A Case For a Bill Recognizing Primary Assumption of Risk as Limiting Liability for Persons and Providers Who Take Part in Sports & Recreational Activities

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§ 1. Definitions

1. A “sport or recreational activity” encompasses all commonly understood sports and recreational and/or adventure activities of any kind, whether or not those activities include an instructional, educational, or competitive component, including but not limited to: alpine sports and/or activities (including skiing, ski-biking, and snowboarding), animal riding, archery, ballooning, backcountry trips, backpacking, badminton, base jumping, baseball, basketball, biathlon, bicycling, billiards, bird-watching, boating activities, bowling, boxing, bungee jumping, camping, caving, challenge courses, cheerleading, cliff diving, climbing (including climbing observation towers, ice climbing, mountain climbing, and rock climbing, either indoors or outdoors on either natural or artificial surfaces), curling, cutting wood, dancing (including social, competitive, and fitness-related dance [e.g., jazzercise and Zumba], diving, dude ranching, any equine activity and sports, exploring caves, extreme sports, fishing, fitness training, football, geocaching, gliding, golf, gymnastics, hang gliding, harvesting the products of nature, hiking, hockey, horseback riding, horseshoe-pitching, hunting and gathering, ice skating, longboarding, martial arts, motorcycling, nature study, Nordic skiing, operating an all-terrain vehicle or utility terrain vehicle (including standard ATV’s and snowmobiles), outdoor education programs, paintball, parachuting, participation in water or ski sports outside of designated areas, picnicking, ping pong, racing, racquetball, removing wood, river floating, rollerblading, roller skating, rugby, self-contained underwater breathing apparatus (SCUBA), sight-seeing, skating, sky diving, sleigh riding, sledding, snorkeling, snowboarding, snowmobiling, snowtubing, soccer, softball, spelunking, sport shooting, swimming, teambuilding ac-
activities, tennis, throwing darts, track and field sports (including all running, jumping, and throwing events [e.g., pole vault, high jump, javelin, long jump, shot put, marathoning, etc.]), trapping, trekking, triathlon, weight training, ultimate Frisbee, volleyball, walking (including walking for fitness or nature walks), white water rafting, wrestling, windsurfing, yoga, zip-lining, and any other sport, game, or educational activity.

2. “Inherent risks in a sport or recreational activity” are those risks which are characteristic of, derivative of, an integral part of, ordinary to, or intrinsic to any given sport or recreational activity, including but not limited to the judgment, decision-making, conduct, ordinary carelessness (i.e., mere negligence), and/or gross negligence (i.e., negligence below the level of culpability of recklessness) of any person as defined below in § 1.3 or provider as defined below in § 1.4.

3. A “person who takes part in a sport or recreational activity” includes, but is not limited to: participants and co-participants, coaches, officials, spectators, caddies, team staff personnel, classmates, chaperones, competitors, drivers, facilities and/or field personnel, instructors, judges (whether on or off the field, ice, court, or other playing surface or area), mentors, organizers, providers, referees, umpires, sponsors, students, teammates, team members, team personnel, team staff, trainers, pit crew, venue employees, personnel, volunteers, vendors, players or participants in sports and recreational activities listed in or within the scope of §1.1.

4. A “provider” includes but is not limited to both public and private: persons, individuals, organizations, clubs, schools, conferences, and corporate entities that, for profit or otherwise, sponsor, organize, arrange, offer, provide a venue for, and/or conduct a sport or recreational activity.

§ 2. Assumption of Risks Inherent in a Sport or Recreational Activity in General. A person, irrespective of his or her age, who takes part in a sport or recreational activity, assumes the inherent risks in that sport or recreational activity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury or death to himself or herself that results from the inherent risks in that sport or recreational activity.

§ 3. Assumption of Risks Inherent in a Sport or Recreational Activity as “Primary Assumption of Risk”. All assumption of inherent risks is “primary assumption of risk” which has the legal effect of negating duty for a sport or recreational activity. This negation of duty results from the nature of the sport or recreational activity and the parties’ relationship to it, because neither a provider nor a person who takes part in a sport or recreational activity owes a legal duty to protect other persons who take part in a sport or recreational activity from the inherent risks of a sport or recreational activity.
§ 4. Non-Inherent Risks Not Assumed in a Sport or Recreational Activity. A person (as defined in § 1.3) does not assume risks of injury caused either by a provider of a sport or recreational activity or by a person (as defined in §§ 1.3 and 1.4) which are not inherent (as defined in § 1.2). Intentional or reckless conduct of a person and/or provider (as defined in §§ 1.3 and 1.4) that is totally outside the range of ordinary activity involved in a sport or recreational activity is not an inherent risk of a sport or recreational activity.

§ 5. Risks Inherent in a Sport or Recreational Activity: A Question of Law. The determination of whether a risk is an inherent risk in a sport or recreational activity, and consequently whether a duty is owed in a sport or recreational activity, is a question of law for the court, and therefore will generally be appropriate for resolution by a motion to dismiss, on summary judgment, and/or directed verdict.

§ 6. Neither a Person Nor Provider is Required to Eliminate, Alter, or Control Inherent Risks. Neither a person nor provider is required to eliminate, alter, or control the inherent risks within a sport or recreational activity.

§ 7. Act Not Applicable to Equipment or Products. This Act does not apply to a cause of action based upon the design or manufacture of any sport or recreational equipment or other products used incidental to or required by a sport or recreational activity.

I. INTRODUCTION

In our litigious society, we have grown accustomed to blaming others for our own misfortunes. It is surprising how common it is for people injured while participating in sports and recreational activities to sue participants, coaches, spectators, officials, volunteers—even the very organizations that sponsor, fund, and produce the sport or recreational activity. Given this development, “[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—spurs litigation.” Those involved in sports and recreational activities sue even though they either know or have reason to know the risks that are simply inherent in

1. Terence J. Centner, Equestrian Immunity and Sport Responsibility Statutes: Altering Obligations and Placing them on Participants, 13 VILL. SPORTS & ENT. L.J. 37, 40–41 (2006) [hereinafter Centner, Equestrian Immunity and Sport Responsibility Statutes] (“American sports participants experiencing a mishap are more likely to blame the sport provider for not implementing greater safety precautions . . . . American tort law encourages families of persons who are injured to blame the facility and property owners.” (footnote omitted)).

all sports and recreational activities. Some courts and state legislatures have dealt with the fact of this knowledge of inherent risks by adopting legal rules that refuse to impose tort liability for negligence in sports and recreational activities. Instead, these courts and legislatures impose tort liability in the context of sports and recreational activities only when injury occurs as a result of reckless or intentional conduct. “These provisions potentially reduce the number of accidents that will lead to successful lawsuits. In this manner, the statutes help facilitate participation in risky sport activities.”

This article explains the rationale for a specific kind of proposed legislation: a uniform sport responsibility act. In short, this proposed legislation is intended to encourage Americans to participate in sports and recreational activities in a vigorous, robust, and energetic fashion, without undue concern for liability.

California and Ohio courts have led the way by adopting, through common law, the basics of the legal principles that serve as the foundation for the proposed legislation. California has adopted a legal concept that attempts to stop litigation by persons who at- tempt to blame others. It’s called the primary assumption of risk doctrine. It allows courts to dismiss cases involving sport participants blaming others when no duty exists.”

See also Yerger, supra note 4, at 694–97 (summarizing the California common law).
the California Supreme Court noted: “The courts have concluded that vigorous participation in . . . sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct.”

Ohio courts have stated the rule rather simply: “the Supreme Court of Ohio has generally held that ‘where injuries are sustained in a sporting event, there is no liability for injuries caused by negligent conduct.’” In addition, many individual states—Wyoming for example—have attempted, with varied success, to codify such a law.

This article proposes a uniform state law (“the Bill”) and explains the content, language, and intent of the Bill. Drawing on the experience of both case law and state sport responsibility statutes, the Bill attempts to blend the interpretations and teachings of courts, legislators, and commentators to fashion a sound uniform sport responsibility law.

In doing so, the article and the Bill seek to clarify ambiguities and close loopholes that have given some state courts difficulty when interpreting the legal principles related to a comprehensive sport responsibility law.

The purpose of the Bill is to create a statute that employs the legal principle of primary assumption of risk to remove from those participating in sports and recreational activities the legal duty to protect others from the risks that are inherent in such activities. A common law creation, “primary assumption of the risk is the judicially created affirmative defense whereby a defendant owes no duty to protect a plaintiff against certain risks that are so inherent in an activity that they cannot be eliminated.” As Catherine Hansen-Stamp has explained:

8. Id. at 710.
10. See Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at 48–65 (discussing various types of statutes limiting liability, including Good Samaritan statutes, ski statutes, equestrian immunity statutes, and sport responsibility statutes in general). For a general discussion of sport responsibility statutes, see Centner, Expanding Statutory Immunity, supra note 4, at 19–27. See also John O. Spengler, Brian P. Burket, Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation, 11 J. LEGAL ASPECTS SPORT 135, 136–57 (2001) (includes a comprehensive table of state sport responsibility statutes). For a brief summary of Wyoming’s statute, see Yerger, supra note 4, at 697–702.
11. See Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at 47 (“The need for tort liability exceptions has been recognized for hundreds of years.”).
12. See, e.g., Geurin v. Icepro, No. G042455, 2011 Cal. App. Unpub. LEXIS 556 at *4 (Jan. 25, 2011) (“The existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection.”) (citation omitted). See also Centner, America’s Blame Culture, supra note 6, at 144 (“Most sport responsibility statutes delineate a directive that participants cannot recover damages for injuries resulting from the inherent risks of the sport.”).
[T]he application of the . . . [doctrine] requires a duty analysis: if the in-
jury results from an inherent risk, the provider owes no legal duty, plain-
tiff’s cause of action must fail . . . . If the injury does not result from an
inherent risk, plaintiff may go on to prove that the provider’s negligence
caus ed his injuries.  

Primary assumption of risk holds those who participate in or provide
sports and recreational activities liable for injury to others participating if
and only if the injury is caused by reckless or intentional conduct, but not for
mere negligence or even for what some describe as gross negligence.  

