

Extreme Sports and Assumption of Risk: A Blueprint

By DAVID HORTON*

A GROWING NUMBER of personal injury litigants stand outside the contours of tort law. Plaintiffs who are hurt while engaging in high risk recreational activities do not fit within a doctrine that uses “reasonableness” as its central criterion. Reasonableness hinges on whether the cost of an untaken precaution outweighs that of a particular harm.¹ In many risky sports, the only way to avoid getting hurt is to forego the activity altogether. For most people, this is not a burden. Even if it is, the lost opportunity value is dwarfed by the omnipresent specter of grave injury. For example, consider the sport of motocross, which involves racing and performing stunts on off-road motorcycles.² Motocross is so dangerous that midway through the professional circuit’s most recent season, half of its contestants had suffered broken bones or concussions.³ Thus, the reasonably prudent person would probably never try the sport.⁴ However, if it is unreasonable to take part in motocross, then it must also be unreasonable for a motocross

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1. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

2. See, e.g., *A Motor Sport Takes Off, Leaving a Trail of Broken Bones*, N.Y. TIMES, Sept. 2, 2002, at A10 [hereinafter *Motor Sport*].

3. See *id.*

4. See, e.g., Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 216–17 (1987) (flagging the issue) [hereinafter Simons, *Full Preference*]; David Horton, Comment, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339, 364 n.151 (2003) (“[T]ort law, grounded in the objective reasonable person standard, simply does not deal well with idiosyncratic plaintiffs who actively seek thrills through dangerous, socially sanctioned activities.”).

track owner to offer the plaintiff the opportunity to do so.⁵ Risky sports defy classification under tort law's fundamental norm.

But for people like Travis Pastrana, a professional motocross competitor, even the most dangerous sports are reasonable. Pastrana began riding at the age of four.⁶ Two years later, a crash temporarily paralyzed him.⁷ Shortly after recovering, he got back on his bike.⁸ By his eighteenth birthday, he had endured ten concussions, undergone twelve operations, and broken more than thirty bones.⁹ When asked about his injuries, he replied: "Every time I've gotten hurt . . . has been worth it."¹⁰ Indeed, for "risk-preferrers" like Pastrana, not only are dangerous sports worthwhile despite their risks, but they are worthwhile *because* of their risks. Risk-preferrers invert the negligence equation: for them, the greater the risk, the greater the benefit. Yet while Pastrana's accidents are "worth it" to him, whether the value of motocross outweighs its costs as a normative matter is less clear. Although "[m]aking one's own choices about risk . . . is an important aspect of individual autonomy[,] "¹¹ few activities that injure so frequently are reasonable under traditional negligence principles.¹²

For years, this theoretical problem had little pragmatic significance. If an injured sports participant filed suit, the business entity that provided the activity would invoke the affirmative defense of assumption of risk. Traditionally, assumption of risk barred a plaintiff's claim—whether his behavior was reasonable or unreasonable—on the

5. See Simons, *Full Preference*, *supra* note 4, at 217.

6. See KIDZWORLD, SPORTS ZONE—EXTREME SPORTS, MOTORCROSS TRAVIS PASTRANA, at <http://www.kidzworl.com/site/p1739.htm> (last accessed March 18, 2004).

7. See Anne Arundel, *Names in the News*, WASH. POST, Sept. 25, 2003, at T4. Pastrana fell during a 120-foot-long jump. The force of the impact drove his spinal column through his pelvis. See *Motor Sport*, *supra* note 2.

8. See Arundel, *supra* note 7. Pastrana soon earned notoriety by riding his motorcycle into the Grand Canyon. See Lynn Hoppes, *Pastrana Still Ailing*, ORLANDO SENTINEL, Feb. 14, 2003, at D14, 2003 WL 11318237.

9. See *Motor Sport*, *supra* note 2.

10. See *id.* Pastrana's statement provoked an angry reply. See Letter to the Editor, *The Cost of a Sport*, N.Y. TIMES, Sept. 6, 2002, at A22 ("We are mired in a national crisis over how to pay for basic health care and cannot afford the costs of self-inflicted injuries Perhaps those who are footing the bill should decide if his stunts are 'worth it.'").

11. Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 3 (1993).

12. See Simons, *Full Preference*, *supra* note 4, at 234 ("Often it is simply impossible to say whether or not risk-preferring conduct is negligent."). Many extreme sports luminaries have medical histories that mirror Pastrana's. At the 2001 X Games in Philadelphia, Cary Hart fell thirty-five feet during a mid-air flip, shattering three ribs, his tailbone, and his right foot. See Kevin Van Valkenburg, *Something They're Really Flipping Over*, BALTIMORE SUN, Aug. 20, 2002, at 1D, 2002 WL 6966811.

ground that he voluntarily chose to encounter a known danger.¹³ However, assumption of risk partially overlapped with the doctrine of contributory negligence, which completely precluded recovery if the plaintiff engaged in unreasonable conduct.¹⁴ Recently, most jurisdictions replaced contributory negligence with comparative negligence, which apportions damages according to fault. Thus, assumption of risk's viability has become one of the most unsettled areas of tort law—an issue so complex that the drafters of the *Second Restatement of Torts* dubbed it “The Battle of the Wilderness.”¹⁵ In the wake of this change, the existence and scope of a commercial recreation vendor's liability exposure depends on a complex web of specialized duty rules, sports-specific exculpatory statutes, and contractual waivers.

Sailing full steam toward these choppy waters is one of the most dramatic sociological transformations of our time: the “extreme sports” phenomenon.¹⁶ Once dismissed as the province of a few foolhardy individuals,¹⁷ high risk recreational activities have now become ubiquitous in advertising,¹⁸ television,¹⁹ and film.²⁰ Participation in

13. See RESTATEMENT (SECOND) OF TORTS § 496A (1965).

14. See *id.* § 463.

15. See *Foronda v. Hawaii Int'l Boxing Club*, 25 P.3d 826, 834 (Haw. Ct. App. 2001).

16. For articles chronicling the rise of extreme sports, see Michael Angeli, *Inside the Extreme Machine*, PLAYBOY, Nov. 1, 1997, at 82, 1997 WL 9309409; Mike Bresnahan, *X Games in Los Angeles: Avoiding Injury Is Most Difficult Stunt to Pull Off*, L.A. TIMES, Aug. 16, 2003, at D1; Karl Taro Greenfeld, *Life on the Edge*, TIME, Sept. 6, 1999, at 28; Robert Johnson, *Extreme-Sports Industry Faces Risky New Challenge*, WALL ST. J., July 17, 2001, at B2; Brendan I. Koerner, *Extreeme: The Peril, the Thrill, the Sheer Rebellion of It All*, U.S. NEWS & WORLD REP., June 30, 1997, at 50, 1997 WL 8332292; James Parker, *Zen and the Art of Stunt Riding: How America Became Safe for Extremism*, BOSTON GLOBE, Jan. 19, 2003, at D2, 2003 WL 3375534; Paula Parrish, *Going to Extremes; For Daredevils Who Cheat Death, the Risks are Right up There with the Rewards*, ROCKY MOUNTAIN NEWS, June 22, 2002, at D1, 2002 WL 9104168; Paula Span, *Insanely Sick*, WASH. POST, Aug. 11, 2002, at W14, 2002 WL 24827290; Karen Thomas, *Going to the Extreme: Young Daredevils Zip into Mainstream*, USA TODAY, Aug. 13, 1997, at A1, 1997 WL 7010476; Dennis Tuttle, *On the Cutting Edge; Radical Sports Find a Foothold*, WASH. POST, Jan. 11, 1998, at Y6, 1998 WL 2461271.

17. See, e.g., Charles Stein, *X Marks the Sport*, BOSTON GLOBE, Aug. 23, 1998, at 1, 1998 WL 9149722 (“Once, it was ‘those kids’ who went to extremes. Now, it is ‘our kids,’ the same ones who play Little League and soccer.”); see also Jennifer Gabriel, *Crazy for Sports*, KANSAS CITY STAR, Aug. 7, 1997, at E1, 1997 WL 3020998 (“[P]eople who participated in these activities [once] weren’t called athletes. They were called crazy.”).

18. See Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1647 (2003) (noting the success of Old Spice and Nissan's extreme-sports-themed advertising campaigns); Colin Grimshaw, *Sports Marketing: Living Dangerously*, REUTERS, Mar. 29, 2002, at 35, 2002 WL 9473113 (noting that Audi, Honda, Nissan, Volvo, Motorola, Davidoff, and Nokia are sponsoring mountain-biking, in-line skating, snowboarding, and windsurfing events); Koerner, *supra* note 16, at 7 (mentioning Mountain Dew's and Pringles's advertising campaigns); Kathleen Nelson, *Increasingly Extreme*, ST. LOUIS POST-DISPATCH, May 22, 2002, at D1, 2002

sports such as skydiving, bungee jumping, rock climbing, hang gliding, motocross, BMX, snowboarding, wake-boarding, kite-boarding, and skateboarding has soared in the last decade.²¹ This movement has been driven largely by youth culture.²² While participation in team sports declined by a quarter in the last decade, the number of teenag-

WL 2564547 (commenting that Nestea, Hershey's, Mr. Coffee, Tyco, and Saturn have all hired snowboarders as spokespeople); Span, *supra* note 16 (adding Chevrolet, AT&T, Taco Bell, Jeep, Circuit City, and the Marine Corps to the list).

19. See Leslie Earnest, *Sports-Apparel Makers Angling to Get 'Big Air' Time on Fox*, L.A. TIMES, Jan. 27, 2003, at C1 (describing 54321, a Fox News show that focuses on extreme sports); Fox Entertainment Group, Inc., *New Cable Channel Will Focus on Extreme Sports*, WALL ST. J., Dec. 5, 2002, at B10; Malcolm Mayhew, *Hollywood Gets X-TREME: Action Sports Grab the Big-Screen Spotlight with Movies Like 'Extreme Ops' and 'XXX'*, FORT WORTH STAR-TELEGRAM, Nov. 29, 2002, 2002 WL 103707468; Nelson, *supra* note 18 (detailing EXPN, a specialty cable channel devoted entirely to extreme sports).

20. See BLUE CRUSH (Universal 2002) (telling the story of aspiring female surfers); DIE ANOTHER DAY (Metro-Goldwyn-Mayer 2002) (opening with a team of secret agents surfing to shore in hostile territory at night); DOGTOWN AND Z BOYS (Sony 2001) (documenting skateboarding's early history); EXTREME OPS (Apollo Media 2002) (involving a team of extreme sports experts who encounter terrorists while making a commercial); GRIND (Warner Bros. 2003 (following a group of skateboarders); STEP INTO LIQUID (Artisan 2003) (profiling various extreme surfers); XXX (Columbia Pictures 2002) (featuring a snowboarding, BASE-jumping super-spy). Extreme sports have also been the subject of two IMAX films. See ADRENALINE RUSH: THE SCIENCE OF RISK (Metro-Goldwyn-Mayer 2003); ULTIMATE X (ESPN 2002).

21. For example, membership in the United States Parachute Association has increased by more than thirty percent in the last ten years. See Jim Lockwood, *Skydivers Don't Want State Jumping Hastily*, N.J. STAR-LEDGER, July 6, 2003, at 25. Half a million Americans rock climb. See Koerner, *supra* note 16. Participation in snowboarding has increased two-and-a-half times; the activity emerged from obscurity to become an Olympic sport. See Mike Bresnahan, *TV Making Leap to Extreme Sports*, L.A. TIMES, Aug. 16, 2003, at E12. BMX will also be a medal sport at the 2008 Olympic Games in Beijing. See Ryan Clark, *BMX Racing: A Wheel-Life Fantasy*, WASH. POST, Aug. 3, 2003, at A1, 2003 WL 56510417. Skateboarding is the fastest-growing sport in the United States. See C. Woodrow Irvin, *The Great Skate Debate*, WASH. POST, Nov. 14, 2002, at T20. Motocross, which involves racing and performing tricks on off-road motorcycles, is the second-most popular spectator sport in the country. See *Motor Sport*, *supra* note 2; Chris Ballard, *American Idols*, SPORTS ILLUSTRATED, Jan. 20, 2003, at 11, 2003 WL 8586155 (noting that American Motocross Events draw an average of 49,566 fans per event). In addition, the overwhelming success of ESPN's X Games—an extreme sports competition modeled on the Olympics—has spawned a series of similar events, including Tony Hawk's Boom-Boom Huckjam, the Gravity Games, the Taz Fair, and the Warped Tour. See Marcia Manna, *Airheads*, S.D. UNION-TRIB., June 13, 2002, at NC1, 2002 WL 4608124.

22. For example, the X Games drew more teenage viewers last year than the Super Bowl, the World Series, or the World Cup. See Nelson, *supra* note 18. In addition, teenagers rated skateboarder Tony Hawk as the most popular male athlete—ahead of such sports luminaries as Shaquille O'Neil, Tiger Woods, Derek Jeter, and Michael Jordan. See *id.* Ironically, Hawk is often described as "the Michael Jordan of skateboarding." See, e.g., Tim Layden, *What Is This 34-year-Old Man Doing on a Skateboard? Making Millions*, SPORTS ILLUSTRATED, June 10, 2002, at 80. Hawk's licensing deals with Adio Shoes, Bagel Bites, Hot Wheels, and Activision generate an estimated \$250 million in annual sales. See *id.*

ers who skateboard, snowboard, or in-line skate increased more than five times.²³ In addition, unlike team sports, where even the best players must wait years before turning professional, many pubescent skateboarders, motocross riders, wake-boarders, and BMXers are inking lucrative deals with sponsors.²⁴ For these reasons, commentators are beginning to acknowledge what once would have been unthinkable—that extreme sports will soon replace recreational staples like baseball, basketball, and football.²⁵ Indeed, Americans spend \$40 billion each year on sporting goods,²⁶ and the extreme sports industry has “captured an expanding piece of th[is] pie.”²⁷ Because extreme sports are often sponsored by corporations²⁸ and municipalities²⁹—deep-pocket entities—some fear that America stands on the brink of a

23. See Nelson, *supra* note 18. More children currently skateboard than play baseball. See Irvin, *supra* note 21. In 2002, sporting goods stores sold more skateboards than baseball gloves. See Ross Siler, *The X-Factor Once a Curiosity, X Games Now an Extreme Player*, L.A. DAILY NEWS, Aug. 14, 2003, 2003 WL 5682964. Just six percent of skateboarders are older than twenty-five. See Colleen Jenkins, *A Skate-Park Sign of the Times: Boomer on Board*, WASH. POST, Dec. 1, 2002, at A12.

