COMMENT

Looking Beyond the Name of the Game: A Framework for Analyzing Recreational Sports Injury Cases

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INTRODUCTION

Over the fourth of July weekend, a co-ed group of college friends decide to play an impromptu game of slow pitch softball.[1] In the spirit of playing a fun social game, the players agree not to slide into the bases.[2] But, during the last inning, when the score is tied with two outs, a batter dives into first base and crashes forcefully into the baseman's left leg.[3] The baseman collapses to the ground in agony.[4]

The baseman files a negligence action against the batter, claiming that the batter's conduct created an unreasonable risk of harm by violating

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[1] While this is a hypothetical scenario, the issue presented is factually similar to several sports injury cases. *See generally* Ginsberg v. Hontas, 545 So. 2d 1154, 1155 (La. Ct. App. 1989) (involving negligence cause of action for injuries sustained when defendant slid into plaintiff's leg during recreational softball game); Bourque v. Duplechin, 331 So. 2d 40, 41-42 (La. Ct. App. 1976) (pertaining to injuries sustained when defendant flagrantly ran into plaintiff who was playing second base during recreational softball game); Crawn v. Campo, 643 A.2d 600, 602 (N.J. 1994) (reviewing negligence claim for injuries sustained when defendant slid into plaintiff at home base despite no slide rule); *see also* Ian M. Burnstein, *Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard*, 71 U. DET. MERCY L. REV. 993, 993 (1994) (raising question of whether courts should allow injured sports participants to recover for injuries sustained during recreational sports activities in which they voluntarily agree to participate).

This hypothetical is illustrative of injuries that occur during recreational sports activities. *See, e.g.*, Knight v. Jewett, 3 Cal. 4th 296, 301, 834 P.2d 696, 697 (1992) (involving permanent injuries sustained when defendant tackled plaintiff during co-ed game of touch football); Kuehner v. Green, 436 So. 2d 78, 79 (Fla. 1983) (entailing negligence action for personal injuries plaintiff sustained when defendant negligently performed karate take down maneuver during sparring match); Keller v. Mols, 509 N.E.2d 584, 585 (Ill. App. Ct. 1987) (involving impromptu game of floor hockey on defendant's patio that resulted in injuries to plaintiff when hockey puck hit plaintiff's eye); Oswald v. Township High School Dist. No. 214, 406 N.E.2d 157, 158 (Ill. App. Ct. 1980) (addressing negligence action for injuries to plaintiff while playing basketball in high school gym class); Nabozny v. Barnhill, 334 N.E.2d 258, 259-60 (Ill. App. Ct. 1975) (determining whether plaintiff could recover for injuries sustained during recreational soccer game when defendant kicked plaintiff's head while trying to free ball with his foot).

[2] *See generally Crawn*, 643 A.2d at 601-02 (describing that participants in softball team adopted no slide rule to prevent injury during softball games).

[3] *See id.* (summarizing plaintiff's testimony that defendant slid into home base, striking plaintiff catcher's left leg, despite players' previous reminder that game prohibited sliding).

[4] *See id.* (explaining that plaintiff's left leg collapsed after defendant slid feet first into plaintiff).

the no slide rule.[5] The impact caused severe harm to the baseman's knee, prompting the baseman to seek recovery for his injury.[6] The question is whether the batter is liable for the damage his conduct caused.[7] Unfortunately, the answer can vary depending on the jurisdiction hearing the case.[8]

Currently, courts are divided on the issue of how to judge unreasonable conduct in recreational sports injury cases.[9] California courts apply an objective standard to determine whether the defendant owed the injured participant a duty of care.[10] California courts look at the nature of the sport and ask what risks a participant should expect.[11] Under California's approach, the baseman would not be entitled to recover even though the batter violated the rules.[12] As a general rule,

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[5] *See id.* (stating that plaintiff filed action to recover for personal injuries because defendant's conduct was either negligent, intentional, or reckless).

[6] *See id.* (noting that plaintiff required surgery to repair torn knee ligament).

[7] *See* Burnstein, *supra* note 1, at 993 (explaining issue that arises in recreational sports injury cases is whether plaintiff can recover for injuries sustained during game).

[8] *Compare* Knight v. Jewett, 3 Cal. 4th 296, 320-21, 834 P.2d 696, 711-12 (finding that sports participants are not liable for negligent conduct because careless conduct is inherent risk in sport activities), *with* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (ruling that sports participants can be liable for negligent conduct when their conduct is not reasonably anticipated risk of game).

[9] *See Knight*, 3 Cal. 4th at 320-21, 834 P.2d at 711-12 (adopting limited duty of care rule that provides that sports participants are not liable for negligent conduct but they are liable for intentionally harmful or reckless conduct); Gauvin v. Clark, 537 N.E.2d 94, 96-97 (1989) (ruling that sports participants are only liable for intentionally harmful or reckless conduct); *Crawn*, 643 A.2d at 605 (holding that liability in recreational sports injury cases is not based on ordinary negligence standard, but on reckless standard). *But see Kuehner*, 436 So. 2d at 80 (ruling that sports participants can be liable for negligent conduct when their conduct is not reasonably anticipated risk of game); Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (adopting negligence standard to determine whether recreational sports participants are liable for their conduct).

[10] *See* Ford v. Gouin, 3 Cal. 4th 339, 344-45, 834 P.2d 724, 727-28 (1992) (explaining that recreational sports participants' duty of care is based on nature of sport); *Knight*, 3 Cal. 4th at 312-14, 834 P.2d at 706-07 (stating that sports participants' duty of care depends on objective nature of game and not on co-participants' expectations); Record v. Reason, 73 Cal. App. 4th 472, 482-83, 86 Cal. Rptr. 2d 547, 554 (Cal. Ct. App. 1999) (maintaining that nature of sport defines defendant's duty of care rather than players' subjective expectations).

[11] *See Ford*, 3 Cal. 4th at 344-45, 834 P.2d at 727-28 (stating that recreational sports participants' cannot recover for injuries caused by inherent risk of game); *Knight*, 3 Cal. 4th at 316, 834 P.2d at 708-09 (ruling that sports participants' liability depends on those risks plaintiff should have anticipated based on nature of sport rather than on what risks plaintiff subjectively knew or expected); *Record*, 73 Cal. App. 4th at 482-83, 86 Cal. Rptr. 2d at 554 (explaining that sports participants are not liable for inherent risks of sports activity). California courts look at the nature of the sport to identify what conduct is an inherent risk of participating in the sport. *See, e.g., Knight*, 3 Cal. 4th at 315-16, 834 P.2d at 707-09.

[12] *See Knight*, 3 Cal. 4th at 318-19, 834 P.2d at 710 (ruling that court will not impose

California courts would not hold the defendant liable for his conduct because sliding is an inherent risk in softball games.[13]

Unlike California, Florida courts apply a subjective standard to determine the reasonableness of a player's conduct.[14] Florida courts consider the reasonable expectations of the participants to determine whether the injured party consented to the risk of harm by participating in the activity.[15] While California courts look at what risks the participant should have expected, Florida courts focus on what risks the participant subjectively expected to encounter.[16] Under Florida's approach, the baseman is entitled to recover if he did not expect the risk.[17] However, if the baseman subjectively recognized the risk, Florida courts bar him from recovery under the doctrine of express assumption of risk.[18]

Neither the California approach nor the Florida approach provide a sufficient standard for resolving sports injury claims.[19] Instead, courts

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liability on participants who violate rules of game for fear that liability would chill vigorous participation in sports). Although *Knight* involved a game of touch football, the court stated that the limited duty rule applies to a wide variety of active sports. *See id.* at 320 n.7, 834 P.2d at 711 (citing application of limited duty rule to active sports such as basketball, ice hockey, and skating).

[13] *See, e.g., id.* at 316-20, 834 P.2d at 707-12 (holding that because careless conduct of co-participants is inherent risk of sports, sports participants are not liable for their negligent conduct). Under *Knight*, the court would look at the nature of softball games and conclude that sliding is an inherent risk of playing the game. *See id.* Therefore, the defendant batter would not be liable for his conduct because he did not increase the inherent risks of the game. *See id.* at 320-21, 834 P.2d at 711-712.

[14] *See, e.g., Kuehner*, 436 So. 2d at 80 (maintaining that courts must determine whether plaintiff subjectively recognized risk of harm to determine whether coparticipant is liable for plaintiff's injuries or whether plaintiff assumed risk of harm).

[15] *See id.* at 80 (explaining that courts should take into account how plaintiff expected game to be played when determining liability for sports injury). Under Florida's approach, sports participants who subjectively appreciate the risks involved in the activity and voluntarily participate assume the risk of harm and are not entitled to recover for injuries sustained during the game. *See id.* at 80-81.

[16] *Compare Knight*, 3 Cal. 4th at 312-15, 834 P.2d at 706-08 (discussing that liability depends on those risks participants should have anticipated based on nature of game and not on what risks plaintiff's subjective knew), *with Kuehner*, 436 So. 2d at 80 (considering whether plaintiff subjectively appreciated risk that caused injury to determine liability in recreational sports injury claim).

[17] *See Kuehner*, 436 So. 2d at 80 (holding that plaintiffs are entitled to recover only if they did not anticipate risk or alternatively, if reasonable person would not anticipate risk that caused injury).

[18] *See id.* (ruling that if plaintiffs subjectively appreciated risk and voluntarily participated in activity, they are completely barred from recovery because they consented to assume risk of harm).

[19] *See* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (ruling that courts must consider multiple factors to determine whether sports participants should be

should determine the reasonableness of the defendant's conduct under a two prong test.[20] Using a negligence framework, courts should define a defendant's reasonable standard of behavior based on both the objective nature of the game and the subjective expectations of the participants.[21]

This Comment explains how courts should analyze what is appropriate behavior in recreational sports injury cases.[22] Part I describes the law of negligence and explains how California and Florida courts apply negligence principles to resolve recreational sports injury cases. Part II identifies problems with the California and Florida approaches and explains why using either an objective or subjective

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liable for their conduct); Mark M. Rembish, *Liability for Personal Injuries in Sporting Events After Jaworski v. Kiernan*, 18 QUINNIPIAC L. REV. 307, 348 (1998) (asserting that courts must consider factual variations of games including type of sport, players' characteristics, participants' expectations, and physical nature of sport to properly determine liability in sports injury claims); *see also* Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI. ENT. & SPORTS L. REV. 191, 223 (1990) (suggesting need for alternative approach to purely objective standard and recommending that better approach is to combine objective standard with subjective standard). *Compare Knight*, 3 Cal. 4th at 316, 834 P.2d at 709 (explicitly rejecting plaintiff's subjective appreciation of risk and focusing solely on what risks plaintiff should have expected), *with Kuehner*, 436 So. 2d at 80 (focusing on whether plaintiff subjectively appreciated risk to determine coparticipant's liability).

[20] *See* Lazaroff, *supra* note 19, at 193-94 (arguing that current standard of care provides inadequate protection for injuries arising out of sports and suggesting that better alternative is to combine subjective and objective elements). Professor Lazaroff focuses on the standard of conduct for sports participant liability. *See id.* He proposes that courts combine the subjective elements of the reckless standard with the objective elements based on the sport's rules and customs. *See id*; *see also* DAN B. DOBBS, THE LAW OF TORTS § 215, at 549 (2000) (suggesting that courts must consider subjective expectations of participants in recreational sports activities). Dobbs argues that the limited duty rule, which excuses players for their negligent conduct, is not appropriate for recreational sports activities. *See id.* Dobbs argues that the subjective expectations of the players indicates what risks they were willing, or consented, to confront. *See id.*

[21] *Compare Knight*, 3 Cal. 4th at 316-17, 834 P.2d at 709 (using objective standard to determine duty of care sports participants owe one another), *with Kuehner*, 436 So. 2d at 80 (using subjective standard to determine plaintiffs' right to recovery); *see also* DOBBS, *supra* note 20, § 215, at 550 (maintaining that courts must take into account subjective expectations of sports participants so that particular facts of cases and type of sports activity are meaningful); Lazaroff, *supra* note 19, at 223 (suggesting that alternative approach to pure objective approach is to combine objective standard with subjective standard).

[22] *See Knight*, 3 Cal. 4th at 318, 834 P.2d at 710 (addressing issue of whether sports participants are liable for conduct which causes another player injury); *Kuehner*, 436 So. 2d at 79 (resolving whether sports participants are liable for unintentional conduct that causes injury to another participant); *see also* Burnstein, *supra* note 1, at 997-98 (noting that courts are struggling with standard of care for sports participants due to tension between desire for vigorous competition and need to redress injuries that unsportsmanlike behavior causes); Lazaroff, *supra* note 19, at 194-95 (explaining need to define acceptable boundaries for sports participants' conduct).

model exclusively is problematic. Finally, Part III proposes that courts adopt a hybrid approach and apply a two prong test to determine what is reasonable conduct in recreational sports injury cases.

I. STATE OF THE LAW

A sports participant can file a negligence action to recover for injuries caused by a coparticipant's unreasonably risky conduct.[23] The plaintiff's ability to recover, however, differs depending on whether the court applies an objective or subjective standard to evaluate the reasonableness of the defendant's conduct.[24] California courts apply an objective standard, while Florida courts apply a subjective standard to resolve recreational sports injury cases.[25]

A. The Law of Negligence

The law of negligence protects people against conduct that creates an unreasonable risk of harm to others.[26] To determine whether a person's conduct creates an unreasonable risk, courts must define an appropriate standard of care.[27] Then courts must apply the facts to that standard to determine whether the person behaved reasonably.[28] Failure to conform

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[23] *See Knight*, 3 Cal. 4th at 301, 834 P.2d at 698 (reviewing negligence action to recover damages for permanent injuries defendant's careless conduct caused during touch football game); *Kuehner*, 436 So. 2d at 79 (resolving negligence action for injuries plaintiff sustained during recreational karate sparring match with defendant).

[24] *Compare Knight*, 3 Cal. 4th at 320, 834 P.2d at 711 (applying objective standard to determine that tackling was inherent risk of football; therefore, plaintiff was not entitled to recover despite participants' agreement to play touch football), *with Kuehner*, 436 So. 2d at 80 (applying subjective standard to allow plaintiff to recover for injuries sustained during game if plaintiff did not reasonably anticipate risk).

[25] *Compare, e.g., Knight*, 3 Cal. 4th at 312-313, 834 P.2d at 706 (looking at what risks reasonable person should have expected by participating in that type of sport), *with Kuehner*, 436 So. 2d at 80 (focusing on whether particular plaintiff actually and reasonably expected specific risk of harm).

[26] *See* DOBBS, *supra* note 20, § 116, at 275 (defining negligence as conduct that creates unreasonable risk of injury to others); W.PAGE. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 31, at 169 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS] (explaining that law imposes standard of care to protect people from unreasonable risks of harm that arise when people act negligently); *see also* JOHN W. WADE ET AL., PROSSER, WADE, AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 131 (1994) [hereinafter PROSSER AND WADE ON TORTS] (stating that negligence is designed to protect others from unreasonable risk of harm).

[27] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 31, at 169-70 (explaining that negligence law imposes standard of conduct to ensure that people act with care for safety of others).

[28] *See id.* § 31, at 170 (defining negligence as conduct that falls below standard of care

to the standard of conduct constitutes negligence.[29]

To determine the existence of negligence courts look at four factors: duty, breach, causation, and damages.[30] First, courts identify what duty, or standard of care, the defendant owed the plaintiff.[31] Generally, a person has a duty to exercise reasonable care.[32] Courts measure duty objectively by considering how a reasonable person would act under the circumstances.[33]

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imposed by law to protect others from unreasonable risks of harm). If a person fails to conform to the standard of care they are negligent and liable for the harm they cause. *See id.* § 31, at 169-73.

[29] *See id.* § 31, at 169.

[30] *See* Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 346, 151 Cal. Rptr. 796, 799 (1979) (stating elements of negligence as (1) duty to exercise reasonable care; (2) breach of that duty; (3) breach was but for cause and proximate cause of plaintiff's injury; (4) damages to plaintiff); Arneson v. City of Fargo, 303 N.W.2d 515, 519 (N.D. 1981) (listing four elements of negligence as (1) duty imposed by law to protect people from unreasonable risks; (2) failure to conform conduct to standard of care required by duty; (3) causal connection between injury and conduct; (4) damage to another's interest); Strother v. Hutchinson, 423 N.E.2d 467, 469-70 (Ohio 1981) (explaining that to establish negligence action plaintiff must prove defendant breached legal duty of care and caused plaintiff harm); DOBBS, *supra* note 20, § 114, at 269 (outlining prima facie case elements for negligence cause of action); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 164-65 (defining elements of negligence cause of action as duty, breach of duty, causal connection, and actual loss or damage). The plaintiff bears the burden of proving each of the following elements to successfully establish a claim for negligence: (1) defendant owed the plaintiff a duty of care to not engage in unreasonably risky conduct; (2) defendant breached that duty by engaging in unreasonably risky conduct; (3) defendant's conduct was the cause in fact of plaintiff's harm; (4) defendant's conduct was not only cause in fact of plaintiff's harm but also the proximate cause of the harm suffered by the plaintiff; and (5) plaintiff suffered actual harm of a legally recognized kind such as physical injury to person or property. *See* DOBBS, *supra* note 20, § 114, at 269; *see also* PROSSER AND WADE ON TORTS, *supra* note 26, at 131 (outlining elements of negligent cause as (1) duty to use reasonable care (2) breach of duty (3) causation which consists of cause in fact and proximate cause and (4) actual damage to complaining party); Burnstein, *supra* note 1, at 1007 (defining negligence cause of action as requiring duty, breach of duty, causation, and damages).

