holding a release to be invalid.¹⁴⁸

The California Supreme Court's analysis in both *Knight* and *Kahn* points to a similar conclusion. In both cases, the court pointed to the different roles played by different defendants, "including owners of sports facilities, manufacturers of sports equipment, and coaches and instructors."¹⁴⁹ Indeed, "[d]uties with respect to the same risk may vary according to the role played by particular defendants involved in the sport."¹⁵⁰ And in each case, the court drew a distinction between the duties owed by individual baseball players and stadium owners by using the example of a thrown bat.

The "batter would not have a duty to avoid carelessly throwing the bat after getting a hit"¹⁵¹ The fear is that a full duty of care might chill "vigorous deployment of a bat in the course of a game."¹⁵² In contrast, "a stadium owner . . . may have a duty to take reasonable measures to protect spectators from carelessly thrown bats." In the case of the stadium owner, "reasonable steps may minimize the risk without altering the nature of the sport."¹⁵³ The clear implication is that the court contemplated that owners of sport facilities, and presumably manufacturers of sports equipment, would be held to a standard of reasonable care.

This implication is supported by the law and policy developed by the court in commercial premises cases. For example, in *Ortega v. K-Mart Corp.*,¹⁵⁴ the court developed an aggressive negligence rule—some have argued approaching strict liability—to be applied to store owners in slip and fall cases.¹⁵⁵ The court in *Ortega* pointed to the "important policy that places a premium on maintenance, a crucial factor in the storekeeper's duty to take [safety] precautions."¹⁵⁶

Manufacturers also play a very different role than either players or coaches, and the law and policy developed by the court in the area of products liability reflects this. California products liability cases have long recognized that "public policy demands that responsibility be fixed

148. *Id.* at 800.

149. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 39 (Cal. 2003).

150. *Id.* at 38 (emphasis omitted).

151. *Id.*

152. *Id.* See also *Knight v. Jewett*, 834 P.2d 696, 709 (Cal. 1992).

153. *Kahn*, 75 P.3d at 38.

154. 36 P.3d 11 (Cal. 2001).

155. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 651–52 (1992); Steven D. Winegar, Comment, *Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. REV. 861, 893–94 (1994).

156. *Ortega*, 36 P.3d at 19.

wherever it will most effectively reduce the hazards to life and health”¹⁵⁷ In *Soule v. General Motors Corp.*,¹⁵⁸ for example, the court reaffirmed the basic framework of its landmark 1978 decision in *Barker v. Lull Engineering Co.*,¹⁵⁹ which had established a two-prong test for design defects, and refused to return products to a pure negligence theory.¹⁶⁰ It would be startling, indeed, if a court were to rule that manufacturers of sporting equipment do not even owe a full duty of reasonable care.¹⁶¹ Not surprisingly, courts of appeal early on recognized that *Knight's* intentional injury/recklessness rule does not apply to products liability claims against manufacturers, and they reached an

157. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

158. 882 P.2d 298 (Cal. 1994).

159. 573 P.2d 443 (Cal. 1978).

160. *Soule*, 882 P.2d at 308.

161. Of course, manufacturers and owners of sports facilities may once again trot out the “policy argument that [imposing negligence liability] would lead to the demise or substantially diminished availability of recreational services and programs.” See *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1112 (Cal. 2007). This would not be a fact-based policy argument; it would be pure conjecture, unsupported by empirical evidence. And the court rejected this type of argument in recent decisions involving high-speed amusement park rides and recreational services and programs. See *Gomez v. Superior Court*, 113 P.3d 41, 51 (Cal. 2005); *City of Santa Barbara*, 161 P.3d 1095. In *City of Santa Barbara*, for example, the court held, in an opinion by Chief Justice George, that “public policy generally precludes enforcement of an agreement . . . purporting to release [a defendant from] liability for future gross negligence” *Id.* at 1115. The court also indicated an increasing impatience with this type of conjectural argument. The Chief Justice wrote:

[I]f the premise of defendants and their amici curiae were correct—that is, if failing to enforce [such] agreements . . . would imperil the very existence of sports and recreational industries—we at least would expect to see some analogous evidence in the experience of those states that prohibit even agreements releasing liability for future *ordinary* negligence.

Id. at 1110.

The court “brought [seven such states] to the parties’ attention and solicited supplemental briefing concerning the defendants’ policy argument” *Id.* at 1112. It reported that the defendants “concede[d] in their supplemental briefs that they found no empirical support” for the claim that prohibiting agreements releasing defendants from negligence liability “would lead to the demise or substantially diminished availability of recreational services and programs.” *Id.* In the court’s view, the “circumstance that neither defendants nor their supporting amici curiae have found from the experience of our sister states any substantial empirical evidence supporting their dire predictions is . . . both relevant and telling.” *Id.* at 1113.

analogous conclusion with respect to claims against owners of sports facilities.¹⁶²

In light of this analysis, it may appear anomalous that among the court of appeal cases the court relied on in *Shin* to extend *Knight's* recklessness rule to golf participants was *American Golf Corp. v. Superior Court*—a case in which the defendant was the golf course, the owner of a sport facility. Like *Shin* itself, the court of appeal in *American Golf* had relied on the earlier *Diliger* decision, which had applied *Knight's* recklessness rule to golfers.¹⁶³ In *American Golf*, a golfer's shot ricocheted off a wooden yard marker and injured his companion. The companion sued the golf course for negligent design and placement of the markers.¹⁶⁴ Relying on *Diliger*, the *American Golf* court applied the primary assumption of the risk doctrine and directed the trial court to grant the golf course's motion for summary judgment.¹⁶⁵

In *Shin* the California Supreme Court quoted *American Golf's* holding that “golf is an active sport, errant shots are an inherent risk of golf, yardage markers are an integral part of the sport, and the golf course as recreation provider did not increase the risk of injury by its design and placement of the yardage marker.”¹⁶⁶

American Golf's holding—and the *Shin* court's apparent approval of this holding—suggest that owners of sports facilities, like golf courses, may only owe sports participants a duty not to intentionally injure them or engage in conduct totally outside the range of the ordinary activity involved in the sport. On the other hand, both *Knight* and *Kahn* make clear that before the *Knight* no-duty rule is extended to owners of sports

162. Thus, in 1993 in *Milwaukee Electric Tool Corp. v. Superior Court*, the court concluded that it could “find nothing in the nature of . . . manufacturing . . . to indicate that a finding of no duty on the manufacturer's part should be made.” 19 Cal. Rptr. 2d 24, 34 (Cal. Ct. App. 1993). *Milwaukee Electric Tool Corp.* was not a sports case, but subsequent decisions involving sports equipment have reached a similar conclusion. For example, in a products liability action based on a claim of inadequate warning of danger against the manufacturer of an above ground swimming pool, the court in *Bunch v. Hoffinger Industries, Inc.* held that “assumption of risk does not insulate equipment suppliers from liability for injury from providing defective equipment.” 20 Cal. Rptr. 3d 780, 797 (Cal. Ct. App. 2004). More recently, in 2006, the court of appeal in *Ford v. Polaris Industries, Inc.* reached the same conclusion with respect to design defects in a case involving a jet ski. 43 Cal. Rptr. 3d 215 (Cal. Ct. App. 2006).

In *Morgan v. Fuji Country USA, Inc.*, decided in 1995, the court distinguished the duty owed by co-participant golfers from that owed by owners and operators of golf courses, holding that the latter “owed a duty of care to [golfers] in the design and maintenance of . . . golf course[s].” 40 Cal. Rptr. 2d 249, 253 (Cal. Ct. App. 1995); see *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591 (Cal. Ct. App. 1997).

163. See *Shin v. Ahn*, 165 P.3d 581, 588 (Cal. 2007); *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 689 (Cal. Ct. App. 2000).

164. *Am. Golf*, 93 Cal. Rptr. 2d at 686–87.

165. *Id.* at 690.

166. *Shin*, 165 P.3d at 587 (quoting *Am. Golf*, 93 Cal. Rptr. 2d at 685).

facilities, a court should examine “not only . . . the nature of the sport, but also . . . the ‘role of the defendant whose conduct is at issue. . . .’”¹⁶⁷ And this examination should include an inquiry as to whether the *Knight* policies apply. The court of appeal in *American Golf* did not engage in such an examination, nor did the California Supreme Court do so in its discussion of *American Golf*.

In fact, *American Golf* is better read as applying *Knight*'s second no-duty rule: the no-duty-for-inherent-risk rule. *American Golf* illustrates that this second no-duty rule can be applied to protect owners of sports facilities without the need to consider *Knight*'s framework and policies. The golf course and its yardage markers are equivalent to the ski resort and moguls.

V. THE “INHERENT RISK” DUTY RULES

The inherent risk no-duty rule, it will be recalled, originated with *Knight*'s discussion of the duties owed by a ski resort to its patrons. Contrasting moguls on a slope with negligently maintained towropes, the court wrote that although a ski resort has “no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, [such as moguls on a slope,] it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport[, for example, with unsafe towropes].”¹⁶⁸ This discussion suggested two duty rules in addition to the intentional injury/recklessness rule: (1) a no-duty-for inherent risk rule; and (2) a duty, where one might not otherwise exist, to use due care not to increase the risks to a participant over and above those inherent in the sport. In contrast to the intentional injury/recklessness rule, whose framework was carefully laid out in *Knight* and subsequent cases, the inherent risk duty rules are fraught with confusion and problematic in their applications. Before discussing these rules in detail, however, we examine a court of appeal decision that shaped the development of these rules.

167. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Cal. 2003).

168. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).

A. *The No-Duty For Inherent Risk Rule: An Early Application*

Three years after the *Knight* decision, a court of appeal held that a ski resort owed no duty to a skier who collided with one of its ski towers.¹⁶⁹ Since a ski resort is a sports facility, one might have thought that the court would apply the *Knight* framework and ask whether the policy of chilling vigorous participation applies to such a defendant. That analysis, called for when a court is deciding whether *Knight*'s intentional injury/recklessness rule applies to a category of defendants, was not made. Instead, the court applied *Knight*'s second no-duty rule: the inherent risk no-duty rule, thus illustrating how this second no-duty rule can be applied without regard to the *Knight* framework—or the duty analysis called for by *Rowland v. Christian*.

Connelly v. Mammoth Mountain Ski Area involved Mammoth Mountain Ski Resort's claim that it owed no duty to protect its patrons from injuries caused by collisions with inadequately padded ski towers.¹⁷⁰ The plaintiff in *Connelly* was injured when he lost control and collided with a ski lift tower while skiing at defendant's ski resort. The plaintiff claimed that defendant had been negligent in not properly padding the metal tower so as to cushion the blow and prevent his injuries.¹⁷¹ The court of appeal upheld the trial court's summary judgment for the defendant.¹⁷² Relying in part on pre-*Knight* assumption of the risk cases, the court reasoned that "primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks"¹⁷³ The court wrote that the plaintiff "collided with a ski lift tower while skiing. This risk . . . is inherent in the sport. Consequently . . . Mammoth, under the doctrine of primary assumption of risk, owed no duty to protect [the plaintiff] against this inherent risk."¹⁷⁴

The plaintiff in *Connelly* also had argued that Mammoth breached "a different duty, the duty not to *increase* the inherent risks of skiing . . . by failing to maintain adequate padding on the lift towers at snow level."¹⁷⁵ The court, however, found no authority requiring ski area operators to pad lift towers. It would be anomalous, in the court's view, "to hold an

169. *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 856 (Cal. Ct. App. 1995).

170. *Id.*

171. *Id.* at 857.

172. *Id.* at 859.

173. *Id.* at 857.

174. *Id.* at 858.

175. *Id.*

operator who padded its towers . . . more liable than an operator who failed to do so.”¹⁷⁶ The court found “no evidence . . . that Mammoth *increased* the inherent risk of colliding with a ski lift tower while skiing.”¹⁷⁷ The *Connelly* court held that a skier “colliding with a ski lift tower while skiing is an inherent risk within the doctrine of primary assumption of risk, and [thus the ski resort] owed no duty to [the injured skier] to protect him from this inherent risk.”¹⁷⁸ The plaintiff in *Connelly* could not “establish the duty element of his negligence and negligence-based premises liability causes of action” and thus summary judgment was appropriate.¹⁷⁹

B. Knight as Duty-Creating?

1. Rejection of Knight as Creating a Broad New Duty of Due Care

In *Parsons v. Crown Disposal Co.*, the court in 1997 attempted to clarify its *Knight* ruling.¹⁸⁰ In *Parsons*, the plaintiff was injured when thrown from his horse which had been frightened by noise from the defendant’s nearby garbage truck. The court of appeal had concluded that, based on *Knight*, the defendant had a common law duty to avoid increasing the risk of harm to the plaintiff over and above the inherent risk in the activity of recreational horseback riding.¹⁸¹ The California Supreme Court rejected this view.¹⁸²

The court found that a traditional no-duty, or “limited duty,” rule applied. Specifically, courts had long “recognized that a defendant breaches no duty of care merely by operating socially beneficial machinery in a manner that is regular and necessary, even if such ordinary operation happens to frighten a nearby horse and, as a result of the horse’s reaction, some injury or damage ensues.”¹⁸³ Although the defendant

176. *Id.*

177. *Id.*

178. *Id.* at 859.

179. *Id.*

180. *Parsons v. Crown Disposal Co.*, 936 P.2d 70 (Cal. 1997).

181. *Parsons v. Crown Disposal Co.*, 44 Cal. Rptr. 2d 133, 137 (Cal. Ct. App. 1995).

182. *Parsons*, 936 P.2d at 72.

183. *Id.*

had a duty to conduct its garbage collection activity in a prudent fashion (and to use due care to avoid making unusual noises unnecessary to accomplish its task), it had no duty to avoid making the regular noises that were a normal incident to its operations merely because of the possibility that these ordinary operations might happen to frighten a horse that was in the vicinity of its truck.¹⁸⁴

The plaintiff in *Parsons* argued that *Knight* was what might be called a “duty creating” decision and thus, under *Knight*, a duty of due care was owed to the horseback rider. It will be recalled that the court in *Knight* had written that “[a]lthough defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, . . . defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.”¹⁸⁵ This statement could be read as creating new duties of due care where none had previously existed. The court in *Parsons* sought to correct this impression.

The court made clear that *Knight* did not create a broad new general duty of due care where none had previously existed. This should be no surprise since *Knight* created a new *no-duty* regime. The *Parsons* court rejected the “proposition that defendants generally owe a duty not to increase the risk inherent in whatever activity plaintiffs happen to be pursuing, regardless of the lack of relationship between defendant and plaintiff.”¹⁸⁶ Thus, in this case “in which defendant had no participatory involvement in the activity undertaken by plaintiff, the decision in *Knight* does not define whatever duty was owed by defendant to plaintiff.”¹⁸⁷

2. *Knight as Duty-Creating in Organized Relationship Cases*

Although the court in *Parsons* emphasized that *Knight* did not create a broad new general duty of care where a duty of care had not previously existed, its opinion nevertheless suggests that *Knight* is a duty-creating decision for a limited group of defendants. The court wrote that the *Knight* statement that defendants generally owe a duty not to increase the risk inherent in a sporting activity “was made in the context of our discussion of the duty owed by parties who have some organized relationship with each other and to a sporting activity—in our example, that of ski resort and ski patron.”¹⁸⁸

184. *Id.*

185. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (emphasis added).

186. *Parsons*, 936 P.2d at 84.

187. *Id.* at 72.

188. *Id.* at 86.

The court then noted that court of appeal cases decided since *Knight* illustrated that “there are circumstances in which the relationship between defendant and plaintiff gives rise to a duty on the part of the defendant to use due care not to increase the risks inherent in the plaintiff’s activity.”¹⁸⁹ Citing *Connelly v. Mammoth Mountain Ski Area*¹⁹⁰ as an example, the court wrote that “a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage.”¹⁹¹ “Likewise,” the court continued, “a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student.”¹⁹² In contrast were cases, such as *Parsons* itself, in which the “parties have no such (or similar) relationship—and instead are independent actors, separately pursuing their own activities.”¹⁹³ In these cases, “a defendant generally has no duty to avoid increasingly the risks inherent in a plaintiff’s activity.”¹⁹⁴

It might seem, therefore, that the court in *Parsons* viewed *Knight* as both creating a new no-duty rule for sports participants and establishing a category of sports-related cases in which defendants have a “duty to use due care not to increase the risk inherent in the plaintiff’s activity.” This category includes purveyors of recreational activities and coaches or instructors. These are “parties who have some organized relationship with each other and to a sporting activity—in our example, that of ski resort and ski patron.”¹⁹⁵

189. *Id.* at 86–87.

190. *Id.* at 87 (citing *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855 (Cal. Ct. App. 1995)).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 86. Similarly, the court in *Avila v. Citrus Community College District*, 131 P.3d 383 (Cal. 2006) treated *Knight* as a duty-creating decision. With respect to *Knight*’s duty-creating aspect, the court wrote:

We have previously established that coparticipants have a duty not to act recklessly, outside the bounds of the sport, and coaches and instructors have a duty not to increase the risks inherent in sports participation; we also have noted in dicta that those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities. In contrast, those with no relation to the sport have no such duty.

Id. at 392 (citations omitted).

Turning to the duty owed by a college hosting an intercollegiate baseball game, the court wrote that “the host school’s role is a mixed one: its players are coparticipants, its

3. An Unnecessary Source of Confusion

Knight was not needed, however, to establish a duty of due care. As the *Parsons* court recognized, *Rowland* had long ago established that “[a]s a general rule, each person has a duty to use ordinary care and ‘is liable for injuries caused by his failure to exercise reasonable care in the circumstances’”¹⁹⁶ Thus coaches, purveyors of recreational activities, and school districts would owe a duty to use due care not to increase the risk inherent in the plaintiff’s activity unless for reasons of policy a court were to include—as it did in *Parsons* with respect to machine operators—that no such duty was owed.