24. For example, Dylan Oliver garnered national attention by receiving corporate sponsorship at the age of four. See *Morning Edition* (NPR radio broadcast, Sept. 22, 2003), 2003 WL 4859999; *The Next Big Little Thing Forward*, LEXINGTON HERALD LEADER, June 1, 2003, 2003 WL 18300314; see also Margaret Talbot, *Why Isn't He the Cutest Brand-Image Enhancer You've Ever Seen?*, N.Y. TIMES MAGAZINE, Sept. 21, 2003, at 32, 2003 WL 75231627 (noting that Luke Mitrani, a thirteen-year-old snowboarder, is under contract with Mountain Dew and that Mitchie Brusco, a six-year-old skateboarder, is sponsored by Jones Soda and Lego); Span, *supra* note 16 (explaining that seventeen-year-old professional skateboarder Kyle Beard “already outearns his father”); Hoppes, *supra* note 8 (hailing the success of thirteen-year-old Phillip “Froggy” Soven); James Whitters, *Wallenda on Wheels Is Only 7: Boy Can Fly Through Bike Stunts Few Older Riders Would Attempt*, BOSTON GLOBE, Aug. 31, 2003, at 1, 2003 WL 3416209 (describing Nick Rogatkin, a sponsored seven-year-old freestyle BMX rider); Dan Arritt, *From Extreme to Mainstream*, CHI. TRIB., Aug. 17, 2003, at 14 (profiling sixteen-year-old wake-boarder Dallas Friday); Peter Yoon & Rob Fernas, *X Games in Los Angeles: Winners Get Even Younger*, L.A. TIMES, Aug. 18, 2003, at D13 (featuring thirteen-year-old Ryan Sheckler, the youngest skateboarding gold medalist in X Games history).

25. See, e.g., Koerner, *supra* note 16 (“Sports that involve speed, variety, and change will replace [team sports].” (quoting Temple University Professor Frank Farley)); Maureen Tkacik, *Foothold: As Extreme Goes Mass, Nike Nips at a Skate-Shoe Icon*, WALL ST. J., Apr. 24, 2002, at A1 (commenting that Rick Anguilla, Nike’s director of brand communications, predicts that “in a few years, the kid who plays Little League baseball is going to be considered ‘alternative’”).

26. See Koerner, *supra* note 16.

27. Ramsey, *supra* note 18, at 1647.

28. Indeed, “[e]xtreme sports are big business,” and providing them to the public has become a thriving industry. Kate Linebaugh, *Bankers on the Run in Asia*, SEATTLE TIMES, Feb. 6, 2003, at C3, 2003 WL 3620148; Tkacik, *supra* note 25; Jorge Sanchez, *Extreme Fun: The Business of Playtime*, ST. PETERSBURG TIMES, Nov. 25, 2002, at 1, 2003 WL 102917897; Rachel Wimberly, *Sport Taking Off: Extreme Sports Gain Popularity, Profit Potential*, DALLAS MORNING STAR, June 8, 2003, at E1, 2003 WL 57132919.

spike in tort litigation.³⁰ Surprisingly, though, contemporary assumption of risk doctrine has generated little scholarly attention,³¹ and no commentator has addressed the issue of extreme sports and assumption of risk in depth.³²

This Article contends that extreme sports accentuate flaws in modern assumption of risk doctrine. Many jurisdictions now apply a doctrine called “primary assumption of risk” to the sports setting.³³ Primary assumption of risk frees defendants from a duty to protect

29. Municipalities have opened over six hundred new skate parks in the past two years. See Nelson, *supra* note 18 (calling skate parks “the baseball and softball diamonds of the 21st Century”); Span, *supra* note 16 (noting that sports marketing executives predict that most shopping malls will have a skate park within the decade). There are an estimated 1,800 skate parks in the United States currently. See Aaron Kahn, *The Air Apparent*, ST. PAUL PIONEER PRESS, Aug. 18, 2003, at 1A, 2003 WL 2620545. ESPN recently opened skate parks in five cities that bear the X Games brand. See Shira Springer, *X Games Grow Up: ESPN Turned Mainstream on to Extreme* BOSTON GLOBE, Aug. 18, 2002, at C1, 2002 WL 4144067. Cities find skate parks attractive because they funnel teenagers away from skating in public places. See Sheila McLaughlin, *Skaters To Get a Place to Play*, CINCINNATI ENQUIRER, July 21, 2003, at B3, 2003 WL 55042909; Nancy Maes, *On a Roll: Growth in Skate Parks Meet Needs of Extremely Active Users*, CHI. TRIB., Aug. 11, 2000, at 57, 2003 WL 3696011 (attributing skate parks’ popularity to the fact that “adults have long been looking for ways to corral preteens and teens with activities that sparked their interest”).

30. See, e.g., Nancy C. Rodriguez, *Skate Park Users Lobby to Keep Site Open, Free*, LOUISVILLE COURIER-J., July 31, 2002, at 4B (detailing a proposal to privatize a municipal-owned skate park due to liability concerns after a near-fatal accident involving an eleven-year-old bicyclist).

31. Two exceptions are Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 VAL. U. L. REV. 833, 836 (1997) (contending that courts should eliminate assumption of risk as an independent concept) [hereinafter Sugarman, *Assumption of Risk*] and Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 483 (2002) (reiterating an earlier claim that assumption of risk should be a total bar to recovery in two limited circumstances) [hereinafter Simons, *Reflections*].

32. Although Professor Simons notes the issue—asking “[w]ould the reasonably prudent person ever try the experimental sport of hang gliding?”—he only mentions it in passing. See Simons, *Full Preference*, *supra* note 4, at 234; see also Ramsey, *supra* note 18 (discussing assumption of risk and extreme sports for the limited purpose of arguing that criminal law is expanding to areas that were once only governed by tort).

33. Despite the “assumption of risk” label, some jurisdictions have made it clear that the no duty rule is now just part of the plaintiff’s prima facie case. See, e.g., *Foronda v. Hawaii Int’l Boxing Club*, 25 P.3d 826, 837 (Haw. Ct. App. 2001). However, courts in other states are still confused over whether primary assumption of risk is merely run-of-the-mill duty analysis or whether it remains an affirmative defense. Compare Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 51 (Cal. 2003) (Kennard, J., dissenting) (claiming that the state has “abolished assumption of risk as an affirmative defense to a negligence action”) with Moser v. Ratnoff, 105 Cal. Rptr. 2d 198, 201–202 (Ct. App. 2003) (“[A] defense to a claim of negligence is that the plaintiff either expressly or impliedly assumed the risk.”). This issue determines whether plaintiffs or defendants bear burdens of pleading and proof. See, e.g., Simons, *Reflections*, *supra* note 31, at 486 n.17 (2002).

plaintiffs from a sport's inherent risks.³⁴ However, defendants do owe a duty not to "increase" these risks.³⁵ Although courts have articulated several different conceptual rationales for the no duty rule, they have not noticed subtle differences between these principles. Teasing out these distinctions elucidates that the no duty rule is founded on a series of assumptions that do not apply to high risk recreational activities.

For one, some courts apparently believe that the no duty rule is necessary because all sports are inherently reasonable.³⁶ This stance presupposes that the social value of any particular sport outweighs its risks. Nevertheless, while this may be true for many recreational activities, it is likely not so for a sport like motocross, which injures participants at "astonishing levels."³⁷

Another perspective is that the no duty rule represents a policy judgment that it is better to allow sports to continue unchanged than to impose safety measures that might fundamentally alter their nature.³⁸ Courts that adhere to this position claim that the no duty rule is necessary because the benefits and dangers of many sports are connected.³⁹ For example, basketball is worthwhile because it involves exercise, competition, and rapid movement; yet these aspects of the sport also cause injuries. Because it would lessen basketball's social value to eliminate these risks, the no duty rule does not force defendants to do so. This is a more radical view of the no duty rule. Because it shields conduct that would otherwise be unreasonable from liability, it confers a subsidy upon sports participants and vendors. Yet, unlike traditional recreational activities which feature socially valuable conduct that happens to carry with it attendant risks, the primary virtue of many extreme sports is that they allow participants to make the auton-

34. Of course, the existence of a duty is a prerequisite to a tort suit. When deciding whether to impose a duty, courts engage in a rather complex analysis that considers the relationship of the parties, the nature of the risk—that is, its foreseeability and severity—and the impact the imposition of a duty would have on public policy. Recognition of a duty of care, ultimately, rests on considerations of public policy and on notions of fairness. *Crawn v. Campo*, 643 A.2d 600, 604 (N.J. 1994) (quoting *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994)).

35. See *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (plurality decision).

36. See, e.g., *Fortier v. Los Rios Cmty. Coll. Dist.*, 52 Cal. Rptr. 2d 812, 817 (Ct. App. 1996) (explaining that the no duty rule flows from the fact that "football [i]s played and enjoyed by thousands").

37. *Motor Sport*, *supra* note 2.

38. See, e.g., *Wattenbarger v. Cincinnati Reds, Inc.*, 33 Cal. Rptr. 2d 732, 735–37 (Ct. App. 1994).

39. See, e.g., *Knight*, 834 P.2d at 708 ("[C]onditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.").

omous decision to wager life and limb. Extending the no duty rule to such activities therefore subsidizes pure risk-taking.

The fact that extreme sports cannot be deemed either reasonable or unreasonable creates a further complication. When a defendant's breach of duty injures a plaintiff, the jury should award full damages unless the plaintiff has also been negligent. Extreme sports often hurt people who have not been careless at all. Thus, the only possible basis for reducing an extreme sport participant's damages often will be the bare decision to engage in the activity. As a result, the no duty rule poses a Hobson's choice: either reducing the plaintiff's damages in contravention of the overarching principle that tort law should deter only unreasonable behavior or allowing the plaintiff full recovery despite the fact that he purposely placed himself in harm's way. In order to deal with the issue, some state supreme courts and legislatures claim that a jury may lower a plaintiff's damages based on the choice to take part in a dangerous activity even if it determines that the decision was reasonable.⁴⁰ But this position proves untenable upon close inspection. Indeed, two years after the Washington Supreme Court made such a claim, an intermediate appellate court in that state simply disagreed.⁴¹

Finally, several states employ primary assumption of risk when the plaintiff engages in conduct that reveals that he has consented to face dangers created by the defendant. Yet this "implied consent" approach creates its own anomalies. When applied to minors—an essential element of the extreme sports movement—the consensual approach *imputes* an agreement to relieve the defendant from liability on behalf of a party who could void any *express* arrangement made in contract. In fact, some jurisdictions require the same elements of proof for primary assumption of risk and contractual liability waivers, leaving vendors with no means to bar the claims of child plaintiffs.

This Article proposes a subtle doctrinal shift that would bring high risk recreational activities back within the negligence concept and provide vendors with a dependable basis for barring claims. Because common law tort rules offer little guidance, purveyors of recreational activities increasingly rely on waivers as a means of protecting themselves from liability. Yet courts often find such agreements unenforceable as a matter of contract law. Therefore, this Article advocates giving waivers independent tort significance. Business entities that

40. See *id.* at 706; *Kirk v. Wash. State Univ.*, 746 P.2d 285, 290–91 (Wash. 1987).

41. See *Leyendecker v. Cousins*, 770 P.2d 675, 678–79 (Wash. Ct. App. 1989).

provide extreme sports should be held to an additional duty to take reasonable steps to inform patrons of an activity's dangers. Although the duty to inform would have little effect on the day-to-day operations of vendors, many of whom already take elaborate steps to warn patrons, it would bring extreme sports back within the reasonableness concept. A fully-informed plaintiff's decision to engage in an extreme sport indicates that, for him, the benefits of the activity outweigh its risks. Warnings would thus allow businesses to cater only to those people who find such activities to be reasonable. By limiting the availability of a risky activity only to those who truly prefer to face its dangers, defendant businesses would ensure that they too are operating on the right side of the negligence line. Indeed, tort law recognizes an analogous concept in similar contexts: the doctrine of informed consent in medicine and the duty of manufacturers of dangerous products to provide warnings.⁴²

The Article proceeds as follows. Part I explains why the traditional assumption of risk doctrine was so problematic. It reveals that courts often claimed to apply the defense when their reasoning suggested another basis for barring the plaintiff's claim: that he was contributorily negligent, that the defendant owed him no duty of care, or that the defendant simply never engaged in unreasonable conduct. Part I then explicates the current state of the law. It shows that the patchwork of doctrines that have replaced the traditional assumption of risk defense—including the no duty rule, liability releases, and sport-specific inherent risk statutes—fail to provide recreational activity purveyors with a trustworthy means to insulate themselves from liability.

Part II explains how extreme sports expose the weaknesses in the no duty rule's doctrinal edifice. This Part first details why high risk recreational activities are so difficult to analyze under the negligence formula. It then explores the ramifications of this problem. The fact that extreme sports resist classification under tort law's basic standard belies the reasonableness rationale for the no duty rule and casts doubt on the propriety of subsidizing conduct that may inflict a net loss on society. It has also led courts to reach wildly different conclusions about what it means to "increase" an extreme sport's inherent risks. In addition, it has forced courts to grapple with how to apportion damages between a negligent defendant and a plaintiff who has engaged in risky but not necessarily unreasonable behavior—a ques-

42. See *infra* Part II.A.3.

tion to which there is no adequate answer. Part II then explicates the clash between the traditional contractual protections accorded to minors and the "implied consent" justification for primary assumption of risk.