[31] *See, e.g.*, *Strother*, 423 N.E.2d at 469-70 (stating court must first determine what standard of care defendant owed to plaintiff); DOBBS, *supra* note 20, § 115, at 270 (defining duty as legal standard, or standard of care, which courts use to judge defendant's conduct); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 164-65 (explaining that duty is legal obligation to act in conformance with standard of conduct); PROSSER AND WADE ON TORTS, *supra* note 26, at 131 (explaining that duty is legal obligation on actor to conform his or her behavior in accordance with standard of care).

[32] *See* Knight v. Jewett, 3 Cal. 4th 296, 315, 834 P.2d 696, 708 (1992) (explaining general rule that people have duty to use due care to avoid causing injury to others); Gossett v. Jackson, 457 S.E.2d 97, 100 (Va. 1995) (stating that people have duty to exercise due care); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 164-65 (stating that people have duty to protect others against unreasonable risk of harm).

[33] *See* Parsons v. Crown Disposal Co., 14 Cal. 4th 456, 473, 936 P.2d 70, 80 (1997) (stating that people have duty to exercise reasonable care under circumstances); *Strother*,

Once courts have defined the standard of care, they must determine whether the defendant is liable for a breach of duty.[34] Under the second prong of a negligence test, a defendant breaches the duty of care by engaging in unreasonable behavior.[35] However, a defendant is only liable for a breach of duty if that breach actually caused injury.[36] Thus, the third issue for courts to decide is whether the defendant's conduct was the cause in fact, as well as the proximate cause of the plaintiff's injury.[37] Finally, the court must find that the defendant's conduct caused

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423 N.E.2d at 70 (noting that person's duty of care is measured by standard of conduct that reasonable person would exercise under same circumstances); Mansfield v. Circle K. Corp., 877 P.2d 1130, 1132 (Okla. 1994) (stating that people must exercise care of reasonable person under same or similar circumstances); *Gossett*, 457 S.E.2d 97, 100 (stating that people have duty to act with care that reasonable person would exercise under same circumstances); DOBBS, *supra* note 20, § 117, at 227 (explaining that courts measure standard of care by identifying how reasonable person would have acted under similar circumstances); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 173-75 (describing reasonable person standard courts employ to determine if defendant's conduct fell below standard of care). The reasonable person standard does not look at what the actual actor knew or believed. *See* DOBBS, *supra* note 20, § 117, at 227. Rather, this standard holds actors responsible for what they should have known. *See id.*

[34] *See* Knight v. Jewett, 3 Cal. 4th 296, 315-17, 834 P.2d 696, 708-09 (1992) (determining whether defendant breached duty of care after finding defendant owed plaintiff limited duty of care); Florida Power & Light Co., v. Lively, 465 S0.2d 1270, 1273 (Fla. Dist. Ct. App. 1985) (explaining that once court determine defendant's duty of care, court decides whether defendant breached that duty); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 164 (explaining that people are negligent when they breach duty of care by failing to adhere to requisite standard of behavior).

[35] *See Arneson*, 303 N.W.2d at 519 (explaining that defendant breached duty of care by failing to conform to standard of conduct required by duty); DOBBS, *supra* note 20, § 115, at 270 (explaining that defendants breach duty of care when their behavior falls below standard of care that reasonable person would have exercised under similar circumstances). Generally, a defendant breaches the duty of care when he or she engages in unreasonably risky behavior. *See id. But see, Knight*, 3 Cal. 4th at 320-21, 834 P.2d 696, 711-12 (ruling that recreational sports participants do not breach duty of care for negligent conduct). The *Knight* court held sports participants breach standard of care only when they engage in intentionally harmful or reckelss conduct. *See id.*

[36] *See* Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 346, 151 Cal. Rptr. 796, 799 (1979) (stating that defendants are only liable if their negligent conduct caused actual injury to plaintiff); *Strother*, 423 N.E.2d at 70 (noting that courts must find defendant's careless conduct caused plaintiff's injury); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 165 (explaining that plaintiff must suffer actual harm to recover in negligence action and that harm must be caused by defendant's conduct).

[37] *See* Jackson v. Ryder Truck Rental, Inc., 16 Cal. App. 4th 1830, 1846-47, 20 Cal. Rptr. 2d 913, 923 (1981) (discussing causation analysis court applied to determine whether defendant's conduct was actual and proximate cause of plaintiff's injury); DOBBS, *supra* note 20, § 115, at 270-73 (noting that plaintiff cannot recover unless defendant's conduct caused plaintiff's injury); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 165 (explaining that foreseeable causal connection must exist between defendant's conduct and plaintiff's injury).

actual harm to the plaintiff.[38] If the plaintiff establishes all four elements, the defendant is negligent as a matter of law.[39] Nevertheless, defendants can escape liability for their negligence by successfully presenting an affirmative defense.[40]

Assumption of risk is an affirmative defense to negligence that completely bars a plaintiff from recovering.[41] People assume the risk of harm when they know of a specific danger and voluntarily choose to participate in the activity despite the risk.[42] The assumption of risk

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[38] *See* Beauchene, 88 Cal. App. 3d at 346, 151 Cal. Rptr. at 797 (stating that defendant's conduct must cause acutal injury to plaintiff); *Arneson*, 303 N.W.2d at 519 (noting that courts must find defendant's conduct caused actual damage to plaintiff to impose liability); DOBBS, *supra* note 20, § 110, at 258 (explaining that defendant is not liable to plaintiff for negligence unless plaintiff suffers actual harm); PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 165 (stating that plaintiff must suffer actual loss or damage to recover under negligence claim).

[39] *See* DOBBS, *supra* note 20, § 114, at 269 (explaining that plaintiff must establish all four prima facie case elements to establish negligence claim).

[40] *See id.* § 114, at 269 (explaining that plaintiff does not prevail after proving prima facie case because defendant can raise affirmative defenses that completely or partially defeat plaintiff's claim).

[41] *See* Knight v. Jewett, 3 Cal. 4th 296, 326-29, 834 P.2d 696, 715-18 (1992) (Kennard J., dissenting) (explaining that assumption of risk operates as complete defense to negligence action because it negates negligent party's liability); Li v. Yellow Cab Co., 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240 (1975) (recognizing assumption of risk as defense to negligence only in cases where assumption of risk is variant of contributory negligent conduct); Blackburn v. Dorta, 348 So. 2d 287, 289-93 (Fla. 1977) (acknowledging historical treatment of assumption of risk as defense to negligence that provides absolute bar to plaintiff's recovery, but ruling that defense is abolished in favor of comparative negligence principles); *see also* RESTATEMENT (SECOND) OF TORTS § 496A cmt. b (1977) (defining assumption of risk as defense to negligence or reckless conduct of defendant); Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 Yale L.J. 185, 195 (1968) [hereinafter James, *Unhappy Reincarnation*] (explaining that some commentators want to maintain assumption of risk as affirmative defense to defendant's negligent conduct rather than merging doctrine with principles of contributory negligence); Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 141 (1952) [hereinafter James, *Assumption of Risk*] (suggesting that even though commentators have come to recognize defense of assumption of risk, doctrine is redundant way of expressing defendant's lack of duty); Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. Rev. 213, 215 (1987) (explaining that assumption of risk bars plaintiff's negligence claim when plaintiff has voluntarily confronted known risk).

[42] *See Knight*, 3 Cal. 4th at 328, 334 P.2d at 716-17 (Kennard, J., dissenting) (explaining that assumption of risk arises when plaintiff voluntarily chooses to encounter specific known risk); Kuehner v. Green, 436 So. 2d 78, 79 (Fla. 1983) (indicating that assumption of risk requires plaintiff to subjectively appreciate magnitude of risk and voluntarily encounter risk); *Blackburn*, 348 So. 2d at 293 (explaining that assumption of risk occurs when people voluntarily expose themselves to known risk); *see also* Stephanie M. Wildman & John C. Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California*, 25 U.S.F. L. REV. 647, 650-55 (1991) (explaining principles of assumption of risk doctrine that plaintiff must recognize specific risk, appreciate magnitude of risk, and voluntarily

doctrine provides that courts should require people to accept responsibility for the normal consequences of a freely chosen action.[43]

Courts place responsibility on injured participants by finding the plaintiff assumed the risk of harm in one of two ways.[44] First, a plaintiff can expressly agree to accept the risk of harm and thereby waive the right to sue for any injury sustained.[45] Second, the court can construe the plaintiff's conduct as implicitly assuming the risk of harm.[46]

1. Express Assumption of Risk

A plaintiff expressly assumes risk in an advanced written or oral agreement that releases the defendant from liability for injury sustained during the activity.[47] Express agreements waive the defendant's duty to

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confront risk).

[43] *See Knight*, 3 Cal. 4th at 332, 834 P.2d at 719-20 (Kennard, J., dissenting) (explaining that because plaintiffs voluntarily agree to confront the danger, they should be responsible for normal consequences and actions); *see also* Simons, *supra* note 41, at 258 (stating that consent expresses what plaintiff wanted or preferred and that is enough to bar recovery); Wildman & Barker, *supra* note 42, at 650 (explaining that touchstone of assumption of risk doctrine is freedom of individual action).

[44] *See Knight*, 3 Cal. 4th at 325, 834 P.2d at 715 (Kennard, J., dissenting) (explaining that defendant can establish assumption of risk by showing either that plaintiff expressly assumed risk or impliedly assumed risk); *Blackburn*, 348 So. 2d at 290-91 (distinguishing between express assumption of risk and implied assumption of risk as alternative theories to prove that plaintiff voluntarily chose to encounter specific harm); DOBBS, *supra* note 20, § 215, at 546 (explaining that plaintiff can consent to risks of defendant's actions either by express agreement or by implication).

[45] *See Knight*, 3 Cal. 4th at 325, 834 P.2d at 715 (Kennard, J., dissenting) (explaining that plaintiff can make verbal or written agreement to assume risk); *see also* RESTATEMENT (THIRD) OF TORTS § 2 (Proposed Final Draft (Revised) 1999) (recognizing that parties can form contractual limitation on liability for future harm which bars plaintiff from recovery for injury caused by other party); Wildman & Barker, *supra* note 42, at 650-55 (defining express assumption of risk as method to relieve defendant of liability). *But see Blackburn*, 348 So. 2d at 290 (expanding traditional definition of express assumption of risk to include express contracts not to sue and situations where plaintiffs actually consent to harm, as exemplified when they voluntarily participate in sports).

[46] *See Knight*, 3 Cal. 4th at 325, 834 P.2d at 715 (Kennard, J., dissenting) (explaining that alternatively court can find plaintiff assumed risk by inferring consent from plaintiff's conduct); *see also* Wildman & Barker, *supra* note 42, at 652 (explaining that courts can infer plaintiff's willingness to assume risk by looking at plaintiff's conduct).

[47] *See Knight*, 3 Cal. 4th at 308 n.4, 834 P.2d at 703 (referring to express assumption of risk as contract-based species of doctrine where plaintiff makes express agreement to take chance of injury from known risk); RESTATEMENT (THIRD) OF TORTS, *supra* note 45, § 2, cmt. j (defining express assumption of risk as contractual limitation on liability that bars plaintiff from recovering for harm caused by defendant); DOBBS, *supra* note 20, § 213, at 541 (explaining that plaintiff expressly assumes risk by signing defendant's responsibility disclaimer, release form, or exculpatory agreement in advance of injury); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 482 (explaining that express agreement in advance

protect the plaintiff from risk and relieve the defendant from liability for otherwise negligent conduct.[48] For example, if an amateur drag racer signed a liability release form before participating, courts would not hold the negligent race track owner liable for injuries sustained during the race.[49]

2. Implied Assumption of Risk

When a plaintiff has not expressly agreed to release the defendant from liability, a court may still construe the plaintiff's conduct as implicitly assuming the risk of harm.[50] Courts reason that a plaintiff who agreed to participate in the activity has, in effect, consented to the risk.[51]

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relieves defendant from duty of care towards plaintiff); *see also* James, *Assumption of Risk*, *supra* note 41, at 141 (explaining that express assumption of risk changes reciprocal rights and duties of parties by one party agreeing to assume risk of what would otherwise be breach of duty by the other); Wildman & Barker, *supra* note 42, at 653 (explaining that plaintiff can give express consent to dangerous activity thereby relieving defendant of legal duty). *But see Kuehner*, 436 So. 2d at 79 (adopting and applying *Blackburn's* definition of express assumption of risk to preclude plaintiff from recovery even though there was no express agreement between parties); *Blackburn*, 348 So. 2d at 290 (expanding doctrine of express assumption of risk to include situations where actual consent exists like when person voluntarily participates in contact sports activity).

[48] *See Knight*, 3 Cal. 4th at 308 n.4, 834 P.2d at 703 n.4 (explaining that express agreement relieves defendant of legal duty to protect plaintiff from harm and bars plaintiff from recovering for defendant's negligent conduct); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 482 (explaining that defendant is not liable for conduct that would otherwise be negligent if parties expressly agree in advance that defendant is relieved of duty of care towards plaintiff); *see also* DOBBS, *supra* note 20, § 213, at 541 (explaining that express consent relieves duty of care that defendant otherwise has to meet); RESTATEMENT (THIRD) OF TORTS, *supra* note 45, § 2 cmt. b (stating that parties can agree who will bear risk or injury even though one party would otherwise be liable for conduct).

[49] *See* Winterstein v. Wilcom, 293 A.2d 821, 828 (Md. Ct. Spec. App. 1972) (holding that plaintiff expressly assumed risk of injury by signing release form prior to participating in amateur drag race even though defendant negligently failed to clear hazards off track).

[50] *See Knight*, 3 Cal. 4th at 325-26, 834 P.2d at 715-17 (Kennard, J., dissenting) (explaining that absent express agreement, court can find plaintiff assumed risk by making inference from plaintiff's conduct); DOBBS, *supra* note 20, § 214, at 545-46 (describing that courts have found that plaintiff's implied consent is sufficient to relieve defendant's duty of care and preclude plaintiff from recovery); Wildman & Barker, *supra* note 42, at 653 (stating that courts infer implied assumption of risk from plaintiff's conduct). *But see Blackburn*, 348 So. 2d at 290 (maintaining that situations involving actual consent, such as when person voluntarily participates in sports activity, fall under category of express assumption of risk).

[51] *See Knight*, 3 Cal. 4th at 332, 834 P.2d at 719-20 (Kennard, J., dissenting) (explaining that because plaintiffs voluntarily agree to confront danger, they cannot complain later when they are injured); *see also* Simons, *supra* note 41, at 258 (stating that consent expresses what plaintiff wanted or preferred and that is enough to bar recovery). The assumption of risk doctrine is based on consent. *See Knight*, 3 Cal. 4th at 325-27, 834 P.2d at 715-17 (Kennard, J., dissenting) (explaining that assumption of risk negates defendant's liability

To preclude a plaintiff from recovery, a defendant must prove that the plaintiff consented to encounter the risk that caused the injury.[52]

A defendant must establish three facts to show that the plaintiff implicitly assumed a risk of harm.[53] First, the plaintiff must have actual knowledge of a specific risk arising from the defendant's conduct.[54] Second, the plaintiff must subjectively appreciate the magnitude of the risk.[55] Finally, the plaintiff must voluntarily encounter the risk.[56] For example, if a soccer player knows and appreciates the risk of being slide tackled and proceeds to participate, the player cannot recover for the

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because plaintiff consented to risk). Assumption of risk was originally derived from the concept *volenti non fit injuria* which translates as to one who is willing or consents to an act no harm is done. *See id.* at 325-26, 834 P.2d at 715-17; RESTATEMENT (SECOND) OF TORTS, *supra* note 41, § 496A cmt. b (converting maxim to "no wrong is done to one who consents"); Wildman & Barker, *supra* note 42, at 650 & n.11 (translating concept as "he who consents cannot receive an injury"). Because the plaintiff has consented to accept the risk, courts bar plaintiff from recovery. *See Knight*, 3 Cal. 4th at 325-29, 834 P.2d at 715-17 (Kennard, J., dissenting) (indicating that when plaintiffs voluntarily consent to encounter specific risk they cannot recover for injuries sustained during activity).