Not only was *Knight* unnecessary to establish a duty of due care, but to use it to do so injects confusion into the court’s analysis. In *Kahn* the court quoted *Parsons*, writing “that ‘there are circumstances in which the relationship between defendant and plaintiff gives rise to a duty on the part of the defendant to use due care not to increase the risks inherent in the plaintiff’s activity.’”¹⁹⁷ For example, “a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage. Likewise, a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student.”¹⁹⁸

One might have thought, based on this statement, that purveyors of recreational activities and coaches or sports instructors owe participants the same duty of care and that this duty is to use due care to avoid injuring them. However, as we have seen, the *Kahn* court held as a matter of policy that the protection of *Knight*’s intentional injury/recklessness rule extends to coaches. Carelessness, in the case of coaches, is considered an inherent risk of the sport.

So it turns out that a seemingly straightforward statement that a defendant has “a duty . . . to use due care not to increase the risks inherent in the plaintiff’s activity” means, in the case of a coach, a duty to use due

coaches and managers have supervisory authority over the conduct of the game, and other representatives of the school are responsible for the condition of the playing facility.” *Id.* With regard to *Knight* as a duty-creating decision, the court found that the District was “not a disinterested, uninvolved party vis-à-vis the athletes it invites to compete on its grounds.” *Id.* The court thus disagreed with the argument that “the District is little more than a passive provider of facilities and therefore should have no obligation to visiting players.” *Id.* Instead, the court held that “in interscholastic and intercollegiate competition, the host school and its agents owe a duty to home and visiting players alike to, at a minimum, not increase the risks inherent in the sport.” *Id.*

196. *Parsons*, 936 P.2d at 80 (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

197. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 39 (Cal. 2003) (quoting *Parsons*, 936 P.2d at 86–87).

198. *Parsons*, 936 P.2d at 87 (citations omitted).

care not to act “with intent to cause a student’s injury or . . . [act] recklessly in the sense that the instructor’s conduct was ‘totally outside the range of the ordinary activity’ . . . in teaching or coaching the sport.”¹⁹⁹ In other words, the “duty of due care” does not include a duty of due care.

In fact, the statement that a defendant owes a duty not to increase the risks inherent in a sporting activity is meaningless. In translation, it amounts to the statement that coaches and those responsible for maintaining athletic facilities have a “similar” duty not to increase the inherent risks, but their duties may not be similar. A statement that a defendant owes “a duty not to increase the inherent risk” really means that a defendant owes “some unspecified duty.” This is because “inherent risk” is an empty vessel: as to some defendants, carelessness is an inherent risk; for others, it may not be.

A more serious problem lurks behind this semantic confusion. If “a purveyor of recreational activities” and “[l]ikewise a coach . . . [owe] a duty not to increase the risks inherent [in an activity]” and coaches owe only a duty to refrain from intentionally or recklessly injuring, it might be inferred that purveyors of recreational activities “likewise” only owe this limited duty.²⁰⁰ However, *Kahn*, by retaining and reemphasizing the *Knight* framework, suggests that the extension of this no-duty rule to another category of defendants such as purveyors of recreational activities would only occur after the court’s examination of whether the *Knight* policy of not chilling vigorous participation applied. The possibility remains, however, that *Knight*’s second no-duty rule—the no-duty-for-inherent-risk rule—might apply, illustrating once again the possibility that this rule might bypass the duty analysis required by *Knight* and *Rowland* and trump long-established premises liability policies.

199. *Kahn*, 75 P.3d. at 43.

200. The court’s 2006 *Avila* decision is illustrative. The court wrote that *Knight* “established that coparticipants have a duty not to act recklessly, outside the bounds of the sport . . .” *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 392 (Cal. 2006). Next, the court wrote that “coaches and instructors have a duty not to increase the risks inherent in sports participation [and] . . . those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities.” *Id.* Since coaches and instructors, according to *Kahn*, are protected by the same limited duty—not to intentionally or recklessly injure—as participants, and those responsible for maintaining athletic facilities have “a similar duty,” *Avila* could be read to suggest that those maintaining athletic facilities or those who sell recreational activities owe only the limited duty not to intentionally injure or engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

C. *The Inherent Risk No-Duty Rule: Endorsement and Application*

As will be recalled, the inherent risk no-duty rule originated with *Knight's* mogul example. In *Parsons* the court wrote, quoting *Knight*, that “[a]lthough defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.”²⁰¹ Thus, the court continued, “although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition.”²⁰²

In addition, the court in *Parsons* cited *Connelly* approvingly as illustrating that “a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage.”²⁰³ But, of course, *Connelly* actually held that “colliding with a ski lift tower while skiing is an inherent risk within the doctrine of primary assumption of risk, and [thus the ski resort] owed no duty to [the injured skier] to protect him from this inherent risk.”²⁰⁴

By its approving citation of *Connelly* and its repetition of *Knight's* analysis of the mogul example, *Parsons* seems to be endorsing a no-duty rule that is independent of the framework and policies of the intentional injury/recklessness no-duty rule. This is a no-duty rule applicable to what a court determines are inherent risks posed by commercial premises that provide recreational activities.

A similar endorsement can be found in cases subsequent to *Parsons*.²⁰⁵

201. *Parsons*, 936 P.2d at 85.

202. *Id.* (quoting *Knight*, 834 P.2d at 708).

203. *Id.* at 87 (citing *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855 (Cal. Ct. App. 1995)).

204. *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 859 (Cal. Ct. App. 1995).

205. In *Avila v. Citrus Community College District*, 131 P.3d 383 (Cal. 2006), the case which extended the intentional injury/recklessness no-duty rule to pitchers who throw at batters, the court also considered three alternative plaintiff theories which were unrelated to the court's main holding regarding a pitcher intentionally hitting a batter. *Id.* at 393. The first of these was that the District breached a duty to the plaintiff by conducting the game in violation of the alleged rule prohibiting preseason games. Because hosting such a game only exposed players to the ordinary inherent risks of baseball, nothing about hosting the game enhanced those ordinary risks, and thus it did “not constitute a breach of its duty not to enhance the ordinarily risks of baseball.” *Id.*

Failing to provide umpires, which was another theory propounded by the plaintiff, “likewise did not increase the risks inherent in the game.” *Id.* at 395. Finally, the plaintiff claimed that the defendant breached a duty to him by failing to provide medical care after he was injured. *Id.* The court, for a variety of reasons, doubted that the District owed such an affirmative duty. *Id.* at 395–96. But even if it did owe some duty, that duty was satisfied when the player's own coaches were alerted to his condition. *Id.* at 396.

For example, the court's 2007 *Shin v. Ahn* golf participants decision²⁰⁶ relied on *American Golf Corp.*, the previously mentioned case, in which a golfer injured when a shot ricocheted off a wooden yard marker sued the golf course for negligent design and placement of the markers.²⁰⁷ The court of appeal applied the primary assumption of the risk doctrine, holding that the golf course "had no duty to protect [the plaintiff] from the inherent risk of being hit by an errant shot, and the primary assumption of the risk doctrine [barred plaintiff's] action."²⁰⁸ The *Shin* court cited this holding approvingly.²⁰⁹ Thus, *Shin* can also be seen to endorse *Knight's* no-duty-for-inherent-risk rule.²¹⁰ But, as is

Although the court analyzed these claims under the rubric of primary assumption of the risk and the duty not to increase risks inherent in a sport, nothing in the court's brief analysis contradicts Justice Kennard's conclusion, expressed in her dissent, that these claims "can be disposed of without resort to the no-duty-for-sports rule." *Id.* at 397 (Kennard, J., dissenting). The "District did not breach any duty to [the plaintiff] by conducting the game" in violation of the rule prohibiting preseason games. *Id.* at 398. Similarly, "baseball games are often played without umpires, and there is no reason to impose on community colleges a duty to provide them." *Id.* And finally, the "theory (that the District failed to provide medical care) fails because . . . the District had no duty to provide medical care when [the plaintiff's] team came equipped with its own trainers, who were present to treat his injuries." *Id.*

206. *Shin v. Ahn*, 165 P.3d 581 (Cal. 2007).

207. *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 685 (Cal. Ct. App. 2007).

208. *Id.* at 690. In *American Golf*, the plaintiff's accident reconstruction expert in a declaration stated that the yardage marker was dangerous and defective because of its rigid and hard construction and its location near the fairway. *Id.* at 686–87. The court of appeal noted that it is "common in the golf industry for hard yardage markers to be utilized." *Id.* at 689. The defendant's "yardage marker system utilizing three wooden posts on each side of the fairway is found in 20 to 25 percent of the nation's golf courses." *Id.* From this, it concluded that "yardage markers are an integral part of the sport of golf, and the yardage marker system used at golf course is standard in the industry." *Id.* The defendant "golf course did not increase the risk that [the plaintiff] would be struck by an errant shot by the construction or placement of the . . . yard marker." *Id.* Therefore, the "golf course had no duty to protect [the plaintiff] from the inherent risk of being hit by an errant shot, and the primary assumption of the risk doctrine bars [the plaintiff's] action." *Id.* at 690.

209. *Shin*, 165 P.3d at 587.