A primary goal of the Bill is to reduce the volume of lawsuits brought
by those participating in sports and recreational activities.  Often a plain-
tiff’s insurer initiates such lawsuits because, if the insurer can convince a
jury that someone else is to blame for the plaintiff’s injury, then that some-
one else (i.e., the defendant or the defendant’s insurer) must pay medical
bills in order to compensate the injured participant. Admittedly, in most
instances, when a serious injury occurs while participating in a sport or rec-
reational activity, someone must pay medical costs and other compensation.
But it will be far more efficient for the injured participant (or, as will often
be the case, the injured participant’s first-party medical insurer) to pay or
absorb medical costs. The Bill creates a legal rule that will decrease the
number of lawsuits brought by injured sports participants. One reason why
there will be fewer lawsuits is because the Bill will reduce the likelihood
that a plaintiff’s attorney will be willing to take a case on a contingency ba-
sis. This is so because in order to prevail, the plaintiff’s lawyer will have to
prove that the plaintiff’s injury resulted from the defendant’s reckless or
intentional conduct that was totally outside the range of ordinary activity
involved in the sport or recreational activity in question. And it is decidedly
more difficult to prove recklessness or intent than it is to prove either mere

14. Catherine Hansen-Stamp, Recreational Injuries and Inherent Risks: Wyoming’s
omitted) [hereinafter Hansen-Stamp, Recreational Injuries].
15. See infra Parts II and IV for more discussion about primary assumption of risk.
16. Many commentators and courts have recognized this as a legitimate goal of such a
legal rule. See, e.g., Centner, Equestrian Immunity and Sport Responsibility Statutes, supra
note 1, at 39 (“[T]his Article acknowledges policy-driven proposals, common law principles,
and statutory solutions that have been offered to curtail tort litigation. . . . [T]his Article pro-
poses that future changes to the American tort system should model the success of equestrian
immunity and sports responsibility statutes by enacting obligations on participants to reduce
litigation and accompanying expenses.).
17. See Centner, Expanding Statutory Immunity, supra note 4, at 35 (“Moreover, as
statutory parameters become understood, plaintiffs without a bona fide claim due to the im-
munity provided by a statute may be expected to be less likely to find an attorney willing to
represent them in a lawsuit.”) (footnote omitted).
negligence or even gross negligence. As Professor Centner explains: “Although most sport responsibility statutes do not prevent plaintiffs from bringing a lawsuit, plaintiffs with injuries caused by inherent risks of the sport may be expected to not file suit because, under the statute, they cannot recover their damages.” He adds, “the statutory directives stating that providers do not have a duty of care concerning inherent risks should lead some sport participants to forgo litigation concerning their injuries.”

In the absence of the legal rule proposed by the Bill, insurers are frequently forced to defend negligence claims in situations where a sport or recreational activity participant has been injured in the ordinary course of participation, even though the risk that caused the injury was a risk inherent in the sport or recreational activity. “A legal system involving a low level of personal responsibility facilitates liability disputes.” Defending such lawsuits is expensive and wasteful. Some providers of sports and recreational activities have simply discontinued offering activities either out of fear of being sued or due to rising insurance costs. “The assignment of liability affects who must buy insurance to cover accidents and prices charged to participants. Under our legal principles, providers of risky activities must buy more insurance and increase participation fees to cover the costs of damages from accidents involving careless participants.”

At a time when many Americans bemoan the sedentary lifestyle of many of our youth, our laws should be encouraging—not discouraging those who provide sports and recreational activities. As Centner illustrates, “[o]ur tort system needs to allow normal childhood behavior without blam-

18. See infra Part V.A.
19. Centner, Expanding Statutory Immunity, supra note 4, at 35 (footnote omitted).
20. Centner, Expanding Statutory Immunity, supra note 4, at 35.
22. See CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 12 (“America’s legal rules governing tort lawsuits are costly for defendants and taxpayers. No wonder the legal system is so expensive. It involves a large number of lawsuits by individuals who fail to accept responsibility and who seek pecuniary gain.”). See also id. at 183 (“But what about all the wasted efforts involved with the litigation for the defendants, as well as the court system handling the motions, trial, and appeal? Is there a way to more clearly assign liability so that lawsuits do not require a trial?”).
23. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 84 (“Schools forgo new activities, or even cancel longstanding practices, due to liability concerns.”). See also Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at 45–46.
24. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 162.
25. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 10, 84 (“Because of our tort system, Americans have exchanged scraped knees and broken arms for obese children who may be expected to have serious health problems when they are older. Americans would rather have kids sit indoors and search the internet than run around in their neighborhoods . . . . No wonder why our kids resort to playing video games and watching TV; most of the fun activities are banned because they are too dangerous.”).
ing others for every mishap." The plaintiffs’ bar profits at the expense of those who participate in and provide sports and recreational activities and their insurers. Both plaintiffs and defendants in such lawsuits are forced to hire expert witnesses and pay their costly fees. Jurors, who understandably sympathize with injured athletes or spectators, more as a product of sympathy rather than reason, are prone to find innocent defendants liable. Knowing the inclinations of jurors, defense counsel often settle these cases in an effort to avoid jury awards that can be astronomical.

Part II of this Article expands upon the meaning of the doctrine of primary assumption of risk. Part III parses the key definitions of terms used in the Bill and provides interpretive details to explain the intent of those definitions. Parts IV through VIII elaborate upon each substantive provision of the Bill, providing interpretations and accounts from courts and commentators in an effort to clarify potential ambiguities. The Conclusion restates the purposes of the Bill in simple terms, and exhorts legislators to seriously consider its adoption.

II. THE GENERAL RULE OF PRIMARY ASSUMPTION OF RISK

§ 2 Assumption of Risks Inherent in a Sport or Recreational Activity

In General

A person, irrespective of his or her age, who takes part in a sport or recreational activity, assumes the inherent risks in that sport or recreational activity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury or death to himself or herself that results from the inherent risks in that sport or recreational activity.

“This primary assumption of risk doctrine provides generally that individual participants assume the inherent risks of recreational activities and all liability or responsibility for injuries resulting from those risks. Alternatively, providers of recreational activities have no duty to protect participants

26. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 158, 161 (“Parents determine whether their kids are mature enough to participate in sports such as ice hockey, skiing, or football. These parental decisions mean that parents have impliedly consented to their children’s activities . . . . Parents who decide to allow their kids to pursue a dangerous activity make a conscious choice in accepting risks of injury.”).

27. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 33 (“One of the major concerns about the American litigation system is that it is costly. It is by far the most expensive in the world, costing about $250 billion per year. With a population of about 300 million, an average of $830 per year is spent on tort costs for every American. Many believe that attorneys’ fees are excessive, verdicts are too big, and that too much money is spent preparing for trial.”) (footnotes omitted).
from the inherent risks and dangers of recreational activities.”28 “The doctrine of primary assumption of risk is a shorthand way of saying that a defendant owes no duty to protect plaintiffs from an activity’s inherent risks.”29 Section 2 of the Bill expressly adopts the reasoning articulated in and holdings of cases such as Knight v. Jewett,30 Crace v. Kent State University,31 and Kahn v. East Side Union High School District.32 For example, in Crace v. Kent State University, the Ohio Supreme Court held that “[u]nder primary assumption of the risk, an individual assumes the inherent risks of the recreational activity and cannot recover for injuries unless another individual acted recklessly or intentionally. The rationale is that certain risks are so inherent in some activities that the risk of injury is unavoidable.”33 Angela Crace was a cheerleader who suffered serious injuries from a fall during a cheerleading practice.34 The Ohio Court of Appeals held that the trial court

28. Hansen-Stamp, Recreational Injuries, supra note 14, at 251 (footnote omitted). See also Centner, Expanding Statutory Immunity, supra note 4, at 34 (“In contrast, the new sport responsibility statutes impose obligations. Participants have an obligation to take care of themselves while providers also have responsibilities centered around the provision of safer activities.”) (footnotes omitted).

29. Horton, supra note 4, at 612.

30. 834 P.2d 696 (Cal. 1992). See Hansen-Stamp, Recreational Injuries, supra note 14, at 259–60 (“Determination of the application of primary assumption of risk is a ‘duty’ analysis which precedes the negligence inquiry. A participant assumes the inherent risks of a recreational activity by agreeing to voluntarily participate in that activity. A recreation provider has no duty to protect the participant from these risks, and ultimately, has no liability to the participant for injuries resulting from those risks.”) (footnotes omitted). See also CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 27 (“A third strategy prevalent in sport responsibility statutes is to have participants assume risks related to a sport. Participants assume responsibility for injuries that are a part of the inherent danger of the sport. For example, a ski statute may provide that no skier may make any claim against any ski area operator for injury resulting from the inherent dangers of skiing.”) Id. at 79 (footnote omitted). “Obvious risks that are associated with an activity are assumed by the participants. These risks are so directly associated with the activity that participants are responsible for related injuries. In some states, this acceptance of risk is known as primary assumption of risk. Under this doctrine, a provider offering an activity has no duty with respect to obvious and inherent risks. In the absence of a duty, there is no obligation to eliminate risk or to protect persons against injuries. Rather, risks that are part of the activity are assumed by the participants. Primary assumption of risk serves as a defense for businesses, recreational and sport providers, and property owners.” Id. at 134. (“[T]o reduce some litigation, state legislatures have adopted laws to place responsibilities for some sport accidents on participants.”) Id. at 141).


32. 75 P.3d 30 (Cal. 2003).

33. 924 N.E.2d at 909 (citations omitted). The court quoted Thompson v. McNeill: “Acts that would give rise to tort liability for negligence on a city street or in a backyard are not negligent in the context of a game where such an act is foreseeable and within the rules.” 53 Ohio St. 3d 102, 104 (1990).

34. Crace, 924 N.E.2d at 908 (“Angela’s fall was unbroken and caused catastrophic injuries, including immediate paraplegia”).
properly applied the doctrine of primary assumption of the risk as a defense, and further held that Kent State University “owed no duty to protect [Angela] from the inherent risk of injury related to a fall while participating in a mounted stunt or human pyramid. Based upon the claims presented in this matter, [she] may only recover if . . . [the cheerleading coach] acted recklessly or intentionally.”35 In the final analysis, the Crace court held that the plaintiff suffered her injuries “in the recreational activity of cheerleading” and that her injuries were a result of “an inherent risk . . . that [was] incapable of being completely eliminated.”36 And because the trial court had found that the cheerleading coach had not acted either recklessly or intentionally, primary assumption of the risk barred the plaintiff’s claims.37

The Supreme Court of California in Kahn v. East Side Union High School District38 articulated the rule similarly: “[S]ome risk of injury is inherent in most sports, and in order to avoid the detriment to a sport that would arise from discouraging participants from vigorously engaging in the activity, it is appropriate to hold that a participant breaches a duty of care to a coparticipant only if he or she ‘intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.’”39 The Ohio Supreme Court framed the rule in Marchetti v. Kalish,40 asserting that “[w]here individuals engage in recreational or sports activity, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant’s actions were either ‘reckless’ or ‘intentional’ . . . .”41

The rationale for including risks “whether known or unknown” reflects the reasoning in Crace, wherein the court explained: “Under primary assumption of the risk, the injured plaintiff’s subjective consent to and appreciation for the inherent risks are immaterial to the analysis.”42 The Bill follows the Wyoming sport responsibility statute expressly stating that age is not a factor in determining whether a person assumes inherent risks.43

35. Id. at 914.
36. Id. at 915.
37. Id.
38. 75 P.3d 30 (Cal. 2003).
39. Id. at 32 (quoting Knight v. Jewett, 834 P.2d 696, 711 (Cal. 1992)). See also CENTNER, AMERICA’S BLAME CULTURE 179 (“Many sports are dangerous. Under the sport responsibility statutes, participants are obligated to accept responsibility for their own safety.”).
41. Id. at 699.
42. 924 N.E.2d at 910.
43. WYO. STAT. ANN. §§ 1-1-121, 1-1-123 (West 2013).
III. KEY DEFINITIONS

A. Sport or Recreational Activity

1. A “sport or recreational activity” encompasses all commonly understood sports and recreational and/or adventure activities of any kind, whether or not those activities include an instructional, educational, or competitive component, including but not limited to: alpine sports and/or activities (including skiing, ski-biking, and snowboarding), animal riding, archery, ballooning, backcountry trips, backpacking, badminton, base jumping, baseball, basketball, biathlon, bicycling, billiards, bird-watching, boating activities, bowling, boxing, bungee jumping, camping, caving, challenge courses, cheerleading, cliff diving, climbing (including climbing observation towers, ice climbing, mountain climbing, and rock climbing, either indoors or outdoors on either natural or artificial surfaces), curling, cutting wood, dancing (including social, competitive, and fitness-related dance [e.g., jazzercise and Zumba], diving, dude ranching, any equine activity and sports, exploring caves, extreme sports, fishing, fitness training, football, geocaching, gliding, golf, gymnastics, hang gliding, harvesting the products of nature, hiking, hockey, horseback riding, horseshoe-pitching, hunting and gathering, ice skating, longboarding, martial arts, motorcycling, nature study, Nordic skiing, operating an all-terrain vehicle or utility terrain vehicle (including standard ATV’s and snowmobiles), outdoor education programs, paintball, parachuting, participation in water or ski sports outside of designated areas, picnicking, ping pong, racing, racquetball, removing wood, river floating, rollerblading, roller skating, rugby, self-contained underwater breathing apparatus (SCUBA), sight-seeing, skating, sky diving, sleigh riding, sledding, snorkeling, snowboarding, snowmobiling, snow tubing, soccer, softball, spelunking, sport shooting, swimming, teambuilding activities, tennis, throwing darts, track and field sports (including all running, jumping, and throwing events [e.g., pole vault, high jump, javelin, long jump, shot put, marathoning, etc.]), trapping, trekking, triathlon, weight training, ultimate Frisbee, volleyball, walking (including walking for fitness or nature walks), white water rafting, wrestling, windsurfing, yoga, zip-lining, and any other sport, game, or educational activity.