[52] *See Knight*, 3 Cal. 4th at 326, 834 P.2d at 715 (Kennard, J., dissenting) (explaining that defendant must prove plaintiff knew and appreciated specific risk involved and voluntarily confronted risk); Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (stating that plaintiffs assume risk when they subjectively appreciate risks and voluntarily participate despite dangers involved in activity).

[53] *See* DOBBS, *supra* note 20, § 214, at 543 (summarizing that implied assumption of risk requires implied consent, voluntary assumption, and knowledge of risk); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 486-87 (stating that implied assumption of risk has three requirements, namely (1) plaintiff must have knowledge that risk exists; (2) plaintiff must understand nature of risk of harm; and (3) plaintiff must voluntarily choose to encounter risk); Wildman & Barker, *supra* note 42, at 651 (noting that defendant must prove plaintiff knew magnitude of risk and willingly encounter that specific risk).

[54] *See Kuehner*, 436 So. 2d at 80 (stating that actual knowledge of risk is essential to plaintiff's voluntary assumption of risk); DOBBS, *supra* note 20, § 214, at 543-44 (explaining that specific knowledge of risk is required to find plaintiff impliedly assumed risk); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 487 (informing that knowledge of general danger is not sufficient, thus plaintiff must have specific knowledge of risk that caused injury); Wildman & Barker, *supra* note 42, at 651 (describing that plaintiff must have knowledge of specific risk, rather than knowledge of general danger involved in activity).

[55] *See Kuehner*, 436 So. 2d at 80 (stating that plaintiff must subjectively appreciate risk that ultimately caused the injury); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 486-87 (informing that plaintiff must appreciate nature of danger); Wildman & Barker, *supra* note 42, at 651 (noting that assumption of risk requires plaintiff to appreciate magnitude of risk).

[56] *See Kuehner*, 436 So. 2d at 80 (emphasizing that voluntary exposure to risk is foundation of assumption of risk doctrine); DOBBS, *supra* note 20, § 214, at 543 (explaining that voluntary confrontation of risk means that plaintiff has reasonable alternative course of action); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 490 (stating that by voluntarily choosing to encounter risk, plaintiff, in effect, consents to confront danger); Wildman & Barker, *supra* note 42, at 651 (noting that plaintiff's assumption of risk must be voluntary).

negligent infliction of that injury.[57] If a defendant can prove that the plaintiff either impliedly or expressly assumed the risk, the court completely bars the plaintiff from recovery.[58] However, absolute bars to recovery are disfavored under modern comparative fault principles because they lead to inadequate and harsh results.[59]

3. Comparative Fault

Because assumption of risk operates as a complete bar to plaintiff's recovery, some courts have abandoned the doctrine in favor of comparative negligence principles.[60] Under comparative negligence,

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[57] *See* Nganga v. College of Wooster, 557 N.E.2d 152, 153 (Ohio Ct. App. 1989) (barring plaintiff from recovering for broken ankle injuries sustained when defendant slide tackled into plaintiff in effort to take possession of ball).

[58] *See e.g., Kuehner*, 436 So. 2d at 81 (denying plaintiff entire recovery because court found plaintiff had expressly assumed risk); *Nganga*, 557 N.E.2d at 154 (barring plaintiff from recovery for injuries sustained during recreational soccer game because plaintiff consented to harm by participating).

[59] *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 810-14, 532 P.2d 1226, 1230-33 (1975) (finding that justice, logic, and experience counsel against complete bars to recovery because they are inequitable and harsh); Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973) (deciding contributory negligence produces harsh outcomes and fails to achieve justice between parties who are both at fault); *see also* Blackburn v. Dorta, 348 So. 2d 287, 289 (Fla. 1977) (acknowledging that jurisdictions and commentators criticize assumption of risk doctrine as resulting in confusion and unjust results); DOBBS, *supra* note 20, § 211, at 539 (explaining that after courts adopted comparative negligence inequitable results occurred depending on how plaintiff's conduct was classified). For example, if a court found that the plaintiff was also negligent, the court reduced plaintiff's damages in proportion to plaintiff's fault. DOBBS, *supra* note 20, § 211, at 539. However, if a court found that the plaintiff had assumed the risk, the court completely denied plaintiff recovery. *See id.* These discrepancies led states to merge the assumption of risk doctrine with comparative negligence. *See id.*

[60] *See* Knight v. Jewett, 3 Cal. 4th 296, 303-10, 834 P.2d 696, 699-705 (1992) (analyzing merger of entire doctrine of implied assumption of risk into comparative negligence analysis); *Li*, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41 (merging implied unreasonable assumption of risk defense with comparative negligence considerations); *Blackburn*, 348 So. 2d at 293 (abolishing assumption of risk defense in favor of comparative negligence because doctrine denied recovery unjustly); *see also* DOBBS, *supra* note 20, § 211, at 534 (suggesting that courts are increasingly abandoning assumption of risk as separate defense).

The assumption of risk doctrine is a product of contributory negligence. DOBBS, *supra* note 20, § 211, at 535-36 (explaining assumption of risk doctrine's relationship to contributory negligence). Under contributory negligence, courts completely barred the plaintiff from recovery if the plaintiff's conduct contributed in any way to the injury causing event. *See* Butterfield v. Forrester, 103 Eng. Rep. 926, 927 (K.B. 1809) (denying plaintiff recovery because plaintiff failed to exercise reasonable care for himself even though defendant was also negligent). Thus, courts would deny plaintiff recovery even though the defendant had violated his duty of care to the plaintiff and would otherwise be liable. *See Li*, 13 Cal. 3d at 810, 532 P.2d at 1230 (stating that contributory negligence would

courts look at the behavior of both parties and divide liability in proportion to their relative degrees of fault.[61] Jurisdictions have embraced comparative negligence because it produces more equitable results by allocating liability between the parties.[62] California and Florida have both adopted comparative negligence. However, California and Florida continue to completely bar plaintiffs from recovery in recreational sports injury cases.[63]

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bar plaintiff's recovery even though defendant was negligent and would otherwise be liable); *see also* RESTATEMENT OF TORTS (SECOND), *supra* note 41, § 467 (stating that plaintiff's contributory negligence exonerates defendants from liability even though defendants engaged in negligent conduct that would otherwise make them liable for plaintiff's injury). In the late 1960's, jurisdictions started to reject contributory negligence because it produced harsh outcomes. *See, e.g., Li*, 13 Cal. 3d at 810-13, 532 P.2d at 1230-32 (rejecting contributory negligence because court found it was inequitable doctrine). Instead, courts adopted comparative negligence because it provides a more equitable method of allocating liability. *See id.* at 808-11, 532 P.2d at 1230-31 (rejecting harsh all or nothing approach of contributory negligence in favor of comparative negligence which equates liability with fault); *Hoffman*, 280 So. 2d at 437-38 (determining that comparative negligence is more equitable and socially desirable system of allocating liability based on fault).

Like contributory negligence, the assumption of risk doctrine completely bars plaintiff from recovery. *See Kuehner*, 436 So. 2d at 80 (holding that plaintiffs who consent to risk may not recover for their injury); DOBBS, *supra* note 20, § 211, at 535 (explaining that plaintiffs who assume risk of defendant's negligent conduct cannot recover). Because the assumption of risk doctrine is inconsistent with the principles of comparative negligence, courts are abandoning the doctrine and resolving cases under comparative fault principles. *See, e.g., Blackburn*, 348 So. 2d at 293 (replacing implied assumption of risk defense with principles of comparative negligence); *see also* DOBBS, *supra* note 20, § 211, at 534 (explaining that issues which were formerly resolved under assumption of risk doctrine can now be resolved by: (1) applying comparative negligence principles, (2) finding that defendant had no duty of care, or (3) determining that defendant did not breach duty of care).

[61] *See Li*, 13 Cal. 3d at 810-11, 532 P.2d at 1230 (explaining that comparative negligence assigns liability in proportion to party's fault); *Hoffman*, 280 So. 2d at 437-38 (stating that under comparative negligence, courts apportion negligence to both plaintiff and defendant). Courts no longer completely bar plaintiffs from recovery simply because their conduct contributed to the negligent act. *See, e.g., Hoffman*, 280 So. 2d. at 438 (noting trend toward "almost universal adoption of comparative negligence"). Instead they reduce plaintiffs' recovery by a percentage equal to their amount of fault. *See, e.g., id.* (explaining that plaintiff can recover only for amount proportionate to defendant's negligence).

[62] *See, e.g., Li*, 13 Cal. 3d at 812-13, 532 P.2d at 1232 (rejecting contributory negligence as inequitable doctrine because it completely bars plaintiff's recovery against defendant who would otherwise be liable for the negligent conduct); *Hoffman*, 280 So. 2d at 437-38 (determining that comparative negligence is more equitable and socially desirable system of allocating liability based on fault). By adopting comparative negligence, the court rejected the harsh all or nothing approach of contributory negligence in favor of distributing liability in proportion to fault. *See Li*, 13 Cal. 3d at 812-813, 532 P.2d at 1232.

[63] *See Knight*, 3 Cal. 4th at 320, 834 P.2d at 711-12 (denying plaintiff recovery for injuries caused by defendant's negligent conduct in impromptu social game of touch football); *Kuehner*, 436 So. 2d at 80-81 (barring plaintiff's recovery for injuries sustained during recreational sparring match when defendant negligently performed karate take down

B. California's Objective Approach to Recreational Sports Injury Cases

In *Knight v. Jewett*, the California Supreme Court adopted an objective standard to determine liability in recreational sports injury claims.[64] California's objective standard assesses the reasonableness of the defendant's conduct upon the nature of the sport and provides that mere negligent conduct is not sufficient to warrant liability.[65] Under California's standard, a plaintiff is completely barred from recovery even though the defendant acted negligently. To recover in California, the plaintiff must demonstrate that the defendant's conduct was intentionally harmful or reckless.[66]

Knight involved an impromptu game of co-ed touch football among friends.[67] Although the group did not explicitly discuss any rules before the game, the plaintiff told the defendant to stop playing aggressively after he ran into her.[68] The defendant appeared to acknowledge the plaintiff's request, however, he knocked her down and crushed her finger during the very next play.[69] The plaintiff suffered severe damage that eventually led doctors to amputate her finger.[70]

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maneuver).

[64] *See* 3 Cal. 4th at 312-15, 834 P.2d at 706-08 (deciding that liability in sports injury cases depends on nature of sport and what risks of harm participants should have expected).

[65] *See id.* at 318-21, 834 P.2d at 710-12 (deciding that courts should not hold sports participants liable for ordinary negligence because vigorous conduct in sports often includes accidentally careless conduct). The court feared that liability for careless conduct that typically occurs in athletic events would chill vigorous participation and fundamentally alter the nature of sports. *See id.* at 318, 834 P.2d at 710.

[66] *See id.* at 320, 834 P.2d at 711 (holding that sports participants are liable for damage they cause only when they intentionally injure another participant or engage in reckless conduct).

[67] *See id.* at 300-01, 834 P.2d at 697-98 (explaining that coed group of friends decided to play impromptu game of touch football using peewee sized ball during half time of 1987 Super Bowl game).

[68] *See id.* Although the players did not discuss the etiquette of the game, the plaintiff claimed that she expected this to be a noncompetitive game. *See id.* at 302, 834 P.2d at 698-99. Additionally, the defendant's declaration conceded that he knew that the game should be played differently than if he had been playing with just a group of men. *See id.* at 302, 834 P.2d at 699. After the first time the defendant ran into the plaintiff she told him to stop playing rough or she would not continue playing. *See id.* at 300, 834 P.2d at 697. The plaintiff's declaration claimed that the defendant gave her the impression that he would start playing less aggressively. *See id.*

[69] *See id.* (showing that defendant immediately disregarded plaintiff's request). According to plaintiff's testimony, the defendant jumped up to intercept a pass and as he was coming down he knocked plaintiff down. *See id.* When the defendant landed, he stepped back onto the plaintiff's right hand and crushed her little finger. *See id.*

[70] *See id.* at 301, 834 P.2d at 698. Plaintiff suffered a loss of mobility and persistent pain in her little finger. *See id.* After three unsuccessful operations to repair the damage, doctors

The plaintiff filed a negligence action against the defendant to recover damages for her injury.[71] Finding that the plaintiff had assumed the risk of the injury, the trial court granted the defendant's motion for summary judgment.[72] The appellate court affirmed the trial court's decision and completely denied the plaintiff recovery.[73] On appeal, the California Supreme Court, in a plurality decision, affirmed the judgment on different grounds.[74] The supreme court barred the plaintiff from recovery, not because she assumed the risk, but because the defendant did not breach his duty of care.[75]

In analyzing the plaintiff's negligence action, the *Knight* court relied on an objective standard to define the defendant's duty of care.[76] *Knight* held that sports participants' duty of care is based on the nature of the sport rather than the other players' conduct.[77] Thus, even though the court found the defendant acted negligently, he was not liable for plaintiff's injury.[78]

In analyzing the plaintiff's negligence action, the *Knight* court relied on an objective standard to define the defendant's duty of care.[79] *Knight* held that sports participants' duty of care is based on the nature of the sport rather than the participant's subjective expectations about the other players' conduct.[80] Thus, the court judges the reasonableness of a

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amputated plaintiff's pinky finger. *See id.*

[71] *See id.*

[72] *See id.* at 303, 834 P.2d at 699 (holding that plaintiff was not entitled to recovery because she impliedly assumed risk by participating in football game).

[73] *See id.* (explaining that trial court properly granted summary judgment in favor of defendant because there were no disputed material facts).

[74] *See id.* at 321, 834 P.2d at 712 (holding that defendant was not liable for plaintiff's injuries because the defendant did not breach his duty of care to plaintiff). The supreme court analyzed the case under the prima facie case of negligence rather than the assumption of risk defense to negligence. *See id.*

[75] *See id.* at 320-21, 834 P.2d at 711-712 (finding that defendant did not breach limited duty of care he owed to plaintiff and therefore, plaintiff was not entitled to recover for her injuries).

[76] *See id.* at 315, 834 P.2d at 708 (stating that liability in sports injury cases depends on nature of sport and whether defendant's conduct breached duty of care owed to plaintiff).

[77] *See id.* at 315-16, 834 P.2d at 708-09 (maintaining that defendant's duty does not depend on plaintiff's subjective expectations). Rather, the court held that the defendant's duty of care is based on the nature of the sport. *See id.* at 316-17, 834 P.2d at 709.

[78] *See id.* at 320-21, 834 P.2d at 711-12 (holding that defendant's negligent conduct did not breach duty of care owed to plaintiff and, therefore, he was not liable for her injuries).

[79] *See id.* at 315, 834 P.2d at 708 (stating that liability in sports injury cases depends on nature of sport and whether defendant's conduct breached duty of care owed to plaintiff).

[80] *See id.* at 315-16, 834 P.2d at 708-09 (maintaining that defendant's duty does not depend on plaintiff's subjective expectations). Rather, the court ruled that the defendant's duty of care is based on the nature of the sport. *See id.* at 316-17, 834 P.2d at 709.

defendant's conduct by looking at what risks a participant should have expected based on the nature of the sport.[81]

The *Knight* court held that the general rule requiring people to exercise reasonable care does not apply to sports injury cases.[82] The court feared that imposing liability on careless conduct would chill vigorous participation and thus fundamentally alter the nature of sports.[83] The court reasoned that because sports are inherently risky activities, sports participants owe only a limited duty of care to other players.[84] The limited duty rule excuses sports participants from any duty to eliminate the inherent risks of the sport, but imposes a duty to not increase the risks.[85]

Participants increase the inherent risks of the game when their conduct falls outside the normal activity of the sport.[86] Under California's standard, negligent conduct is a normal risk of sports activities. Although California courts typically hold parties liable for their negligent conduct, the California Supreme Court created an exception for recreational sports injury cases in *Knight*. The *Knight* court held that participants who intentionally injure another player or act with reckless disregard for the safety of other players breach their limited duty of

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[81] *See id.* at 312, 834 P.2d at 706 (rejecting dissent's argument that defendant's duty is based on risks plaintiff subjectively knew about).

[82] *See id.* at 315, 834 P.2d at 708 (stating that as general rule people have duty to exercise reasonable care to avoid injury to others). The court explained that conduct which people would otherwise consider dangerous is often an integral part of the game. *See id.*

[83] *See id.* at 318, 834 P.2d at 710 (noting that majority of cases do not hold sports participant liable to co-participants for ordinary careless conduct).