Part III begins by offering a definition of "extreme sports." It then argues that assimilating such activities into the reasonableness paradigm would create a doctrinal framework that is consistent with the policy justifications for the no duty rule. Grounding the no duty rule in informed consent would also allow courts to defensibly apply it to plaintiffs of all ages and risky recreational activities of all stripes. Finally, the duty to inform would eliminate the need for fact-finders to apportion damages between negligent and non-negligent behavior. Instead, juries would evaluate two related forms of conduct: the reasonableness of a vendor's efforts to inform a plaintiff of an activity's risks and the reasonableness of the plaintiff's decision to engage in the activity.

I. The Evolution of the Doctrine of Assumption of Risk

A. The Traditional Assumption of Risk Defense

The traditional doctrine of assumption of risk sounds simple: "[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."⁴³ Yet scholars have long regarded assumption of risk as being "more difficult to understand and apply than almost any other [doctrine] in the law of torts."⁴⁴ The confusion stemmed from the fact that judges used the assumption of risk label to signify several discrete le-

43. RESTATEMENT (SECOND) OF TORTS § 496A (1965).

44. John Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 17 (1961), stating:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly [sic] used to express different and sometimes contradictory ideas.

See *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959) ("Assumption of risk is a term of several meanings."); Fleming James, *Assumption of Risk*, 61 YALE L.J. 141, 169 (1952) ("[T]he term and the concept should be abolished"); W.P. KEETON, D. DOBBS, R.E. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 68, at 480 (5th ed. 1984) (assumption of risk "has been surrounded by much confusion"); *Knight v. Jewett*, 834 P.2d 696, 699 (Cal. 1992) (plurality opinion) ("As every leading tort treatise has explained, the assumption of risk doctrine long has caused confusion both in definition and application, because the phrase 'assumption of risk' traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts."); Sugarman, *Assumption of Risk*, *supra* note 31, at 834 (calling assumption of risk a "doctrinal

gal concepts.⁴⁵ First, assumption of risk bore a strong resemblance to the affirmative defense of contributory negligence, which precluded recovery when the plaintiff's conduct fell below the standard of a reasonable person.⁴⁶ Because voluntarily choosing to encounter a known danger was often unreasonable, and because both contributory negligence and assumption of risk were complete defenses to liability, courts had no reason to distinguish between the two doctrines.⁴⁷

Second, some courts applied assumption of risk to recurring situations with well-known risks—for example, cases in which baseball spectators were injured by foul balls—even where there was no evidence that the particular plaintiff actually realized that he was in a hazardous situation. Instead, these courts reasoned, any plaintiff would have come to that conclusion.⁴⁸ Although these courts claimed to apply assumption of risk, their wholesale determinations that an entire class of plaintiffs should not recover are better described as finding that the defendant owed the plaintiff no duty of care.⁴⁹ Indeed, the same fact—that an activity was dangerous—could cause a court either to hold a defendant to no duty of care or to bar a plaintiff's claim under assumption of risk.⁵⁰ Finally, courts also claimed to

muddle [which] . . . is confusing, unnecessary, and if we are not careful, . . . will lead us to the wrong outcome”).

45. See *Tiller v. Atl. Coast Line Ry.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

46. See RESTATEMENT (SECOND) OF TORTS § 463 (1965).

47. See RESTATEMENT (SECOND) OF TORTS § 463 cmt. d (1965) (“The great majority of the cases involving assumption of risk have . . . overlap[ped] contributory negligence.”). This occurred “where the known risk of harm is great relative to the utility of plaintiff's conduct.” *Id.* at cmt. c.; *Salinas v. Vierstra*, 695 P.2d 369, 373 (Idaho 1985) (“Many courts in non-comparative negligence settings have used both defenses interchangeably without attempting to distinguish between the two.”).

48. See *Keys v. Alamo City Baseball Co.*, 150 S.W. 368, 371 (Tex. App. 1941) (barring claim of forty-two year old baseball spectator who had never been to a game before on the grounds that her son must have “handled baseballs in and around his house, under the watchful eye of his mother” thereby making her aware of “the potential dangers inherent in a baseball in play”).

49. See STEVEN SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 9.4, at 168–169 (1974); RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965) (noting that when a plaintiff “enters voluntarily into some relation with the defendant which he knows to involve the risk, . . . the defendant is relieved of his duty to the plaintiff”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 65, at 451 (5th ed. 1984).

50. See, e.g., *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986) (“Thus, it has become necessary, and quite proper, when measuring a defendant's duty to a plaintiff to consider the risks assumed by the plaintiff.”).

apply assumption of risk when there was no evidence that the defendant's activity was unreasonable in the first place.⁵¹

For example, in the classic textbook case *Murphy v. Steeplechase Amusement Co.*,⁵² the plaintiff fractured his kneecap while riding "The Flopper," a fast-moving belt at an amusement park.⁵³ The New York Court of Appeals, speaking through Judge Cardozo, dismissed his claim under the doctrine of assumption of risk. Judge Cardozo reasoned that the plaintiff knew that The Flopper caused people to lose their balance because he had watched other riders fall.⁵⁴ Thus, Judge Cardozo concluded, because the plaintiff voluntarily chose to encounter a known danger, he could not recover damages.⁵⁵ In a famous passage, Judge Cardozo remarks:

Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility The timorous may stay at home.⁵⁶

This analysis has no relation to whether the plaintiff voluntarily chose to encounter a known danger. Instead, it suggests that defendants should not be required to eliminate an activity's inherent risks. Such a determination—that defendants have no legal obligation to prevent certain injuries—bears the hallmark of pure duty analysis. In addition, later in the opinion, Judge Cardozo notes that although a quarter of a million guests rode The Flopper each year, very few were injured.⁵⁷ This reasoning suggests a third basis for exonerating the defendant from liability: because the benefits of The Flopper outweighed its risks, it was perfectly reasonable.

51. See, e.g., Sugarman, *Assumption of Risk*, *supra* note 31, at 836–38 (arguing that many sports-related cases are better explained under the reasonableness concept than assumption of risk).

52. 166 N.E. 179 (N.Y. 1929).

53. *Id.* at 174.

54. See *id.*

55. See *id.*

56. *Id.* "Volenti non fit injuria" is a Latin phrase that means "a person cannot be harmed by that to which he or she consents." BLACK'S LAW DICTIONARY 657 (Pocket ed. West 1996).

57. See *Murphy*, 166 N.E. at 175 ("Some quota of accidents was to be looked for in so great a mass. One might as well say that a skating rink should be abandoned because skaters sometimes fall.").

This kind of analytical imprecision became problematic in the 1970s, when most jurisdictions recognized that it was no longer normatively defensible to allow a plaintiff's own negligence to bar recovery completely.⁵⁸ Thus, forty-six states abolished the contributory negligence defense and instituted schemes that apportioned damages according to fault.⁵⁹ In light of this change, unless assumption of risk was eliminated to the extent that it overlapped with contributory negligence, "the same conduct by a plaintiff w[ould] be an absolute bar if viewed as assumption of risk but only a partial bar if considered contributory fault."⁶⁰ Courts and commentators identified several distinct variations of what they once considered to be a single doctrine⁶¹ and argued about which ones should have survived contributory negligence's fall from grace.⁶²

B. The Current State of the Law

In the last decade, a flurry of litigation between sports participants forced states to grapple with how to resolve cases that formerly fell under the rubric of assumption of risk.⁶³ A few jurisdictions retained the traditional defense.⁶⁴ Conversely, due to the widespread abolition of contributory negligence, several states eliminated the doc-

58. See, e.g., *Li v. Yellow Cab*, 532 P.2d 1226, 1231 (Cal. 1975) ("The basic objection to [contributory negligence]—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.").

59. See, e.g., *Horton*, *supra* note 4, at 350 n.5.

60. *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 507 (8th Cir. 1988).

61. See, e.g., *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977) (calling assumption of risk "a potpourri of labels, concepts, definitions, thoughts, and doctrines" and noting "distinctions . . . between primary and secondary; and between reasonable and unreasonable or, as sometimes expressed, strict and qualified") (citations omitted).

62. See generally John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717 (1991) (arguing in favor of merging secondary assumption of risk with comparative fault); Simons, *Full Preference* *supra* note 4 (advocating a system in which a plaintiff's claim would be barred only if they "fully preferred" the risky activity); Stephanie M. Wildman & John C. Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California*, 25 U.S.F. L. REV. 647, 679 (1991) (arguing that assumption of risk should be abolished because it is "accounted for already in the negligence prima facie case and existing comparative fault defense").

63. See, e.g., MARK A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 472 (7th ed. 2001).

64. See *Nelson v. Great E. Resort Mgmt., Inc.*, 574 S.E.2d 277, 281 (Va. 2003) ("We continue to be of opinion that fairness militates in favor of the traditional standard because it clearly places the burden of proof upon the party asserting consent and because of the absolute defense that consent affords."); *Vaughn v. Pleasant*, 471 S.E.2d 866, 868 (Ga. 1996); *ADM P'ship v. Martin*, 702 A.2d 730, 734 (Md. 1997); *Huffman v. Walker Jones Equip. Co.*, 658 So. 2d 871, 873 (Miss. 1995); *Pleiss v. Barnes*, 619 N.W.2d 825, 830 (Neb.

trine completely.⁶⁵ Eventually, however, most states recast assumption of risk as duty analysis. This sub-part briefly describes the dominant contemporary approaches.

1. Primary Assumption of Risk

The doctrine of primary assumption of risk is a shorthand way of saying that a defendant owes no duty to protect plaintiffs from an activity's inherent risks.⁶⁶ However, defendants do owe a duty not to "increase" or "enlarge" these risks.⁶⁷ Because a plaintiff cannot receive damages if the defendant has not breached a duty, the doctrine continues to completely bar recovery. The first cases in which courts considered the viability of assumption of risk after the abolition of contributory negligence involved athletes suing other athletes.⁶⁸ Although courts soon extended the no duty rule to recreational vendors,⁶⁹ they initially struggled to define its parameters in that context.⁷⁰ Eventually, most courts held that while athletes may not "increase" a sport's inherent risks through intentional or reckless conduct, sponsoring business entities only owe participants a duty not to negligently increase a sport's inherent risks.⁷¹ Other states simply hold

2000); *Imbruglio v. Portsmouth IGA, Inc.*, 747 A.2d 1011, 1012 (R.I. 2000); *Petry v. Rapid City Area Sch. Dist.*, 630 N.W.2d 705, 708 (S.D. 2001).

65. See *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 454 (10th Cir. 1982) (applying Kansas law); *Brown v. Kreuser*, 560 P.2d 105, 108 (Colo. Ct. App. 1977); *Salinas v. Vierstra*, 695 P.2d 369, 374 (Idaho 1985); *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983); *Le v. Johnstown Props.*, 572 So. 2d 1070, 1073-74 (La. Ct. App. 1990).

66. See, e.g., *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959) ("In one sense (sometimes called its 'primary' sense), [assumption of risk] is an alternate expression for the proposition that defendant was not negligent, i.e., either owed no duty or did not breach the duty owed.").

67. See, e.g., *Schneider v. Erickson*, 654 N.W.2d 144, 152 (Minn. Ct. App. 2002).

68. See, e.g., *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992) (plurality opinion).

69. See, e.g., *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 69 (Ct. App. 1995) (extending no duty rule to white-water rafting company).

70. See, e.g., *Bjork v. Mason*, 92 Cal. Rptr. 2d 49, 55-56 (Ct. App. 2000) (noting the confusion). The uncertainty stemmed from the breadth and complexity of the transformation from the subjective version of assumption of risk to the modern approach. For example, the leading case of *Knight v. Jewett* contains three similar but not identical holdings. *Knight* first holds that defendants generally owe no duty to protect plaintiffs from a sport's inherent risks. See *Knight*, 844 P.2d at 703. *Knight* then holds that defendants generally owe a duty not to increase these risks. *Id.* at 708. Finally, *Knight* holds that athletes owe other athletes a duty not to injure intentionally or recklessly. *Id.* at 710.

71. For example, in *Knight*, the California high court illustrated the duty owed by commercial recreational vendors through an example:

Although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use *due care* to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that th[is]

vendors to that duty standard without using the phrase “assumption of risk.”⁷² Without noticing, courts have offered several slightly different rationales for the no duty rule.⁷³

a. The No Duty Rule as Acknowledgement of Reasonableness

First, courts sometimes reason that the no duty rule stems from the fact that sports are inherently reasonable.⁷⁴ This view recognizes

type of risk, posed by a ski resort's *negligence*, clearly is not a risk (inherent in the sport) that is assumed by a participant.

Knight, 844 P.2d at 708 (emphasis added); see also *Harrold v. Rolling J Ranch*, 23 Cal. Rptr. 2d 671, 675–76 (Ct. App. 1993) (“The general principle which may be extracted from this discussion in *Jewett* is that commercial operators of sports and recreational facilities owe a duty of care to their patrons.”); *Schneider v. Am. Hockey & Ice Skating Ctr. Inc.*, 777 A.2d 380, 385 (N.J. Super. Ct. App. Div. 2001) (holding that “the operator of a sports facility is subject to a standard of care based on *negligence* rather than the recklessness standard applicable to participants in recreational activities”); *Turcotte v. Fell*, 502 N.E.2d 964, 971 (N.Y. 1986) (holding that the conduct of a race track owner “in maintaining the premises was measured by a general negligence standard”).