The list of activities provided in § 1.1 is an illustrative list—not a limiting or exhaustive list. Human history has provided an ever-expanding array of activities that we consider sport and/or recreational.

The most common types of sport safety statutes are those which provide legislative protection for snow skiing, roller skating and equestrian activities. The list of protected activities, however, has expanded to include limitations on liability for activities as diverse as hang gliding, snowmobiling, and whitewater boating. Additionally, some states have enacted
legislative provisions that provide blanket protection to sport and or recreational activities. 44

According to Professor Centner, a number of the sport responsibility statutes enacted by states are designed to cover “risky sport activities.” 45 But, “[w]hile tennis and golf may have fewer injuries than horseback riding and skiing, it is not clear that such numbers should translate into different treatment for liability purposes.” 46 In Angland v. Mountain Creek Resort, 47 the Supreme Court of New Jersey found no meaningful distinction to be drawn between sports that are ‘commonly perceived’ to be ‘contact’ sports and those that are not. Rather, because we had previously recognized that ‘the risk of injury is a common and inherent aspect of informal sports activity[,]’ we saw no reason to adopt a framework that would utilize a different standard for different types of recreational endeavors. 48

Thus, the Bill is meant to encompass all such sports and activities, and is meant to apply to new sports and recreational activities as they develop whether known now or later introduced in the future as humans embrace new forms of sport and recreation. Unlike ski and equine liability statutes, many of which were enacted in response to specific lobbying groups, the Bill is intended to encompass as wide a variety of sports and recreation activities as possible. Commentators have noted that a broader statute is likely to be preferable in a number of ways to the narrow ski and equestrian liability statutes. 49

44. Spengler & Burket, supra note 3, at 135.
45. Centner, Expanding Statutory Immunity, supra note 40, at 19. See also CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 131 (“People seeking adventure will want to participate in activities despite risks of injury. What rules should our legislatures adopt to safeguard participants in dangerous sports? How should liability for injuries be assigned?”); Id at 144 (“Providers of risky sport activities have claimed that they need additional protection against some lawsuits to maintain viable business enterprises. Sport providers have found an answer through legislative dispensation: sport responsibility statutes.”). See generally Paul Caprara, Surf’s Up: The Implications of Tort Liability in the Unregulated Sport of Surfing, 44 CAL. W. L. REV. 557 (2008) (examining the potential of applying primary assumption of risk and other legal theories to the sport of surfing). One commentator has suggested that primary assumption of risk may not fit well with certain exceptionally risky sports. Horton, supra note 4, at 604–05, 652–53 (explaining a potential definition for extreme sports).
46. Centner, Expanding Statutory Immunity, supra note 4, at 4.
47. 66 A.3d 1252 (N.J. 2013).
48. Id. at 1262 (citations omitted) (edit in original).
49. See, e.g., Centner, Expanding Statutory Immunity, supra note 4, at 4 (“Alternatively, a concise sport responsibility statute, as adopted in Wyoming, may delineate a way to reduce the number of statutes to simplify liability rules for risky recreational activities.”) (footnotes omitted). “Rather than proceed on a sport-by-sport basis, consideration might be given for all
Many sports and recreational activities that the Bill includes are rather obvious, such as the traditional sports of football, basketball, and baseball. Other sports, such as cheerleading, may be less traditional but nevertheless easily fit into the Bill’s definition. For example, in Crace, “the trial court held that ‘the risk of injury due to a fall while performing a mounted stunt is a result of a foreseeable, customary part of the sport of cheerleading.’”50 In its discussion of inherent risks included in the sport of cheerleading, the Crace court quoted a California case, Aaris v. Las Virgenes Unified School District, remarking that “[w]henever gravity is at play with the human body, the risk of injury is inherent.”51 But many other recreational activities also are covered, such as hiking. For example, in Morgan v. Ohio Conference of the United Church of Christ, the plaintiff was a teacher who was serving as a chaperone for a sixth grade “Nature’s Classroom” hike at night.52 The Court of Appeals applied the Ohio common law of primary assumption of risk to him because it considered that hiking at night was a recreational activity and that he was voluntarily engaging in it.53 Another Ohio case, Byer v. Lucas, helps to illustrate the breadth of activities that the Bill encompasses.54 Byer involved a hayride where a tractor pulled a wagon carrying partygoers.55 The Court of Appeals made it clear that, merely because the injury occurred as a result of a mishap involving a motor vehicle, the activity should, nevertheless, be considered a recreational activity.56 After discussing cases involving motorcycles, tubing behind a motor boat, snowmobiles, and all-terrain vehicles (ATVs), the court summarized the case law as follows: “Clearly, courts have found that activities involving motor vehicles are recreational, and that activities can be recreational even when they occur on public roads.”57

51. Id. at 913 (quoting Aaris v. Las Virgenes Unified School Dist., 75 Cal. Rptr. 2d 801, 802 (Cal. Ct. App. 1998)).
52. 2012 Ohio 453, 1.
53. Id. at 6.
54. 2009 Ohio 1022.
55. Id. at 1.
56. Id. at 7.
57. Id. at 3.
B. Inherent Risks

2. “Inherent risks in a sport or recreational activity” are those risks which are characteristic of, derivative of, an integral part of, ordinary to, or intrinsic to any given sport or recreational activity, including but not limited to the judgment, decision-making, conduct, ordinary carelessness (i.e., mere negligence), and/or gross negligence (i.e., negligence below the level of culpability of recklessness) of any person as defined below in § 1.3 or provider as defined below in § 1.4.

Commentators have recognized the critical importance of defining inherent risks in sports responsibility legislation:

Sport safety statutes exist in most states to protect sport and recreation providers from liability. The theme of these laws is to place responsibility on participants for risks that they voluntarily assume. These risks are referred to as inherent risks and are often listed in the statute. Defining inherent risks has become a key aspect of many sport specific legislative initiatives. 58

Section 1.2 encompasses a broad range of risks. The Supreme Court of California has explained:

In the sports setting . . . conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, 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. (See generally Annot. (1987) 55 A.L.R.4th 632.) In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant. 59

In the same case, the Supreme Court of California elaborated:

In some situations, however, the careless conduct of others is treated as an “inherent risk” of a sport, thus barring recovery by the plaintiff. For example, numerous cases recognize that in a game of baseball, a player generally cannot recover if he or she is hit and injured by a carelessly thrown ball (see, e.g., Mann v. Nutrilite, Inc., (1995) 136 Cal.App.2d 729, 734–735, 289 P.2d 282), and that in a game of basketball, recovery

58. Spengler & Burket, supra note 3, at 135.
59. Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992). See also Centner, America’s Blame Culture, supra note 6, at 145 (“The meaning of inherent risks is critical for comprehending the immunity provided by sport responsibility statutes. A few statutes prescribe a general definition for multiple sports.”).
is not permitted for an injury caused by a carelessly extended elbow (see, e.g., Thomas v. Barlow (1927) 5 N.J.Misc. 764, 138 A. 208).

In Gallagher v. Cleveland Browns Football Co., the Ohio Supreme Court explained inherent risks, stating that “only those risks directly associated with the activity in question are within the scope of primary assumption of risk, so that no jury question would arise when an injury resulting from such a direct risk is at issue, meaning that no duty was owed by the defendant to protect the plaintiff from that specific risk.”

Explaining inherent risks as they relate to equestrian liability statutes, Professor Centner generalizes that “[i]nherent risks’ are dangers or conditions that are an integral part of equestrian activities including animal behavior, unpredictability of reactions, hazards such as surface and subsurface conditions, and collisions with other horses and objects.”

Some state statutes have attempted to enumerate inherent risks. As a rule, any such list is likely to fall short. No matter how comprehensive the drafters may try to be, misfortune and injury during sports and recreational activities are always finding new ways to manifest themselves. Consequently, rather than listing specific inherent risks, the Bill takes the view that courts will be able to use reason and common sense to assess whether any given injury has been caused by a risk inherent in the sport or recreational activity in question. The Ohio courts refer to a risk as inherent if it is

60. Knight, 834 P.2d at 708.
61. 659 N.E. 2d 1232, 1237 (Ohio 1996).
62. Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at 50 (footnote omitted). For another good, general discussion of equine liability statutes, see also Centner, Expanding Statutory Immunity, supra note 4, at 14–17. See also Centner, AMERICA’S BLAME CULTURE, supra note 6, at 26, 131.
63. See Hansen-Stamp, Recreational Injuries, supra note 14, at 255 (discussing the Wyoming “judicial approach” and the efforts of other state legislatures to list inherent risks). See also Centner, Expanding Statutory Immunity, supra note 4, at 19 (“Inherent risks are defined in some statutes.”).
64. See, e.g., CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 145 (2008) (“For skiing, inherent risks may be defined as the risks of personal injury, death, or property damage caused by variations in terrain, weather conditions, and persons. These include surface or subsurface snow, ice, bare spots, areas of thin cover, moguls, ruts, bumps, other persons using the facilities, rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility. Participants assume responsibility for injuries by such conditions.”)(footnote omitted); id. (“Roller skating immunity statutes prescribe multiple approaches to reducing lawsuits against operators. In some statutes, skaters assume the inherent risks of roller skating. These would include injuries resulting from collisions (including collisions with columns, doors and benches), incidental contact with another skater or spectator, and falls.”)(footnote omitted).
65. As commentators have observed: “Inherent risk is a foundational legal concept for recreational sporting activities. The nature of the activity itself is a source of risk. Removal of risk from these types of activities is not usually an option for organizers, because the activity would be so fundamentally altered that it would no longer be recognizable as the same activi-
foreseeable and customarily associated with any given sport or recreational activity. The Morgan court explained that “[t]he rationale behind the doctrine is that certain risks are so intrinsic in some activities that the risk of injury is unavoidable.” Specifically, in Morgan, the Court of Appeals agreed with the trial court’s conclusion that “hiking contains an inherent risk of slipping, tripping or falling that cannot be eliminated, even more so with hiking at night.” The court did not need a statute attempting to enumerate a list of all of the potential inherent risks in hiking in order to reach its conclusion. Judges are capable of determining what risks are inherent in any given sport or recreational activity on an ad hoc basis.