[84] *See id.* at 318-20, 834 P.2d at 706 (finding that sports participants duty of care is limited because active sports necessarily involve accidentally careless conduct and court did not want to chill vigorous participation by imposing liability on careless conduct). Courts disagree on whether recreational sports participants should be liable for negligent conduct or only for reckless and intentionally harmful conduct. *Compare id.* at 315-20, 834 P.2d at 708-11 (1992) (ruling that recreational sports participants are only liable for reckless or intentionally harmful conduct), *with* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 31 (Wis. 1993) (holding that courts should apply negligence standard to determine liability in recreational sports cases). Courts and commentators sometimes refer to the limited duty rule as the reckless standard, recklessness standard, or reckless disregard standard. *See, e.g., Lestina*, 501 N.W.2d at 32-34 (comparing recklessness standard with negligence standard); Burnstein, *supra* note 1, at 997-99 (defining reckless disregard standard as extreme departure from ordinary care thereby creating substantially greater risk of harm than). The fundamental difference between negligence and recklessness is the actors' intent and knowledge that they are engaging in unreasonably dangerous conduct. *See id.*

[85] *See Knight*, 3 Cal. 4th at 315-16, 834 P.2d at 708 (explaining participants' duty not to increase risks).

[86] *See id.* at 318-20, 834 P.2d at 710-11. According to the *Knight* court, participants' conduct falls outside the customary activity of the sport when they engage in intentionally harmful or reckless conduct. *See id.* at 320, 834 P.2d at 711-12.

care.[87] However, the *Knight* court held that participants are not liable for their careless conduct even if it constitutes negligence.[88]

Sports participants are not liable for their negligent behavior because careless conduct is an inherent risk of sports.[89] The court reasoned that during the excitement of the game, participants' vigorous conduct often includes careless behavior.[90] Because participants can expect players to act carelessly, courts cannot hold participants liable for the negligent harm they cause.[91]

Applying this standard, the *Knight* court found that the defendant's conduct was, at most, negligent. Thus the court held that the defendant had not breached his duty of care to the plaintiff[92] and was not liable for plaintiff's injuries.[93] However, the outcome might have been different in a jurisdiction using a subjective standard.[94]

C. *Florida's Subjective Approach to Recreational Sports Injury Cases*

Unlike California, Florida courts consider sports participants' subjective expectations of the risks involved in the game.[95] In *Kuehner v. Green*, the Florida Supreme Court held that sports participants are entitled to recover if they did not reasonably anticipate a risk of harm.[96] Thus, under Florida's approach, courts look at plaintiffs' subjective

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[87] *See id.* at 320, 834 P.2d at 711; *see also* Burnstein, *supra* note 1, at 997-98 (defining reckless disregard as conduct that creates substantially greater likelihood of harm to others).

[88] *See Knight*, 3 Cal. 4th at 318-20, 834 P.2d at 710-11.

[89] *See id.* at 316, 834 P.2d at 708 (finding that careless conduct is part of nature of game); *see also* DOBBS, *supra* note 20, § 215, at 548 (explaining that limited duty rule is way of saying that negligent conduct is inherent risk of sports activities).

[90] *See Knight*, 3 Cal. 4th at 318, 834 P.2d at 710 (stating that accidentally careless conduct is inherent risk of sports activities).

[91] *See id.* at 316, 834 P.2d at 708 (stating that careless conduct of other players is inherent risk of sports); *see also* DOBBS, *supra* note 20, § 215, at 548 (explaining that negligent conduct of enthusiastic players is inherent risk of game).

[92] *See Knight*, 3 Cal. 4th at 320-21, 834 P.2d at 711-12 (finding defendant's conduct was not so reckless to fall outside ordinary range of activity involved in game).

[93] *See id.* at 320-21, 834 P.2d at 711-12 (upholding trial court's conclusion that defendant was not negligent).

[94] *See* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (applying subjective standard, court considered what risks plaintiff reasonably anticipated based on nature of that particular game). Thus, Florida courts would recognize that players do not expect to get tackled in a social game of touch football. *See id.*

[95] *See, e.g., id.* (explaining that courts should consider all evidence regarding how plaintiff expected participants to behave during sports activity).

[96] *See* 436 So. 2d 78, 80 (Fla. 1983) (holding that if plaintiff did not anticipate risk that caused his injury, plaintiff is entitled to recover because he did not consent to that harm).

expectations to determine whether they actually consented to the risk.[97]

Kuehner involved a negligence action to recover damages for injuries sustained during a karate sparring match at the defendant's home.[98] During the exercise the defendant negligently executed a leg sweep.[99] The plaintiff was injured as a result of this takedown maneuver and sued the defendant for damages.[100]

The jury found both parties equally negligent based on comparative fault principles.[101] However, because the jury determined that the plaintiff subjectively appreciated the risk, the trial court completely barred plaintiff's recovery.[102] On appeal, the Florida Supreme Court affirmed, holding that express assumption of risk is a viable defense to sports injury negligence actions.[103]

To reach this decision, the *Kuehner* court expanded the traditional definition of express assumption of risk.[104] The court held that risk is

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[97] *See id.*

[98] *See id.* at 79 (explaining sparring match).

[99] *See id.*

[100] *See id.* (explaining that plaintiff incurred $55,000 in damages).

[101] *See id.* (stating that jury determined that both plaintiff and defendant were fifty percent negligent); Lazaroff, *supra* note 19, at 207 (explaining that under comparative negligence principles, jury found that both plaintiff and defendant were at fault).

[102] *See Kuehner*, 436 So. 2d at 79. The trial court presented the jury with a special interrogatory. *See id.* The jury found that the plaintiff knew of the risk that caused the injury, appreciated the possibility of being injured, and voluntarily exposed himself to the danger. *See id.* Based on this finding, the trial court held that there was sufficient evidence to establish the express assumption of risk defense. *See id.* The court held that even though the defendant was negligent, the plaintiff was barred from recovering because he had consented to the risk by participating. *See id.* Accordingly, the court rendered judgment on behalf of the defendant. *See id.*

[103] *See id.* at 81. The Florida Supreme Court granted certiorari to determine whether express assumption of risk completely bars plaintiff's recovery for injuries sustained during a contact sports activity. *See id.* (describing that appellate court affirmed trial court's decision, but certified question of great importance). The appellate court called upon the *Kuehner* court to determine whether express assumption of risk operates as a complete bar to recovery for recreational contact sports injury cases. See *id.* at 79. The Florida Supreme Court had previously ruled that implied assumption of risk was no longer a viable defense to negligence. *See* Blackburn v. Dorta, 348 So. 2d 287, 290-93 (Fla. 1977) (abolishing defense of implied assumption of risk in favor of comparative negligence principles). However, the *Blackburn* court declined to address the viability of express assumption of risk as a defense to negligence. *See* id. at 290 (stating that court was not concerned with express assumption of risk in present inquiry and expressed no opinion regarding doctrine's viability). Yet, in dicta, the *Blackburn* court stated that express assumption of risk covers express contracts as well as situations where the plaintiff actually consents to the risk, such as when a person voluntarily participates in contact sports. *See id.*

[104] *See* John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory Into Tort Doctrine*, 52 OHIO ST. L.J. 717, 732-35 (explaining that *Kuehner* court expanded definition of express assumption of risk beyond traditional contractual definition

expressly assumed whether the plaintiff contractually agrees to accept the risk or consents to encounter the risk by participating in the game.[105] In the absence of a contractual agreement, the jury must determine whether the plaintiff subjectively appreciated the risk and voluntarily participated despite the danger.[106] If the plaintiff recognized the risk, the plaintiff is completely barred from recovery.[107] The court reasoned that plaintiffs in this type of situation have in effect consented to assume the risk of the harm.[108] Because the plaintiff has expressly assumed the risk, the defendant is not liable for the injury.[109]

However, if the plaintiff did not subjectively appreciate the risk, the court applies an objective test.[110] The court looks to see whether a reasonable person would have anticipated the risk.[111] If a reasonable person would have recognized the risk, the court evaluates the plaintiff's conduct under comparative fault principles.[112] But, if a reasonable person would not have expected the risk, then the unsuspecting plaintiff is entitled to complete recovery.[113]

In *Kuehner*, the court found that the plaintiff subjectively recognized the risk of the leg sweep maneuver and voluntarily participated in the sparring match.[114] Although the plaintiff had not made an express

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or need for express agreement). By expanding the traditional definition of express assumption of risk, the *Kuehner* court, in effect, resurrected the doctrine of implied assumption of risk. *See id.* at 734. However, the Florida Supreme Court abolished implied assumption of risk as a viable defense in *Blackburn*. *See Blackburn*, 348 So. 2d at 290-93 (abolishing implied assumption of risk as viable defense in favor of comparative negligence principles). Thus, under Florida case law, the express assumption of risk doctrine bars plaintiffs' recovery even if they did not expressly agree to assume the risk of harm. *See* Diamond, *supra*, at 732.

[105] *See Kuehner*, 436 So. 2d at 79 (citing *Blackburn's* definition of express assumption of risk); *see also Blackburn*, 348 So. 2d at 290 (providing expanded definition of express assumption of risk as either express contract not to sue or situations where actual consent occurs like when person voluntarily participates in contact sports activity).

[106] *See Kuehner*, 436 So. 2d at 79-80 (stating that plaintiff does not automatically assume all risks in contact sports, but only those which plaintiff voluntarily consents to confront).

[107] *See id.* (holding that although defendant was negligent, plaintiff consented to risk and is, therefore, not entitled to recover).

[108] *See id.* (ruling that plaintiff consents to risk by voluntarily participating in activity after knowing of risks involved in sport).

[109] *See id.* (holding that express assumption of risk is viable defense to defendant's negligent conduct).

[110] *See id.* (instructing courts to consider whether reasonable person would have appreciated risk if this particular plaintiff did not).

[111] *See id.*

[112] *See id.*

[113] *See id.*

[114] *See id.* at 81.

agreement to release the defendant from liability, the court found that the plaintiff had expressly consented to the risk.[115] Under the court's expanded definition of express assumption of risk, the court held that the plaintiff had consented to the harm by voluntarily proceeding to spar despite the danger.[116] Accordingly, the court completely barred plaintiff's recovery even though the defendant was negligent.[117]

Florida recognizes the importance of considering the participants' subjective expectations.[118] However, like California, Florida errs by relying on a single standard to determine the reasonableness of the defendant's conduct.[119] Thus, both California's and Florida's approaches are problematic because they exclude relevant factors that the other standard considers.[120]

II. ANALYSIS

Neither California's objective standard nor Florida's subjective standard provide a sufficient model for judging the reasonableness of a sports participant's conduct.[121] California and Florida case law illustrate

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[115] *See id.* (finding that plaintiff voluntarily consented to risk of leg sweep and therefore express assumption of risk doctrine governed outcome).

[116] *See id.* (holding that in recreational contact sports, plaintiffs expressly assume risk when they voluntarily consent to take chance of getting injured). *See id.* The court ruled that when participants voluntarily engage in contact sports they waive their right to be protected from bodily contact inherent in the game. *See id.* Therefore, when participants consent to confront certain known risks, they cannot sue coparticipant for harm arising from those risks. *See id; see also* Diamond, *supra* note 104, at 732-35 (explaining that even though plaintiff had not, expressly agreed to risk in the traditional sense, *Kuehner* court found that express assumption of risk existed).

[117] *See Kuehner*, 436 So. 2d at 80 (affirming trial court's judgment for defendant).

[118] *See id.* at 80 (considering risks plaintiff expected to encounter during sports activity)

[119] *Compare* Knight v. Jewett, 3 Cal. 4th 296, 320, 834 P.2d 696, 711-12 (1992) (relying exclusively on objective standard to determine liability in sports injury case), *with Kuehner*, 436 So. 2d at 80 (relying exclusively on subjective test to determine whether plaintiff appreciates risk of harm, or alternatively, applying objective standard to assess whether plaintiff should have anticipated risk).

[120] *Compare Knight*, 3 Cal. 4th at 315-17, 834 P.2d at 708-09 (applying objective standard to determine liability in sports injury case), *with Kuehner*, 436 So. 2d at 80 (applying subjective standard to resolve recreational sports injury cases); *see also* Lazaroff, *supra* note 19, at 223-24 (proposing courts combine objective standard with subjective standard to establish standard of liability for recreational sports). Professor Lazaroff's article focuses on alternative approaches for liability in recreational sports injury cases. *See id.* at 221-228. He argues that sports participants should be liable for their conduct if they satisfy two conditions. *See id.* at 223. First, the participant must violate the rules and customs of the game (which he references as the objective standard). *See id.* Second, the participant engaged in reckless conduct (which he refers to as a more subjective standard). *See id.*

[121] *See* Lazaroff, *supra* note 19, at 223 (suggesting need for alternative approach to

the problems that arise when courts rely exclusively on either standard.[122] Instead, both objective and subjective considerations should define the defendant's duty of care.[123]

A. California's Objective Standard is Insufficient

California's objective standard provides an insufficient framework to determine liability in sports injury claims.[124] California's reliance on an objective standard is too broad because it ignores both the factual circumstances of the game and denies the relevance of the participants' subjective expectations.[125] Furthermore, California's approach violates public policy by adopting a lower standard of care for sports participants than the general standard that people must exercise reasonable care.[126]

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purely objective standard and recommending that better approach is to combine objective standard with subjective standard).

[122] *See Knight*, 3 Cal. 4th at 334-35, 834 P.2d at 721-22 (Kennard, J., dissenting) (arguing that plurality ignores factual context of mock game as well as players' expectations that game was nonaggressive); *Kuehner*, 436 So. 2d at 81-82 (Boyd, J., concurring specially) (asserting that majority decision fails to consider objective nature of sport).

[123] *Compare Knight*, 3 Cal. 4th at 315-17, 834 P.2d at 708-09 (adopting objective standard to determine liability in recreational sports injury claims), *with Kuehner*, 436 So. 2d at 80-81 (applying subjective standard to resolve sports injury cases); *see also* Larazoff, *supra* note 19, at 223 (proposing that courts should employ both objective and subjective standard to determine liability).

[124] *See Knight*, 3 Cal. 4th at 334-35, 834 P.2d at 721-22 (Kennard, J., dissenting) (arguing that factual circumstances and players' expectations are relevant factors to determine whether defendant's conduct was unreasonable under circumstances); Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (requiring courts to look at facts and circumstances of particular game to determine whether defendant's conduct was negligent); DOBBS, *supra* note 20, § 215, at 549 (maintaining that courts need to consider sports participants' expectations if type of game and particular facts are to have any meaning); PROSSER AND KEETON ON TORTS, *supra* note 26, § 37, at 237 (explaining that courts must determine whether defendant's conduct was reasonable under circumstances in negligence action); Lazaroff, *supra* note 19, at 219-220 (arguing that court's reliance on what risks are inherent in sport is inadequate).

[125] *See Knight*, 3 Cal. 4th at 334-35, 834 P.2d at 721-22 (Kennard, J., dissenting) (arguing that plurality failed to recognize that *Knight* was not traditional football game, but rather mock game because both men and women played using child's ball); Lazaroff, *supra* note 19, at 223 (contending that objective standard which relies solely on whether players violated game rules is troublesome because it disregards any consideration of participant's state of mind during play).

[126] *See* Burnstein, *supra* note 1, at 1015 (maintaining that courts fail to provide adequate protection for sports participants by allowing players to engage in careless conduct that may cause injury to other participants); Rembish, *supra* note 19, at 338-39 (arguing that by adopting limited duty rule, courts provide inadequate protection for participants, allow players to violate rules of game without recourse, and may cause more injuries because players can engage in careless conduct). *But see Lestina*, 501 N.W.2d at 32-34 (holding that negligence standard furthers objectives sought by courts adopting recklessness standard);

Consequently, the *Knight* court found nothing unreasonable about a sports participant tackling another player during a social game of touch football.[127] Both the law of negligence and public policy demand a different outcome.[128]

1. *Knight's* Objective Standard Provides an Insufficient Framework to Determine Liability

The *Knight* court's exclusive reliance on an objective standard is insufficient to determine the reasonableness of a sports participant's conduct.[129] *Knight* suggests that courts can depend solely upon an objective understanding of a sport to determine what is proper, or ordinary, conduct for a particular game.[130] However, while the nature of an activity is relevant to the court's inquiry, it does not define normal conduct for the specific game in dispute.[131] To properly judge the

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Burnstein, *supra* note 1, at 997-98 (asserting that negligence standard provides superior standard of care for recreational sports because negligence standard promotes reasonable behavior and affords greater protection).

[127] *See Knight*, 3 Cal. 4th at 320-21, 834 P.2d at 711-12 (holding that defendant was not liable for tackling plaintiff during touch football game because his conduct was not outside ordinary range of activity for sport).