210. *American Golf's* holding, and the *Shin* court's approval of this holding, illustrates the ambiguities in the cases interpreting and applying the *Knight* no-duty rule. The question *American Golf* raises is what duty a golf course owes to its patrons with respect to design and placement of yard markers and other features of the golf course. The case applied the primary assumption of the risk doctrine and it relied on *Dilger*, a case involving a golfer's duties. This suggests that, like the golfer in *Dilger*, the golf course may only owe golfers a duty not to intentionally injure them or engage in conduct totally outside the range of the ordinary activity involved in the sport. On the other hand, both *Knight* and *Kahn* make clear that before the *Knight* no-duty rule is extended to

usually the case in these no-duty-for-sports cases, the matter is more complex than this.

VI. CLARIFYING DUTY

The no-duty rules applicable to sporting activities have been the source of considerable, but unnecessary, confusion. In our view, much of this confusion comes from the court's carrying over terminology and concepts of the traditional assumption of risk defense, in particular the term *assumption of risk* itself and the concept of inherent risk. Neither of these concepts serves the goals upon which *Knight* is premised. Indeed, the continued use of these concepts only frustrates these goals. Both should be eliminated.

A. *Eliminating Use of the Assumption of the Risk Concept*

The no-duty-for-sports rule is just that: a no-duty rule. Referring to the rule as “primary assumption of the risk” is misleading in that it implicitly directs attention to the plaintiff rather than to the defendant. But, as *Knight* makes clear, and the court subsequently reiterated, the “focus [is not] upon whether . . . [the] plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of defendant's conduct, or impliedly consented to relieve or excuse the defendant from any duty of care”²¹¹ As the court wrote in *Parsons*, “‘primary assumption of risk’ simply describes a subcategory of those cases in which the defendant has not breached a duty of care.”²¹²

By retaining the terminology of the traditional assumption of the risk doctrine, the court has created the danger that courts in the future will, perhaps inadvertently, lapse into pre-*Knight* assumption of the risk analysis, focusing on a plaintiff's subjective knowledge or appreciation of the risk and consent to excuse a defendant from a duty of care, which the *Knight* court itself rejected.²¹³ In fact, just this occurred in the

owners of sports facilities, a court should examine not only the “nature of the sport,” but also the role of the defendant whose conduct is at issue. *Knight v. Jewett*, 834 P.2d 696, 709 (Cal. 1992). And this examination should include an inquiry as to whether the *Knight* policies apply. Neither the California Supreme Court in *Shin* nor the court of appeal in *American Golf* engaged in such an examination. In fact, the court of appeal does not even mention the *Knight* recklessness standard.

211. *Knight*, 834 P.2d at 708. For an example of a reiteration of this statement, see *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 85 (Cal. 1997) (quoting *Knight*, 834 P.2d at 708).

212. *Parsons*, 936 P.2d at 87 n.25 (emphasis omitted).

213. The *Knight* court itself seems to have lapsed into “pre-*Knight*” analysis. Using the example of a ski resort which has been negligent in maintaining its towropes, the court wrote that even if the plaintiff “actually is aware that a particular ski resort on

court's own 2006 decision in *Priebe v. Nelson*, in which the court wrote that the "defense of primary assumption of risk" would not bar a claim if the plaintiff did not know of a risk.²¹⁴ If the risk was unknown to the plaintiff, the defense of assumption of the risk "would not bar [the] claim since [the plaintiff] could not be found to have assumed a risk of which [he or] she was unaware."²¹⁵ This, of course, directly contradicts *Knight's* statement that its new no-duty (primary assumption of the risk) regime "does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk."²¹⁶

In *Knight* the court explained why it retained the assumption of risk terminology. Because the court in *Li v. Yellow Cab Co.* had "indicated that the preexisting assumption of risk doctrine was to be only partially merged into the comparative fault system," the court believed that its "analysis . . . (distinguishing between primary and secondary assumption of risk) . . . more closely reflect[ed] the *Li* holding" than the proposal to abandon the assumption of risk terminology.²¹⁷

The court may technically be correct in its statement that its choice more closely reflected the *Li* holding, but the retention of risk terminology in *Knight* did not accurately capture what the court *did* in *Li*. The court in *Li* broke with traditional doctrine by casting aside the defense of contributory negligence.²¹⁸ It kept the assumption of risk terminology because it was not prepared in that case to rule on whether reasonable assumption of risk should also be subsumed into the comparative negligence equation. And, even then, as the court has pointed out in *Shin v. Ahn*, the *Li* court did not employ the terminology of primary and secondary assumption of risk.²¹⁹ That was introduced in *Knight*.

occasion has been negligent in maintaining its towropes, that knowledge would not preclude the skier from recovering if he or she were injured as a result of the resort's repetition of such deficient conduct." *Knight*, 834 P.2d at 709. In this situation, "the plaintiff may have acted with knowledge of the potential negligence, [but] he or she did *not consent to such negligent conduct or agree to excuse the resort from liability in the event of such negligence.*" *Id.* (emphasis added). In apparent contradiction to this, the court wrote immediately after this sentence that "[r]ather than being dependent on the knowledge or consent of the particular plaintiff, resolution of the question of the defendant's liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to protect the plaintiff against a particular risk of harm." *Id.* (emphasis added).

214. 140 P.3d 848, 850 (Cal. 2006).

215. *Id.*

216. *Knight*, 834 P.2d at 709.

217. *Id.* at 707–08 n.6.

218. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975).

219. *Shin v. Ahn*, 165 P.3d 581, 591 (Cal. 2007).

Just as the court in *Li* made a clean break from contributory negligence by adopting pure—as opposed to modified—comparative negligence, so the court now should abandon the assumption of the risk label and terminology. In California over the past decade and a half—as had previously been the case in New Jersey—experience has shown that “the term ‘assumption of risk’ is so apt to create mist [rather than aid comprehension] that it is better banished from the scene.”²²⁰ The rule adopted in *Knight* should simply be called the no-duty-for-sports doctrine.²²¹

B. Eliminating Use of the Inherent Risk Concept

The inherent risk concept was carried over from the traditional, consent-based assumption of the risk cases. The confusion created by the court’s use of the inherent risk concept and the apparent extension by courts of appeal of the inherent risk no-duty rule to protect owners of sports facilities, or commercial purveyors of recreational activities, suggest the need to reexamine this concept. And the *Knight* decision is the place to start.

In *Knight* the court wrote:

Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.²²²

As this sentence illustrates, the inherent risk concept serves two purposes: to identify the duty owed by a class of defendants to sports participants (not to increase inherent risks) and to limit duty (no duty to protect against inherent risks). The inherent risk is unnecessary for the first purpose and undesirable when used for the second.

220. *McGrath v. Am. Cyanamid Co.*, 196 A.2d 238, 240–41 (N.J. 1963).

221. Another group of cases formerly analyzed under the assumption of the risk doctrine has also been restated in no-duty terms. See *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977); *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347 (Cal. 1994). This group of cases grew out of what was known as the “fireman’s rule,” which barred firefighters from bringing negligence actions against those who set fires. See *Levy & Ursin*, *supra* note 4, at 529. A similar rule has now been applied to police and veterinarian cases. See *Priebe v. Nelson*, 140 P.3d 848, 854 (Cal. 2006); *Neighbarger*, 882 P.2d at 355. These cases have been called by the court “occupational assumption of the risk” cases. See *Priebe*, 140 P.3d at 852.

222. *Knight*, 834 P.2d at 708.

1. Unnecessary to Create Duties

As we have seen, the statement that a defendant has a duty “to use due care not to increase the risks to a participant over and above those inherent in the sport” does not tell us what duty a defendant owes. This is because carelessness may or may not be considered an inherent risk of a sport. When the court wrote in its 2006 *Avila* decision that “coaches and instructors have a duty not to increase the risks inherent in sports participation,” it also noted that “those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks.”²²³ Those responsible for maintaining athletic facilities, however, may in fact *not* have a duty similar to that owed by coaches and instructors. Coaches and instructors do not have a duty of due care; those responsible for maintaining athletic facilities may have such a duty.

Parsons makes clear that the statement that a defendant owes “a duty to use due care not to increase the risks to a participant over and above those inherent in the sport”²²⁴ was not meant to create a general duty not to increase the risk inherent in whatever sporting or recreational activity plaintiff happens to be pursuing, regardless of the lack of relationship between the parties.²²⁵ Rather, the “statement . . . was made in the context . . . of the duty owed by parties who have some organized relationship with each other and to a sporting activity—in our example, that of ski resort and ski patron.”²²⁶ The inherent risk concept, however, is not necessary to establish this duty. Under *Rowland*, ski resorts and others have a duty to use due care to avoid injury to others and may be held liable if their careless conduct injures another person. *Knight* and *Kahn* carve out a no-duty exception for participants and coaches in active sports. Others, including owners of sports facilities, such as ski resorts, and manufacturers of sporting equipment, owe a duty of due care unless brought within *Knight* or some other no-duty rule.²²⁷

223. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 392 (Cal. 2006).

224. *Knight*, 834 P.2d at 708.

225. *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 86 (Cal. 1997).

226. *Id.*

227. As *Parsons* recognizes, “independent actors, separately pursuing their own activities” with no organized relationship with each other and to a sporting activity, may be found to have no duty to a sports participant after engaging in a “traditional duty inquiry utilizing the policy considerations set out in *Rowland v. Christian*.” *Id.* at 87.