72. See *Crawn v. Campo*, 643 A.2d 600, 604 (N.J. 1994); *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517, 523–24 (Mich. 1999); *Gauvin v. Clark*, 537 N.E.2d 94, 97 (Mass. 1989); *Marchetti v. Kalish*, 559 N.E.2d 699, 703–04 (Ohio 1990).

On the other hand, some jurisdictions hold both sports participants and recreation vendors to a duty of reasonable care under all the circumstances. See *Auckenthaler v. Grundmeyer*, 877 P.2d 1039, 1044 (Nev. 1994) (“When properly applied, the negligence standard strikes the proper balance between vigorous participation in sports and accommodating litigants injured by unreasonable behavior.”); *Estes v. Tripson*, 932 P.2d 1364, 1366 (Ariz. Ct. App. 1997); *Allen v. Dover Co-Recreational Softball League*, 807 A.2d 1274, 1284 (N.H. 2002); *Lestina v. W. Bend Mut. Ins. Co.*, 501 N.W.2d 28, 33 (Wis. 1993). However, while breach of duty is traditionally a jury question, appellate courts in these states sometimes make factual determinations that defendants who have hurt plaintiffs through conduct that naturally occurs in a sport have not behaved unreasonably. For example, in *Estes*, a catcher in a company softball game sued a base-runner who stepped on her leg while trying to score. See *Estes*, 932 P.2d at 1365. Although the plaintiff claimed that the defendant had ample opportunity to avoid the accident, an Arizona appellate court granted summary judgment for the defendant, reasoning that “[n]ot every foreseeable risk is an unreasonable risk.” *Id.* at 1366 (quoting *Rogers v. Retrum*, 825 P.2d 20, 23 (Ariz. Ct. App. 1991); see also *Allen*, 807 A.2d at 1284 (“In ordinary negligence terms, a participant, sponsor or organizer ‘who creates only risks that are normal or ordinary to the sport acts as a reasonable person of ordinary prudence under the circumstances.’”) (quoting *Crawn v. Campo*, 630 A.2d 368, 373 (N.J. 1993), *aff’d as modified*, 643 A.2d 600 (N.J. 1994)).

73. From here on, the term “the no duty rule,” is used to mean both primary assumption of risk and the approach that holds defendants to no duty to protect plaintiffs from a sport's inherent risks. See *supra* text accompanying note 72. These two doctrines are functionally identical, with the minor exception of the uncertainty about whether primary assumption of risk is part of the plaintiff's prima facie case or an affirmative defense. See *supra* text accompanying note 33.

74. See, e.g., *Crawn*, 643 A.2d at 604 (adopting the no duty rule because “[o]ne might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play—a traditional source of a community's conviviality and cohesion—spurs litigation”).

that recreational activities are an important part of life for many people. Indeed, the collective value of athletic participation, while impossible to quantify, is substantial. Many psychologists believe that team sports help socialize young people by immersing them in a competitive environment where they must cooperate to succeed.⁷⁵ Even solitary recreational activities like skiing “provide opportunities for self-monitoring, goal-setting, problem solving, and self-reward.”⁷⁶ According to this approach, even the benefits of an activity like football, which occasionally kills participants,⁷⁷ outweigh its risks.⁷⁸ Because football involves exercise, instills discipline, and occupies a place in our cultural heritage, such a determination, while not uncontroversial,⁷⁹ is defensible.

b. The No Duty Rule as Subsidy

Another view of the no duty rule goes farther. It claims that the no duty rule is “a policy judgment that tort law should not impose a duty where the duty would either chill participation in the activity or fundamentally alter its nature.”⁸⁰ This view’s central insight is that a sport’s benefits and risks are often intertwined. For example, skiing is worthwhile partially because it involves traveling at high speeds and negotiating moguls. A resort could make skiing safer by eliminating moguls; however, this would also reduce the sport’s social value. Thus, the no duty rule frees a resort from a legal obligation to do so.⁸¹ To the extent that this version of the no duty rule immunizes conduct that might not otherwise be reasonable from liability, it bestows a sub-

75. See, e.g., Robin Gerber, *Team Sports Create Leaders*, USA TODAY, Feb. 26, 2003, at A13, 2003 WL 5305935.

76. Lynda B. Ransdell, Darcie Oakland & Alison Taylor, *Increasing Physical Activity in Girls and Women: Lessons Learned from the DAMET Project*, 74 J. PHYSICAL EDUC. 37, 41 (2003).

77. Football causes 20.7 serious injuries per 1,000 participants. See U.S. CONSUMER PROD. SAFETY COMM’N, CONSUMER PRODUCT SAFETY REVIEW (Spring 2003), available at http://www.cpsc.gov/cpscpub/pubs/cpsr_nws28.pdf (last accessed Jan. 7, 2004).

78. See, e.g., *Segoviano v. Housing Authority*, 191 Cal. Rptr. 578, 588 (Ct. App. 1983) (holding that the sport of flag football is reasonable because it is “a healthy, socially desirable organized recreational activity”), *overruled on other grounds by Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (plurality opinion).

79. See, e.g., Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 DEPAUL L. REV. 455, 485 (1999) (criticizing the no duty rule in the sports setting).

80. *Randall v. Mammoth Mountain Ski Area*, 63 F. Supp. 2d 1251, 1253 (E.D. Cal. 1999).

81. See *Knight*, 834 P.2d at 708.

sity upon participants and vendors.⁸² Despite this key difference, courts often conflate the subsidy and the reasonableness rationales.⁸³

c. The No Duty Rule as “Implied Consent”

Several states follow an “implied consent” approach to the no duty rule. This version of the doctrine applies when the plaintiff engages in conduct that manifests a tacit agreement to face dangers created by the defendant, “but does not possess ‘the additional ceremonial and evidentiary weight of an express agreement.’”⁸⁴ In these courts’ eyes, the plaintiff’s implied consent to face a specific risk relieves the defendant from a duty to protect him against it.⁸⁵ However, courts employing the consensual approach frequently reach the same results as courts applying the pure duty approach because they generally conclude that plaintiffs did not consent to face dangers created by a defendant’s negligence.⁸⁶

2. Secondary Assumption of Risk

Secondary assumption of risk comes into play when the defendant has breached the duty of care.⁸⁷ In duty-based jurisdictions, sec-

82. For example, in *Distefano v. Forester*, 102 Cal. Rptr. 2d 813 (Ct. App. 2001), a California appellate court applied primary assumption of risk to the sport of off-roading. The court did so despite the fact that “the very nature of the sport of off-roading is ‘driving activity that would not be countenanced on streets and highways, such as [] unsafe speeds, stirring up dust, [and] becoming airborne on hills,’” thereby creating “‘an inherent risk of injury, serious injury or even death.’” *Id.* at 1262. This does not seem like a description of a reasonable activity; yet the court held that the no duty rule barred the plaintiff’s recovery. *Id.* at 823–824.

83. See *Stimson v. Carlson*, 41 Cal. Rptr. 2d 670, 673 (Ct. App. 1992) (calling a sport a “normal . . . socially desirable activity that improves the mental and physical well-being of its participants” but also noting that “[b]y eliminating liability for unintended accidents, the [primary assumption of risk] doctrine ensures that the fervor of athletic competition will not be chilled by the constant threat of litigation”).

84. *Sheppard v. Wilson v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 261 (Mo. Ct. App. 1995) (quoting *Kirk v. Wash. State Univ.*, 746 P.2d 285, 288 (Wash. 1987)); see also *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 510 (8th Cir. 1988) (applying Arkansas law); *Kuehner v. Green*, 436 So. 2d 78, 80 (Fla. 1983); *Gyuriak v. Millice* 775 N.E.2d 391, 394 (Ind. Ct. App. 2002); *Schneider v. Erickson*, 654 N.W.2d 144, 150 (Minn. Ct. App. 2002) (“For primary assumption of the risk to apply as a complete bar to the plaintiff’s recovery, the evidence must show that the plaintiff manifested consent, express or implied, to relieve the defendant of his duty of care.”); *Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. 1997).

85. See *Gyuriak*, 775 N.E.2d at 394 (“[P]rimary assumption of risk occurs when an individual, by voluntarily engaging in an activity, consents to those risks that are inherent in and arise by virtue of the nature of the activity itself.”).

86. See *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 14 (Wash. 1992) (holding that the plaintiff did not agree to relieve the defendant from liability for negligence).

87. See *Knight v. Jewett*, 834 P.2d 696, 707–08 (Cal. 1992) (plurality decision).

ondary assumption of risk applies if a plaintiff's injury stems from some negligent action by the defendant that increases a sport's inherent dangers.⁸⁸ In states that follow the implied consent approach, the doctrine is triggered by circumstances that indicate that the plaintiff did not tacitly agree to face the risk that injured him.⁸⁹ Despite its specialized name, secondary assumption of risk is comparative fault.⁹⁰ Thus, the jury allocates damages between the parties according to their respective culpabilities.⁹¹

3. Express Assumption of Risk

The term "express assumption" of risk refers to a private agreement between parties that alters their rights and obligations under tort law.⁹² Because contract law governs such arrangements,⁹³ the elimination of contributory negligence did not affect the doctrine of express assumption of risk.⁹⁴ In theory, these waivers should offer greater protection than primary assumption of risk. Although primary assumption of risk shields vendors from damages caused by a sport's inherent risks, it still requires them to exercise reasonable care. A contractual release, on the other hand, can even insulate defendants from liability stemming from their own negligence.⁹⁵ Courts usually find

88. *See id.* at 709.

89. *See Scott*, 845 P.2d at 14.

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

91. *Id.*

92. *See Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 446 (Cal. 1963) (defining express assumption of risk as a "private, voluntary transaction [] in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party").

93. *See* RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 (2003) (following second Restatement's rule); RESTATEMENT (SECOND) OF CONTRACTS § 195(2) (1981).

94. *See, e.g., Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1106 (N.M. 2003) ("Abolition of contributory negligence does not counsel in favor of abolishing the right of private parties to enter into agreements allocating the risks of injury.").

95. *See Cain v. Cleveland Parachute Training Ctr.*, 457 N.E.2d 1185, 1187 (Ohio 1983) (noting that "[g]enerally, specific agreements absolving participants and proprietors from negligence liability during hazardous recreational activities are enforceable, subject to willful misconduct limitations"); *Paralift, Inc. v. Superior Court*, 29 Cal. Rptr. 2d 177 (Ct. App. 1993); *Hulsey v. Elsinore Parachute Ctr.*, 214 Cal. Rptr. 194, 200–201 (Ct. App. 1985) (upholding waiver barring negligence claim against skydiving operation); *Jones v. Dressel*, 623 P.2d 370, 377 (Colo. 1981); *Poskozim v. Monnacep*, 475 N.E.2d 1042, 1043 (Ill. App. Ct. 1985); *Boucher v. Riner*, 514 A.2d 485, 491 (Md. Ct. Spec. App. 1986); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 729–31 (Minn. Ct. App. 1986); *Schutkowski v. Carey*, 725 P.2d 1057, 1059–60 (Wyo. 1986); *Manning v. Brannon*, 956 P.2d 156, 159 (Okla. Civ. App. 1997).

such waivers valid if they clearly convey the defendant's intention to disclaim liability for negligence⁹⁶ and do not violate public policy.⁹⁷

But waivers are no panacea for commercial recreation vendors.⁹⁸ For one, they "are construed strictly against the drafter."⁹⁹ After the Vermont Supreme Court recently found that a ski resort could not contract away its duty of reasonable care, courts have become increasingly demanding about enforcing liability releases in the recreational context.¹⁰⁰ Also, children under the age of eighteen can void other-

96. Some states require waivers to use the term "negligence." See *Moore v. Hartley Motors, Inc.*, 36 P.3d 628, 633 (Alaska 2001).

97. See *Tunkl*, 383 P.2d at 445-46 (putting forth a six-factor test for the validity of liability waivers).

98. Commercial recreational vendors typically require their patrons to sign liability waivers. See *Bresnahan*, *supra* note 16, at D6 (noting that ESPN makes all X-Games participants sign liability waivers); Lisa O'Donnell, *Over the Edge: BASE Jumpers Take Their Yearly Plunge into the Void Off Bridge Over New River*, WINSTON-SALEM J. (N.C.), Oct. 27, 2003, at 1, 2003 WL 62349037 (noting that Vertical Visions, a company that organizes BASE jumping events, requires its patrons to sign liability waivers).

99. *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1107 (N.M. 2003); see also *Saenz v. Whitewater Voyages, Inc.*, 276 Cal. Rptr. 672, 677 (Ct. App. 1990) ("[D]rafting a legally valid release is no easy task. Courts have criticized and struck down releases if the language is oversimplified, if a key word is noted in the title but not the text, and if the release is too lengthy or too general, to name a few deficiencies."); *Gross v. Sweet*, 400 N.E.2d 306, 311 (N.Y. 1979) (invalidating skydiving company's waiver where the defendant "seems to have preferred the use of opaque terminology rather than suffer the possibility of lower enrollment"); *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289, 294-95 (D. Colo. 1993) (invalidating liability release because that did not list specific risks being assumed); *Eder v. Lake Geneva Raceway, Inc.*, 523 N.W.2d 429, 433 (Wis. Ct. App. 1994) (same result); *Yauger v. Skiing Enters.*, 557 N.W.2d 60, 64 (Wis. 1996) (invalidating waiver promulgated by ski resort); *Robert Heidt, The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced*, 38 U. RICH. L. REV. 381, 390-91 (2003) ("Almost every jurisdiction contains cases where courts have voided or circumvented the release and have allowed injured patrons who merely show the vendor's negligence to prevail.").