Some inherent risks are obvious, such as ACL injuries caused by twisting and/or contact in sports such as skiing, soccer, basketball, and football. Other inherent risks may be less obvious but nevertheless still “inherent.” For example, the Bill assumes that the negligence of coparticipants, coaches, officials, and providers is an inherent risk. Although some may find this confusing, it is a critical component of the Bill. In particular, risks such as those posed when a coach or an instructor challenges an athlete to attempt a more difficult or complex move are inherent risks. So long as the coach, official, or provider’s negligence is a mistake or an error of judgment that is neither reckless nor intentionally injurious, such mistakes are not actionable under the Bill. In Crace, the Court of Appeals of Ohio soberly noted that serious injuries may occur even when coaches adhere to accepted national regulations. Summarizing the testimony of the expert witnesses at trial, the court remarked:

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66. See Morgan v. Ohio Conference of the Church of Christ, 2012 Ohio 453, 3 (Ohio Ct. App.) (“The types of risks inherent to an activity are those risks that are foreseeable and customary risks of the sport or recreational activity.”). See also Centner, America’s Blame Culture, supra note 6, at 149 (2008) (“While sport responsibility statutes were intended to reduce litigation, sometimes they fail to accomplish this objective. If a legislature fails to adequately define inherent risks, an analysis of the facts may be necessary.”).


68. Morgan, 2012 Ohio 453, at 4 (citing the trial court).


[A]ccording to the experts, the risk of injury is inherent in cheerleading, particularly when performing elevated stunts and human pyramids. Even when a coach follows the AACCA safety guidelines, the risk is forever present and may only be reduced to manageable levels. Manageable risks are nevertheless risks. It necessarily follows that the risk of injury is incapable of being completely eliminated.72

Consider also a diving coach who suggests that a diver who has mastered a single twist ought to attempt a one-and-a-half or double twist. Similarly, a pole vault coach might challenge a vaulter to try a grip that is 4” to 6” higher than the vaulter has used previously or to try a pole that is 5 lbs. or 10 lbs. stiffer than the vaulter has used previously (or both). In these situations, if the diver or pole vaulter, in attempting to meet the coach’s challenge, is injured, that injury is the result of an inherent risk. Accommodating these circumstances is essential to the coach-athlete relationship. “Coaches must be free to push their players to levels that may, in hindsight, be beyond the students’ abilities.”73 The last thing that coaches need is a “Monday-morning-quarterback”—a second-guessing of the coach’s challenge to her athlete. In the absence of the standard established by the Bill, if left to a jury, jurors might readily second-guess a coach’s judgment out of sympathy for an injured athlete, rather than a true assessment of fault.

The Supreme Court of California examined this principle in Kahn v. East Side Union High School District:

In the present case, we recognize that the relationship of a sports instructor or coach to a student or athlete is different from the relationship between coparticipants in a sport. But because a significant part of an instructor’s or coach’s role is to challenge or “push” a student or athlete to advance in his or her skill level and to undertake more difficult tasks, and because the fulfillment of such a role could be improperly chilled by too stringent a standard of potential legal liability, we conclude that the same general standard should apply in cases in which an instructor’s alleged liability rests primarily on a claim that he or she challenged the player to perform beyond his or her capacity or failed to provide adequate instruction or supervision before directing or permitting a student to perform a particular maneuver that has resulted in injury to the student. A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is “totally out-

72. Id.
side the range of the ordinary activity” . . . involved in teaching or coaching the sport. 74

In Kahn, the Supreme Court of California summarized the case law on this point:

[T]he risks associated with learning a sport may themselves be inherent risks of the sport, and . . . an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence. This line of cases analyzes and articulates an important and appropriate limitation on the duty of a sports instructor. The cases point out that instruction in a sport frequently entails challenging or “pushing” a student to attempt new or more difficult feats, and that “liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student’s abilities.” [(Bushnell v. Japanese–American Religious & Cultural Center, 43 Cal. App. 4th 525 (Cal. App. Ct. 1996)).] As a general matter, although the nature of the sport and the relationship of the parties to it and to each other remain relevant, a student’s inability to meet an instructor’s legitimate challenge is a risk that is inherent in learning a sport. To impose a duty to mitigate the inherent risks of learning a sport by refraining from challenging a student, as these cases explain, could have a chilling effect on the enterprise of teaching and learning skills that are necessary to the sport. At a competitive level, especially, this chilling effect is undesirable. 75

On the other hand, Byer v. Lucas illustrates a case where a court determined that the risks incurred by the plaintiff were outside the scope of those that could be deemed “inherent” in a recreational activity. As noted, Byer involved an accident that occurred during a hayride. 76 Lori Byer was a passenger riding in a wagon being pulled by a tractor. The hayride was organized as an activity at a social party. The tractor driver had consumed several beers prior to the hayride, attempted to descend a steep hill, and lost control of the vehicle. The irregular motion of the steep, out of control descent ejected Byer from the wagon, and she suffered severe injuries when she crashed to the ground. Although some risks are clearly inherent in a hayride, such as “getting scratched by tree branches [sic], being bounced around on the wagon, and even losing one’s balance and falling off the wagon, the court concluded that “it cannot be said the risks Byer encountered were an ordinary and foreseeable part of her hayride.” 77 “[T]he recreational activity

74. 75 P.3d 30, 32–33 (2003) (citation omitted).
75. Id. at 40 (emphasis in original).
76. See supra text accompanying notes 49–50.
here entailed risks that extended well beyond the ordinary; risks not directly
associated with a hayride.”78 More specifically, the court held that “a farm
tractor and its wagon cascading down a steep hill out of control and jack-
knifing to a stop throwing passengers from it is not an inherent risk of a
hayride. Therefore, the recreational activities/primary assumption of the risk
doctrine is inapplicable and general negligence principles apply to Byer’s
claim against Lucas.”79

C. Person

3. A “person who takes part in a sport or recreational activity” includes, but is not limited to: participants and co-participants, coaches, officials,
spectators, caddies, team staff personnel, classmates, chaperones, competitors, drivers, facilities
and/or field personnel, instructors, judges (whether on or off the field, ice, court, or other playing sur-
face or area), mentors, organizers, providers, referees, umpires, sponsors, students, teammates,
team members, team personnel, team staff, train-
ers, pit crew, venue employees, personnel, volun-
teers, vendors, players or participants in sports and
recreational activities listed in or within the scope
of §1.1.

The definition of “Person” anticipates that a “person” might be either a
plaintiff or a defendant, depending on the facts of any given case. Participants and co-participants rather obviously are included. But the Bill pro-
vides a great deal of latitude in recognizing that a wide variety of others who
are closely related to sports and recreational activities may also qualify as a
“person” for purposes of the rule. For example, § 1.3 of the Bill contem-
plates that spectators, like participants, are included within the language of
“A person, irrespective of his or her age, who takes part in a sport or recrea-
tional activity.” Cases from a number of jurisdictions have taken this ap-
proach.80 And “[i]n a few instances, sport responsibility statutes provide that

78. Id. at 6.
79. Id. at 7 (emphasis added).
80. See Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at
61–62 (“In general, participants cannot recover damages from sport providers for injuries
resulting from the sport’s inherent dangers and risks. In a few instances, sport responsibility
statutes provide that spectators also assume inherent risks. When sport participants and spec-
tators assume the sport’s inherent risks, they cannot recover damages for these injuries from
others.” (footnotes omitted)). See also Scott B. Kitei, Is the T-Shirt Cannon “Incidental to the
Game” in Professional Athletics?, 11 SPORTS LAW. J. 37, 40 (2004) (examining a variety of
risks that spectators encounter, and considering whether such risks are inherent in sports).
spectators also assume inherent risks.”

Officials, such as umpires, referees, and the like, are also considered participants in sporting events—integral in fact. Thus they easily come within the scope of this provision of the Bill. And, in fact, an important case, Creel v. L & L, Inc., involved a golf official’s conduct.

D. Provider

4. A “provider” includes but is not limited to both public and private: persons, individuals, organizations, clubs, schools, conferences, and corporate entities that, for profit or otherwise, sponsor, organize, arrange, offer, provide a venue for, and/or conduct a sport or recreational activity.

The definition of “provider” represents one kind of entity that might be a potential defendant in a lawsuit involving injuries incurred during sports and recreational activities. Section 6 and the definition in § 1.4 regarding a “provider” embrace the dictum noted in Crace wherein the court stated: “It is clear that courts generally extend primary assumption of the risk to relieve liability of owners, operators, and sponsors of recreational activities.” The court emphasized this point further, remarking that “courts have specifically held [that] ‘[n]on-participants involved in the game may be held to the same standard as participants.’” In addition, the court’s discussion noted that “the defendant’s classification as a participant, nonparticipant, coach, instructor, official, operator, owner, sponsor, provider, or otherwise” ought not

81. Centner, Expanding Statutory Immunity, supra note 4, at 23 (footnote omitted).


84. Crace v. Kent State University, 924 N.E. 2d 906, 911 (Ohio Ct. App. 2009). See also Crace at 912 (“Similarly, the Twelfth Appellate District has expressly held: ‘[i]t is not logical to require “reckless” or “intentional” conduct for recovery against participants, yet allow recovery against non-participants based upon the lower standard of “negligence.”’ [Whitaker v. Walter B. Davis, 1997 WL 30552 at *3 (Ohio Ct. App. 1997).] We agree with this holding when the injuries result from an inherent risk of the activity.”). And see also Crace, 924 N.E.2d at 912 (“A holding to the contrary would likely shift the focus of the analysis away from the activity and its inherent risks. The analysis would then unnecessarily focus upon the extent of the defendant’s involvement and the defendant’s classification as a participant, nonparticipant, coach, instructor, official, operator, owner, sponsor, provider, or otherwise.”).

85. Id. at 911 (quoting Rodríguez v. O.C.C.H.A., 2000 Ohio 2560, 2 (Ohio Ct. App.) (citing Kline v. OID Associates, Inc., 80 Ohio App. 3d 393, 395–96)).
be the central focus in the doctrine of primary assumption of risk in a sports context. Rather the focus ought to be on whether the defendant’s conduct was reckless or intentional. Similarly, in *Geurin v. Icepro*, the California Court of Appeals remarked that the rule applies “to promoters and operators of sports activities, as well as participants.”

IV. ASSUMPTION OF INHERENT RISKS AS PRIMARY ASSUMPTION OF RISK

§ 3 Assumption of Risks Inherent in A Sport or Recreational Activity As “Primary Assumption of Risk”

All assumption of inherent risks is “primary assumption of risk” which has the legal effect of negating duty for a sport or recreational activity. This negation of duty results from the nature of the sport or recreational activity and the parties’ relationship to it, because neither a provider nor a person who takes part in a sport or recreational activity owes a legal duty to protect other persons who take part in a sport or recreational activity from the inherent risks of a sport or recreational activity.