2. *The Conflict with the Court's Analytic and Policy Framework*

Rulings under the inherent risk no-duty rule can have the undesirable effect of canceling out determinations made under *Knight's* analytic and policy framework that a category of defendant should owe a duty of due care. This effect can be seen in the line of golf no-duty cases, of which *Shin* is the culmination. These cases trace back to a 1995 court of appeal decision in *Morgan v. Fuji Country USA, Inc.*²²⁸ In *Morgan* the plaintiff, a golfer, had been hit by an errant tee shot from the fourth tee while standing near the fifth tee.²²⁹ Balls hit from the fourth tee had sailed over trees that stood between the fourth green and the fifth tee and landed on or near the fifth tee before and after removal of one of these trees. The plaintiff in the past had stood under the now-removed tree for protection from flying golf balls. The plaintiff brought an action against the owner of the golf course based on negligent design and maintenance of its golf course.²³⁰ The superior court granted summary judgment, holding that “primary assumption of the risk operated as a complete bar” to the plaintiff’s claim.²³¹ However, the court of appeal reversed, holding that the “duty of a golf course towards a golfer is to provide a reasonably safe golf course.”²³²

Morgan seems inconsistent with *American Golf's* previously mentioned holding that a golf course has “no duty to protect [golfers] from the inherent risk of being hit by an errant shot.”²³³ However, these cases can be reconciled by recognizing that they are dealing with different no-duty rules. *Morgan* dealt with the question whether owners of golf courses, like participants, would be liable only if they intentionally injure a golfer or “engage in conduct ‘that is so reckless as to be totally outside the range of the ordinary activity involved in’ [the sport].”²³⁴ The court held that the intentional injury/recklessness rule does not apply to owners of golf courses. *American Golf* held that the analytically distinct inherent risk no-duty rule may apply.

The *Morgan* court saw the issue before it to be the reach of *Knight's* intentional injury/recklessness no-duty rule. In deciding this issue, the court closely adhered to the *Knight* framework. The court wrote that, under *Knight*, when one sports coparticipant injures another, the duty owed is “to not intentionally injure another player or to engage in

228. 40 Cal. Rptr. 2d 249 (Cal. Ct. App. 1995).

229. *Id.* at 250.

230. *Id.*

231. *Id.* at 251.

232. *Id.* at 253.

233. *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d. 683, 690 (Cal. Ct. App. 2000).

234. *Morgan*, 40 Cal. Rptr. 2d at 253.

conduct 'that is so reckless as to be totally outside the range of the ordinary activity involved in' [the sport]."²³⁵ Thus, if the defendant in *Morgan* had been a coparticipant, "this would clearly be a primary assumption of the risk case under *Knight* and the defendant would have no liability" to the plaintiff.²³⁶

Here, however, the plaintiff was "not suing the other player; he [was] suing the owner and operator of the golf course."²³⁷ Under *Knight*, "before concluding a case falls within primary assumption of the risk it is not only necessary to examine the nature of the sport but also the 'defendant's role in, or relationship to, the sport.'"²³⁸ After quoting from *Knight*'s analysis of the different duties owed by ballplayers and stadium owners with respect to thrown bats, the court wrote that, like the stadium owner, the "owner and operator of the . . . golf course owes a different duty" than do coparticipants; the "duty of a golf course towards the golfer is to provide a reasonably safe golf course."²³⁹ Quoting *Knight*, the court wrote that this duty "requires the golf course owner 'to minimize the risks without altering the nature of the sport.'"²⁴⁰ Thus, "the owner of a golf course has an obligation to design a golf course to minimize the risk that players will be hit by golf balls, e.g., by the way the various tees, fairways, and greens are aligned or separated."²⁴¹ Again drawing on *Knight*, the court wrote:

In certain areas of a golf course, because of the alignment or separation of the tee, fairway and/or greens, the golf course owner may also have a duty to provide protection for players from being hit with golf balls 'where the greatest danger exists and where such an occurrence is reasonably to be expected . . .' just as a baseball stadium owner may have a duty to provide protection for spectators from thrown bats or errant balls in that part of the stadium where the danger of being hit is particularly high and dangerous.²⁴²

The *Morgan* court concluded that the owner and operator of the golf course "owed a duty of care to [the plaintiff] in the design and maintenance of its golf course."²⁴³ The evidence indicated "the area of

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 252.

239. *Id.* at 253.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

the fifth tee was a particularly dangerous place due to the design of the fourth and fifth tees and the removal of the trees.”²⁴⁴ This evidence “could support a finding that [the golf course] breached the duty of care” to the plaintiff.²⁴⁵

Morgan’s statement that *Knight*’s intentional injury/recklessness rule applies to golf participants technically was dictum. But *Dilger v. Moyles*, a second court of appeal decision, so held.²⁴⁶ The *Dilger* court noted *Morgan*’s holding that a golf course owner owes “a duty of care . . . in the design and maintenance of its golf course” and the court’s statement that “if the relationship between the parties was one of coparticipants . . . this would clearly be a primary assumption of the risk case under *Knight*.”²⁴⁷ Closely adhering to the *Knight* framework, the *Dilger* court examined whether *Knight*’s policies applied to participants in the sport of golf. It found that they did:

While golf may not be as physically demanding as . . . basketball or football, risk is nonetheless inherent in the sport. Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. . . .

Holding participants liable for missed hits would only encourage lawsuits and deter players from enjoying the sport. . . . Social policy dictates that the law should not discourage participation in such an activity whose benefits to the individual player and to the community at large are so great.²⁴⁸

Thus, the duty owed by one golfer to another was to not “intentionally injure[] . . . or engage[] in reckless conduct that is totally outside the range of the . . . sport.”²⁴⁹ In *Dilger*, the defendant had failed to warn the plaintiff of his errant shot. “[W]hile possibly negligent, [this] did not breach a legal duty” to the plaintiff and thus summary judgment was appropriate.²⁵⁰

In *Shin v. Ahn*, the California Supreme Court endorsed *Dilger*, holding that “the primary assumption of risk doctrine does apply to golf”²⁵¹ The court reiterated *Dilger*’s policy rationale, quoting the passage noted above.²⁵² *Shin* thus held that “golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”²⁵³

244. *Id.*

245. *Id.*

246. 63 Cal. Rptr. 2d 591, 591 (Cal. Ct. App. 1997).

247. *Id.* at 594.

248. *Id.* at 593.

249. *Id.* at 594.

250. *Id.*

251. 165 P.3d 581, 583 (Cal. 2007).

252. *Id.* at 586–87.

253. *Id.* at 590.

Leaving *American Golf* aside for the moment, the law resulting from *Morgan*, *Dilger*, and *Shin* can be restated, and it is in line with what one could have predicted from the *Knight* case itself. In suits between golfers, the policy of not chilling vigorous participation applies and the duty is to not intentionally injure or engage in conduct totally outside the range of the ordinary activity involved in the sport. In a suit by a golfer against the owner of a golf course, however, a court must examine the different role of, and relationship to, the sport of the golf course owner. The policy of not chilling vigorous participation does not apply in that situation. As in the case of a stadium owner in *Knight's* thrown bat example, the golf course owner owes golfers a full duty of reasonable care in the design and maintenance of its golf course.

American Golf, of course, complicates matters. In *American Golf*, the plaintiff's accident reconstruction expert in a declaration stated that the yardage marker was dangerous and defective because of its rigid and hard construction and its location near the fairway. He "asserted that because of the design of the 13th hole, a golfer was likely to aim the tee shot in the direction of the 200-yard marker, thus making the marker a likely site for a ricochet shot" like the one that injured the plaintiff.²⁵⁴ In apparent contradiction to *Morgan's* holding that a golf course owes a "duty of care to [a golfer] in the design and maintenance of its golf course,"²⁵⁵ the *American Golf* court held that the golf course "had no duty to protect [the golfer] from the inherent risk of being hit by an errant shot, and the primary assumption of the risk doctrine bar[red] the golfer's] action."²⁵⁶

The court, however, purported to follow *Morgan* and *Dilger*. Citing *Dilger*, the court first held that "[g]olf is an active sport to which the assumption of the risk doctrine applies."²⁵⁷ Then, quoting *Morgan*, the court wrote that the "duty of care a golf course [has] towards a golfer is to provide a reasonably safe golf course."²⁵⁸ At this point, however, the

254. *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 687 (Cal. Ct. App. 2000).

255. *Morgan v. Fuji Country USA, Inc.*, 40 Cal. Rptr. 2d 249, 253 (Cal. Ct. App. 1995).

256. *Am. Golf*, 93 Cal. Rptr. 2d at 690.

257. *Id.* at 689.