[128] *See* Florida Power & Light Co., v. Lively, 465 So.2d 1270, 1273 (Fla. Dist. Ct. App. 1985) (noting that tort law imposes duty of care to protect people from unreasonable risks of harm); Arneson v. City of Fargo, 303 N.W.2d 515, 519 (N.D. 1981) (stating that tort law intends to protect people from unreasonable risks by requiring people to excerise reasonable care under circumstances); PROSSER AND KEETON ON TORTS, *supra* note 26, §§ 30-32, at 165-75 (explaining that negligence law seeks to protect people from unreasonably risky conduct that may cause harm); Lazaroff, *supra* note 19, at 218-20 (maintaining that public policy dictates that court provide adequate protection for sports participants); Rembish, *supra* note 19, at 337-38 (discussing that courts defeat policy goal of safety by allowing sports participants to engage in unreasonably risky conduct).

[129] *See Knight*, 3 Cal. 4th at 334-35, 834 P.2d at 721-22 (Kennard, J., dissenting) (arguing that plurality decision ignores relevant considerations to determine defendant's liability, such as factual circumstances of game and plaintiff's expectations); *Lestina*, 501 N.W.2d at 33 (ruling that courts must consider particular facts and circumstances of game to determine liability in recreational sports injury claims); DOBBS, *supra*, note 20, § 215; at 549 (indicating that courts must take into account participants' expectations if the context of game is to have any meaning); PROSSER AND KEETON ON TORTS, *supra* note 26, § 37, at 236-38 (stating reasonableness of defendant's conduct depends on circumstances, therefore, courts must look at context surrounding defendant's actions).

[130] *See Knight*, 3 Cal. 4th at 316-17, 834 P.2d at 709 (stating that sports participants' duty of care depends on nature of sport).

[131] *See id.* at 338, 834 P.2d at 723 (Kennard, J., dissenting) (arguing that there is no ordinary recreational game because recreational sports encompass broad range of activity). Justice Kennard argues that it is unclear what constitutes ordinary activity in recreational sports. *See id.* She states that recreational sports consist of a broad spectrum of activity and therefore it is difficult to conceive of an ordinary game. *See id.* For example, touch football is a generic term that can refer to several different kinds of games. *See id.* at 335, 834 P.2d at

reasonableness of a sports participant's conduct, courts must look beyond the objective characteristics of the sport to the particular factual circumstances of the game.[132]

Negligence law requires courts to look at the facts to determine whether the defendant's conduct was reasonable under the circumstances.[133] Factors, such as the physical characteristics and skills of the players and the use of protective equipment, directly affect the nature of the game.[134] In *Knight*, both men and women played a touch football game using a peewee sized ball.[135] Because the facts of *Knight* demonstrate that this was not a traditional football game, the court should have found that the defendant's conduct was unreasonable.[136]

However, California's objective standard disregards the particular facts of the game.[137] Consequently, California's objective standard

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722. Touch football can describe the conventional aggressive game in which players can knock down other players. *See id.* But touch football can also describe a gentle game that adults and children play at a family picnic. *See id.* Therefore, Justice Kennard argues it is erroneous to think that some type of ordinary activity exists in a recreational sport. *See id.* at 338, 834 P.2d at 723.

[132] *See Lestina*, 501 N.W.2d at 33 (suggesting that courts look at particular facts and circumstances of game to determine whether defendant's conduct was unreasonable); DOBBS, *supra* note 20, § 215, at 550 (arguing that courts must consider participants' reasonable expectations; otherwise, specific facts of case and type of sports activity become meaningless); Lazaroff, *supra* note 19, at 193-94 (arguing that objective standard ignores co-participants' expectations).

[133] *See* Mansfield v. Circle K. Corp., 877 P.2d 1130, 1132 (Okla. 1994) (stating that standard of conduct is that of reasonable person under same or similar circumstances); Gossett v. Jackson, 457 S.E.2d 97, 100 (Va. 1995) (defining negligence as failure to exercise degree of care that ordinary reasonable person would exercise under identical or like circumstances to prevent injury to others); PROSSER AND KEETON ON TORTS, *supra* note 26, § 37, at 236 (explaining that threshold question in negligence law is always what would reasonable person have done under circumstances).

[134] *See Lestina*, 501 N.W.2d at 33 (suggesting material factors that courts should consider to determine whether defendant's conduct was negligent, including participants' physical attributes and skill, and presence of protective equipment).

[135] *See Knight*, 3 Cal. 4th at 300-01, 834 P.2d at 697-98.

[136] *See id.* at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (recognizing that *Knight* involved mock game of football rather than traditional football game); Staten v. Super. Ct. of Alameda County, 45 Cal. App. 4th 1628, 1634-35, 53 Cal. Rptr. 2d 657, 660-62 (1996) (asserting that *Knight* court failed to determine liability based on specific characteristics of game); *cf.* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (holding sports participants liable for conduct which plaintiff did not reasonably anticipate). The plaintiff in *Knight* testified that she did not expect an aggressive game. *See Knight*, 3 Cal. 4th at 302, 834 P.2d at 699.

[137] *See Knight*, 3 Cal. 4th at 315-17, 834 P.2d 708-09 (ruling that sports participants' liability depends on inherent risk posed by objective nature of game). *But see id.* at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (maintaining that court should consider factual circumstances of specific game in dispute); *Staten*, 45 Cal. App. 4th at 1634-35, 53 Cal. Rptr. 2d at 660-62 (criticizing *Knight* decision because court failed consider specific nature of that

violates the law of negligence by failing to judge the reasonableness of the defendant's conduct under the specific facts of the game in dispute.[138]

The *Knight* court also failed to consider that the way participants play the game affects the risks involved in the game.[139] *Knight's* objective approach ignores the distinction between a casual touch football game and a more serious match between league players wearing protective gear.[140] However, the manner of play is relevant because the greater the risk of harm, the higher duty of care the participants owe one another.[141] Therefore, because California's objective standard does not consider the manner of play, courts using California's approach fail to understand the degree of risk involved in the game.[142] Consequently, these courts cannot properly judge whether the defendant's conduct created an unreasonable risk of harm.[143]

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game).

[138] *See Staten*, 45 Cal. App. 4th at 1634-35, 53 Cal. Rptr. 2d at 660-62 (maintaining that *Knight* standard fails to determine liability based on specific characteristics of game). *See generally* Mansfield v. Circle K. Corp., 877 P.2d 1130, 1132 (explaining that reasonableness of defendant's conduct depends on circumstances) (Okla. 1994); Gossett v. Jackson, 457 S.E.2d 97, 100 (Va. 1995) (stating that negligence law evaluates defendant's conduct under circumstances); DOBBS, *supra* note 13, § 117, at 277 (defining negligence as failure to exercise standard of care that reasonable person would exercise under same circumstances); PROSSER AND KEETON ON TORTS, *supra* note 26, § 37, at 237 (explaining that courts must consider whether defendant's conduct was reasonable under circumstances).

[139] *See Knight*, 3 Cal. 4th at 335, 834 P.2d at 722 (Kennard, J., dissenting) (asserting that risks involved in recreational games are not constant based on nature of sport but, rather, risks vary depending on how participants play game); Rembish, *supra* note 19, at 341-44 (maintaining that several variables affect risks involved in game, as well as participant's expectations regarding what risks are present in activity); *see also* Lazaroff, *supra* note 19, at 217 (explaining that because recreational sports often change well-known written rules of game, there is no uniform notion of generally accepted and recognized risks).

[140] *See Knight*, 3 Cal. 4th at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (comparing risks involved in traditional football game with risks present at family picnic football game played with young children to illustrate how risks of harm vary depending on context of game). Although Justice Kennard uses a football example, her argument is equally applicable to hockey and other contact sports. *See id*; *see also*, Crawn v. Campo, 643 A.2d 600, 605 (N.J. 1994) (noting that risks vary from sport to sport, as well as from one group of participants to another).

[141] *See Crawn*, 643 A.2d at 605 (stating that risks involved in game are germane to defining standard of care defendant owed to other participants); PROSSER AND KEETON ON TORTS, *supra* note 26, § 34, at 209 (explaining that people have duty to exercise reasonable care under circumstances and that this duty increases when risks of danger are greater).

[142] *See Knight*, 3 Cal. 4th at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (asserting that plurality ignored participants' agreement to play touch football game that did not involve risk of tackling).

[143] *See Crawn*, 643 A.2d at 605 (maintaining that sports participants' duty of care depends on risks involved in game); Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (asserting that courts must consider inherent risks of sport, as well as risks

Furthermore, *Knight's* objective approach disregards the relevance of the participant's reasonable expectations to determine whether the defendant's conduct breached a duty of care.[144] Sports participants rely on the circumstances of the game to anticipate players' conduct.[145] The players' expectations help courts determine what standard of care the defendant owed the other participants.[146] For example, when the plaintiff in *Knight* warned the defendant that he was playing too aggressively, she put the defendant on notice of her expectations of the game.[147] Once the defendant knew that the plaintiff did not anticipate an aggressive game, the defendant had a duty to play less vigorously.[148] By continuing to play aggressively, the defendant breached his duty of care.[149] California's objective standard ignores the plaintiff's expectations. This is problematic because the plaintiff's expectations change the nature of the game.[150] By failing to consider all the relevant factors in their analysis, the *Knight* court rendered an unjust outcome.[151]

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beyond realm of anticipation, to determine whether defendant's conduct was negligent); Burnstein, *supra* note 1, at 1014-15 (explaining that sports participants' duty of care depends on factual circumstances such as physical characteristics of players and zest with which they play their games).

[144] *See Knight*, 3 Cal. 4th at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (arguing that plurality ignored plaintiff's expectations that she was participating in nonaggressive game because it was informal impromptu game played by both men and women using peewee sized ball); Lazaroff, *supra* note 19, at 223 (maintaining that objective standard is troublesome because it disregards any consideration of participant's expectations).

[145] *See Knight*, 3 Cal. 4th at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (explaining that in traditional aggressive football game, risk of being knocked down and injured is apparent, but risk is not apparent when adults play with young children at family picnic); Lazaroff, *supra* note 19, at 215-17 (stating that players' expectations can vary considerably).

[146] *See* Rembish, *supra* note 19, at 344 (stating that participants' expectations should define standard of care); *see also* DOBBS, *supra* note 20, § 215, at 550 (suggesting that when participants reasonably expect other players to follow rules of game, participants' expectations should control what standard of care players owed one another).

[147] *See Knight*, 3 Cal. 4th at 301, 834 P.2d at 697 (describing that plaintiff informed defendant that she would stop participating if he continued to play aggressively).

[148] *See id.* at 337-38, 834 P.2d at 723-24 (Kennard, J., dissenting) (relying on testimony that defendant played more aggressively than necessary for mock football game, Justice Kennard concluded that defendant's conduct was inappropriate conduct for particular game).

[149] *See id.* at 338, 834 P.2d at 724 (Kennard, J., dissenting) (concluding that defendant's conduct was unreasonable under circumstances of that particular game).

[150] *See id.* at 334-35, 834 P.2d at 721-22 (maintaining that plaintiff's expectations indicated that *Knight* was mock football game that entailed different risks than traditional aggressive game).

[151] *See id.* at 338, 834 P.2d at 723-24 (concluding that defendant's conduct fell outside range of ordinary activity for nonaggressive touch football game and therefore court should not have granted summary judgment for defendant).

Yet, proponents of California's approach argue that it is too difficult to identify the subjective expectations of sports participants.[152] They contend that because it is difficult to determine whether the plaintiff subjectively appreciated the risk, courts should use an objective test.[153] Commentators supporting an objective standard, because of the difficulty with subjective determinations present an unpersuasive argument for two reasons.

First, courts consider the subjective expectations of litigants all the time.[154] Courts regularly address difficult and complex issues that seldom present an easy solution.[155] Determining subjective expectations poses no greater difficulty for the courts.[156] Courts that do consider subjective expectations in sports injury cases explain that assessing subjective expectations presents no greater challenge than allocating liability in comparative negligence cases.[157] Therefore, courts can and should consider the plaintiff's reasonable expectations.[158]

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[152] *See, e.g.*, Crawn v. Campo, 643 A.2d 600, 605-07 (N.J. 1994) (maintaining that subjective inquiries complicate court's analysis, therefore, court relies on objective considerations); Lazaroff, *supra* note 19, at 215-216 (claiming that subjective inquiries pose difficult problems because participants' subjective expectations vary from player to player and game to game).

[153] *See* Knight, 3 Cal. 4th at 313, 834 P.2d at 706 (maintaining that there would always be factual questions concerning whether plaintiff had actual knowledge of specific risk involved); *Crawn*, 643 A.2d at 605-07 (explaining that because subjective inquiries are difficult to determine, court uses objective standard to assess reasonableness of defendant's conduct).

[154] *See generally* PROSSER AND KEETON ON TORTS, *supra* note 26, § 32, at 179 (explaining that courts apply subjective standard to determine standard of care for negligence actions involving children); *see id.* § 68, at 487-88 (stating that courts employ subjective standard in assumption of risk cases to determine whether plaintiff had actual knowledge of specific risk involved in activity); *see id.* § 10, at 43-44 (describing that courts use subjective test in assault cases by looking at whether plaintiff was aware of threat and put in imminent apprehension of harmful or offensive contact).

[155] *See id.* § 3, at 17-19 (stating that "process of weighing the various interests that may be affected by a rule of tort law is not a simple one, and the problems which arise are complex, and seldom easy of solution . . . [but] the responsibility for answering the questions falls to the courts.").

[156] *See* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (stating that considering whether plaintiff subjectively appreciated risk creates no greater practical problems for courts than other tort deliberations); Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (considering what risks participants anticipated based on factual circumstances of game).

[157] *See, e.g., Kuehner*, 436 So. 2d at 80 (asserting that whether plaintiff subjectively anticipated risk does not present greater difficulty than court's assessment of contributory negligence).

[158] *See id.* at 80 (considering plaintiff's expectations to determine reasonableness of defendant's conduct).

Second, even if subjective expectations are difficult to determine, ignoring them altogether provides unjust results.[159] Subjective expectations, like traditional rules of the game, establish the boundaries of a player's conduct.[160] Thus, when players elect to play a game of touch football, they are reasonably entitled to expect that the other players will conform to this standard of conduct.[161] If participants fail to conform to this standard, they breach their duty of care and should be liable for the harm they cause.[162] By ignoring the reasonable expectations of the players, California's objective standard allows negligent sports participants to escape liability even though they have breached their duty of care.[163] Courts cannot justify this kind of inequitable outcome, however, by claiming it is too difficult to determine sports participants' subjective expectations.[164] To the contrary, unjust results require courts to consider the participants' subjective expectations to avoid inequity.[165]

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[159] *See* Crawn v. Campo, 643 A.2d 600, 606 (N.J. 1994) (stating that to fairly evaluate reasonableness of sports participant's conduct, court must look at nature of player's consent to certain conduct, mutual understanding of players, and common expectations).

[160] See Rembish, *supra* note 19, at 344 (proposing that expectations of sports participants should determine what behavior was tolerable, or reasonable, for that particular game).

[161] *See* DOBBS, *supra* note 20, § 215, at 550 (indicating that recreational sports participants are entitled to expect co-participants to follow agreed upon rules of game). Furthermore, Dobbs contends that participants' expectations should control what conduct was reasonable for that particular game. *See id.*; *see also* Rembish, *supra* note 19, at 348 (stating that recreational sports participants expect reasonable behavior).

[162] *See* DOBBS, *supra* note 20, § 215, at 550 (suggesting that when participant violates rules of game, that player's conduct falls below standard of conduct that other participants were reasonably entitled to expect and rely upon); *see also* Knight v. Jewett, 3 Cal. 4th 296, 338, 834 P.2d 696, 724 (1992) (Kennard, J., dissenting) (suggesting that defendant's conduct in tackling plaintiff was unacceptable behavior for circumstances of game and, therefore, court should not have granted defendant's motion for summary judgment).

[163] *See Knight*, 3 Cal. 4th at 338, 834 P.2d at 724 (Kennard, J., dissenting) (claiming that court should not have granted summary judgment for defendant because defendant's conduct was unreasonable for the impromptu, nonaggressive, mock football game that players anticipated).

[164] *See generally* PROSSER AND KEETON ON TORTS, *supra* note 26, § 3 at 17 (explaining that even though courts encounter difficult determinations, courts cannot shy away from making tough decisions).

[165] *See generally* DOBBS, *supra* note 20, § 215, at 550 (maintaining that if courts ignore sports participants' established rules of game, courts produce unjust results); Rembish, *supra* note 19, at 344 (stating that expectations of participants should determine standard of care).