100. See *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799 (Vt. 1995) ("If defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries."); *Spencer v. Killington*, 702 A.2d 35, 37 (Vt. 1997) (extending *Dalury* to informal "Ski-Bum" race); *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 2d 265, 271-72 (Ct. App. 2001) (reversing trial court's grant of summary judgment where skier signed release that was only valid on weekdays, but was injured on a Saturday); *Umali v. Mount Snow, Ltd.*, 247 F. Supp. 2d 567, 572-75 (D. Vt. 2003) (invalidating mountain bike race organizer's waiver under *Dalury*); *Berlangieri*, 76 P.3d at 1003 (commenting that "we cannot deny the truth of [*Dalury*'] statement that recreational business operators, not their patrons, 'have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees'" (quoting *Dalury*, 670 A.2d at 799)); *Hyson v. White Water Mountain Resorts*, 829 A.2d 827, 829 (Conn. 2003) (holding that waiver which did not mention term "negligence" could not absolve defendant from its carelessness but reserving the issue of whether "a well drafted agreement purporting to have such an effect would be enforceable"); *Mauldin v. Coupe*, No. C041511, at 7 (Cal. Ct. App. Oct. 27, 2003), available at WL 22430206 (concluding that motocross track operator's release was too broad and mislead-

wise binding agreements by taking action to disaffirm the contract.¹⁰¹ Filing a lawsuit for personal injuries suffices to void a waiver for persons under the age of majority.¹⁰² In addition, it is well-settled that parents may not consent on behalf of their children to release a defendant from liability.¹⁰³ Thus, in the extreme sports context, where many participants are minors,¹⁰⁴ express assumption of risk provides vendors with limited protection at best.¹⁰⁵ Moreover, as discussed below, many state legislatures have inadvertently eliminated a vendor's

ing to be enforced). Indeed, despite widespread use of waivers, recent decades have born witness to "a sharp curtailment of the availability of some recreational activities." Heidt, *supra* note 99, at 381. For example, liability concerns have caused many recreational swimming pools to take down their high dives. See Susan Levine, *Fall of the High Dive*, WASH. POST, July 13, 2002, at B1.

101. See *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353, 357 (Fla. Dist. Ct. App. 1997) (invalidating waiver signed by fourteen-year-old girl who was hurt while horseback riding); *Smoky, Inc. v. McCray*, 396 S.E.2d 794, 798 (Ga. Ct. App. 1990) (invalidating horseback riding waivers); *Del Santo v. Bristol County Stadium, Inc.*, 273 F.2d 605, 607 (1st Cir. 1960) (applying Massachusetts law and holding even minor who misrepresented age may void contract); *Celli v. Sports Car Club of America, Inc.*, 105 Cal. Rptr. 904, 909 (Ct. App. 1979) (invalidating release signed by nine-year-old injured at auto race); *Cunningham v. State*, 32 N.Y.S.2d 275, 278 (N.Y. Ct. Cl. 1942) (minor not bound by waiver executed before bobsleding injury). Some jurisdictions extend this principal to derivative actions brought by parents to recover for a child's injuries. See, e.g., *Kotary v. Spencer Speedway, Inc.*, 365 N.Y.S.2d 87, 90 (N.Y. App. Div. 1975).

102. See *Dilallo*, 687 So. 2d at 357. But see *Jones v. Dressel*, 582 P.2d 1057 (Colo. Ct. App. 1978). In *Jones*, the plaintiff signed a release absolving a skydiving center from all liability when he was seventeen. *Id.* at 1058. However, he then attempted to skydive again after turning eighteen and was injured when the plane from which he was to parachute crashed. *Id.* The court held that the plaintiff had ratified the agreement by attempting to jump again after he had reached the age of majority. *Id.*

103. See *Aaris v. Las Virgenes Unified Sch. Dist.*, 75 Cal. Rptr. 2d 801, 805 (Ct. App. 1998) (upholding release signed by parent for child's participation on school cheerleading team); *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1234 (Colo. 2002), *overruled by* COLO. REV. STAT. § 13-22-107 (West 2003); *Fedor v. Boy Scouts of America*, 143 A.2d 466, 468 (Conn. Super. 1958); *Meyer v. Naperville Manor, Inc.*, 634 N.E.2d 411, 415 (Ill. App. Ct. 1994); *Doyle v. Bowdoin Coll.*, 403 A.2d 1206, 1208 n.3 (Me. 1979); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 559 (N.J. 1970); *Childress v. Madison County*, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989); *Munoz v. II Jaz, Inc.*, 863 S.W.2d 207, 209-10 (Tex. Ct. App. 1993); *Hawkins v. Peart*, 37 P.3d 1062, 1065 (Utah 2001); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 12 (Wash. 1992). But see *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205-06 (Ohio 1998) (upholding parent's signature on release for child in context of non-profit groups); *Sharon v. City of Newton*, 769 N.E.2d 738, 747 (Mass. 2002) (same result); Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf Tiddlywinks,"* 53 OHIO ST. L.J. 683 (1992) (arguing that such waivers should be valid).

104. For example, eighty-five percent of all skateboarders are under the age of eighteen. See *Go Figure*, CHI. TRIB., July 27, 2003, at 2, 2003 WL 60112031.

105. In addition, there is a plausible argument that while contractual loss-shifting may be appropriate where a participant takes his chances with bumps and bruises, a defendant "should not be permitted to exculpate himself from responsibility . . . where any negli-

ability to contractually disclaim liability for negligence by passing sport-specific statutes that preempt this common law prerogative.

4. Inherent Risk Statutes

Because the doctrine of assumption of risk has been in such flux, many states have attempted to protect vendors by enacting legislation that frees them from liability for injuries caused by a sport's inherent risks.¹⁰⁶ These statutes cover a broad range of activities, including horseback-riding,¹⁰⁷ skiing,¹⁰⁸ roller-skating,¹⁰⁹ and snowmobiling.¹¹⁰

Few inherent risk statutes directly address extreme sports.¹¹¹ However, courts interpret these statutes broadly, occasionally extending them to encompass non-traditional activities that bear a resemblance to the particular sport that is the target of the legislation.¹¹² In addition, five jurisdictions have passed statutes that apply to all recreational activities.¹¹³ Legislation in California, North Carolina, and Illinois also exempts governmental entities from claims brought by "any person who participates in a hazardous recreational activity."¹¹⁴

Ironically, rather than reinforcing business entities' safeguards against liability for sponsoring extreme sports, these statutes often de-

gence would create a strong potential of immediate and violent death." *Manning v. Brannon*, 956 P.2d 156, 161 (Okla. Civ. App. 1997) (Hansen, J., dissenting).

106. For a detailed survey of these statutes, see John O. Spengler & Brian P. Burket, *Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation*, 11 J. LEGAL ASPECTS SPORTS 135 (2001).

107. Over forty states have enacted statutes insulating equestrian center operators from the inherent risks of horseback riding. *Id.* at 161.

108. Twenty-two jurisdictions have passed laws limiting ski resort owners' liabilities. *Id.*

109. *Id.* at 162-63.

110. *Id.* at 163.

111. One exception is Maine, which has a hang gliding-specific inherent risk statute. See 32 ME. REV. STAT. ANN. tit. 32, § 15219 (West 2002) ("[A] person who is hang gliding is deemed to have assumed the risk and legal responsibility for any injury to the hang glider's person or property in the same manner and to the same extent as skiers under this chapter."); see also UTAH CODE ANN. § 78-27-52 (2002) (statute covers snowboarders).

112. For instance, in *Shukowski v. Indian Head Mountain Resort*, 166 F.3d 848, 851 (6th Cir. 1999), the Sixth Circuit Court of Appeals barred the claim of a snowboarder under the Michigan Skier Act. Courts might also extend statutes that cover roller skating rinks to skate parks. *Id.*

113. See ALASKA STAT. § 09.65.290 (Michie 2002); HAW. REV. STAT. ANN. § 663B-1 (Michie 2000); VT. STAT. ANN. tit. 12, § 1038 (2001); VT. STAT. ANN. tit. 12, § 1037 (2003); WYO. STAT. ANN. § 1-1-122 (Michie 2001).

114. CAL. GOV'T CODE § 831.7 (West 2002); see also 745 ILL. COMP. STAT. ANN. 10/3-109 (West 1999); N.C. GEN. STAT. § 99-E-24 (2003). These statutes are significant because of the growing number of skate-parks that are owned and operated by municipalities. See *supra* text accompanying note 29.

prive them of a formidable means of protection. Recall that express assumption of risk generally permits defendants to contract away their duty of due care unless doing so would contravene public policy. Many statutes immunize companies from suits arising from a sport's inherent risks, yet permit suits in which the plaintiff alleges that a vendor's negligence caused the harm.¹¹⁵ These exemptions evince clear legislative recognition of the fact that precluding negligence claims adversely impacts public safety. Therefore, courts regularly invalidate releases that claim to relieve vendors from negligence liability if a sport-specific inherent risk statute applies to the activity in question.¹¹⁶ Most recently, in *Berlangieri v. Running Elk Corp.*,¹¹⁷ the New Mexico Supreme Court nullified a waiver that attempted to shield a horseback-riding company from damages for unreasonable conduct.¹¹⁸ The court reasoned that the state's Equine Liability Act, which expressly permits negligence claims, "expresses in general

115. See, e.g., ALASKA STAT. § 09.65.290 (Michie 2002) (covering all "sports or recreational activities" but exempting a "civil action based on the negligence of the provider"); COLO. REV. STAT. § 33-44-103 (2001) (ski statute permits suits for negligence); IDAHO CODE § 6-1103(10) (Michie 2002) (ski statute permits suits for negligence); N.H. REV. STAT. ANN. § 508:19 (2001) (equine statute permits suits for negligence); N.J. STAT. ANN. § 5:13:3 (West 1994) (ski statute permits suits for negligence); N.J. STAT. ANN. § 5:13:4 (West 1994) (roller skating statute permits suits for negligence); N.Y. C.P.L.R. § 18-101 (McKinney 1997) (ski statute permits suits for "unreasonable" risks); N.C. GEN. STAT. § 99-E-2 (1998) (equine statute permits suits for negligence); N.C. GEN. STAT. § 99-E-11 (1998) (roller skating statute permits suits for negligence); TEX. CIV. PRAC. & REM. CODE ANN. § 87.003 (Vernon 1997) (enumerating viable causes of action against equine activity sponsors); UTAH CODE ANN. § 78-27(b)-102 (2002) (equine statute permits suits for negligence); WASH. REV. CODE ANN. § 74A.45.030(4) (West 1998) (ski statute permits suits for negligence); W. VA. CODE ANN. § 20-3A-6 (Michie 2002) (ski statute permits suits for negligence); WYO. STAT. ANN. § 1-1-123 (Michie 2001) (applying to "any sport or recreational opportunity" and permitting suits for negligence); Ammie I. Roseman-Orr, Comment, *Recreational Activity Liability in Hawai'i: Are Waivers Worth the Paper on Which They Are Written?*, 21 U. HAW. L. REV. 715, 717 & n.11 (1999). Hawaii's statute precludes the use of summary judgment and "allows liability for inherent risks (other than negligence) to be released only with a proper waiver, upon full disclosure, and if reasonable care is given." *Id.* (citing HAW. REV. STAT. § 663-1.54(b)-(c) (1990)).

116. See *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982, 987 (Colo. Ct. App. 1983) ("[S]tatutory provisions may not be modified by private agreement if doing so would violate the public policy expressed in the statute."); *Ghionis v. Deer Valley Resort Co., Ltd.*, 839 F. Supp. 789, 796 (D. Utah 1993) ("Legitimate claims of negligence against ski resorts are not prohibited by the Skiing Act"); *Derricotte v. United Skates of Am.*, 794 A.2d 867, 871 (N.J. Super. Ct. App. Div. 2002) (holding that the New Jersey Roller Skating Act "does not immunize a rink operator from liability for negligently instructing a person how to roller skate"); *Steele v. Mt. Hood Meadows, Ltd.*, 974 P.2d 794, 798-99 (Or. Ct. App. 1999) (interpreting waiver of "any claims for personal injury" not to include negligence because of statutory scheme).

117. 76 P.3d 1098 (N.M. 2003).

118. *Id.* at 1111.

terms a public policy of our Legislature that equine operators should be accountable for injuries due to their own fault.”¹¹⁹

Similarly, a Maine statute was intended to limit the legal responsibility of hang gliding operations.¹²⁰ Maine courts have consistently upheld broad liability waivers.¹²¹ Nevertheless, although the Maine legislation immunizes companies from tort claims arising from hang gliding’s inherent risks, it also authorizes suits for “negligent facility design and operation.”¹²² A Maine court would therefore likely strike down any release that purported to insure a hang gliding outfit from the consequences of unreasonable conduct as violating the statute’s expression of public policy.

Thus, sport-specific inherent risk statutes further erode the protection that express assumption of risk offers. This incongruity underscores the need for a sound and reliable primary assumption of risk doctrine. As this Article discusses next, however, its current incarnations are inadequate when applied to high risk recreational activities.

II. Problems Applying Modern Assumption of Risk Doctrine to Extreme Sports

A. Classifying Extreme Sports Under a Negligence Regime

The doctrine of negligence was originally understood as a broad-based normative generalization.¹²³ An actor’s conduct was measured against the reasonably prudent person: “a creature of the law’s imagination” who “in foresight, caution, courage, judgment, self-control, [and] altruism . . . represents . . . the general average of the community.”¹²⁴ Jury instructions still utilize this objective standard.¹²⁵ However, with the ascent of law and economics, reasonableness has taken a subtly different form. As the *Restatement (Third) of Torts* elucidates, scholars and appellate judges now often view negligence as hinging

119. *Id.* (citing N.M. STAT. ANN. § 42-13-4 (Michie Supp. 2003)).

120. *See* 32 ME. REV. STAT. ANN. tit. 32, § 15219 (West 2002).

121. *See* Norton v. Benjamin, 220 A.2d 248, 252 (Me. 1966); Butters v. Kane, 347 A.2d 602, 607 (Me. 1975); Cyr v. Cyr, 560 A.2d 1083, 1084 (Me. 1989).

122. *See* ME. REV. STAT. ANN. tit. 32 at § 15219.