Section 3 of the Bill goes beyond the generalities of §2 and elaborates upon the mechanics of the doctrine of primary assumption of risk in greater detail. In particular, §3 explicitly explains the relationship between primary assumption of risk and duty, and implicitly recognizes the difference between primary assumption of risk and secondary assumption of risk.

First, as regards the relationship between primary assumption of risk and duty, this section adopts the Supreme Court of California’s philosophy stated in *Knight v. Jewett*: “In cases involving ‘primary assumption of risk’—where, by virtue of the nature of the activity and the parties’ relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff’s recovery.” Technically, the doctrine of primary assumption of risk operates to remove “duty” as an element from the standard negligence cause of action. As the *Morgan* court stated, “[t]he affirmative defense of primary assumption of the risk completely negates a negligence claim because the defendant owes no duty to protect the plaintiff against the inherent risks of the recreational activity in which the plaintiff engages.”

86. Id. at 912.
87. Id.
Another case that captures the essence of this aspect of the basic rule is *Geurin v. Icepro*.\(^{92}\) Invoking prior case law, the California Court of Appeal directly stated: “Under the primary assumption of risk doctrine, the defendant owes *no duty* to protect a plaintiff from particular harms arising from ordinary, or simple negligence. In a sports context, the doctrine bars liability because the plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate.”\(^{93}\) The *Crace* court emphasized the “no-duty” aspect of this rule, stating, “primary assumption of the risk negates a negligence claim because no duty is owed to protect against the inherent risks of the recreational activity.”\(^{94}\)

As was mentioned, § 3 also recognizes the important distinction between *primary* assumption of risk and *secondary* assumption of risk. Catherine Hansen-Stamp has explained that courts have often encountered difficulty in separating the two doctrines: “Courts continually muddled the inherent risk doctrine (primary assumption of risk) with secondary assumption of risk principles. In fact, the two legal doctrines require entirely different analyses.”\(^{95}\) In order to explain the distinction, Hansen-Stamp quoted the Vermont Supreme Court:

> Where primary assumption of risk exists, there is no liability to the plaintiff, because there is no negligence on the part of the defendant to begin with; the danger to plaintiff is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence.\(^{96}\)

As the court in *Morgan* noted, “With the doctrine of primary assumption of the risk, the injured plaintiff’s subjective consent to and appreciation for the inherent risks of the recreational activity are immaterial to the analysis.”\(^{97}\) The court went on to explain that primary assumption of risk serves as a complete bar to a plaintiff’s claim (whether or not the conduct is reasona-

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93. *Id.* at *4–5* (emphasis original) (citations omitted).
95. Hansen-Stamp, *Recreational Injuries*, supra note 14, at 252. See also *Caprara*, supra note 45, at 567 (discussing the difference between primary and secondary assumption of risk); Easter et al., * supra* note 65, at 256 (“Assumption of risk defenses are categorized as primary or secondary assumption of risk or alternatively, as express or implied assumption of risk. Drago (2002) argues that these categories are often confused because the distinctions seem unclear.”); Horton, * supra* note 4, at 608–11, 615–20.
ble or unreasonable), while secondary assumption of the risk is merged into the comparative fault system.\footnote{Id. at 4–5. See also, e.g., Horton, supra note 4, at 600–01 (briefly considering the intersection of assumption of risk and contributory negligence).}

The California Supreme Court’s explanation of the difference between primary and secondary assumption of risk in \textit{Knight v. Jewett} is helpful.\footnote{834 P.2d 696 (Cal. 1992).} In \textit{Knight}, the plaintiff and defendant were on opposite sides in an informal game of touch football with a pee wee football.\footnote{Id. at 697.} Within ten minutes of the game, the defendant ran into the plaintiff during a play.\footnote{Id.} The plaintiff then told the defendant to be careful and not so rough while playing.\footnote{Id.} The plaintiff also claimed that she told the defendant that she would have to stop playing if he were to continue playing roughly (which the defendant did not recall).\footnote{Id.}

During the next play, the defendant jumped up to attempt to intercept a pass and collided with the plaintiff which caused the injury at issue in this case.\footnote{Id.} The plaintiff suffered injury to her finger as a result of the contact.\footnote{Id.} The plaintiff underwent three surgeries in an effort to alleviate the pain in her finger, but an unsuccessful result led to the amputation of her finger and the impetus for bringing suit.\footnote{Id.} The plaintiff brought a claim for negligence and assault and battery.\footnote{Id.} The defendant filed a motion for summary judgment under the theory of primary assumption of the risk.\footnote{Id.}

The Court analyzed assumption of risk and, in an extensive discussion, differentiated between primary assumption of risk and secondary assumption of risk within the context of comparative fault.\footnote{Id. at 704–11.} Primary assumption of risk is defined as “a legal conclusion that there is ‘no duty’ . . . [for] the defendant to protect the plaintiff from a . . . risk.”\footnote{Id. at 703 (footnote omitted).} Secondary assumption of risk, on the other hand, is defined as the defendant having a “duty of care to the plaintiff[,] but the plaintiff knowingly encounters the risk . . . caused by the . . . breach of . . . duty.”\footnote{Knight, 834 P.2d at 703–05. See also Centner, America’s Blame Culture, supra note 6, at 81 (“Secondary assumption of risk generally involves a breach of a duty not to increase the risks encountered by plaintiffs beyond the level inherent in the sport. Secondary assumption of risk also involves a breach of a duty of care by a defendant and additional facts involved.”).} The \textit{Knight} Court explained the distinction between primary and secondary assumption of risk as follows:

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98. \textit{Id.} at 4–5. See also, e.g., Horton, supra note 4, at 600–01 (briefly considering the intersection of assumption of risk and contributory negligence).
99. \textit{Id.}
100. \textit{Id.} at 697.
101. \textit{Id.}
102. \textit{Id.}
103. \textit{Id.}
104. \textit{Id.}
105. \textit{Knight}, 834 P.2d at 697.
106. \textit{Id.} at 698.
107. \textit{Id.}
108. \textit{Id.}
110. \textit{Id.} at 703 (footnote omitted).
111. \textit{Knight}, 834 P.2d at 703–05. See also Centner, America’s Blame Culture, supra note 6, at 81 (“Secondary assumption of risk generally involves a breach of a duty not to increase the risks encountered by plaintiffs beyond the level inherent in the sport. Secondary assumption of risk also involves a breach of a duty of care by a defendant and additional facts involved.”).
The question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff’s conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.\footnote{834 P.2d at 704.}

The court further defined primary assumption of risk more clearly as follows:

In cases involving “primary assumption of risk”—where, by virtue of the nature of the activity and the parties’ relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff’s recovery.\footnote{Id. at 707.}

V. RELATIONSHIP BETWEEN NON-INHERENT RISKS AND INTENTIONAL OR RECKLESS CONDUCT

§ 4 Non-Inherent Risks Not Assumed in a Sport or Recreational Activity

A person (as defined in § 1.3) does not assume risks of injury caused either by a provider of a sport or recreational activity or by a person (as defined in §§ 1.3 and 1.4) which are not inherent (as defined in § 1.2). Intentional or reckless conduct of a person and/or provider (as defined in §§ 1.3 and 1.4) that is totally outside the range of ordinary activity involved in a sport or recreational activity is not an inherent risk of a sport or recreational activity.

A. Intent & Recklessness in General

Section 4 of the Bill adopts the legal standard of reckless or intentional conduct as explained in a number of cases that have considered the issue. For example, the court in \textit{Crace} quoted the Ohio Supreme Court regarding the definition and interpretation of what constituted reckless conduct:

The Supreme Court of Ohio has outlined the requisite analysis on this issue. See \textit{Thompson v. McNeill}, (1990), 53 Ohio St.3d 102, 559 N.E.2d 705:

\begin{quote}
The actor’s conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the
\end{quote}

suggesting that the plaintiff knew of the danger and decided to encounter the risk.” (footnotes omitted)).
other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

What constitutes an unreasonable risk under the circumstances of a sporting event must be delineated with reference to the way the particular game is played, i.e., the rules and customs that shape the participants’ ideas of foreseeable conduct in the course of a game.

Id. at 105, 559 N.E.2d 705, quoting Restatement (Second) of Torts (1965), 587, Section 500.\textsuperscript{114}

Another Ohio court, the Tenth Appellate District Court of Appeals of Ohio, has articulated the rule in a direct manner: “Under the doctrine of primary assumption of the risk, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injuries.”\textsuperscript{115}

Section 4 also follows the California Supreme Court’s holding in Knight v. Jewett: “[L]iability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.”\textsuperscript{116} The Supreme Court of New Jersey recently adopted this same common law standard in a case involving a fatality caused by a collision between a snowboarder and a skier.\textsuperscript{117} In that case, Angland v. Mountain Creek Resort, the court explained:

Our conclusion that a recklessness standard is the appropriate one to apply in the sports context is founded on more than a concern for a court’s ability to discern adequately what constitutes reasonable conduct under the highly varied circumstances of informal sports activity. The heightened standard will more likely result in affixing liability for conduct that is clearly unreasonable and unacceptable from the perspective of those engaged in the sport yet leaving free from the supervision of the law the

\textsuperscript{114} Crace v. Kent State Univ., 924 N.E.2d 906, 914 (2009).

\textsuperscript{115} Morgan v. Ohio Conference of the United Church of Christ, 2012 Ohio 453, 3 (citations omitted).

\textsuperscript{116} 834 P.2d at 710 (citing Gauvin v. Clark, 537 N.E.2d 94, 96–97 (Mass. 1989)). See generally Matthew G. Cole, No Blood No Foul: The Standard of Care in Texas Owed by Participants to One Another in Athletic Contests, 59 BAYLOR L. REV. 435, 438–39 (2007) (citing several egregious acts that most would agree were totally outside the range of ordinary conduct in sport).

risk-laden conduct that is inherent in sports and more often than not assumed to be “part of the game.” 118

Economic analysis of tort law suggests that “[b]ecause negligence regimes should be both more lenient and more predictable, negligence may need to take the form not of ordinary negligence but of a laxer standard of care, such as gross negligence or recklessness.” 119 The Second Restatement of Torts, comment f, explains the distinction between intentional conduct versus recklessness, while comment g explains the distinction between recklessness and negligence. According to comment f, one hallmark of recklessness is that a person knows or should know that “a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.” 120 Comment g adds “that reckless misconduct requires a conscious choice of a course of action, either with the knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose danger to any reasonable man.” 121 And comment g also posits that the distinction between recklessness and negligence “is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.” 122 One commentator, in examining the economic underpinnings of immunity in general, insightfully notes:

[N]egligence regimes will often need to take the form of gross negligence or recklessness because such regimes have the characteristics of both minimum norms and more predictable norms. While the legal definitions of gross negligence and recklessness may be vague, they usually refer to acts that are very clearly inappropriate or, to put it differently, that all reasonable observers consider to be inappropriate. Absolute immunity for tort liability is desirable only when no such minimum norms can be defined. 123

Thus the Bill adopts the benchmark mental states of recklessness and intent to trigger liability. 124 The Bill purposely avoids using the term “gross negligence” out of the concern that drawing a line between negligence ver-