2. *Knight's* Limited Duty Rule Provides an Unreasonable Standard

The *Knight* decision sets an unreasonable standard of care for recreational sports injury cases that violates public policy.[166] By adopting a limited standard of care, *Knight* makes any effort to set boundaries in a particular game unenforceable and immunizes unreasonably risky conduct.[167] Moreover, because *Knight's* standard provides no redress for negligent conduct, *Knight* may actually chill participation in recreational sports.[168] Consequently, *Knight's* standard provides inadequate protection for recreational sports participants.[169]

Knight's limited duty rule reduces the standard of care players owe one another because it permits participants to engage in negligent behavior regardless of the standard of conduct the players established.[170] Public policy, however, encourages people to minimize risks of harm, especially when they are engaged in inherently dangerous activities, such as sports.[171] By allowing participants to engage in unreasonably risky conduct, *Knight's* standard undermines players' efforts to make games safer.[172] Thus, California's objective approach contravenes public

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[166] *See* Burnstein, *supra* note 1, at 1020-21 (arguing that public policy demands that courts should not exempt recreational sports participants from liability for their negligent behavior); Lazaroff, *supra* note 19, at 219 (stating that tort policy serves to provide protection and create safer environment for all participants and there is great social need to protect against unnecessary violence in recreational sports); Rembish, *supra* note 19, at 335-40 (1998) (arguing that recklessness standard of care does not provide recreational sports participants adequate protection and may lead to increased injuries because players can engage in unreasonably risky conduct).

[167] *See* Crawn v. Campo, 643 A.2d 600, 604 (N.J. 1994) (stating that whenever courts lower standard of care owed to others, court implicitly immunizes players' conduct for which they would otherwise be held liable). *But see* Burnstein, *supra* note 1, at 1021 (insisting that there is no legal justification for courts to shelter sports participants from liability when they have acted negligently).

[168] *See* Rembish, *supra* note 19, at 339-340 (asserting that if courts do not hold sports participants liable for their negligent conduct, participation in recreational activities will decline).

[169] *See* Burnstein, *supra* note 1, at 1015 (arguing that immunizing negligent sports participants from liability leaves co-participants unprotected); Rembish, *supra* note 19, at 338-39 (arguing that court's failure to hold players liable for negligent conduct provides insufficient protection for recreational sports participants).

[170] *See* Rembish, *supra* note 19, at 339 (asserting that by adopting limited duty rule, court not only permits players to break rules that were implemented for safety reasons, but court also, in effect, condones conduct that could lead to more injuries).

[171] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 31, § 34, at 169, 209 (explaining that negligence law serves to protect against conduct that creates unreasonable risk of harm to others, and requires people to exercise greater care when risks of danger are higher).

[172] *See* Rembish, *supra* note 19, at 339 (asserting that limited duty rule permits sports participants to violate rules of game and engage in unreasonable conduct, thereby possibly increasing incidents of injury).

policy that encourages sports participants to implement safety rules to reduce risk of injury in recreational games.[173]

Furthermore, *Knight's* reduced standard of care for sports participants immunizes negligent conduct in the sports arena.[174] Thus, sports participants can engage in unreasonably risky conduct that would otherwise be tortious without the fear of liability.[175] Courts, however, should not immunize sports participants for their negligent behavior because public policy seeks to deter unreasonably risky conduct.[176] California's objective approach violates public policy by condoning rather than deterring unreasonably risky conduct.[177] By holding players liable for their negligent conduct, courts could provide greater protection for sports participants and promote reasonable behavior.[178]

The *Knight* decision fails to protect sports injury participants by denying negligently injured players redress for their injuries.[179] *Knight*

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[173] *See generally* Lazaroff, *supra* note 19, at 219 (stating that tort policy intends to provide adequate protection and to create safer environment for sports participants); Rembish, *supra* note 19, at 338-39 (explaining that rules of game are designed to encourage safe conduct and prevent injury).

[174] *See* Crawn v. Campo, 643 A.2d 600, 604 (N.J. 1994) (explaining that whenever courts reduce standard of care owed to others, court implicitly immunizes conduct that would otherwise be tortious and actionable); Burnstein, *supra* note 1, at 1021 (recognizing that lower standard of care immunizes players from liability for their negligent conduct).

[175] *See* Crawn, 643 A.2d at 604 (stating that limited duty rule exonerates sports participants from liability for conduct that would otherwise be tortious and actionable).

[176] *See* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (holding that sports participants are liable when their negligent conduct causes injury to another participant); Burnstein, *supra* note 1, at 1021 (asserting that courts have no legal justification for immunizing negligent sports participants from liability).

[177] *See generally* Rembish, *supra* note 19, at 338-39 (claiming that limited duty rule allows players to violate safety rules of game and condones unreasonable conduct that may cause more injuries in sports activities). *But see Lestina*, 501 N.W.2d at 33 (adopting negligence standard of care to determine liability in recreational sports injury cases for safety reasons); Rembish, *supra* note 19, at 337 (explaining that *Lestina* court found policy objectives, such as safety, more compelling than desire for unbridled vigorous competition in recreational sports activities).

[178] *See* Burnstein, *supra* note 1, at 995 (arguing that negligent standard encourages reasonable behavior and provides greater protection). Some courts and commentators argue that a negligence standard provides a better way to determine liability for recreational sports injury cases. *See Lestina*, 501 N.W.2d at 33 (holding that negligence standard applies to broader range of sports injury claims because it subsumes multitude of factors presented by sports injury cases, but still allows for vigorous competition); Rembish, *supra* note 19, at 348 (concluding that negligence standard is better because it enables courts to determine liability based on type of game, players' characteristics, and physical nature of game).

[179] *See* Knight v. Jewett, 3 Cal. 4th 296, 320, 834 P.2d 696, 711 (1992) (holding that defendants are financially liable only when they intentionally or recklessly injure another player).

contravenes the policies underlying tort law because the torts system seeks to compensate injured parties for harm caused by the unreasonable behavior of others.[180] Consequently, under *Knight's* limited duty of care, many recreational sports participants will be unable to receive compensation for their injuries.[181]

Some commentators argue that imposing liability for negligent conduct would chill vigorous participation in sports.[182] They fear that the threat of tort liability might deter players from vigorously engaging in the game.[183] Proponents of *Knight* maintain that a limited standard of care balances the desire for vigorous competition with the need to provide legal redress for injuries caused by reckless conduct.[184]

Commentators' assertion that imposing legal liability will chill participation is unpersuasive for two reasons.[185] While vigorous competition in sports activities is important, the desire to maintain free competition should not outweigh the policy of protecting sports

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[180] PROSSER AND KEETON ON TORTS, *supra* note 26, § 2 at 5-6 (stating that function of tort law is to afford compensation to persons who are injured by conduct of another).

[181] *See Knight*, 3 Cal. 4th at 320, 834 P.2d at 711.

[182] *See id.* at 318-19, 834 P.2d at 710-11 (claiming that imposing liability on careless conduct would chill vigorous participation and, thus, fundamentally alter nature of sports); *Lestina*, 501 N.W.2d 28, at 34 (Wilcox, J., dissenting) (maintaining that applying negligence standard of care to sports injury cases would discourage vigorous participation in sporting events); Burnstein, *supra* note 1, at 998 (explaining that courts which adopt limited duty rule favor vigorous competition in sports over participant's ability to recover for injury sustained during game); Cameron J. Rains, *Sports Violence: A Matter of Societal Concern*, 55 NOTRE DAME LAW. 796, 801 (1980) (arguing that liability for negligent conduct would discourage participation in recreational sports). *But see Lestina*, 501 N.W.2d at 33 (concluding that imposing liability for negligence conduct in recreational sports would not deter people from vigorously participating in sports activities); Burnstein, *supra* note 1, at 1022-23 (arguing that requiring sports participants to exercise reasonable care will not inhibit willingness of people to engage in recreational sports).

[183] *See Knight*, 3 Cal. 4th at 318-19, 834 P.2d at 710 (explaining that legal liability for careless conduct would fundamentally alter way participants play game); *See* Crawn v. Campo, 643 A.2d 600, 604 (N.J. 1994) (maintaining that legal liability would discourage vigorous participation in sports activities). *But see* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (stating that imposing liability for sports players' negligent conduct will not deter vigorous participating).

[184] *See* Crawn, 643 A.2d at 603-04 (adopting limited duty rule in New Jersey because lower standard promotes vigorous participation in sports). *See generally* Burnstein, *supra* note 1, at 995 (explaining that courts which have adopted limited duty rule contend that lower standard strikes balance between desire for vigorous competition and need to redress unsportsmanlike conduct).

[185] *See* Rembish, *supra* note 19, at 337-40 (arguing that failure to hold participants liable for negligent conduct provides inadequate protection for players and will consequently chill participation in sports).

participants from harm.[186] Vigorous competition in sports should not be a license for players to behave with careless disregard for the safety of others.[187] To the contrary, sports participants owe each other a duty to refrain from unreasonably risky conduct that may cause harm.[188]

By failing to provide legal redress for sports participants' negligent conduct, courts may actually chill people's participation in recreational sports.[189] The *Knight* court justified adopting the limited duty rule to prevent chilling vigorous participation in sports activities.[190] But, by allowing sports participants to engage in unreasonably risky conduct, Knight's approach may deter participation in recreational sports.[191] Recreational sports enthusiasts may be unwilling to step out on the playing field if they have to assume the risk of other players' negligent behavior.[192] Thus, the *Knight* court contravenes its own rationale by adopting a reduced standard of care.[193]

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[186] *See* Burnstein, *supra* note 1, at 1015 (noting that people participate in recreational sports for fitness and entertainment, but desire for vigorous competition should not override participants' safety).

[187] *See Lestina*, 501 N.W.2d at 31-32 (explaining that failure to hold players liable for negligent conduct conflicts with tort law principles which condemn unreasonably risky behavior); *see also* Nabozny v. Barnhill 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975) (stating providing some limits on players' conduct does not necessarily impede vigorous participation in sports activities); Burnstein, *supra* note 1, at 1015 (maintaining that desire for vigorous competition is important, courts should not sacrafice policy of protecting participants from injury).

[188] *See* Burnstein, *supra* note 1, at 1015 (stating that recreational sports participants have duty to exercise reasonable case to avoid injuring other participants). Mr. Burnstein argues that courts should not compromise participants' safety by allowing players to engage in careless conduct. *See id; see also* Lazaroff, *supra* note 19, at 227 (asserting that sports should not be exception to shared societal principles of non-violence, civility, and decency).

[189] *See* Rembish, *supra* note 19, at 339-40 (maintaining that courts will chill participation in recreational sports by failing to hold players accountable for their negligent conduct).

[190] *See* Knight v. Jewett, 3 Cal. 4th 296, 318-20, 834 P.2d 696, 710-12 (1992) (explaining that imposing legal liability for careless conduct would chill vigorous participation in sports activities, therefore, sports participants are liable only for reckless or intentionally harmful conduct).

[191] *See* Burnstein, *supra* note 1, at 1015 n.200 (explaining that allowing players to engage in negligent conduct, courts will deter participation in sports activities); Rembish, *supra* note 19, at 339-40 (noting that by permitting negligent conduct in recreational sports, courts will chill participation).

[192] *See* Burnstein, *supra* note 1, at 1015 n.200 (stating that majority of people will not participate if they have to assume the risk of co-participants' negligent conduct); Rembish, *supra* note 19, at 339-40 (explaining that people will not want to participate in recreational sports when they know players can engage in careless conduct or lawfully violate rules of game).

[193] *See* Rembish, *supra* note 19, at 339-40 (asserting that courts will decrease participation in recreational sports by allowing players to act negligently and break game rules).

In summary, California's objective standard provides an insufficient framework to determine liability in sports injury cases for three reasons. First, *Knight's* objective standard contravenes negligence law by failing to judge the reasonableness of the defendant's conduct under the circumstances of the particular game.[194] Second, *Knight's* objective approach disregards the relevance of the participant's reasonable expectations to determine whether the defendant's conduct breached the duty of care.[195] Finally, *Knight's* approach violates public policy by adopting a lower standard of care for sports participants.[196]

B. Florida's Subjective Standard is Insufficient

Unlike California, Florida courts apply a subjective standard to sports injury cases.[197] Florida's exclusive reliance on a subjective standard, however, provides an insufficient framework to determine liability in sports injury claims.[198] Moreover, Florida's approach is flawed because

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[194] *See* Staten v. Super. Ct. of Alameda County, 45 Cal. App. 4th 1628, 1634-35, 53 Cal. Rptr. 2d 657, 660-62 (1996) (asserting that *Knight* court failed to determine liability based on specific characteristics of game). *See generally* Mansfield v. Circle K. Corp., 877 P.2d 1130, 1132 (explaining that reasonableness of defendant's conduct depends on factual circumstances) (Okla. 1994); Gossett v. Jackson, 457 S.E.2d 97, 100 (Va. 1995) (stating that negligence law looks at defendant's conduct in relation to circumstances); DOBBS, *supra* note 20, § 117, at 277 (noting that defendant's conduct must be reasonable under circumstances); PROSSER AND KEETON ON TORTS, *supra* note 26, § 37, at 237 (explaining that courts must consider whether defendant's conduct was reasonable under circumstances).

[195] *See Knight*, 3 Cal. 4th at 335, 834 P.2d at 721-22 (Kennard, J., dissenting) (arguing that plurality ignored plaintiff's expectations that she was participating in nonaggressive game because it was informal impromptu game played by both men and women using peewee sized ball); Lazaroff, *supra* note 19, at 223 (maintaining that objective standard is troublesome because it disregards any consideration of participant's expectations).

[196] *See generally* Lazaroff, *supra* note 19, at 219 (stating that tort policy intends to provide adequate protection and to create safer environment for sports participants); Rembish, *supra* note 19, at 336-40 (asserting that by adopting limited duty rule, court condones unreasonably risky conduct and permits players to break safety rules, which provides inadequate protection for sports participants).

[197] *Compare Knight*, 3 Cal. 4th at 315-17, 834 P.2d at 708-09 (applying objective standard to determine liability in recreational sports injury cases), *with* Kuehner v. Green, 436 So. 2d 78, 79 (Fla. 1983) (employing subjective standard to determine whether defendant's conduct was reasonable).

[198] *Compare* Knight v. Jewett, 3 Cal. 4th 296, 320, 834 P.2d 696 (1992) (relying exclusively on objective standard to determine whether defendant is liable for plaintiff's injury) *with* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (applying subjective standard exclusively to determine whether defendant's conduct was unreasonable); *see also Kuehner*, 436 So. 2d at 81 (Boyd, J., concurring specially) (maintaining that objective standard, which focuses on defendant's duty of care, provides better way to determine liability than majority's subjective approach); Lazaroff, *supra* note 19, at 223 (proposing that courts combine objective standard with subjective standard to assess liability).

Florida courts apply the subjective standard at the wrong stage of the analysis.[199] Nevertheless, Florida's approach demonstrates why courts should incorporate subjective considerations into their analysis.[200] By adopting a subjective standard, Florida courts recognize the relevance of players' expectations.[201] In addition, Florida's approach furthers important public policies by supporting a higher standard of care for recreational sports participants and by encouraging participants to play reasonably.[202]

1. Benefits of Florida's Subjective Standard

Florida courts recognize the relevance of the players' expectations to determine whether sports participants are liable for their conduct.[203] The players' expectations define the boundaries of the players' conduct, enabling courts to determine whether a defendant's conduct was reasonable under the circumstances.[204] Florida's approach recognizes that courts must consider the players' expectations to determine whether the defendant's conduct fell below the standard of care for that specific game.[205]

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[199] *See* Lazaroff, *supra* note 19, at 223 (proposing that courts combine objective standard with subjective standard to formulate liability standard for recreational sports injury cases).

[200] *See Kuehner*, 436 So. 2d at 80 (considering plaintiff's expectations under assumption of risk defense). *But see* Wildman & Barker, *supra* note 42, at 650 (explaining that courts must first determine that defendant acted negligently before turning to assumption of risk defense).

[201] *See Kuehner*, 436 So. 2d at 80 (acknowledging that court must consider what conduct plaintiff reasonably anticipated to determine liability); DOBBS, *supra* note 20, § 215, at 549 (maintaining that courts must take into account participants' expectation in recreational sports injury claims).

[202] *See Kuehner*, 436 So. 2d at 81 (Boyd, J., concurring specially) (explaining that majority's opinion allows sports participants to recover for negligent conduct of co-participants); Rembish, *supra* note 19, at 348 (asserting that negligence standard provides better assessment of liability in recreational sports injury claims because it considers factual circumstances of game and encourages participants to engage in reasonable conduct).

[203] *See id.* 80 (considering plaintiff's subjective expectations to determine whether defendant's conduct was reasonable); DOBBS, *supra* note 20, § 215, at 549 (stating that courts must consider participant's expectations if the context of game is to have any significance).

[204] *See* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (maintaining that courts must look at particular facts and circumstances of game, rules and customs of game, and participant's knowledge of game to determine whether defendant's conduct was negligent); Rembish, *supra* note 19, at 344 (stating that participant's expectations define players' standard of care).

[205] *See Kuehner*, 436 So. 2d at 80 (considering plaintiff's expectations to determine whether defendant was liable for his injuries).