123. *See, e.g.,* Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 824–25 (2001).

124. FRANKLIN & RABIN, *supra* note 63, at 50–51 (quoting 3 F. HARPER ET AL., *THE LAW OF TORTS* 389–90 (2d ed. 1986)).

125. *See, e.g.,* Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425, 427 (2002) (“[S]tate pattern jury instructions . . . define negligence as a failure to exercise the ‘ordinary care’ or ‘reasonable care’ that would be exercised by the ‘reasonably prudent’ or ‘reasonably careful’ or ‘ordinary prudent’ person.”).

on whether a party could have prevented an accident by taking a cost-effective precaution.¹²⁶ This test, as famously articulated by Judge Learned Hand, states that negligence occurs when the probability of injury multiplied by the gravity of damages exceeds the price of safety measures which would have avoided the harm.¹²⁷

To illustrate the difficulty of applying the basic tort standard to extreme sports, consider Bridge Day, an annual BASE jumping event.¹²⁸ Each October, a company called Vertical Visions gives participants the opportunity to parachute off of the 837-foot-high New River Gorge Bridge in Fayetteville, West Virginia.¹²⁹ BASE jumping, which also involves leaping from cliffs, dams, and skyscrapers, is one of the riskiest activities imaginable.¹³⁰ Because less than ten seconds elapse between the jump and landing, there is little opportunity to maneuver and no chance to deploy a reserve parachute.¹³¹ In fact, two weeks before last year's Bridge Day, Dwain Weston—considered the world's best BASE jumper—was killed during a similar event.¹³² In 2003, ninety of Bridge Day's four hundred participants had never BASE jumped before.¹³³ By the end of the event, four were hospitalized with broken bones.¹³⁴

Under a wholly objective conception of negligence, it is probably not reasonable to BASE jump. Although the extreme sports movement constitutes a sea change in the public perception of risk-taking, it is unlikely that twelve jurors would deem BASE jumping socially acceptable. The same is probably true for many extreme sports:

126. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 4 (Discussion Draft Apr. 5, 1999).

127. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (stating the famous "Hand Formula" for negligence: "if the probability [of injury] be called P; the injury, L; and the burden [of precautions] B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$ "). As Judge Posner argued ten years later, the Hand Formula "adumbrat[ed], perhaps unwittingly, an economic theory of negligence." Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

128. BASE is an acronym for building, antenna, span, and earth. The name was invented by Carl and Jean Boenish, who were later both killed while participating in the sport. See Mark Sommer, *New Breed of Parachutist Dances on Disaster's Edge*, BUFFALO NEWS, June 8, 2003, at A1, 2003 WL 6450622.

129. See O'Donnell, *supra* note 98.

130. See Sommer, *supra* note 128.

131. See O'Donnell, *supra* note 98.

132. See Scott Willoughby, *BASE Jumper Was 'Best in Business': 30 year-old Australian Died During Stunt After Competition at Royal Gorge Bridge*, DENVER POST, Oct. 7, 2003, at A1, 2003 WL 5522798.

133. See O'Donnell, *supra* note 98.

134. *Id.*

motocross, in which a single accident can break a dozen bones,¹³⁵ BMX, which has sent star performer Mat Hoffman to the operating table fifteen times,¹³⁶ or any of the “tricked-out” skateboarding events at Tony Hawk’s Boom-Boom Huckjam, where athletes are introduced by name, hometown, and “worst recent injury.”¹³⁷ But, then again, none of Bridge Day’s participants could have BASE jumped without Vertical Visions, which organized and publicized the event.¹³⁸ Similarly, bungee jumpers require specialized rigs, and motocross, BMX, and skateboarding all take place in custom-built tracks or parks. If it is unreasonable to BASE jump from the New River Gorge Bridge, then surely it must be unreasonable for Vertical Visions to offer the opportunity to do so.

The cost-benefit definition of negligence complicates matters. Although the aggregate expense of BASE jumping injuries may exceed the sport’s social value, the same cost-benefit determination does not apply to each individual participant.¹³⁹ To the contrary, “the judgment that a plaintiff is . . . negligent depends only on the plaintiff’s own internal calculus.”¹⁴⁰ Measured by this utilitarian yardstick, BASE jumping is entirely reasonable for a select few. At Bridge Day, most participants released their parachutes immediately after leaping from the bridge.¹⁴¹ Several waited as long as six seconds—a mere 2.3 seconds before they hit the ground.¹⁴² These people, known as “risk-

135. For example, motocross competitor Cary Hart once broke fourteen bones in a single accident. See *The Today Show* (NBC television broadcast, July 17, 2003), 2003 WL 55605537.

136. Hoffman has broken over fifty bones. See Jose Antonio Vargas, *The Agony of the Ecstasy: Extreme Athletes Don’t Let Danger, or Injury, Diminish Their Love of the Games*, PHILA. DAILY NEWS, Aug. 21, 2001, at 3, 2001 WL 27183970. Chad Kagy, who also rides BMX, has suffered through six knee operations. See Shannon Russell, *Equipment Decreases Extreme-Sports Risks*, CINCINNATI ENQUIRER, May 22, 2003, at B1, 2003 WL 55042909.

137. Reilly Capps, *Tony Hawk Ramps Up the Excitement*, WASH. POST, Nov. 3, 2003, at C1, 2003 WL 62228247.

138. See VERTICAL VISIONS, FREQUENTLY ASKED QUESTIONS (2002), at <http://www.vertical-visions.com/28faq.html#6> (last accessed July 11, 2004); see also O’Donnell, *supra* note 98, at 3 (Each participant paid seventy dollars for the chance to jump. Vertical Visions requires patrons to have sky diving experience, but has no way to verify this information.).

139. See, e.g., Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1719 (1995) [hereinafter Simons, *Puzzling Doctrine*] (arguing that “utilitarianism can certainly accommodate highly varied individual judgments of the good”); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 715–16 (1978) (“Economics is keen on leaving to each individual the right to define and determine his goal.”) [hereinafter Schwartz, *Reappraisal*].

140. Simons, *Puzzling Doctrine*, *supra* note 139, at 1720.

141. See O’Donnell, *supra* note 98, at 2.

142. *Id.*

preferrers," turn the negligence equation on its head. Instead of weighing risks against benefits, risk-preferrers view an activity's danger as part of its allure.¹⁴³ For risk-preferrers, the riskier BASE jumping gets, the better.¹⁴⁴ To brand BASE jumping unreasonable for a risk-preferrer is to substitute a normative judgment for a deeply-felt personal inclination. Interference with such a fully-informed, autonomous decision smacks of paternalism.¹⁴⁵ As will be discussed, this is especially true when the plaintiff imposes a risk of harm only on himself.¹⁴⁶

In addition, BASE jumping may be reasonable for other Bridge Day participants. Those who have BASE jumped before may conclude on the basis of their past experience that the activity's thrill is worth the potential for injury.¹⁴⁷ Again, branding the sport unreasonable with respect to these repeat players allows social norms to override the results of an individual cost-benefit calculation. However, not every repeat player makes an informed choice. Some may have jumped under safer conditions; others may not be aware of how real the odds of serious injury actually are. The cost-benefit definition of negligence takes for granted that individuals will make choices that *actually* further their own net good. Indeed, a decision "increases one's welfare (and indirectly, social welfare) only when it results from one's informed, voluntary choice to engage in the transaction, or when it accurately mimics the choice that one would have made under those ideal conditions."¹⁴⁸ Conversely, a decision made on the basis of im-

143. See, e.g., Paula Horvath & Marvin Zuckerman, *Sensation Seeking, Risk Appraisal, and Risky Behavior*, 14 PERS. INDIVIDUAL DIFFERENCES 41, 41 (1993) ("High sensation seekers take risks [because they] value the rewards of the activities more than the low sensation seekers The intense reward effects of such activities may outweigh the risks for the high sensation seekers.").

144. See Rhea Wessel, *Executive Health: Risk-Lovers Take Sports to the Extreme*, WALL ST. J. EUR., Jan. 30, 2004, at P3, 2004 WL-WSJE 56862342. In fact, one reason extreme sports may be reasonable for high sensation seekers is because they are literally less dangerous. Indeed, "[h]igh sensation seekers may have an orienting reflex . . . and during that time, sensations are intensified and clarified, so they . . . actually can function better." *Talk Nation* (NPR radio broadcast, Oct. 22, 2003), 2003 WL 6674600 (statement of Garrett Soden, author of *FALLING: HOW OUR GREATEST FEAR BECAME OUR GREATEST THRILL* (2002)).

145. Schwartz, *Reappraisal*, *supra* note 139, at 715-16 ("When a plaintiff has idiosyncratic values, it is hardly clear that his is conduct that society should really want to prevent.").

146. See *infra* Part II.A.3.

147. See Jason Scott Johnston, *Paradoxes of the Safe Society: A Rational Actor Approach to the Reconceptualization of Risk and the Reformation of Risk Regulation*, 151 U. PA. L. REV. 747, 759 (2003) ("Smoking, overeating, hang gliding, and other risky behaviors are . . . such that the individuals who choose to engage in these behaviors get positive utility from so doing.").

148. Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 901 (1994).

perfect information introduces the potential for error and undermines the cost-benefit definition of negligence's utility-maximizing purpose.

Accordingly, Bridge Day jumpers who never engaged in the sport before stake an even more tenuous claim to reasonableness. Although their participation indicates that they have concluded, on some level, that the activity is worth doing, society may not want to credit such a choice if it does not stem from a rational deliberative process. Risk-averse extreme sports participants inflict a net loss on society: unlike risk-preferrers or repeat players, such individuals have no utility gain to offset the cost of their accidents.

Therefore, it is impossible to generalize about high risk sports without grossly oversimplifying. The traditional assumption of risk defense, which barred recovery whether the plaintiff's conduct was reasonable or unreasonable, obviated this problem. As explained in the subsections below, the modern approach presses it to the fore.

1. The No Duty Rule's Imprimatur of Reasonableness

As mentioned, some courts believe that the no duty rule stems from the fact that sports are inherently reasonable.¹⁴⁹ Others believe that the no duty rule represents a judgment that courts should not impose a legal obligation that would change the way sports are played.¹⁵⁰ Because "[a] no-duty or limited-duty rule withholds scrutiny of reasonableness,"¹⁵¹ both the reasonableness and subsidy approaches have the same effect—to brand a broad range of risky activities reasonable as a matter of law.

As argued above, extreme sports are not reasonable when offered indiscriminately to the public. For example, compare motorcycling, one of the riskiest socially-sanctioned activities, to the sport of motocross. Motorcycle riders are nearly twenty times more likely to die in accidents than car passengers.¹⁵² Yet despite the fact that there are three times more motorcycles than motocross bikes, last year both activities seriously injured the same number of people.¹⁵³ Thus, there is a plausible argument that society should not allow motocross at all.

149. See *supra* Part I.B.1.a.

150. See *supra* Part I.B.1.b.

151. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 3 cmt. d (2003).

152. See Nat'l Highway Traffic Safety Admin., Traffic Safety Facts 2000: Motorcycles (2000), available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2000/2000mcfacts.pdf> (last accessed Jan. 7, 2004).

153. See *Motor Sport*, *supra* note 2.

But the absurdity of the no duty rule comes into sharp relief when one recalls that not only does it beg the question of whether to *permit* motocross, but whether motocross is *reasonable*. Precluding a court from considering whether the benefits of motocross outweigh its risks for seasoned X Game competitor Mike Metzger—who has so many screws and surgical plates in his body that he is unable to pass through airport metal detectors¹⁵⁴—makes sense. On the other hand, the same rule applied to five-year-old Tyler Santos, killed on his motocross bike in July 2003, does not.¹⁵⁵

In addition, even the subsidy rationale for the no duty rule must yield to society's interest in preventing injuries at some point. Although motorcycling is extraordinarily dangerous, courts let it continue. As Gregory Keating explains,

The substantial risks of riding motorcycles are acceptable because: (1) those risks are inseparable from the activity; (2) the activity realizes values which we can imagine figuring in a plausible and defensible human life; and (3) the special, substantial risks of motorcycling are largely borne by motorcyclists, and voluntarily so.¹⁵⁶

But some recreational activities do not fulfill these criteria. For example, Russian roulette cannot be made safer without having its essential nature destroyed and it too imposes risks only on participants. Nevertheless, because the act of pointing a loaded gun to one's head and pulling the trigger does not further values that society is willing to legitimate, it is illegal.¹⁵⁷ Similarly, Vertical Visions obtained a special permit for Bridge Day because BASE jumping at any other time is against the law.¹⁵⁸ Paradoxically, the subsidy rationale for the no duty rule dictates that BASE jumping—though a criminal act—possesses

154. See George Dickie, *Flying High: Sky's the Limit in this Competition*, CHI. TRIB., Aug. 17, 2003, at 3, 2003 WL 62150268.

155. See Timothy Pratt, *Track's Future Unclear After Child's Death*, LAS VEGAS SUN, July 2, 2003, 2003 WL 7822292.

156. Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 715 (2003). Accordingly, many states regulate motorcycling. See, e.g., *People v. Elkins*, 16 Cal. Rptr. 2d 504, 507 (Cal. App. Dep't. Super. Ct. 1992) (upholding a mandatory helmet law as reasonable under the police power).

157. See, e.g., *Commonwealth v. Atencio*, 189 N.E.2d 223, 224–25 (Mass. 1963) (holding that participation in Russian roulette made defendant liable for involuntary manslaughter).

158. See Willoughby, *supra* note 132; O'Donnell, *supra* note 98; see also *United States v. Oxx*, 127 F.3d 1277, 1279 (10th Cir. 1997) (interpreting statute to prohibit BASE jumping in national parks) (citing 36 C.F.R. § 2.17(a)(3) (1996)); *United States v. Albers*, 136 F.3d 670, 673–74 (9th Cir. 1998) (citing same statute).

an innate value so far in excess of its social cost that a court cannot even consider whether its benefits outweigh its risks.