118. Id. at 1262 (quoting Crawn v. Campo, 643 A.2d 600, 607 (N.J. 1994)) (edit in original).
120. Restatement (Second) of Torts § 500 cmt. f (1965).
121. Restatement (Second) of Torts § 500 cmt. g (1965).
122. De Geest, supra note 119, at 293.
123. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 67 (“Activity providers who are reckless or willfully cause injuries need to pay for resulting damages.”). See also Terence J. CENTNER, AMERICA’S BLAME CULTURE: POINTING FINGERS AND SHUNNING RESTITUTION 134 (2008) (“Willful conduct needs to be so reckless or so charged with indifference to the consequences as to be equivalent in spirit to actual intent.”).
sus gross negligence would simply be too fine a distinction to prove useful as a practical matter.\textsuperscript{125} In evaluating the efficacy of state sport responsibility laws that impose liability for gross negligence, Professor Centner remarks: “By retaining liability for gross negligence, the statutes may not be very significant in curtailing tort lawsuits.”\textsuperscript{126} “Statutes that adopt provisions granting immunity unless there was a willful and wanton disregard for the plaintiff’s safety are more likely to reduce litigation.”\textsuperscript{127} Hence, under the Bill, a plaintiff must present evidence of recklessness or intent in order to survive summary judgment.\textsuperscript{128} As the Supreme Court of New Jersey recognized in \textit{Angland v. Mountain Creek Resort:} “The heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.”\textsuperscript{129}

In a case involving an ice hockey injury, the Supreme Court of Illinois explained that even intentional injuries may, in certain sports, be considered inherent.\textsuperscript{130} It is only when a defendant’s conduct ventures outside the boundaries of what is customarily expected in the sport that recklessly or intentionally causing injury can be considered non-inherent.\textsuperscript{131} In \textit{Karas v. Strevell}, the Illinois Supreme Court explained:

\begin{quote}
125. \textsc{Centner, America’s Blame Culture, supra} note 6, at 97 (“Gross negligence involves an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. It involves a subjective awareness of an extreme degree of risk.”).

126. Centner, \textit{Expanding Statutory Immunity, supra} at 4, at 28 (“If an immunity statute only provides protection for qualifying negligent acts and retains liability for gross negligence, as occurs in most Good Samaritan statutes, the statute may not preclude many lawsuits.”) (footnote omitted).

127. Id. at 30.

128. \textsc{Centner, America’s Blame Culture, supra} note 6, at 81 (“[P]articipants do not assume the risks of another’s reckless or intentional conduct. Nor do they assume the risks of a concealed or unreasonably increased risk.”) (footnote omitted)); \textsc{Terence J. Centner, America’s Blame Culture: Pointing Fingers and Shunning Restitution} 81 (2008) (“Whenever there is reckless or intentional conduct by another, the defense of primary assumption of risk does not apply.”).


130. Though they are often used interchangeably, there is a distinction made between consent and assumption of risk. \textit{See} Kenneth J. Vandevelde, \textit{The Modern Prima Facie Tort Doctrine}, 79 Ky. L.J. 519, 529 (1991). Consent—or, the assumption of the risk—is a defense to an intentional tort. The Restatement, however, treats this as the first element of a prima facie tort. \textit{See} Restatement (Second) of Torts § 870 cmt. b (1979) (The element is satisfied where the tortious actor “knows or believes that the consequence is certain, or substantially certain, to result from his act.”). When engaging in sports, like football or rugby for example, participants are attempting to intentionally hurt opposing players.

Striking or bodychecking a person who is standing on two thin metal blades atop a sheet of ice is an inherently dangerous action. Even a cleanly executed body check, performed according to the rules of ice hockey, evinces a conscious disregard for the safety of the person being struck. Yet, in an ice hockey game where bodychecking is permitted, players are struck throughout the game. This conduct is an inherent, fundamental part of the sport.\textsuperscript{132}

The court recognized that “[i]n these sports, holding participants liable for consciously disregarding the safety of coparticipants is problematic,”\textsuperscript{133} and examined the issue in a rather sophisticated and nuanced manner, ultimately holding that “[i]n a full contact sport such as ice hockey or tackle football, a participant breaches a duty of care to a coparticipant only if the participant intentionally injures the coparticipant or engages in conduct ‘totally outside the range of the ordinary activity involved in the sport.’”\textsuperscript{134}

In part, the Karas Court relied on its own precedent, \textit{Pfister v. Shusta}, which had created a contact sports exception that imposes liability on a participant in the contact sport “only if a participant intentionally, or willfully and wantonly, injures a coparticipant. Stated differently, in a contact sport the duty owed by the participant to a fellow participant is the ‘duty to refrain from willful and wanton or intentional misconduct.’”\textsuperscript{135}

In determining whether to hold organizational defendants liable for a participant’s injuries the Court reasoned: “Whether the contact sports exception applies to a non-participant defendant is a policy determination that rests on the circumstances of the sport and its inherent risks, the relationship of the parties to the sport and to each other, and whether imposing broader liabilities on the defendant ‘would harm the sport or cause it to be changed or abandoned.’”\textsuperscript{136}

\section*{B. Coaches, Instructors, and Negligence}

In addition, § 4 harmonizes with the rule stated in § 3 as it relates to coaches, instructors, teachers and others who are in a position to push or challenge athletes. As the Supreme Court of California explained:

The instructor’s conduct was itself an inherent risk of the sport, the court found, and the instructor did nothing to increase that risk. “Instruction in an activity such as judo necessarily requires pushing a student to move more quickly, attempt a new move, or take some other action that the

\begin{footnotes}
\item[132] Id. at 132.
\item[133] Id. at 132.
\item[134] Id. at 134 (quoting Knight v. Jewett, 834 P.2d 696, 711 (Cal. 1992)).
\item[135] Id. at 130 (quoting Pfister v. Shusta, 657 N.E.2d 1013, 1015 (Ill. 1995)).
\item[136] Id. at 137 (quoting Kahn v. East Side Union High Sch. Dist., 75 P.3d 30, 39 (Cal. 2003)).
\end{footnotes}
student previously may not have attempted. That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. *Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student’s abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole.* (Bushnell *v. Japanese-American Religious & Cultural Center*, 43 Cal. App. 4th [525, 532 (1996)] italics added.)\(^{137}\)

In *Kane v. National Ski Patrol System, Inc.*, the court specifically recognized that “an instructor’s assessment errors—either in making the necessary subjective judgment of skill level or the equally subjective judgment about the difficulty of the conditions—are in no way ‘outside the range of the ordinary activity involved in the sport.’”\(^{138}\) A number of courts have expressly held that mere subjective judgment errors do not necessarily rise to the level of recklessness or intent. For example, in *Morgan*, the plaintiff alleged numerous facts regarding the provider’s decisions to lead a hike at night on a narrow trail, with limited visibility.\(^{139}\) The court, however, ruled that “[d]espite Morgan’s attempt to argue that the risks were heightened,” it concluded that given the facts, the “risks were inherent risks to night hiking.”\(^{140}\)

Concurring in *Kahn*, Judge Werdegar also explained and clarified the principle and the policy that animates the principle:

Instructors and coaches of active sports must, as an essential part of their jobs, encourage and direct students to learn new and more difficult maneuvers and to perform already learned skills in more stringent competitive circumstances, a learning process that carries inherent risks of physical injury. In learning active sports and in athletic competition the risk of injury is ever present; instructors must frequently exercise their individual, subjective judgment in deciding whether a student is ready to attempt a more dangerous skill or to face tougher competition; and when an injury occurs, especially an injury to a young person, the jury may be tempted to “second-guess [the] instructor’s assessment” (*Kane v. National Ski Patrol System, Inc.*[*], 88 Cal. App. 4th 204, 214 ([2001])). For these reasons, I agree with the majority that application of ordinary negligence standards to sports instruction threatens to severely chill both in-

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137.  *Kahn*, 75 P.3d at 40.
140.  Id. at 6.
simply stated, this section of the Bill recognizes that, among other things, subjective errors of judgment may occur within the range of ordinary, acceptable, prudent coaching, instructing, teaching, officiating, and the like, such as when a coach or official uses discretion to challenge an athlete to test or try more difficult moves or skills. Such subjective errors of judgment are inherent risks within § 3 and not reckless or intentional within the scope of conduct in § 5.142

VI. INHERENT RISKS ARE A QUESTION OF LAW

§ 5 Risks Inherent in a Sport or Recreational Activity: A Question of Law

The determination of whether a risk is an inherent risk in a sport or recreational activity, and consequently whether a duty is owed in a sport or recreational activity, is a question of law for the court, and therefore will generally be appropriate for resolution by a motion to dismiss, on summary judgment, and/or directed verdict.

Section 5 follows the Supreme Court of California’s rule articulated in both Knight v. Jewett143 and Kahn v. East Side Union High School District144: “We emphasized that the question of ‘the existence and scope’ of the defendant’s duty is one of law to be decided by the court, not by a jury, and therefore it generally is ‘amenable to resolution by summary judgment.’”145 The Ohio court framed the same rule in dictum in Crace: “As a procedural matter, we note that the case law regarding primary assumption of the risk generally consists of cases resolved upon summary judgment.”146 Ohio courts appear consistent on this issue.147 As recently as 2012, in Morgan v. Ohio Conference of the United Church of Christ, the Court of Appeals succinctly stated that the decision “to apply the affirmative defense of primary

141. Kahn, 75 P.3d at 48 (Werdegar, J., concurring).
142. For an extensive discussion of this principle, see Kahn, 75 P.3d at 40–43.
143. 834 P.2d 696 (Cal. 1992).
144. 75 P.3d 30 (Cal. 2003).
145. Kahn, 75 P.3d 30 (quoting Knight, 834 P.2d at 706).
147. See, e.g., Byer v. Lucas, 2009 Ohio 1022, 27 (“It is important to be mindful that ‘[t]he application of the doctrine of primary assumption of the risk involves a basic determination as to whether the defendant owed the plaintiff a duty of care. It is well established that the existence of a duty is a question of law for the court to decide on a case-by-case basis.’”) (emphasis added by the Byer court) (quoting Wilson v. Lafferty Volunteer Fire Dep’t, No. 00 BA 29, 2001 Ohio App. LEXIS 5328, at *8–9 (Ohio Ct. App. Nov. 29, 2001) (citing Grover v. Eli Lilly & Co., 591 N.E.2d 696 (Ohio 1992))).
assumption of the risk presents an issue of law for the court to determine.”

Professor Centner has bluntly asserted that “[i]f the reduction of litigation is important, then sport responsibility statutes need to provide that determination of an inherent risk is a question of law. In this manner, a court can grant summary judgment in qualifying cases without a trial.”

Interestingly, Hansen-Stamp takes the position that the Wyoming Recreation Safety Act was intended to embrace this philosophy. According to Hansen-Stamp:

Although the Act’s sheer breadth of coverage gives it power and flexibility, it does require a strong and committed judiciary to apply it properly, within the context of appropriate cases. The original purpose of the Act was to codify that, as a matter of law, providers of recreational activities have no duty to protect participants from injuries resulting from the inherent risks of those activities. Presumably, defendant providers could bring motions to dismiss, or for summary judgment, arguing that the injury resulted from an inherent risk, the provider owed no duty, and thus, the case should be dismissed.