258. *Id.* Also quoting from *Morgan* the court wrote that this duty care "requires the golf course owner 'to minimize the risks without altering the nature of the sport.'" *Id.* Thus

a golf course has an obligation to design a golf course to minimize the risk that players will be hit by balls, e.g., by the way the various tees, fairways, and

American Golf court's analysis departed from that of the *Morgan* and *Dilger* courts. Those courts, it will be recalled, had focused on whether *Knight's* intentional injury/recklessness rule applied to golfers and golf course owners and operators. Thus, they had heeded *Knight's* admonition that "before concluding a case falls within primary assumption of the risk it is not only necessary to examine the nature of the sport but also the 'defendant's role in, or relationship to, the sport.'"²⁵⁹ Their conclusion was that whereas participants are protected by *Knight's* intentional injury/recklessness rule, golf courses are not; they owe a duty of due care.

The *American Golf* court did not examine the golf course's role in, or relationship to, golf in reaching its conclusion that the "primary assumption of the risk doctrine bar[red the plaintiff's] action."²⁶⁰ This was because its holding was not based on the intentional injury/recklessness rule. In fact, the court does not mention that rule. Instead, it based its holding on the inherent risk no-duty rule.

The court wrote that the "question of duty [is] a function of the scope and definition of a given active sport's inherent risks."²⁶¹ Under this duty doctrine, "participation in an active sport is governed by primary assumption of risk, and a defendant owes no duty of care to protect a plaintiff against risks inherent in the sport."²⁶² Without pausing to consider whether the different role played by the owner and operator of a golf course should lead to a different duty, the court simply stated, "[u]nder the assumption of the risk doctrine, ordinarily a recreation provider owes no duty to a participant in an active sport to use due care to eliminate risks inherent in the sport."²⁶³ It followed that the "golf course had no duty to protect [the plaintiff] from the inherent risk of being hit by an errant shot"²⁶⁴

The golf duty cases demonstrate the potential of the inherent risk no-duty rule to trump determinations made under the analytic and policy frameworks carefully articulated under *Knight's* intentional injury/recklessness rule. Employing this framework, the *Dilger* court held that owners and operators of golf courses owe golfers who are hit by errant shots a duty

greens are aligned or separated. In certain areas of a golf course, because of the alignment or separation of the tee, fairway and/or greens, the golf course owner may also have a duty to provide protection for players from being hit with golf balls 'where the greatest danger exists and where such an occurrence is reasonably to be expected'

Id. (quoting *Morgan*, 40 Cal. Rptr. at 253).

259. *Morgan*, 40 Cal. Rptr. 2d at 252.

260. *Am. Golf*, 93 Cal. Rptr. 2d at 690.

261. *Id.* at 688.

262. *Id.*

263. *Id.* at 687–88.

264. *Id.* at 690.

of care in the design and maintenance of golf courses.²⁶⁵ The *American Golf* court agreed with this conclusion.²⁶⁶ Then, turning to the inherent risk no-duty rule, it held that the owner and operator of the “golf course [had] no duty to protect [the golfer hit by the ricochet] from the inherent risk of being hit by an errant shot.”²⁶⁷

This holding, and similar holdings under the inherent risk no-duty rule,²⁶⁸ are troubling. Unlike duty rulings under the intentional injury/recklessness rule, they are not guided by the policy of not chilling vigorous participation in a sport. Nor are they sensitive to the defendant’s role in, or relationship to, the sport. In fact, rulings under the inherent risk no-duty rule can cancel out determinations based on those considerations that an owner or operator of a sporting facility owes a duty of due care to a patron. In addition, these rulings ignore *Rowland* policy considerations of special significance in the case of commercial enterprises: “the policy of preventing future harm” and “the availability, cost, and prevalence of insurance for the risk involved.”²⁶⁹ By doing so, they undercut policies that are central to the law governing commercial premises liability.²⁷⁰ Also, as we discuss next, the inherent risk no-duty decisions can be, and have been, criticized for impinging on the proper role of juries.

3. *The Role of Judge and Jury*

Critics of California’s no-duty-for-sports regime have aimed special criticism at what they see as the willingness by the California Supreme Court and lower courts to usurp the role that properly should be assigned to juries. Esper and Keating, for example, write:

The . . . basic role played by duty doctrine is to divide the labor of negligence law between judge and jury. Judges determine whether the defendant’s conduct will be judged by the standard of reasonable care, and juries apply that standard to particular controversies, even when its application involves the exercise of evaluative judgment. The evaluative role of the jury is one of the most distinctive features of negligence adjudication.²⁷¹

265. *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 594 (Cal. Ct. App. 1997).

266. *Am. Golf*, 93 Cal. Rptr. 2d at 689.

267. *Id.*

268. *See, e.g.*, *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 857 (Cal. Ct. App. 1995).

269. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

270. *See Ortega v. Kmart Corp.*, 36 P.3d 11, 19 (Cal. 2001); Sugarman, *supra* note 48, at 867; Ursin, *Business Premises*, *supra* note 5, at 821.

271. *See Esper & Keating*, *supra* note 12, at 270 (emphasis omitted).

They complain that *Knight* and subsequent “primary assumption of risk cases assign both the choice of legal standard and its application to the facts to the judge.”²⁷² Under *Knight*, “trial and appellate courts are asked to make factual findings as to what risks are inherent in common activities.”²⁷³

That criticism, as we will discuss, has merit when directed at decisions invoking the inherent risk no-duty rule. It cannot, however, be fairly directed at the California Supreme Court’s adoption and application of the intentional injury/recklessness rule.

In *Knight*, the court decided that the conduct of a participant in an active sport would not be judged by the standard of reasonable care. Instead, it held that participants would be liable only if they intentionally injure another participant or “engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in” the sport.²⁷⁴ Whether or not one agrees with the policy judgment that led to the adoption of this rule, the court in adopting it was performing the role traditionally assigned to courts—it was determining the standard by which the conduct of a category of defendants would be judged.

In *Knight*, the parties were participating in a coed game of touch football when the defendant knocked the plaintiff to the ground, stepped on her hand, and injured her finger.²⁷⁵ It is true that the court affirmed the trial court’s granting of summary judgment.²⁷⁶ The court did not, however, usurp the jury’s role. It is for the jury to determine if a defendant intentionally injured a plaintiff or engaged in reckless conduct that is totally outside the range of the ordinary activity involved in the sport—if the facts are such that a reasonable jury could so determine. In *Knight*, the court held that the “conduct alleged . . . [was] not even closely comparable to the kind of conduct—conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport—that is a prerequisite to the imposition of legal liability upon a participant in such a sport.”²⁷⁷

The court’s most recent primary assumption of risk decision, *Shin v. Ahn*, underscores this point. The plaintiff and defendant in that case were playing golf together.²⁷⁸ Plaintiff was standing in front of the tee box twenty-five to thirty-five feet from the defendant at a forty to forty-five degree angle from the intended path of defendant’s tee shot as the

272. *Id.* at 271 (emphasis omitted).

273. *Id.* at 297; see also Goldberg & Zipursky, *supra* note 13, at 343.

274. *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992).

275. *Id.* at 697.

276. *Id.* at 712.

277. *Id.*

278. *Shin v. Ahn*, 165 P.2d 581, 583 (Cal. 2007).

defendant teed off.²⁷⁹ The defendant “inadvertently ‘pulled’ his tee shot to the left, hitting plaintiff in the temple.”²⁸⁰ There was dispute over whether the defendant knew where the plaintiff was standing.²⁸¹ The trial court denied the defendant’s summary judgment motion.²⁸² The Supreme Court affirmed, holding that the “record [was] . . . too sparse to support a finding, as a matter of law, that defendant did, or did not, act recklessly. This will be a question the jury will ultimately resolve based on a more complete examination of the facts.”²⁸³ *Shin* “makes clear that the issue of recklessness of a defendant’s action is an issue for the trier of fact . . . [unless] no reasonable jury could find defendant’s actions so reckless as to be outside the ordinary activity [involved in the sport].”²⁸⁴

If the Supreme Court’s decisions involving the intentional injury/recklessness rule cannot be accused of usurping the jury’s role, the same cannot be said of lower court decisions employing the inherent risk no-duty rule. Unlike the former decisions, decisions under the inherent risk no-duty rule do not involve the choice of the legal standard to be assigned to categories of activity. These decisions are not about categories of activity; they are about the facts of particular cases.

Knight’s use of the mogul example to introduce the inherent risk concept is illustrative. The court wrote that although “a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm.”²⁸⁵ In the towrope example, the “risk[] posed by a ski resort’s negligence[] clearly is not a risk (inherent in the sport) that is assumed by a participant.”²⁸⁶ Since the defendant in the mogul and towrope examples is the same—the owner of the ski resort—the no-duty-for-inherent risk rule the court invokes in the case of the mogul is not a rule applicable to all risks posed by the operation of the resort. Rather, it is a rule based on finding a particular risk to be “inherent.”

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 583–84.

283. *Id.* at 592.

284. Neil M. Levy, Commentary, *Primary Assumption of Risk: Levy on Shin v. Ahn*, available at 2007 CAL. LEXIS 10356.

285. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).

286. *Id.* at 708.

Court of appeal decisions that find particular risks to be inherent follow this pattern. In these decisions, courts state fact-specific conclusions with no felt need to articulate any criteria that may have guided their decisionmaking. Moreover, trial and appellate courts in these cases do “make factual findings as to what risks are inherent in common activities.”