In addition to recognizing the relevance of players' expectations, Florida's approach promotes reasonable behavior by providing recovery for negligent conduct.[206] Unlike California's standard, which requires a showing of intentional or reckless conduct, Florida's decision in *Kuehner* suggests that mere negligence is sufficient to warrant liability.[207] By holding sports participants liable for their negligent conduct, Florida courts adopt a more reasonable standard of care for recreational sports.[208]

Furthermore, Florida's approach encourages sports participants to engage in reasonable conduct and abide by the agreed upon rules of the game.[209] Because sports participants know they will be liable for their negligent conduct, players will exercise greater care to avoid injury to other players.[210] Additionally, Florida's approach encourages players to discuss the etiquette of the game before play.[211] By encouraging players to discuss and comply with the rules of the game, Florida's approach promotes reasonable conduct in the sports arena.[212] While Florida's approach illustrates the benefits of subjective considerations, there are problems with Florida's application of the subjective standard.[213]

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[206] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 2, at 6 (explaining that purpose of tort law is to provide compensation for injuries sustained due to conduct of another); Rembish, *supra* note 19, at 348 (asserting that negligence standard promotes reasonable behavior while preserving competitive spirit of sport). Under Florida's approach, a sports participant may recover for injuries caused by the defendant's negligent conduct. *See Kuehner*, 436 So. 2d at 81 (Boyd, J., concurring specially) (noting that majority opinion allows sports participants to recover for negligence conduct of co-participants).

[207] *Compare* Knight v. Jewett, 3 Cal. 4th 296, 320-21, 834 P.2d 696, 711-12 (1992) (holding that recreational sports participants are liable only for reckless or intentionally harmful conduct), *with Kuehner*, 436 So. 2d at 80 (ruling that recreational sports participants do not automatically assume all risks and can recover for injuries caused by unanticipated risk of harm).

[208] *See* Rembish, *supra* note 19, at 338, 348 (arguing that negligence standard is better than limited duty rule because negligence standard provides greater protection for participants by encouraging players to avoid careless conduct that could cause injury to others).

[209] *See* Lazaroff, *supra* note 19, at 219-22 (maintaining that threat of potential liability provides incentive for players to engage in reasonable conduct).

[210] *See id.* (stating that players will temper their careless conduct if they know that courts will hold them liable for injuries sustained by another participant).

[211] *See Kuehner*, 436 So. 2d at 80 (Boyd, J., concurring specially) (noting that court's approach will encourage sports participants to share their expectations with one another before playing game); Lazaroff, *supra* note 19, at 221 (asserting that threat of liability may result in higher incentive for participants to engage in self-regulation).

[212] *See generally* Rembish, *supra* note 19, at 338-39 (explaining that recreational sports participants adopt rules to prevent injuries and encourage safe conduct).

[213] *See* Kuehner v. Green, 436 So. 2d 78, 81 (Fla. 1983) (Boyd, J., concurring specially) (stating that liability in recreational sports injury cases should not depend on whether plaintiff assumed risk, but instead on duty of care defendant owed plaintiff).

2. Problems with Florida's Application of the Subjective Standard

While Florida recognizes that courts must consider the subjective expectations of sports participants, Florida's approach is problematic for two reasons.[214] First, Florida considers the participants' subjective expectations under the wrong phase of the negligence analysis.[215] Second, the court neglects the importance of the objective nature of the game.[216]

Florida's application of the subjective standard is misplaced because the court fails to consider the players' subjective expectations under its negligence analysis.[217] Instead, Florida courts consider the players' subjective expectations under the assumption of risk defense.[218] But, Florida courts should consider the players' subjective expectations under their negligence analysis because the participants' expectations help the court determine the defendant's duty of care.[219] By failing to use the players' expectations to define the defendant's duty of care, Florida courts cannot properly judge the reasonableness of the defendant's conduct. Yet, subjective considerations alone are inadequate.[220]

Florida's exclusive reliance on a subjective standard provides an insufficient framework to determine liability in sports injury claims.[221]

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[214] *See generally id.* (explaining that majority incorrectly evaluates case under assumption of risk doctrine and that under majority's approach participants would have to warn each other of all risks involved).

[215] *See id.* at 80 (determining whether plaintiff expressly assumed risk of harm by considering whether plaintiff subjectively knew of and voluntarily encountered risk of harm). *But see* Wildman & Barker, *supra* note 42, at 649 (explaining that plaintiff must establish prima facie elements of negligence against defendant, otherwise, courts do not need to reach affirmative defenses).

[216] *See generally Kuehner*, 436 So. 2d at 81 (Boyd, J., concurring specially) (maintaining that by evaluating cases under assumption of risk doctrine, which is subjective inquiry, court forces players to warn each other of all risks involved in sport).

[217] *See* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (providing that courts should consider risks participants expected under negligence analysis to determine if defendant's conduct was unreasonable); Rembish, *supra* note 19, at 344 (stating that courts should rely on participants' expectations to define defendant's standard of care).

[218] *See Kuehner*, 436 So. 2d at 80 (determining whether plaintiff expressly assumed risk of harm by subjectively appreciating risk of injury and voluntarily consenting to encounter risk).

[219] *See generally Lestina*, 501 N.W.2d at 33 (stating that courts must consider multiple factors, including what risks players could not anticipate, to determine defendant's duty of care); Rembish, *supra* note 19, at 344 (maintaining that courts cannot disregard participants' expectations because they define defendant's duty of care).

[220] *See generally* PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 487-88 (explaining that because subjective standard alone can be unreliable, courts incorporate objective elements into their consideration).

[221] *See Kuehner*, 436 So. 2d at 81 (Boyd, J., concurring specially) (arguing that court

Florida's approach is insufficient because it fails to balance the players' subjective expectations with the objective nature of the game.[222] Instead, Florida treats subjective and objective standards as alternative tests.[223] Florida courts apply an objective test only when the plaintiff fails to subjectively appreciate a risk of harm.[224] However, Florida courts should not use an objective standard as an alternative test, but rather as a concurrent test to determine the defendant's duty of care.[225]

Florida courts should incorporate an objective test in their analysis because an objective standard offsets uncertainties inherent to a purely subjective standard.[226] A purely subjective standard creates reliability issues because plaintiffs can declare that they did not anticipate a particular injury even though the harm was an obvious risk of the game.[227] However, an objective standard enables courts to protect against a plaintiff's insincerity and unreasonable expectations by comparing plaintiff's expectations with the expectations of a reasonable person.[228] For example, an injured plaintiff could claim that he did not anticipate the risk of a hockey puck striking him in the eye during a recreational game.[229] But, a reasonable person, with a general

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should assess liability based on defendant's duty of care to plaintiff and not under assumption of risk doctrine).

[222] *See id.* (claiming that under majority's opinion defendant would have to warn plaintiff of every risk involved).

[223] *See id.* at 80 (applying subjective test first to determine whether plaintiff reasonably anticipated risk of harm, and only if plaintiff did not expect risk does court adopt objective standard to determine if plaintiff should have anticipated risk).

[224] *See id.* (employing objective test only when court finds plaintiff did not subjectively appreciate risk of harm to determine if plaintiff should have expected risk because reasonable person would have recognized risk).

[225] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 486-88 (describing that courts often enter objective elements into their analysis to compare what reasonable person would have done under circumstances).

[226] *See* Knight v. Jewett, 3 Cal. 4th 296, 313, 834 P.2d 696, 706 (1992) (maintaining that because subjective inquiries are unreliable courts should employ objective standard); Crawn v. Campo, 643 A.2d 600, 606 (N.J. 1994) (stating that because subjective inquiries present complex issues, courts apply objective standard to determine how reasonable person would behave); PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 486-488 (explaining that courts are reluctant to rely exclusively on purely subjective standard for concern that subjective testimony can be unreliable).

[227] *See* generally PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 486-488 (explaining that courts are unwilling to rely on purely subjective standard because plaintiffs can insincerely testify that they did not appreciate risk when they did).

[228] *See Crawn*, 643 A.2d at 607 (stating that because subjective inquiries are not entirely reliable, court employs objective standard to consider how reasonable person would have acted under circumstances).

[229] *See* Keller v. Mols, 509 N.E.2d 584, 585 (Ill. App. Ct. 1987) (claiming that defendant negligently shot hockey puck in plaintiff's direction even though defendant knew plaintiff

understanding of hockey, would know that hockey pucks frequently lift off the ice.[230] By using an objective standard in conjunction with a subjective standard, Florida courts could better evaluate the reasonableness of the plaintiff's expectations.[231] Thus, Florida courts should apply an objective standard, in conjunction with the subjective standard, to determine liability in recreational sports injury cases.[232]

In summary, neither California's objective standard nor Florida's subjective standard provide a sufficient model for judging the reasonableness of a sports participant's conduct in a negligence claim.[233] Courts should apply both standards to determine whether the defendant's conduct breached a duty of care, because exclusive reliance on either an objective or subjective standard is problematic.[234] Using both objective and subjective considerations provides a more equitable assessment of sports participants' conduct, and resolves the problems that result from an exclusive application of either model.[235]

III. PROPOSED SOLUTION: A HYBRID APPROACH

Rather than rely exclusively on an objective standard or a subjective standard, courts should adopt a hybrid approach to determine liability in recreational sports injury claims.[236] By incorporating both objective and subjective considerations, courts could provide a more equitable assessment of sports participants' conduct.[237] Moreover, a hybrid

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was not wearing any protective equipment). The plastic hockey puck struck the plaintiff in the eye, causing personal injury. *See id.*

[230] *See id.* at 586 (holding that defendant was not liable for plaintiff's injuries because defendant's shot was ordinary conduct for hockey game).

[231] *See id.* (explaining that courts balance subjective testimony with objective criteria to assess whether plaintiff should have anticipated risk of harm).

[232] *See generally* Lazaroff, *supra* note 19, at 223 (suggesting that courts consider both objective and subjective considerations to determine liability in recreational sports injury claims).

[233] *See* Rembish, *supra* note 19, at 338-39 (maintaining that objective standard fails to provide adequate protection for recreational sports by allowing players to engage in unreasonable conduct despite co-participants' expectations); *cf. Crawn*, 643 A.2d at 607 (stating that subjective inquiries present reliability issues, therefore, courts should employ objective standard to assess whether plaintiffs' subjective expectations were reasonable).

[234] *See generally* Lazaroff, *supra* note 19, at 223 (maintaining that by employing both objective and subjective standards, courts avoid problems with using pure objective test).

[235] *See generally id.* at 222-24 (asserting that combining objective and subjective considerations provides better alternative than courts' exclusive reliance on single standard).

[236] *See generally id.* at 223-24 (proposing that courts combine both objective standard and subjective standard to assess liability in sports injury cases).

[237] *See id.* at 223 (proposing that better alternative to purely objective standard is

approach furthers important public policies by increasing the safety in recreational sports activities.[238]

Using a traditional negligence analysis, courts should incorporate objective and subjective standards as a two prong test to determine the defendant's duty of care.[239] First, courts should apply an objective standard to understand the nature of the game.[240] Second, courts should apply a subjective standard to supplement their understanding of the specific nature of the game in dispute.[241] Once courts have identified the standard of care, they should proceed to determine whether the defendant's conduct breached the duty of care and caused actual harm to the plaintiff.[242]

A. Courts Should Use A Two Prong Test to Determine Defendant's Duty of Care

To determine the defendant's duty of care, courts should first apply an objective standard.[243] An objective standard provides courts with a general understanding of the commonly accepted rules, customs, and practices of the game.[244] The governing rules and customs are relevant to the courts' analysis because they set the boundaries of the participants'

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combination of both objective and subjective standards to determine liability).

[238] *See generally* Rembish, *supra* note 19, at 338-38 (maintaining that courts promote reasonable conduct and protect recreational sports participants by acknowledging players' modified safety rules for particular game).

[239] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 164-65 (outlining traditional elements of negligence action as determining defendant's duty, whether defendant breached that duty, and whether defendant's breach caused actual harm to plaintiff).

[240] *See* Knight v. Jewett, 3 Cal. 4th 296, 315-17, 834 P.2d 696, 708-10 (1992) (stating that sports participants' duty of care depends on nature of game); Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (requiring courts to consider rules and regulations of game, as well as commonly accepted customs and practices of game to determine whether sports participants' conduct breached duty of care).

[241] *See* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (considering whether plaintiff reasonably expected specific risk of harm to determine liability in recreational sports injury claims); Rembish, *supra* note 19, at 344 (maintaining that courts should recognize players' expectations because they determine standard of care owed to other participants).

[242] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 30, at 164-65 (explaining that court must find defendant breached duty of care that caused actual harm to plaintiff to hold defendant liable for negligence).

[243] *See Knight*, 3 Cal. 4th at 316-17, 834 P.2d at 708-09 (applying objective standard, court defines defendant's duty of care based on nature of sport).

[244] *See Lestina*, 501 N.W.2d at 33 (maintaining that courts must consider sport's rules, regulations and generally adopted customs and practices to determine whether player's conduct was negligent).

conduct.[245] Using the rules as a guideline for conduct that is normally acceptable in the sport, courts can define the duty of care the defendant owed to other participants.[246]

Furthermore, an objective standard helps courts understand the inherent risks of the sport.[247] Courts need to appreciate the inherent risks of the sport to assess whether the defendant's conduct created an unreasonable risk of harm.[248] Additionally, by understanding what risks are involved in the sport, courts can evaluate the reasonableness of the plaintiff's expectations.[249] Therefore, by employing an objective standard, courts gain a general understanding of the nature of the game.[250]

A general understanding of the nature of the game, however, is insufficient to determine whether the defendant's conduct was reasonable.[251] An objective standard does not describe the factual context of the particular game nor tell courts how the participants chose to play the game.[252] Therefore, courts must refine their understanding of the game by also applying a subjective standard.[253]

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[245] *See* Lazaroff, *supra* note 19, at 222 (asserting that courts must consider customs, rules, and regulations of each sport to define standard of appropriate conduct for recreational sports); Rembish, *supra* note 19, at 338-39 (noting that players implement rules in recreational games to encourage safety and eliminate injurious physical conduct).

[246] *See Lestina*, 501 N.W.2d at 33 (stating that courts need to consider traditional rules of game, types of conduct, and level of aggression that is commonly accepted in game to determine whether defendant breached duty of care to other participants).

[247] *See id.* (noting that courts should look at risks inherent in sport, as well as risks beyond participant's anticipation).

[248] *See* Crawn v. Campo, 643 A.2d 600, 605 (N.J. 1994) (stating that nature of risks involved in recreational sports are germane to determining defendant's duty of care); *Lestina*, 501 N.W.2d at 33 (suggesting that courts consider inherent risks in sport to determine whether defendant's conduct was negligent).

[249] *See Lestina*, 501 N.W.2d at 33 (stating that courts must consider what risks were beyond realm of anticipation in sport).

[250] *See id.*

[251] *See* Lazaroff, *supra* note 19, at 222-23 (arguing that court's reliance on objective standard alone is problematic because objective standard ignores relevance of players' expectations); Rembish, *supra* note 19, at 347 (asserting that courts must consider factual context of game to determine standard of care players owe one another).

[252] *See* Knight v. Jewett, 3 Cal. 4th 296, 335-38, 834 P.2d 696, 721-24 (1992) (Kennard, J., dissenting) (arguing that plurality's objective approach disregards factual context of game as well as participant's expectations which are relevant factors to determine whether defendant's conduct was appropriate under those circumstances).

[253] *See* Rembish, *supra* note 19, at 344, (maintaining that courts must consider players' expectations because they define standard of care for that particular game).

A subjective standard provides courts with a more complete understanding of the context of the specific game in dispute.[254] Courts need to understand the context of the game before they can judge the appropriateness of the defendant's conduct.[255] Factors, such as the players' modified rules, the factual circumstances of the game, and the players' expectations help courts understand the game's context.[256] They also help to define the standard of care the defendant owed the other participants.[257]

If players modify the rules of the game, they define the standard of conduct they expect from one another for that particular game.[258] Courts should incorporate the players' rules to determine the duty of care the defendant owed the plaintiff.[259] However, sports participants do not always discuss or modify the rules of the game, so courts must look at other factors to understand the context of the game.[260]

Courts must consider the particular facts and circumstances of the game to determine whether the defendant's conduct was appropriate under the context of that game.[261] First, courts should look at the physical characteristics of the players, such as their age, gender, and

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[254] *See id.* at 344-348 (contending that courts must look at participants' expectations in addition to type of sport, characteristics of participants, and physical nature of game to determine defendant's duty of care).

[255] *See id.* at 347 (suggesting that courts must look at factual context of specific game to determine appropriate standard of care for those circumstances).

[256] *See* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (providing factors that courts must consider to appreciate nature of specific game in which injury occurred).

[257] *See id.* (asserting that court must consider several factors to determine whether defendant's conduct breached duty of care to other participants).