Hansen-Stamp punctuates this point, noting, “[T]he judiciary’s decision to aggressively make this legal duty determination, where possible, will effectively minimize frivolous claims.”

Although sport responsibility statutes may be expected to reduce litigation and recovery against providers of enumerated sports, additional reduction of litigation costs may be possible. The question of whether an injury was a result of an inherent risk may be a question of law or a question of fact. If a sport responsibility statute is written so that inherent

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148. 2012 Ohio 453, 2 (citing Crace v. Kent State Univ., 924 N.E.2d 906, 909 (Ohio 2009)).
149. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 151. But see Caprara, supra note 42, at 564 (mentioning courts that have treated this as a question of fact for a jury in the context of ski accidents).
150. Hansen-Stamp, Recreational Injuries, supra note 14, at 256 (footnotes omitted). See also Yerger, supra note 4, at 699 (discussing the Wyoming courts’ interpretations of this issue)(2005); CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 80 (“In applying the doctrine of primary assumption of risk to the facts, a court can dismiss a lawsuit if there is no evidence of reckless or intentional conduct related to the injury.” (footnote omitted)).
151. Hansen-Stamp, Recreational Injuries, supra note 14, at 277. See also Centner, Expanding Statutory Immunity, supra note 4, at 4 (“Legislative responses that allow issues to be decided as a matter of law rather than a question for the trier of fact may help diminish litigation expenditures.” Id. at 4 (footnote omitted); “If a court finds that a jury decision is required to determine whether an injury resulted from an inherent risk under a specific statute, it may be possible to amend the statute so that future courts could decide as a matter of law that an injury was or was not the result of an inherent risk. In this manner, cases involving inherent risks would not require a jury trial and associated expenditures.” Id. at 35 (footnotes omitted)).
risks are questions of law, the statute has the potential of reducing litigation expenditures.  

The Bill does not attempt to enumerate duties owed by providers of sports and recreational activities. According to Professor Centner, “[m]ost sport responsibility statutes prescribe duties for sport providers.” On balance, this approach poses more problems than it solves. First, if the Bill were to list providers’ duties, it is possible that a court could later construe items on the list as creating new duties, and thus increase rather than decrease potential liability. And secondly the imposition of statutory duties of this nature may have a negative effect on the validity of express assumption of risk by means of a liability waiver signed by plaintiffs. Nothing in the Bill is intended to alter or in any way diminish the effects, enforceability, or validity of any type of express assumption of risk, including but not limited to a waiver of liability for negligence.

VII. NO REQUIREMENT TO ELIMINATE, ALTER, OR CONTROL INHERENT RISKS

§ 6 Neither a Person Nor Provider is Required to Eliminate, Alter, or Control Inherent Risks

Neither a person nor provider is required to eliminate, alter, or control the inherent risks within a sport or recreational activity.

Section 6 of the Bill simply adopts language from cases that have emphasized that this rule operates to remove any duty to eliminate, alter, or control inherent risks. It is likely that this goes without saying. Nevertheless,

152. Centner, Expanding Statutory Immunity, supra note 4, at 38.
153. Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at 58 (footnote omitted).
154. Centner, Equestrian Immunity and Sport Responsibility Statutes, supra note 1, at 58–59 (footnote omitted); Centner, Expanding Statutory Immunity, supra note 4, at 22 (“Because sport responsibility statutes enumerate duties for providers, they may increase liability due to specific duties set forth by the legislative grant.” (footnote omitted)).
155. See Centner, America’s Blame Culture, supra note 6, at 65–66 (“Many providers of recreational and sport activities have adults sign releases from liability for themselves and their children. They hope that these releases will protect them from prospective liability for injuries. Yet, most states prohibit releases that waive liability claims for children. Absent statutory or judicial authority, parents are not permitted to waive a child’s cause of action. Although this legal principle has been altered for a few exceptions, it applies to most parental releases. Other principles limit releases applicable to adults.”). For a brief discussion of liability waivers, see, e.g., Easter et. al., supra note 65, at 258–59; David Horton, Extreme Sports and Assumption of Risk: A Blueprint, 38 U.S.F. L. Rev. 599, 616–19 (2004). See also Horton, supra note 4, at 640–48 (discussing the validity of waivers signed by parents on behalf of their children, and discussing a variety of issues related to minors and assumption of risk in general).
this brief provision makes this principle clear. Interestingly, a number of courts have stated that a defendant owes a duty not to increase the plaintiff’s risk. This provision of the Bill is intended to avoid such an inquiry by expressly stating that there is no duty to control inherent risks. Framing an exception to primary assumption of risk as whether a defendant has increased the plaintiff’s risk begs the question, or the very least asks the wrong question.156 Providers may increase inherent risks in a number of ways without necessarily acting with recklessness or intent. For example, in *Geurin v. Icepro*, the defendant, Icepro, failed to provide the regulation equipment, such as special shoes and helmets that the USA Broomball Regulations required for participants.157 One could certainly argue that failing to provide safety equipment required by the national rules constituted and increase in risk to the plaintiff. And, in fact, the court stated that “Icepro . . . had no duty to protect Geurin [the plaintiff] unless it increased the risk that he would fall on the ice.”158 Nevertheless, the appellate court refused to find Icepro liable. Although the court posed the question as “whether Icepro increased the risk of slipping on the ice,” it held that “IcePro had no duty to take actions that would make broomball safer, such as providing special equipment or instruction.”159 This was due, in part, to the fact that the game in question “was . . . a social, not a league game.”160 The court also rejected the plaintiff’s argument that Icepro should have resurfaced the ice before the match, reasoning that no one playing on ice is entitled to assume perfect conditions and that varying conditions of ice surface are included as part of the inherent risks.161

At the opposite extreme, the Wyoming Supreme Court fell prey to this very problem. In *Creel v. L & L*, the Court engaged in the inquiry of whether the defendant’s employee increased the risk to the plaintiff when she insisted that a tournament golfer hit from the tee even though the golfer had expressed a safety concern for the people on and around the green towards which he was hitting.162 Had the *Crace* court163 indulged in the same line of questioning and reasoning, it, no doubt, would have asked whether the coach’s negligence increased the risk to the defendant cheerleader, and

156. See Horton, *supra* note 4, at 629–33 (Horton sharply criticizes this concept, labeling it as “doctrinal disorder”).
157. No. G042455, 2011 Cal. App. Unpub. LEXIS 556, at *2. According to the court, “Though USA Broomball regulations require commercially produced shoes with specially-designed soft rubber soles and helmets, none were provided to any of the participants including plaintiff. They were issued only brooms and a ball.” *Id.*
158. *Id.* at *7 (emphasis in original).
159. *Id.* at *6–7 (emphasis in original) (citation omitted).
160. *Id.* at *8 (footnote omitted).
161. *Id.* at *8.
163. See *supra* text accompanying notes 32–36, 46–47, and 77–79.
probably would have determined that factual questions remained that necessitated a jury question. Such a result would be ludicrous, and would, like the *Creel* opinion, render the principle a nullity.

In order to more fully appreciate the danger posed by the *Creel* case, it is worthwhile to consider that case in greater detail. This is a case that, if followed, has the potential to create an exception that swallows the rule.\(^\text{164}\) The plaintiff, James Creel, was a spectator at the 2006 Wyoming Open, a golf tournament (held July 7, 2006), when he was struck on the head by a tee shot hit by a participant in the tournament.\(^\text{165}\) L & L was the company that operated both the golf course and the tournament.\(^\text{166}\) The plaintiff was standing near the first green, watching his son’s group putt.\(^\text{167}\) Kathy Irvine, a volunteer with 24 years of experience as a “starter” at this tournament, was serving as the starter on tee number one.\(^\text{168}\) Because of the importance of maintaining the tournament time schedule, she instructed a competitor (Brett Veesart) to hit from the number one tee, even though the foursome ahead (the foursome that James Creel was watching) was still on the green.\(^\text{169}\) That particular hole “is straight . . . [and] roughly 320 to 330 yards long.”\(^\text{170}\) Veesart, a professional golfer, told Irvine that he was concerned that he might be capable of driving the green.\(^\text{171}\) Irvine expressed her doubts, and, using her authority as starter, instructed Veesart to hit his tee shot.\(^\text{172}\) In interpreting the rule of primary assumption of risk, the trial court, citing precedents from other jurisdictions, including New York, California, and Hawaii, stated that “there is a duty not to increase the inherent risks of a sport.”\(^\text{173}\) The trial court then apparently tried to make a connection between the concept of a duty not to increase inherent risks with the language of the Wyoming Recreation Safety Act, when it said: “These standards appear to be in accords with the WRSA, at least to the extent that an affirmative act that increases risk, is reckless or is an intentional tort is not necessarily ‘intrinsic to’ or ‘an integral part of’ most sports.”\(^\text{174}\) Apparently, the trial court understood that the “increase of risk” exception cannot logically apply to any trivial or even negligently caused increase of risk. Rather, as the trial court correctly stated, it is only if the defendant’s increase of risk amounts to recklessness or an intent to cause injury that the increase of risk by a de-

\(^{164}\) *Creel*, 287 P.3d 729 (Wyo. 2012).

\(^{165}\) Id. at 731.

\(^{166}\) Id.

\(^{167}\) Id. at 730–31.

\(^{168}\) Id. at 731.

\(^{169}\) Id.

\(^{170}\) *Creel*, 287 P.3d at 730.

\(^{171}\) Id. at 731.

\(^{172}\) Id.

\(^{173}\) Id. at 732 (citations omitted).