The *American Golf* decision provides an example—and a contrast—to the Supreme Court’s *Shin* decision under the intentional injury/recklessness rule. In *American Golf*, it will be recalled, the plaintiff’s accident reconstruction expert stated in a declaration that the yardage marker was dangerous and defective because of its rigid and hard construction and its location near the fairway. He “asserted that because of the design of the 13th hole, a golfer was likely to aim the tee shot in the direction of the 200-yard marker, thus making the marker a likely site for a ricochet shot,” such as the one that hit the plaintiff.²⁸⁷

Despite this declaration, the court of appeal ordered that the defendant golf course’s summary judgment motion be granted on the basis of primary assumption of the risk.²⁸⁸ The court noted that it is “common in the golf industry for hard yardage markers to be utilized.”²⁸⁹ The defendant’s “yardage marker system utilizing three wooden posts on each side of the fairway is found on 20 to 25 percent of the nation’s golf courses.”²⁹⁰ From this, it concluded that “yardage markers are an integral part of the sport of golf, and the yardage marker system used at golf course is standard in the industry.”²⁹¹ The defendant “golf course did not increase the risk that [the plaintiff] would be struck by an errant shot by the construction or placement of the . . . yard marker.”²⁹²

The plaintiff in this case was hit by a ball when a hooked shot struck a removable obstacle, which was not in the line of play and had not been removed. There had been “no prior reports of injuries caused by the construction or location of either this particular yardage marker or any of the 84 removable wooden yardage markers located in the rough on both sides of 14 fairways.” This was “not an area of great danger or a place where such occurrences could reasonably be expected.”²⁹³ Thus, the court held that the “golf course had no duty to protect [the plaintiff] from

287. *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 686–87 (Cal. Ct. App. 2007).

288. *Id.* at 690.

289. *Id.* at 689.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 689–90.

the inherent risk of being hit by an errant shot, and the primary assumption of the risk doctrine [barred plaintiff's] action."²⁹⁴

The "[p]laintiff's expert's opinion that this particular yardage marker should have been located farther from the fairway or made of a softer material [was] not sufficient to create a duty on the part of golf course."²⁹⁵ And, "[i]n any event, all of the plaintiff's expert's objections to the location and construction of the yardage markers [were] negated by the fact that the markers are indisputably visible to the players and removable at the player's discretion."²⁹⁶

The criticism of "appellate courts [making] factual findings as to what risks are inherent in common activities"²⁹⁷ can fairly be aimed at *American Golf* and other decisions²⁹⁸ under the inherent risk no-duty rule. These decisions can be fairly characterized as employing a standardless inherent risk no-duty rule to improperly usurp the role assigned to juries in our negligence system. As we will discuss shortly, it may well be that summary judgment was appropriate in *American Golf*; but it was not appropriate on the ground that the golf course "had no duty to protect [the plaintiff] from the inherent risk of being hit by an errant shot."²⁹⁹ Rather, this may have been a case in which the court could appropriately rule as a matter of law that the defendant had not been negligent.

4. No Negligence as a Matter of Law?

The mogul example, which is used by *Knight* as well as commentators to illustrate the inherent risk concept, also illustrates the point that inherent risk cases can be better understood as cases in which courts may appropriately rule as a matter of law that a defendant has not been negligent. Neither *Knight* in discussing the mogul example nor the court of appeal decisions applying the inherent risk no-duty rule have offered criteria for identifying what risks are inherent (moguls, ski towers, yardage markers) and what risks are not (towropes). Commentators have, however, attempted to fill that void.

294. *Id.* at 690.

295. *Id.*

296. *Id.*

297. Esper & Keating, *supra* note 12, at 270.

298. See, e.g., *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855 (Cal. Ct. App. 1995).

299. *Am. Golf*, 93 Cal. Rptr. 2d at 690.

For example, Catherine Hansen-Stamp has suggested that “[i]nherent risks fall into two general categories: 1) those risks that are essential characteristics of a recreational activity and . . . that participants desire to confront: e.g., moguls, steep grades, exciting whitewater; and 2) those undesirable risks which simply exist, e.g., falling rock or sudden, severe weather changes.”³⁰⁰ Dylan Esper and Gregory Keating have offered a variation of this. They write that “‘inherent risks’ of recreational activities are constitutive of their character and essential to their enjoyment. Eliminate those risks and you destroy or degrade the activity.”³⁰¹ These are risks that are “essential to the challenge and pleasure of the activities that occasion them.”³⁰² For example, if you “[e]liminate mogul fields from expert ski slopes[,] you eliminate a characteristic which makes expert runs more challenging and demanding than intermediate ones.”³⁰³ Although these definitions are similar and the mogul example is common to both—and is *Knight*’s central example—their use of the mogul example points to the problem with the inherent risk concept: to state that a risk is “inherent” merely states a conclusion that there is no duty.

When these authors, and the court in *Knight*, cite moguls as an inherent risk of skiing and write that a ski resort has “no duty to remove moguls from a ski run,” they undoubtedly have a *particular* type of ski run in mind. Esper and Keating, for example, write that moguls are a “characteristic which makes *expert* runs more challenging and demanding than intermediate ones.”³⁰⁴ But what about moguls on an intermediate or beginner run?

Decades ago, moguls were accepted as part of the sport of skiing and skiers “got what nature offered.”³⁰⁵ Skiing over moguls poses a risk. “Navigating a field of moguls requires speed, superhuman quads and the bones and cartilage to withstand knee-jarring, lower-back-compressing drops from mini-hill to valley.” Moguls “can dislodge skis, throwing heels over heads and poles, hats and goggles flying.”³⁰⁶ Nevertheless, it might have made sense at one time to say that it is reasonable for a ski resort not to remove moguls from slopes. Indeed, it might have been close to impossible to do so.

300. Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming’s Recreational Safety Act—An Update*, 33 LAND & WATER L. REV. 249, 251 (1998).

301. Esper & Keating, *supra* note 12, at 298.

302. *Id.* at 299.

303. *Id.* at 298–99.

304. *Id.* at 298 (emphasis added).

305. A mogul is a mound that forms wherever skiers turn repeatedly. Hannah Nordhaus, *The Big Combover*, L.A. TIMES, Nov. 2, 2004 at F4.

306. *Id.*

In the last two decades, however, things have changed. As early as the 1950s, ski areas began to look for ways to reduce moguls. In the 1960s, the “Sno-Cat,” a tracked vehicle towing a twenty-foot-wide culvert, had been developed.³⁰⁷ And in “the mid-1980s . . . manufacturers added blades to push snow back uphill and tillers to comb the hard pack into the silky corduroy that many skiers now expect.”³⁰⁸ In fact, ski areas now refer to snow on their slopes as “product” that they “groom” with Sno-Cats to “smooth away any wrinkles or blemishes that might scare their best customers: jet-loads of risk-averse baby boomers.”³⁰⁹ Today, grooming of slopes is a marketing tool to attract skiers. Ads for ski areas tout “the most groomed terrain on the planet,” and ski areas may groom beginner and intermediate slopes daily, do lunch-time “touch-ups,” and email maps to hotels that point out the day’s corduroy.³¹⁰

If a ski resort’s employees carelessly failed to groom the intermediate and beginner slopes and a skier on the first run of the day, not expecting—and unable to navigate—“mini-hills and valleys,” were to go tumbling “heels over head,” we doubt that the court would conclude that the ski resort has no duty to protect the injured skier from this risk. This situation is analogous to the court’s towrope example in which the court wrote that the resort “clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm.”³¹¹ Similarly, we believe a ski resort clearly does have a duty to use due care to maintain its beginner and intermediate slopes in a reasonably safe condition so as not to expose skiers to an increased risk of harm.

The court’s statement that a ski resort has “no duty to remove moguls from a ski run” might better be understood as a statement that, as a matter of law, it is reasonable not to remove moguls on appropriate—that is, advanced—ski runs. Just as it is reasonable to have slopes that are steep even though they pose some danger, it is also reasonable to have slopes with moguls for advanced skiers. These conditions do pose some danger, but if the ski resort appropriately marks its trails as advanced, intermediate, or beginner, these markers and the obviousness of the danger satisfy the obligation to warn, and this warning satisfies the

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).

resort's duty of due care. The resort has a duty of due care, but as a matter of law the resort is not negligent. Courts and commentators at times use "no-duty" as a shorthand reference for the conclusion that as a matter of law a duty of due care has been satisfied,³¹² and the mogul reference is an example of this tendency.

Likewise, *Connelly* and *American Golf* might be better explained as instances in which no negligence existed as a matter of law. These cases can be seen to involve negligent design of recreational facilities. Changing the facts in *Connelly* or *American Golf*, by placing the ski tower in the middle of a narrow beginner ski run or the yardage markers in a riskier location, might well make a holding that the defendants were reasonable as a matter of law inappropriate. A no-duty rule would not be fact sensitive in this manner.