[258] *See* Rembish, *supra* note 19, at 338 (explaining that recreational sports participants modify traditional rules of game to prevent injuries and encourage safe conduct); *see e.g.*, Brief for Appellee at 10-19, Jaworski v. Kiernan, 696 A.2d 332 (Conn. 1997) (explaining that soccer league modified traditional soccer game rules by enacting challenge rule to prevent injuries and recognize coed nature of game); Crawn v. Campo, 643 A.2d 600, 602 (N.J. 1994) (explaining that weekly participants in informal recreational softball games adopted no slide rule).

[259] *See* Rembish, *supra* note 19, at 344 (describing that recreational sports participants establish rules of conduct to promote safety among players and courts must recognize these rules because they define participants' standard of care).

[260] *See* Knight v. Jewett, 3 Cal. 4th 296, 300, 834 P.2d 696, 697 (1992) (stating that group did not explicitly discuss any rules of game before playing); *see id.* at 338, 834 P.2d at 724 (Kennard, J., dissenting) (explaining that game was poorly defined).

[261] *See* Burnstein, *supra* note 1, at 1011 (maintaining that reasonableness of defendant's conduct depends upon individual facts of game); Rembish, *supra* note 19, at 344 (explaining that nature of game affects manner in which courts should judge defendant's conduct).

size.[262] Second, courts should consider the participants' knowledge of the game and skill level.[263] Third, courts should look at whether the participants used any protective equipment.[264] Finally, courts should consider the purpose of the game and the degree of competitiveness.[265] By incorporating these considerations into their analysis, courts can assess the reasonableness of the defendant's conduct in relation to the specific context of the game.[266]

Finally, courts should look to see whether the plaintiff took any affirmative action to express his or her expectations during the game.[267] Even if players do not discuss the etiquette of the game before playing, players can establish their expectations during the game by expressing disfavor with their co-participants' conduct.[268] When players communicate their expectations they impose a duty of care on the other players to act in accordance with that standard of care.[269] Thus, the players' expectations helps courts define the duty of care the defendant owed the other players.[270]

Using a hybrid approach, courts can more properly determine the duty of care the defendant owed the other participants.[271] By combining both objective and subjective standards, courts gain a more comprehensive understanding of the specific nature of the game in

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[262] *See Lestina*, 501 N.W.2d at 33 (acknowledging that participants' physical attributes as well as their ages are important considerations in court's negligence analysis).

[263] *See id.* (suggesting that courts look at participants' respective skill as well as their knowledge of game's rules and customs).

[264] *See id.* (urging courts to look at presence of protective gear and uniforms).

[265] *See* Burnstein, *supra* note 1, at 1011 (listing degree of zest with which participants played game is relevant factor in court's negligence analysis).

[266] *See Lestina*, 501 N.W.2d at 33 (ruling that courts must consider multiple factors to determine whether defendant's conduct was unreasonable for that particular game).

[267] *See, e.g.*, Knight v. Jewett, 3 Cal. 4th 296, 300, 834 P.2d 696, 697 (1992) (summarizing plaintiff's testimony that she told defendant to stop playing aggressively or she would no longer participate); Crawn v. Campo, 643 A.2d 600, 602 (N.J. 1994) (describing that players reminded defendant of no slide rule after he slid into second base).

[268] *See, e.g., Knight*, 3 Cal. 4th at 300, 834 P.2d at 697 (noting that players did not discuss rules of game, but plaintiff responded to defendant's unreasonable conduct during game by telling him to stop playing aggressively).

[269] *See* Rembish, *supra* note 19, at 344 (maintaining that players' expectations define standard of care that participants owe one another).

[270] *See id.* (stating that courts should look at players' expectations to understand what conduct was reasonable for that game).

[271] *See generally* Lazaroff, *supra* note 19, at 223-24 (proposing that combination of objective and subjective standards provides better alternative for determining liability in sports injury cases).

dispute.[272] Based on this understanding, courts can assess what conduct was appropriate for the game.[273] Thus, a hybrid approach enables courts to properly evaluate the reasonableness of the defendant's conduct to determine liability in sports injury cases.[274] Moreover, a hybrid approach furthers important public policy considerations.[275]

B. Hybrid Approach Furthers Public Policy Considerations

A hybrid approach provides courts with a more equitable and uniform process for resolving recreational sports injury claims.[276] A hybrid approach produces more equitable outcomes because courts must resolve sports injury claims on a case by case basis according to the specific facts of the game in dispute.[277] By looking at both the objective nature of the game, as well as the participants' subjective expectations, courts provide a more equitable assessment of the defendant's conduct.[278] Moreover, a hybrid approach provides a uniform methodology to analyze recreational sports injury cases across jurisdictions.[279]

Courts' exclusive reliance on either an objective approach or a subjective approach imposes different standards on sports participants in different jurisdictions.[280] However, to provide fair and reliable

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[272] *Compare Knight*, 3 Cal. 4th at 312-17, 834 P.2d at 706-09 (employing objective standard enables courts to determine those risks that plaintiff should have expected based on nature of sport), *with* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (using subjective standard to identify those risks plaintiff reasonably anticipated).

[273] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 37, at 236-37 (explaining that reasonableness of defendant's conduct depends on circumstances).

[274] *See generally* Lazaroff, *supra* note 19, at 223-24 (proposing that combining objective and subjective standards provides better alternative to determine liability than court's exclusive reliance on single standard).

[275] *See generally* Rembish, *supra* note 19, at 336-48 (maintaining that by incorporating factual context of game and players' expectations, courts provide better protection to sports participants and encourage reasonable behavior).

[276] *See generally* Lazaroff, *supra* note 19, at 222-24 (asserting that by combining objective and subjective standards, courts eliminate inconsistencies that arise when courts apply objective standard alone across various types of sports activities).

[277] *See generally* Burnstein, *supra* note 1, at 1023 (maintaining that courts provide more equitable determination of liability when they conduct case by case analysis judging defendant's conduct under specific circumstances of game).

[278] *See id.* (suggesting that courts provide more equitable determination of liability by considering reasonableness of defendant's conduct under circumstances).

[279] *Compare* Knight v. Jewett, 3 Cal. 4th 296, 320-21, 834 P.2d 696, 711-12 (1992) (employing objective standard, court does not hold sports participants liable for their negligent conduct), *with* Kuehner v. Green, 436 So. 2d 78, 81 (Fla. 1983) (Boyd, J., concurring specially) (applying subjective standard, court holds sports participants liable for their negligent conduct).

[280] *Compare Knight*, 3 Cal. 4th at 320-21, 834 P.2d at 711-12 (applying objective standard,

outcomes, courts should resolve sports injury claims under a uniform standard.[281] By adopting a hybrid approach, courts reduce the inconsistency that results from exclusively relying on one standard, while providing the benefits of both standards.[282]

In addition to providing a more equitable and uniform analysis, a hybrid approach may make recreational sports activities safer.[283] By considering the players' expectations in their analysis, courts provide an incentive for sports participants to discuss the rules of the game before playing.[284] By encouraging players to discuss the etiquette of the game, participants will have a better understanding of what constitutes acceptable conduct.[285] Finally, players will be less likely to engage in unreasonably risky conduct if they know courts will hold them liable for their behavior.[286]

Some commentators might argue that imposing liability under this hybrid approach would not deter sports participants' unreasonably risky conduct.[287] They would claim that the threat of liability does not deter

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court held that plaintiff was not entitled to recover because tackling was inherent risk of football), *with Kuehner*, 436 So. 2d at 80 (applying subjective standard, court allows plaintiff to recover for injuries sustained during game if plaintiff did not reasonably anticipate risk).

[281] *See generally* DOBBS, *supra* note 20, §§ 9-11, at 13-20 (discussing tort law serves to deter unreasonable conduct and provide just outcomes); STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW, 7-9 (1989) (explaining goal of tort law is to promote socially desirable behavior by imposing liability for unreasonably dangerous conduct).

[282] *See generally* Lazaroff, *supra* note 19, at 223-24 (proposing that combining objective and subjective standards provides better alternative than court's exclusive reliance on single standard).

[283] *See generally* Rembish, *supra* note 19, at 338-48 (maintaining that by considering factual context of game, players' expectations, and physical nature of games, courts provide sports participants with protection and encourage adherence to safety rules).

[284] *See gernerally* Lazaroff, *supra* note 19, at 219-21 (asserting that imposition of liability provides sports participants with incentive for self-regulation and encourages participants to play safely).

[285] *See Knight*, 3 Cal. 4th at 338, 834 P.2d at 724 (Kennard, J., dissenting) (explaining that because group did not define rules of game, players were uncertain about boundaries of appropriate conduct).

[286] *See* Lazaroff, *supra* note 19, at 219-21 (maintaining that threat of liability will cause sports participants to avoid engaging in reckless conduct).

[287] *See generally* Lazaroff, *supra* note 19, at 221 (noting that it may be unreasonable to expect sports participants to restrain themselves from aggressive conduct); R. COX, SPORTS PSYCHOLOGY, 209-42 (1985) (discussing that aggression is integral aspect of sports activities). *But see* Lazaroff, *supra* note 19, at 219-221 (asserting that threat of legal liability will reduce violent conduct in recreational sports activities); Rembish, *supra* note 19, at 336-40 (maintaining that imposing liability for players' negligent conduct would deter unreasonably risky conduct, encourages participants to conform to safety rules, and prevent injuries in recreational sports).

sports participants' risky conduct for two reasons.[288] First, people are generally ignorant of the potential for tort liability before they participate in sports activities.[289] Second, people fail to appreciate that their conduct creates a risk of injury to others that may be actionable.[290] Because sports participants lack knowledge of the law, the threat of liability does not deter their conduct.[291]

However, the hybrid approach would deter unreasonably dangerous conduct by compensating injured participants.[292] This compensation will put future defendants on notice of potential liability for unreasonable conduct.[293] Over time, the threat of tort liability causes people to alter their conduct in a socially desirable way.[294] Rather than engage in unreasonably dangerous conduct and risk liability, sports participants will alter their behavior to avoid causing injuries.[295] Thus, the hybrid approach furthers the dual goals of tort law by compensating injured participants and deterring unreasonably risky conduct.[296]

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[288] *See generally* SUGARMAN, *supra*, note 281, at 7-9 (maintaining that tort law fails to provide systematic deterrence); Daniel Shuman, *The Psychology of Deterrence in Tort Law*, 42 KAN. L. REV. 115, 121 (1993) (recognizing that deterrence is achieved only when certainty of punishment reaches sufficient level).

[289] *See generally* SUGARMAN, *supra* note 281, at 7 (explaining that deterrence requires knowledge to be effective and most people are ignorant of potential legal risks).

[290] *See id.* at 8 (stating that people are not alert to consequences of their behavior).

[291] *See id.* at 7 (maintaining that law cannot deter people's conduct if they are not aware of law).

[292] Under the hybrid approach, the subjective prong is conducive to compensation because it considers the injured player's expectations. But the objective prong ensures that an injured participant can only recover for unreasonable risks associated with the game.

[293] *See* SUGARMAN, *supra* note 281, at 1 (discussing goal of tort law is to prevent injuries by deterring unreasonably dangerous conduct); DOBBS, *supra* note 20, § 11, at 19 (stating that tort law serves to deter unsafe conduct by imposing liability when that conduct causes harm).

[294] *See* SUGARMAN, *supra* note 281, at 1 (explaining that to avoid liability people will engage in behavior). The power to alter behavior is not unknown to tort law. For example, negligence actions for a manufacturer's failure to warn demonstrate that the imposition of liability deters dangerous conduct and produces a safer environment. The fear of costly liability encouraged manufacturers to provide adequate warnings on their products that increased consumer safety. A similar result will happen in recreational sports. The threat of tort liability will deter unreasonably risky conduct in the sports arena.

[295] *See* SUGARMAN, *supra* note 281, at 1 (explaining that risk of legal liability deters people from engaging in unreasonably dangerous conduct).

[296] *See generally* DOBBS, *supra* note 20, §§ 11-12, at 19-22 (explaining goals of tort law are to deter unreasonably risky conduct that may create harm and to compensate people who are injured by another's dangerous conduct); SUGARMAN, *supra* note 281, at 1 (discussing how imposing liability furthers tort policies by deterring dangerous conduct, preventing unreasonable risks of harm, and compensating people harmed by socially undesirable behavior).

CONCLUSION

Neither California's objective standard nor Florida's subjective standard provides a sufficient framework to determine liability in recreational sports injury claims.[297] California's objective standard is insufficient because an objective approach disregards the relevance of the players' expectations and the factual circumstances of the game.[298] Florida's subjective approach is inadequate because a purely subjective inquiry may be unreliable.[299] Yet, because there are benefits to each approach, courts should combine both standards to create a hybrid test.[300]

By combining both objective and subjective standards, courts gain the benefits of both approaches while balancing out the inadequacies of each standard.[301] The subjective standard helps courts understand the context of the game as well as the conduct players reasonably expected.[302] The

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[297] *See* Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (ruling that courts must consider multiple factors to determine whether sports participants should be liable for their conduct); Burnstein, *supra* note 1, at 1011, 1023 (maintaining that courts must evaluate recreational sports injury claims on case by case analysis, using multiple factors to determine liability); Rembish, *supra* note 19, at 348 (asserting that courts must consider factual variations of games including type of sport, players' characteristics, participants' expectations, and physical nature of sport to properly determine liability in sports injury claims). *See also* PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 487-88 (explaining that due to reliability concerns with purely subjective inquiries, courts introduce objective elements into their analysis); Lazaroff, *supra* note 19, at 223 (suggesting need for alternative approach to purely objective standard and recommending that better approach is to combine objective standard with subjective standard).

[298] *See* Knight v. Jewett, 3 Cal. 4th 296, 335, 834 P.2d 696, 721-22 (1992) (Kennard, J., dissenting) (arguing that plurality decision disregards relevance of factual context of game and players' expectations and court fails to recognize that risks involved in sport vary depending on how participants play game); DOBBS, *supra* note 13, § 215, at 549-50 (suggesting that courts must incorporate participants' subjective expectations otherwise factual context and nature of particular game have no significance); Rembish, *supra* note 19, at 344 (maintaining that courts must consider participants' expectations because they define standard of care players owe one another).

[299] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 487-88 (explaining that courts are reluctant to rely purely on subjective inquiry because plaintiffs' testimony can be unreliable); *see also Knight*, 3 Cal. 4th at 313, 834 P.2d at 706 (stating that if court relies exclusively on plaintiff's expectations there will always be questions regarding whether plaintiff recognized that specific risk of injury).

[300] *See* Lazaroff, *supra* note 19, at 223-44 (proposing that combining objective and subjective standards is better method to determine liability than court's exclusive reliance on single standard).

[301] *Compare Knight*, 3 Cal. 4th at 312-17, 834 P.2d at 706-09 (applying objective standard enables court to determine those risks plaintiff should have anticipated based on nature of game), *with* Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983) (employing subjective standard to identify those risks plaintiff reasonably anticipated).

[302] *See Lestina*, 501 N.W.2d at 33 (ruling that courts must consider particular facts and

objective standard, on the other hand, offsets courts' skepticism towards subjective inquiries by enabling courts to evaluate the reasonableness of the plaintiff's expectations.[303]

Finally, a hybrid approach provides courts with a more equitable and uniform process for resolving recreational sports injury claims.[304] Using a hybrid approach produces more equitable outcomes because courts resolve sports injury claims on a case by case basis according to the facts of the specific game in dispute.[305] Applying both subjective and objective considerations provides uniformity and promotes fairness across jurisdictions.[306]

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circumstances of game to determine liability); Rembish, *supra* note 19, at 344 (stating that participants' expectations define standard of care).

[303] *See* PROSSER AND KEETON ON TORTS, *supra* note 26, § 68, at 487-88 (explaining that courts introduce objective elements into their analysis to evaluate reasonableness of plaintiff's expectations with those risks reasonable person should have known or anticipated).

[304] *See* Burnstein, *supra* note 1, at 1023 (asserting that courts provide equitable determination of liability by considering defendant's conduct in relation to circumstances).

[305] *See Lestina*, 501 N.W.2d at 33 (ruling that courts must consider multiple factors to determine whether sports participants' conduct was unreasonable for that particular game); Burnstein, *supra* note 1, at 1011, 1023 (maintaining that courts provide more equitable assessment of liability when they apply case by case analysis that considers multiple factors to determine liability); Rembish, *supra* note 19, at 347-48 (asserting that courts must consider factual variations among games by looking at type of sport, players' characteristics, physical nature of game, and players' expectations).

[306] *Compare Knight*, 3 Cal. 4th at 320-21, 834 P.2d at 711-12 (ruling that sports participants are not liable for negligent conduct under objective approach), *with Kuehner*, 436 So. 2d at 80 (holding that sports participants can be liable for negligent conduct under subjective approach).

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