Indeed, courts have recognized that the no duty rule does not apply to all recreational activities. For example, in *Record v. Reason*,¹⁵⁹ a California appellate court noted that it only applies to "sports."¹⁶⁰ The court reasoned that a "sport" is as an activity that is "done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury."¹⁶¹ Subsequently, in *Shannon v. Rhodes*,¹⁶² another California appellate court held that simply riding in a waterskiing boat was not a "sport."¹⁶³ The court noted that the point of being a passenger in a boat is to move from place to place.¹⁶⁴ Although riding in a boat is risky, the court explained, it can easily be made safer without concomitantly reducing the activity's effectiveness as a form of transportation.¹⁶⁵

However, if the subsidy rationale for the no duty rule does not apply to being a boat passenger because its benefits exist independently of its risks, it should not apply to an activity like BASE jumping for the opposite reason. Despite the intense kinetic experience of falling off of tall structures, BASE jumping involves virtually no affirmative conduct. BASE jumpers perform one action—pulling their ripcords—during the course of an event that spans a mere ten seconds.¹⁶⁶ Sky diving, by contrast, lasts about seven minutes and requires maneuvering to stay on course.¹⁶⁷ *Record's* definition of a "sport" envisions an activity that involves exercise, challenge, and risk. Yet BASE jumping offers little more than *risk itself*. People play sports to stay healthy and hone their skills. People BASE jump to experience

159. 86 Cal. Rptr. 2d 547 (Ct. App. 1999).

160. *Id.* at 554.

161. *Id.*

162. 112 Cal. Rptr. 2d 217 (Ct. App. 2001).

163. *Id.* at 223–224.

164. *Id.* at 224.

165. *Id.* ("It simply cannot be said that the 'nature' of the activity of recreational boating will be altered if boat drivers are required to exercise due care . . ."). Similarly, in *Childs v. County of Santa Barbara*, 8 Cal. Rptr. 3d 823, 825 (Ct. App. 2004), a California appellate court held that riding a scooter was not a "sport" where there was no evidence that the plaintiff "was riding at any particular speed, or with other children in a structured or unstructured contest, or was testing the limits of her ability on the scooter, or . . . was attempting any trick or maneuver requiring skill." *Id.* at 825.

166. See O'Donnell, *supra* note 98.

167. See *Get Out: See Try Sky Diving*, WASH. POST, Aug. 10, 2003, at M9, 2003 WL 56511577.

being "as close as you can get to cheating death."¹⁶⁸ Thus, to extend the no duty rule to the activity is to subsidize pure risk-taking.¹⁶⁹

In addition, the no duty rule presupposes that certain internal and external forces limit the degree of potentially injurious conduct in recreational activities. For one, sports have rules that discourage risky behavior.¹⁷⁰ The no duty rule itself also establishes an outer boundary: defendants may not increase a sport's inherent risks.¹⁷¹ However, these checks on dangerous conduct do not exist in the extreme sports context. Rule-less activities like BASE jumping, motocross, BMX, hang gliding, sky diving, bungee jumping, and rock climbing are characterized by their fluid and improvisational nature. Extreme sports participants compete within a hierarchy where willingness to gamble with physical safety is the coin of the realm.¹⁷² Also, the phrase "extreme," though overused by the media,¹⁷³ generally signifies something fundamentally at odds with the duty not to increase inherent risks: that participants have taken "an established sport, and, by changing its locale, season or equipment" made it more dangerous.¹⁷⁴ In ice climbing, for example, competitors scale a frozen water-

168. See O'Donnell, *supra* note 98.

169. BASE jumping is essentially "a leap of faith." Sommer, *supra* note 128. Others have compared BASE jumping to Russian roulette. For example, Jari Kuosma, an extreme sports entrepreneur recently explained that his organization "[o]fficially . . . do[esn't] even recommend BASE jumping" because "[w]e can't really recommend Russian roulette to anybody. Although it's fun." Michael Abrams, *The Birdman of DeLand*, FORBES, May 26, 2003, at 54.

170. See *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (plurality opinion). Also, in organized sports, the presence of referees and the possibility of sanctions from league officials render tort law superfluous, as "there already exists outside the formal legal system, an elaborate structure to deal with goals of deterrence, punishment, and justice." Sugarman, *Assumption of Risk*, *supra* note 31, at 848. No similar concepts exist in the extreme sports context.

171. See *supra* text accompanying notes 69–71.

172. Indeed, "[s]erious injuries are part of the extreme-sport mystique." Mike Antonucci, *Hawk's Huckjam an Extreme Event*, SAN JOSE MERCURY NEWS, Oct. 10, 2002, at D1.

173. See Justin Kerr, *Showshoe-Racing is a Hot Item This Year*, PORTLAND OREGONIAN, Jan. 29, 1998, at 6, 1998 WL 4177601 (claiming that the phrase "extreme sports" applies to "any semi-unorthodox" activity).

174. See Deborah Stokes, *Winter Tracks*, NAT'L POST, Nov. 29, 2000, at F1, 2000 WL 29576974. Other extreme sports combine elements of several risky activities. For example, kite-boarding is a "fusion of surfing, kite-flying and parasailing." Lisa Rose, *Going to Extremes: Kiteboarders and Skateboarders, in Search of Thrills, Test Their Limits*, N.J. STAR-LEDGER, Aug. 15, 2002, at 53. The sport was born "when adrenaline junkies experimented with water skis propelled by wing-shaped kites." See Beth Kwon, *Reach for the Sky*, FORTUNE SMALL BUS., Sept. 1, 2002, at 93, 2002 WL 15146576. Similarly, wake-boarding "is akin to water-skiing on a snowboard." David Arnold, *Up, Up, and Away: When Seeking a New Thrill, Go Fly a Kite*, BOSTON GLOBE, Aug. 15, 2003, at D7, 2003 WL 3413398. SnoCross is "like a motocross race on snow," featuring 100 foot jumps on snowmobiles. See Cammy Clark, *Injuries Won't*

fall.¹⁷⁵ Superior Climbing, a company that offers the sport, describes it as “rock climbing turned up a notch or two on the danger scale.”¹⁷⁶ Similarly, BASE jumping is “an extreme version of sky diving.”¹⁷⁷ Bungee jumping has evolved into “bungee bouncing.”¹⁷⁸ Given the prohibition against increasing risks, these activities should be considered legally reasonable only if a plaintiff makes a fully-informed decision to engage in them. Yet the no duty rule imposes no such requirement. Thus, as participants continue to push the envelope and sports take risky new forms, the no duty rule paints all recreational activities with the same broad strokes.

2. The Duty Not to Increase Inherent Risks and Doctrinal Incoherence

Conceptual disorder breeds doctrinal disorder. As noted, sponsoring business entities owe participants a duty not to negligently increase a sport's inherent risks.¹⁷⁹ This section demonstrates how courts have failed to apply this rule to high risk recreational activities in a consistent manner.¹⁸⁰

Put Brakes on Snocross Star, MIAMI HERALD, Dec. 21, 2003, at 15, 2003 WL 71419006. T.J. Gulla, the sport's preeminent competitor has broken his collarbones five times—once so severely that “splinters came through the skin.” See *id.*

175. See Koerner, *supra* note 16, at 50.

176. *Id.* Ice climbing aficionados “expect to lose three to four friends per year” to the sport. *Id.*; see also Michael Ko & Sara Jean Green, *Avalanche Kills Three Veteran Climbers*, SEATTLE TIMES, Feb. 14, 2004, at A1, 2004 WL 58924014. BASE jumping has also evolved into two even riskier sports: “free running” and “urban exploration.” In free running, participants perform acrobatics—without safety net or cables—on skyscraper ledges and monuments. See Arifa Akbar, *The Latest Extreme Sport—‘Free Running’ Hits Britain*, INDEPENDENT (London), Aug. 14, 2003, at 3, 2003 WL 60756072. Urban exploration involves prowling condemned city property. See Gregory Kirschling, *Social Climbers*, ENT. WKLY, July 25, 2003, at 75, 2003 WL 56001469.

177. Karen Rivedal, *Jumping Professor Got Tangled in Risky Sport*, WIS. ST. J., Aug. 6, 2003, at 1, 2003 WL 59176482.

178. See *Blankenship v. CRT Tree*, No. 80907, 2002 WL 31195215, at *1 n.7 (Ohio Ct. App. Oct. 3, 2002) (defining “bungee bouncing” as “a variation of the activity of bungee jumping”). “Rather than jumping off of a high structure, the ‘bouncer’ wears a harness that is attached with a bungee cord to the wire cable of a crane and is hoisted off the ground. An operator then takes up and lets out the cable to create a bouncing motion for the participant.” *Id.* (citations omitted).

179. See *supra* text accompanying note 72.

180. One problem is the comparative novelty of extreme sports. Defining the “inherent risks” of an extreme sport can be difficult. Indeed, as *Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 660–61 (Ct. App. 1996) noted, courts may be forced to make such a determination “while factually uninformed of how the sport is played and . . . whether a given injury is within the ‘inherent’ risk of the sport We all grew up with baseball and football; some of us have skated, skied, or sailed. But what of sports such as, say, . . . parasailing?” *Id.*

Some courts have held that extreme sports providers simply owe no duty to protect patrons from the activity's inherent risks. For example, in *Regents of the University of California v. Superior Court*,¹⁸¹ a student fell to his death during a rock climbing class.¹⁸² Although there was evidence that instructors had accidentally positioned four rope anchors in the same crack system—a violation of rock climbing custom—a California appellate court noted that “[f]alling, whether because of one’s own slip, a co-climber’s stumble, or an anchor system giving way, is the very risk inherent in the sport mountain climbing and cannot be completely eliminated without destroying the sport itself.”¹⁸³ Without considering whether the instructors had “increased” the sport’s inherent risks by misplacing the rope anchors, the court barred the plaintiff’s claim under primary assumption of risk.¹⁸⁴

Yet in *Branco v. Kearny Moto Park, Inc.*,¹⁸⁵ another California appellate court required more of a BMX track owner. The seventeen-year-old plaintiff was paralyzed while riding his bike on the defendant’s course. He had attempted to perform a wheelie over an obstacle called the “million dollar jump.”¹⁸⁶ The plaintiff and defense experts disagreed about whether the million dollar jump was too steep.¹⁸⁷ The court noted that, under the doctrine of primary assumption of risk, the track owner had no legal obligation to eliminate obstacles and jumps that are an inherent part of the sport.¹⁸⁸ However, the court reasoned, the defendant did have a duty not to “create an extreme risk of injury” with the jump.¹⁸⁹ Because the court determined that the plaintiff’s expert’s testimony created a disputed issue of material fact, it reversed the trial court’s grant of summary judgment for the defendant.¹⁹⁰

For example, in *Maudlin v. Coupe*, No. C041511, 2003 WL 22430206, at *2 (Cal. Ct. App. Oct 27, 2003), the plaintiff was struck by an errant motocross bike. The defendant submitted an affidavit from one of the promoters who claimed to have participated in six hundred races and viewed thousands, saying that a motorcycle leaving the course was a common event. *Id.* at *7. Yet the court held that it could not decide whether the defendant had increased motocross’s inherent risks because it did not have enough information about the sport. *Id.* at *8.

181. 48 Cal. Rptr. 2d 922 (Ct. App. 1996).

182. *Id.* at 923.

183. *Id.* at 925–26.

184. *Id.*

185. 43 Cal. Rptr. 2d 392 (Ct. App. 1995).

186. *Id.* at 394–95.

187. *Id.* at 395.

188. *Id.* at 398.

189. *Id.*

190. *Id.*

Similarly, in *Dare v. Freefall Adventures*,¹⁹¹ the plaintiff, a veteran skydiver, was hurt when he tried to avoid colliding with a fellow skydiver. He sued both his co-participant and the skydiving company.¹⁹² The New Jersey Appellate Division explained that a recklessness standard applied to the co-participant, noting that "it would hardly promote 'vigorous participation' in the activity if skydivers were exposed to lawsuits when their mere negligence during descent caused an injury to a co-participant."¹⁹³ However, the court refused to apply the recklessness standard to the skydiving company.¹⁹⁴ Operators of sports facilities, the court explained, should be held to a duty not to "materially increase" the odds that the plaintiff would be injured "beyond those reasonably anticipated by skydiving participants."¹⁹⁵

Conversely, in *Lamp v. Reynolds*,¹⁹⁶ a Michigan appellate court held a motocross track owner to an even higher standard of care. The plaintiff executed two liability waivers before participating in a race.¹⁹⁷ After completing a jump, the plaintiff swerved off of the track and struck a tree stump that was hidden in a patch of weeds.¹⁹⁸ The court upheld the trial court's determination that the defendant's failure to remove the stump constituted willful and wanton misconduct.¹⁹⁹ Even though the stump stood outside the race course, the court reasoned that the defendant should have foreseen the potential for a serious accident in light of the fact that motocross riders travel at high speeds and occasionally lose control of their bikes.²⁰⁰ In addition, because state law forbade defendants from contracting to shield themselves from damages for willful and wanton misconduct, the court voided both liability releases.²⁰¹

Startlingly, these irreconcilable holdings hinge on the same variable: the hazardous nature of the activity that injured the plaintiff. *Regents* reasons that the plaintiff's decision to participate in rock climbing is sufficiently blameworthy to allocate the burden of prevent-

191. 793 A.2d 125 (N.J. Super Ct. App. Div. 2002).

192. See *id.* at 128.

193. *Id.* at 131.

194. See *id.* at 132-33.

195. *Id.* at 133. Because the plaintiff produced no evidence that either defendant had breached its particular duty, the court granted summary judgment against him. *Id.*

196. 645 N.W.2d 311 (Mich. Ct. App. 2002).

197. *Id.* at 313-14.