Treating the mogul example, *Connelly*, and *American Golf* as instances of "no negligence" is preferable to treating them as announcing a no-duty rule. It is widely recognized,³¹³ and the court has acknowledged,³¹⁴ that in determining questions of duty the focus is on a category of conduct, not on the specific facts of a case. In contrast, "no negligence" determinations are based on the particular facts of a case. The inherent risk rulings are of the latter type. As the towrope and ungroomed beginner or intermediate slope examples illustrate, it would be inappropriate to hold that ski resorts have no duty of due care in the maintenance of their sporting facilities. However, on the facts of a particular case, it might be appropriate to rule that a ski resort was reasonable as a matter of law.

Moreover, whereas the inherent risk concept is standardless, the "no negligence" approach focuses the court's attention on the variables that should guide its decision. In the familiar Learned Hand formulation, the focus is on "the magnitude of the loss if an accident occurs; the probability of the accident's occurring; and the burden of taking precautions that would avert it."³¹⁵

312. See Sugarman, *supra* note 48, at 842; see also Esper & Keating, *supra* note 12, at 284.

313. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 8 cmt. b, (Proposed Final Draft No. 1, 2005); Robert Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 791 (2001); Sugarman, *supra* note 48, at 843.

314. *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 85 (Cal. 1997).

315. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972).

VII. CONCLUSION

It is time for the California Supreme Court to bring clarity to the no-duty-for-sports rules that have developed in the decade and a half since its *Knight* decision. The first step is the easiest. The court should simply eliminate the assumption of the risk concept from its jurisprudence. That term serves no analytic purpose and can, misleadingly, direct attention to the plaintiff's conduct or state of mind.³¹⁶ As the court has recognized, "'primary assumption of the risk' simply describes a subcategory of those cases in which the defendant has not breached a duty of care."³¹⁷

The court should also make clear that *Knight* creates a single no-duty-for-sports rule. This is the intentional injury/recklessness rule that has been the basis of the court's holdings in this area. The court has established a clear analytic and policy framework to determine whether this rule protects a particular category of defendants. The policy question is whether "recognizing a duty of care . . . would tend to alter the nature of [a] sport or chill vigorous participation in the activity."³¹⁸ Based on this policy, *Knight* and *Kahn* held that participants, coaches, and sports instructors do not owe a full duty of due care to sports participants. Rather, they breach a duty of care "only if [they] intentionally injure [the plaintiff] or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."³¹⁹

316. In *Priebe v. Nelson*, for example, the court wrote that "the defense of primary assumption of risk" would not bar a claim if the plaintiff did not know of a risk. 140 P.3d 848, 850 (Cal. 2006). If the risk was unknown to the plaintiff, the defense of assumption of the risk "would not bar [the] claim since [the plaintiff] could not be found to have assumed a risk of which [he or] she was unaware." *Id.* This, of course, directly contradicts *Knight*'s statement that its new no-duty primary assumption of the risk regime "does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk." *Knight*, 834 P.2d at 709.

317. *Parsons*, 936 P.2d at 87 n.25. When a plaintiff knowingly encounters a risk of injury caused by a defendant's breach of a duty of care, the amount of the plaintiff's recovery is determined by comparative fault principles. The term "secondary assumption of risk" serves no purpose.

318. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (Cal. 2003).

319. *Knight*, 834 P.2d at 711; see *Kahn*, 75 P.3d. at 38–39 (quoting *id.*). As previously discussed, the *Avila* decision might be read to alter this holding. It is best read as creating an exception—specific to baseball—under which pitchers have no duty to refrain from throwing at batters.

Whether a defendant's conduct meets this standard is a question for the jury unless no reasonable jury could find the standard to be met.³²⁰

The court has also provided a framework for determining whether the protection of the intentional injury/recklessness rule extends to categories of defendants other than participants, coaches, and sports instructors. These other categories include owners of sports facilities and manufacturers of sports equipment. Because "the question of duty depends not only on the nature of the sport, but also on the 'role of the defendant whose conduct is at issue,'" a court, in addressing this question, should examine the "role of the [defendant] . . . and the likely effect . . . of imposing [a duty of due care]."³²¹ Owners of sports facilities and manufacturers of sports equipment have been,³²² and should be, held to a duty of care—the result foreshadowed by the court's distinction between the separate duties owed by a baseball batter and a stadium owner with respect to a thrown bat.³²³ Imposing such a duty would not alter the nature of a sport and is called for by the policy considerations especially relevant to and underlying the law of premises and products liability, including the "policy of preventing future harm" and "the availability, cost, and prevalence of insurance."³²⁴

In *Knight*, the court wrote that although "moguls on a ski run pose a risk of harm to skiers," a "ski resort has no duty to eliminate them."³²⁵ This was said to be because moguls are an "inherent risk" of the sport of skiing and "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself."³²⁶ This statement has been seen to create a second, distinct "no-duty-for-inherent risk" rule, which has been employed in cases like *Connelly*—the ski lift tower case—to protect owners of sports facilities from a duty of care.³²⁷ This so-called inherent risk no-duty rule has been the focus of academic critics who have accused the court of "abusing duty"³²⁸ and who have

320. Compare *Knight*, 834 P.2d at 712 (holding there is no jury question because the defendant's conduct was "not even closely comparable to" recklessness) with *Shin v. Ahn*, 165 P. 3d 581, 592 (Cal. 2007) (finding this question as being one for the jury to decide "based on more complete examination of the facts").

321. *Kahn*, 75 P.3d at 38.

322. See *Ford v. Polaris Indus., Inc.*, 43 Cal. Rptr. 3d 215 (Cal. Ct. App. 2006); *Morgan v. Fuji Country USA, Inc.*, 40 Cal. Rptr. 2d 249 (Cal. Ct. App. 1995).

323. *Kahn*, 75 P.3d at 38.

324. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968); see *Ortega v. Kmart Corp.*, 36 P.3d 11, 19 (Cal. 2001).

325. *Knight*, 834 P.2d at 708.

326. *Id.*

327. See *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855 (Cal. Ct. App. 1995).

328. *Esper & Keating, supra* note 12.

seen a need to “shield” the duty concept from such abuse.³²⁹ None of the California Supreme Court’s holdings, however, has been based on this no-duty rule,³³⁰ and we believe it is time for the court to make clear that no such rule exists.

As the court recognized in *Parsons*, and as was true in its adoption of the intentional injury/recklessness rule, determinations of duty focus on a category of conduct—not the specific facts of a case.³³¹ But the focus of the inherent risk no-duty rule—the second no-duty rule—is all about the facts of the specific case.³³² This is an inappropriate use of the duty concept. Unlike determinations under the intentional injury/recklessness rule, fact-specific determinations under the standardless inherent risk no-duty rule usurp the role that is properly assigned to juries in our negligence system. Moreover, such determinations can have the undesirable effect of trumping determinations, made under the *Knight* framework, that a particular category of defendants, such as operators of sports facilities, owes a sports participant a duty of due care.³³³ If cases such as *Connelly* were correctly decided, it was because, on the facts of the particular case, there was no negligence as a matter of law.³³⁴

The court seems to have believed that the inherent risk concept is necessary to identify the duty owed by persons who have a relationship to a sporting activity. Thus, it has written that such persons owe a duty “to use due care not to increase the risk to a participant over and above those inherent in the sport.” In fact, however, the inherent risk concept is not needed to identify the duty owed by persons who have a relationship to a sporting activity. Under *Rowland*, such persons owe a baseline duty of care,³³⁵ which would include a duty to use due care not to increase the risks to a participant over and above the so-called

329. Goldberg & Zipursky, *supra* note 13.

330. The court in *Knight* did state that “careless conduct of [sports participants] is treated as an ‘inherent risk’ of a sport.” 834 P.2d at 708. That, however, was merely a linguistic characterization. The decision to exempt sports participants from a duty of due care was based on the policy of not chilling vigorous participation in the sport. See Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 38 (Cal. 2003).

331. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 8 cmt. b (Proposed Final Draft No. 1, 2005).

332. See *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683 (Cal. Ct. App. 2007).

333. Compare *Morgan v. Fuji Country USA, Inc.*, 40 Cal. Rptr. 2d 249, 253 (Cal. Ct. App. 1995) with *Am. Golf*, 93 Cal. Rptr. 2d at 689.

334. See *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855 (Cal. Ct. App. 1995).

335. See *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

inherent risks of the sport³³⁶—unless a court determines, for reasons of policy, that no duty is owed.³³⁷ Moreover, the statement that a defendant owes a duty “to use due care not to increase the risks to a participant over and above those inherent in the sport” is meaningless. It does not tell us what duty is owed. This is because carelessness is considered an inherent risk of a sport with respect to some defendants, but not as to others. In fact, the only real use of the inherent risk concept is to cause confusion. But there is already too much confusion in the no-duty-for-sports case law. The court can bring clarity to the law by eliminating the use of the inherent risk concept.³³⁸

336. See *Ford v. Polaris Indus., Inc.*, 43 Cal. Rptr. 3d 215, 231 (Cal. Ct. App. 2006) (“Determination of whether a particular design increased the inherent risks . . . would necessarily focus on the ingredients of a risk/benefit analysis . . .”).

337. See *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 87 (Cal. 1997).

338. It is not that the word *inherent* is, in itself, so bad. If it were merely used as an adjective—like *intrinsic* or *characteristic*—there would be no problem. The problem is that it is used as a substitute for analysis. And this misuse is embedded in the case law.