\(^{174}\) Id. at 732 (citing WYO. STAT. ANN. § 1-1-122(a)(i) (2009)).
fendant would be considered not to be an inherent risk. The trial court, therefore, quite logically, concluded:

Ultimately, reasonable minds cannot differ that getting hit by an off-line or errant golf shot is an inherent risk of playing and watching golf. Mr. Creel assumed the risk of such an occurrence. [The defendants did not have] a duty to eliminate, alter or control that risk. As a result, summary judgment based on the undisputed facts is appropriate.175

On appeal, the Wyoming Supreme Court took a different approach, and interpreted the Wyoming Recreational Safety Act to permit an action for negligence in cases where a defendant’s negligent conduct was not an inherent risk in the sport.176 This interpretation, of course, is at odds with those jurisdictions that consider a provider’s negligence, itself, as an inherent risk.177 A refusal to consider a provider’s negligence as an inherent risk is essentially opening Pandora’s Box, by allowing a jury to second-guess the defendant’s conduct. To make matters worse, the Court also expressed the opinion that “[t]he level of factual specificity required to establish an inherent risk will often but not always preclude summary judgment on the duty question.”178 Thus, the Wyoming Supreme Court here took the opposite viewpoint of California and Ohio where the judiciary treats the determination of whether a risk is inherent in any given sport or recreational activity as a question of law for the court, and, thus, precisely the type of determination that routinely ought to be resolved on summary judgment.179 Quoting a prior case that involved an injury caused when a saddle slipped and the rider fell from his horse, the Court remarked:

Because under Wyoming law the question of what is an inherent risk is normally a question of fact for the jury, we do not attempt to set the parameters here as to what factual proof would take the risk of a slipping

175. Id. at 733.
177. See supra Part IV.B.
178. Creel, 287 P.3d at 737. This view is completely at odds with the viewpoint of one of the authors of the Act, Catherine Hansen-Stamp, who, in remarking on amendments to the Wyoming Recreational Safety Act asserted: “Now, however, the amended language will strengthen the Act’s utility as a vehicle to summarily dismiss appropriate cases. Judges will have a much clearer path to determine, as a matter of law, those cases where injuries result from inherent risks.” Hansen-Stamp, Recreational Injuries, supra note 14, at 272 (emphasis added) (footnote omitted). “Should the inherent risk question ever go to the jury? The author advocates that a court can and should make this determination in each case. In Wyoming, the court conducts the duty determination as a matter of law. Such a determination is outside the province of the jury. The Act states that a provider has no duty to participants for injuries resulting from inherent risks. The inherent risk determination is thus a duty determination.” Id. at 276 (emphasis added) (footnotes omitted).
179. See supra Part VI.
saddle outside the realm of an inherent risk. We can only say that presenting testimony that the saddle was not cinched tightly enough is not sufficient. As a result, this court agrees that there is no genuine dispute of material fact that would preclude summary judgment.\footnote{180}

The Wyoming Supreme Court then took the argument to extremes. The Court acknowledged that “the evidence appears largely undisputed, that getting hit by a golf ball is, generally stated, an inherent risk of playing golf or being a spectator at a golf tournament.”\footnote{181} Nevertheless, the Court unnecessarily complicated matters when it held that “[t]his statement of the inherent risk is of limited usefulness, however, because it is abstract and presents the question in a vacuum without consideration of the specific facts of the case.”\footnote{182} Actually, the Court simply missed the point. The point is that getting hit by a golf ball while observing a golf match is an inherent risk of being a spectator at a live match. “The specific facts of the case” to which the court refers may well shed light on whether a defendant’s conduct was reckless or intentional, but specific additional facts ought not alter whether any given risk is characterized as “inherent.” The Court tried to explain itself as follows:

Under our required inherent risk analysis, the question we must answer is whether L & L did anything to increase the risk that Mr. Creel would be hit by a golf ball. That is, did the conduct of L & L’s agent, Kathy Irvine, increase the risk beyond what everyone agrees would normally be an inherent risk. It is when the question is framed with this specificity that we find genuine issues of material fact that preclude summary judgment.\footnote{183}

Actually the question should have been whether Irvine’s conduct was reckless or intentionally injurious. Framed in such a manner, the Court still may have decided that the issue ought to have gone to a jury. But a more appropriate result would have been to have assumed the facts as alleged in the light most favorable to the plaintiff,\footnote{184} and to have decided, as a matter

\footnote{180} Creel, 287 P.3d at 738 (quoting Cooperman v. David, 214 F.3d 1162, 1168–69 (2000)).
\footnote{181} Creel, 287 P.3d at 738.
\footnote{182} Id.
\footnote{183} Id.
\footnote{184} The Court stated: “Where we find disputed issues of material fact in this regard is in the question whether Kathy Irvine’s actions increased the risk that Mr. Creel would be struck by a golf ball.” \textit{Id.} at 739. The court then listed four separate factual issues that required a jury’s determination: “1) Ms. Irvine’s directions to Mr. Veessart and, more particularly, what the two of them said to each other; 2) Ms. Irvine’s authority and ability to influence Mr. Veessart’s actions; 3) the ability of Ms. Irvine and Mr. Veessart to see the spectators near the green of Hole No. 1; and 4) Ms. Irvine’s knowledge that there were spectators near the green of Hole No. 1,” and then recounted trial testimony to illustrate why it considered the facts and
of law, whether sufficient facts had been alleged to reach the legal conclusion that Irvine’s conduct was reckless or intentionally injurious. With all due respect, it is likely that her conduct was neither. But rather than taking this logical approach and straightforward application of the statute and the doctrine of primary assumption of risk, the Court instead sent the case back to trial holding:

Based on the conflicting evidence and the reasonable inferences that can be fairly drawn from the record, we find genuine questions of material fact exist and the jury must resolve the duty question. That is, the jury must determine whether L & L’s agent, Kathy Irvine, increased the risk that James Creel would be struck by a golf ball, beyond the risk inherent in the sport, when she instructed Mr. Veesart to tee off when golfers and spectators were on and around the green and Mr. Veesart expressed concern that he could hit the group ahead of him.185

The dissenting Justice, Tyler, approached the problem in a manner similar to that suggested by the Bill. He accused the majority of ignoring the legislative intent of the Wyoming Recreational Safety Act by “resorting to subtle and forced construction.”186 He contended that “the negligence exception under . . . [the statute] applies solely to ‘non-inherent risks.’”187 Accordingly, he logically concluded:

Inasmuch as the uncontroverted fact that being struck by a golf ball on a golf course during play at a professional golf tournament is an “inherent risk” assumed by a participant of a “sport or recreational opportunity,” the negligence exception in subsection (c) does not apply. Wyo. Stat. Ann. § 1-1-122(a)(i), (iii) and § 1-1-123(c). To decide otherwise would effectively render the core purpose of the Recreation Safety Act a nullity.188

In sum, Justice Tyler reasoned that L & L’s “motion for summary judgment made a sufficient prima facie showing that no genuine issue of inferences to be drawn from them were in dispute. Id. Nevertheless, if the Court had construed these disputed facts in a light most favorable to the plaintiff, there still seems little doubt that Irvine’s conduct still fell far short of recklessness or intentional injury.  

185. Id. at 743.  
186. Id. at 745 (Tyler, J., dissenting).  
187. Creel, 287 P.3d at 745 (Tyler, J., dissenting). See also Hansen-Stamp, Recreational Injuries, supra note 14, at 272 (expressing the view that there is only a limited survival of claims for negligence claims under the Wyoming Recreation Safety Act: “If the judge determines otherwise, plaintiff may go on and attempt to prove that provider’s negligence (breach of duty) caused or contributed to his injury. The legal duty determination required by the Act is applied separately from, and prior to, a factual determination regarding potential negligence.” (footnote omitted)).  
188. Creel, 287 P.3d at 745 (Tyler, J., dissenting).
material fact exists and that summary judgment should be granted as a matter of law under the Recreation Safety Act. W.R.C.P. 56(c)."189 Certainly he is right. Unless Irvine’s conduct was reckless or intentionally injurious, the doctrine of primary assumption of risk precludes liability for such inherent risks. The language of § 6, namely that there is no duty to control inherent risks, is intended to avoid the kind of twisted logic evident in the Creel decision regarding a phantom duty not to increase inherent risks. At its core, this principle is the very same principle that acknowledges that subjective errors of judgment by a coach or instructor that fall short of recklessness or intentionally injurious are inherent risks.190

VIII. NO POSITION REGARDING LIABILITY FOR INJURY CAUSED BY EQUIPMENT OR PRODUCTS

§ 7 Act Not Applicable to Equipment or Products

This Act does not apply to a cause of action based upon the design or manufacture of any sport or recreational equipment or other products used incidental to or required by a sport or recreational activity.

Section 7 makes it clear that the Bill is not intended to address questions of liability relating to products and sports and recreational equipment. Although it is possible that it might be prudent to alter the rules of liability for cases involving equipment failure that causes injury, such legislation may have to await future consideration prompted by those who manufacture and sell such products and equipment.

IX. CONCLUSION

Participants in sports and recreational activities suffer injuries. The risk of injury is inherent in sports and recreational activities. Of course the probability and severity of the risks of injury vary depending on the sport. Football, ice hockey, skiing, whitewater rafting, horseback riding, automobile racing, and rugby are, generally speaking, more dangerous than curling. And when high-profile athletes and events are involved, the modern media makes certain that the public hears about it. A 30-day window of time in early 2013 serves as an example of just how dangerous sports and recreational activities can be. On January 24, 2013 Caleb Moore, one of the world’s most prolific snowmobilers died in Aspen, Colorado after his snowmobile flipped and

189. Id. (Tyler, J., dissenting).
190. See supra Part VI.B.
rolled over him during a competition. On February 5, 2013 Olympic Gold Medal skier Lindsay Vonn tore her ACL, MCL, and suffered a fractured tibia while competing in the Super-G in Austria. And on February 23, 2013 a 12-car crash at the Daytona Motor Speedway in Florida sent Kyle Larsen’s racecar into the spectator seating area, injuring 28 spectators.

At first blush one may worry that the legal rule created by the Bill might result in insurers increasing premiums for first-party medical insurance. But this ought not be the case. By significantly decreasing the volume of litigation, insurers will have far fewer lawsuits to defend. Consequently, the legal fees of insurers will be reduced (e.g., fees for outside counsel, private investigators, and expert witnesses). This in turn will result in a net decrease in costs to insurers because they will pay far less in litigation costs. By appreciably reducing litigation costs, insurers will realize an aggregate, cumulative financial gain. Thus, there will be no need for insurers to increase premiums for first-party medical insurance. “We can revise our legal system to do a better job of precluding persons from bringing lawsuits concerning accidents where they should assume the risks of injury.” The winners will be the insurers and those who participate in sports and recreational activities. The losers will be the plaintiffs’ bar, private investigators, and expert witnesses. In terms of fundamental fairness, this result is one that society as a whole can support.

Professor Centner poses the problem directly:

Thus, the challenge is to draft legislation incorporating responsibilities for participants. Because our common law has digressed so far in mandating accident deterrence by owners of property, a corrective measure is

192. David Leon Moore, Vonn’s Injuries Put Sochi Games at Risk, USA Today, Feb. 6, 2013, at 1C.
193. Nate Ryan, Daytona 500 Delivers Everything but Drama; Johnson Wins Historic Race, USA Today, Feb. 25, 2013, at 1C.
194. Centner, America’s Blame Culture, supra note 6, at 13 ("A majority of funds from damage awards goes for attorneys’ fees, defense costs, and administration. Only about 22 percent of tort costs are paid to winning plaintiffs as awards for economic losses. These facts highlight a grossly unfair legal system that needs to be changed." (footnote omitted)).
195. Centner, Expanding Statutory Immunity, supra note 4, at 27 ("the reduction of litigation expenses, a goal of some immunity statutes, must be balanced against other issues of fairness.").
196. Centner, America’s Blame Culture, supra note 6, at 185.
197. Centner, Expanding Statutory Immunity, supra note 4, at 34 ("Reductions of liability and litigation are dual objectives of immunity statutes, with the reduction of liability being most obvious in the sport responsibility statutes." (footnote omitted)).
198. Centner, America’s Blame Culture, supra note 6, at 186 ("Attorneys who are dependent on contingency fees for their compensation will decline cases where plaintiffs’ injuries resulted from inherent risks.").
needed to shift responsibilities back to users. Persons participating in sports, engaging in recreation, or using property of another should assume some responsibility for their own well-being. They need to assume risks that accompany their choices of engaging in life’s activities.199

Thus state legislators, in passing the Bill, have an opportunity to improve sports and recreation in a number of ways. The financial benefits are important. But the benefits to the individuals who wish to exercise and exercise their freedom to participate in sports and recreational activities are even greater.

199. CENTNER, AMERICA’S BLAME CULTURE, supra note 6, at 180.