198. *Id.*

199. *Id.*

200. *Id.* at 314.

201. *Id.* at 313-14.

ing injury entirely to him.²⁰² Likewise, *Dare* and *Branco* determine that the danger inherent in sky diving and BMX racing warrants a departure from the normal duty standard of due care under all the circumstances. *Branco* holds a BMX track owner to a duty not to "create an extreme risk of injury."²⁰³ *Dare* determines that a sky diving facility owes a duty not to "materially increase" the odds that the plaintiff would be injured "beyond those reasonably anticipated by skydiving participants."²⁰⁴ Although *Lamp* also focuses on the fact that motocross is extremely dangerous, it draws the opposite conclusion. Indeed, *Lamp* reasons that the track owner must be especially vigilant about its patrons' safety due to the heightened chance of injury.²⁰⁵ Thus, *Lamp* holds that a comparatively trivial misdeed—failing to remove an obstacle several feet outside the track's perimeter—amounted not just to negligence, but to willful and wanton misconduct.²⁰⁶

The problem, once again, is the slipperiness of the reasonableness concept in the extreme sports context. Although vendors owe a duty not to negligently increase inherent risks, in recurring factual circumstances, courts sometimes shift the duty line that separates plaintiffs from defendants, carving out special definitions of "negligence." The "baseball rule," which holds stadium owners to a duty to provide enough screened seats for the number of fans who can be expected to desire them, is one such example.²⁰⁷ The heightened

202. See *Regents of the Univ. of Cal. v. Superior Court*, 48 Cal. Rptr. 2d 922, 925–26 (Ct. App. 1996) (noting the dangers of rock climbing). Indeed, *Regents* seems to hold that a plaintiff who is injured by a dangerous sport's inherent risks can never recover. According to the court, because in rock climbing "a fall can occur at anytime, regardless of the negligence of one's coparticipants," the fact that the defendant misplaced the rope anchors was irrelevant. *Id.* at 926. This is clearly wrong. Under the duty not to increase inherent risks, the proper inquiry is not the *kind* of injury the plaintiff suffered, but the *manner* in which he was injured. A defendant's negligence violates the duty not to increase inherent risks even if it causes an injury that occurs frequently during the particular activity. Indeed, the no duty rule does not "relieve a defendant [from] liability for negligence, because inherent risks 'are not those created by a defendant's negligence but rather by the nature of the activity itself.'" *Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868, 877 (8th Cir. 2003) (quoting *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. 1993)).

203. *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 2d 392, 398 (Ct. App. 1995).

204. *Dare v. Freefall Adventures*, 793 A.2d 125, 133 (N.J. 2002).

205. See *Lamp*, 645 N.W.2d at 314 (explaining that "motocross racing involve[s] high rates of speed and . . . it [i]s common for racers to leave the track during the race").

206. *Id.* at 314 (noting that the tree stump stood "outside [the] perimeter of the racetrack").

207. See *Akins v. Glens Falls City Sch. District*, 424 N.E.2d 531, 533 (N.Y. 1981); *Bellezzo v. State*, 851 P.2d 847, 853 (Ariz. Ct. App. 1992); *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 225 (Mich. Ct. App. 2001); *Swagger v. City of Crystal*, 379 N.W.2d 183, 185

duty of common carriers is another.²⁰⁸ Yet what makes extreme sports unique—and why courts struggle to define what constitutes reasonable care in such activities—is that they feature conduct by *both parties* that, considered in isolation, would justify asking them to bear a greater share of the cost of accidents. On the one hand, as *Regents, Branco*, and *Dare* recognize, the plaintiff's decision to engage in a risky endeavor should enable defendants to reasonably undertake fewer safety precautions than might otherwise be necessary. However, as *Lamp* acknowledges, the defendant's provision of a risky activity should require exercise of the utmost care. Each point of view is half-correct; together, they are wholly right. Because the duty not to increase inherent risks test centers on the meaning of "negligence" during the course of activities that already seem to be unreasonable, decisions will necessarily reflect the whims of individual judges rather than any neutral principles.

3. Extreme Sports and Secondary Reasonable Assumption of Risk

When a defendant's breach of duty injures a plaintiff, the jury should award full damages unless the plaintiff has also been negligent. Extreme sports often hurt people who have not been careless at all.²⁰⁹ Thus, the only potential basis for reducing a plaintiff's recovery frequently will be the bare decision to engage in a high risk sport. Of course, tort law has long imposed liability only when a litigant's behavior falls below the standard of a reasonably prudent person. Indeed, twenty-four states²¹⁰ and the Uniform Comparative Fault Act do not

(Minn. Ct. App. 1985); *Schneider v. Am. Hockey & Ice Skating Ctr., Inc.*, 777 A.2d 380, 384 (N.J. Super. Ct. App. Div. 2001) (applying a screening-based test to hockey); *Hobby v. City of Durham*, 569 S.E.2d 1, 2 (N.C. Ct. App. 2002); *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995).

208. See, e.g., *Bethel v. N.Y. City Transit Auth.*, 703 N.E.2d 1214, 1214 (N.Y. 1998) (noting the rule "imposing duty upon common carriers of 'the exercise of the utmost care, so far as human skill and foresight can go,' for the safety of their passengers in transit") (quoting *Kelly v. Manhattan Ry. Co.*, 20 N.E. 383, 385 (N.Y. 1889) (emphasis supplied by *Bethel*)).

209. See, e.g., *Regents of the Univ. of Cal. v. Superior Court*, 48 Cal. Rptr. 2d 922, 926 (noting that "[i]nherent in the sport of rock-climbing is the fact a fall can occur at anytime").

210. See ALASKA STAT. § 09.17.060 (Michie 2002); CONN. GEN. STAT. ANN. § 52-572h (West 1958 & Supp. 2003); DEL. CODE ANN. tit. 10, § 8132 (1999); FLA. STAT. ANN. § 768.81(2) (West 1997 & Supp. 2003); GA. CODE ANN. § 51-11-7 (2000 & Supp. 2002); HAW. REV. STAT. ANN. § 663-31 (Michie 2002); IDAHO CODE § 6-801 (Michie 1998 & Supp. 2002); IOWA CODE ANN. § 668.3 (West 1998); KAN. STAT. ANN. § 60-258a (1994 & Supp. 2002); LA. CIV. CODE ANN. art. 2323 (West 1997 & Supp. 2003); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000 & Supp. 2003); ME. REV. STAT. ANN. tit. 14, § 156 (West 2003); MINN. STAT. ANN. § 604.01 (West 2000); NEB. REV. STAT. § 25-21, 185 (1995); NEV. REV. STAT. ANN. § 41-141 (Michie 2002); N.J. REV. STAT. § 2A:15-5.1 (West 1994); OKLA. STAT. ANN. tit.

allow a jury to reduce a plaintiff's recovery unless it first determines that his behavior was unreasonable.²¹¹ Because the decision to engage in an extreme sport cannot be unreasonable without making the defendant's provision of the sport also unreasonable, a plaintiff who is not otherwise negligent should in theory recover in full.²¹² This conclusion, however, does not sit well with some courts and legislatures.²¹³ Twelve jurisdictions' comparative fault statutes either define fault broadly enough to encompass reasonable behavior or authorize juries to decrease damages based on a plaintiff's assumption of risk.²¹⁴

In addition, two state supreme courts have claimed that a jury may reduce a plaintiff's recovery even for reasonable behavior. First,

23, §§ 13-14 (West 1987 & Supp. 2003); N.D. CENT. CODE §§ 32-03.2-01-04 (1996 & Supp. 2001); 42 PA. CONS. STAT. ANN. § 7102 (West 1998 & Supp. 2003); S.D. CODIFIED LAWS § 20-9-2 (Michie 1995 & Supp. 2002); VT. STAT. ANN. tit. 12, § 1036 (2002); WASH. REV. CODE ANN. § 4.22.005 (West 1988 & Supp. 2003); WIS. STAT. ANN. § 895.045 (West 1997 & Supp. 2002); WYO. STAT. ANN. § 1-1-109 (Michie 2001).

211. The Uniform Comparative Fault Act provides:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent . . . and unreasonable failure to avoid an injury or to mitigate damages.

UNIF. COMPARATIVE FAULT ACT § 1(b) U.L.A. (West 2004) (emphasis added).

212. Of course, a plaintiff could engage in unreasonable conduct *during* the sport that causes his injury. In that case, the jury could properly reduce his recovery under comparative fault. *See infra*, text accompanying notes 355-56.

213. The view that juries may reduce recovery on the basis of risky but not unreasonable conduct is known as "secondary reasonable assumption of risk."

214. *See* ARIZ. REV. STAT. ANN. § 12-2505 (West Supp. 2002); ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 2001); COLO. REV. STAT. ANN. § 13-21-111 (West 2002); IND. CODE ANN. § 34-51-2-6 (Michie 1998 & Supp. 2001); IOWA CODE ANN. § 668.3 (West 1998); MONT. CODE ANN. § 27-1-702 (2001); N.Y. C.P.L.R. 1411 (McKinney 1997 & Supp. 2003); OHIO REV. CODE ANN. § 2315.33 (West. Supp. 2003); OR. REV. STAT. § 31.600 (West 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1997 & Supp. 2002); UTAH CODE ANN. § 78-27-38 (2002).

In *Harris v. The Ark*, 810 P.2d 226, 232 (Colo. 1992), the Colorado Supreme Court held that one such statute survived an equal protection challenge despite the fact that it permitted a jury to reduce a plaintiff's recovery for reasonable conduct but conditioned a defendant's liability on unreasonable behavior. *Id.* at 229. The statute authorizes damage reduction when a plaintiff "voluntarily or unreasonably exposes herself to injury." *Id.* at 228 (quoting COLO. REV. STAT. § 13-21-111) (emphasis added). The court noted that plaintiffs' legal entitlements have never mirrored those of defendants. *Id.* at 231. Instead, doctrines like contributory negligence and assumption of risk traditionally precluded a plaintiff from recovering damages, but had no defendant-side analogue. *Id.* at 233.

Similarly, although the Third Restatement rejects "all forms of implied assumption of risk," one of its drafters casually mentions that "a player's *entering a game* might constitute negligence and thereby reduce [their] recovery." William Powers, Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771, 775 (1999) (emphasis added).

in *Kirk v. Washington State University*,²¹⁵ the Washington Supreme Court held that a jury could reduce a plaintiff's damages because she chose to join her university's cheerleading team. The university relocated cheerleading practices from a padded room to an Astroturf field.²¹⁶ The plaintiff fell during a maneuver where she leapt onto the shoulders of another cheerleader.²¹⁷ The jury found the university negligent for not supervising the practice or warning the squad about the unforgiving Astroturf surface.²¹⁸ Yet the jury also reduced the plaintiff's damages by twenty-seven percent.²¹⁹ On appeal, she argued that, because her conduct was reasonable, there was no basis for lowering her recovery.²²⁰ The court rejected this argument, opining that

[the view] that reasonable implied assumption of risk should not serve to diminish the amount of plaintiff's recovery . . . is seriously flawed. When a person's conduct under the facts is truly voluntary and when he knows of the specific risk he is to encounter, this is a form of responsibility or fault that the jury should evaluate. Those who argue that the 'jury cannot do this' have not met too many jurors.²²¹

But two years later, an unlikely source cast doubt on *Kirk*. In *Leyendecker v. Cousins*,²²² a Washington appellate court held that a logger's decision to walk near a spinning helicopter rotor did not constitute primary assumption of risk.²²³ Then, in *dicta*, the court explained that because the state comparative fault statute only mentioned "unreasonable assumption of risk" as a damage-reducing factor, *Kirk* could not have meant what it said.²²⁴ Indeed, the court noted, "if a person acts reasonably, that person's conduct, *ipso facto*, is not negligent . . . and has been, by definition, free from blame."²²⁵

215. 746 P.2d 285 (Wash. 1987).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 290-91.

221. *Id.* at 292 (quoting VICTOR SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.5, at 180 (2d ed. 1986)).

222. 770 P.2d 675 (Wash. Ct. App. 1989).

223. *Id.* at 678-79.

224. *Id.* at 684 n.2 (citations omitted).

225. *Id.* (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 68, at 497-98 (5th ed. 1984)). Ironically, *Kirk* cited this treatise with disapproval. See *Kirk v. Wash. State Univ.*, 746 P.2d 285, 291 (Wash. 1992) (commenting that the treatise's reasoning was inapplicable because the court was not retaining assumption of risk as a total bar); see also *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 508 (8th Cir. 1988) ("Because this form of the doctrine involves reasonable conduct, i.e., faultless conduct, it is clear that [it] cannot have any role in comparative fault analysis."); *Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 262 (Mo. Ct. App. 1995) (noting that "reasonable assumption of risk . . . is not fault").

Subsequently, in *Scott v. Pacific West Mountain Resort*,²²⁶ the Washington Supreme Court retreated from *Kirk*. In *Scott*, the court explained that *Kirk* actually held that because the plaintiff "continued to practice on a dangerous surface, without instruction, she may have 'unreasonably assumed the risk,' i.e., have been contributorily negligent."²²⁷ This is, however, revisionist history: *Kirk* never mentions the possibility that the cheerleader's conduct may have been unreasonable. To the contrary, *Kirk* explicitly claims to "determine the status of implied reasonable assumption of risk."²²⁸ *Scott's* reading of *Kirk* therefore suggests that the court has now abandoned the position that juries may reduce a plaintiff's damages based on his bare decision to participate in a risky activity.

Nevertheless, later that same year, in *dicta* in *Knight v. Jewett*,²²⁹ the California Supreme Court cited *Kirk* for the proposition that

a jury in a 'secondary assumption of risk' case would be entitled to take into consideration a plaintiff's voluntary action in choosing to engage in an unusually risky sport, whether or not the plaintiff's decision to encounter the risk should be characterized as unreasonable, in determining whether the plaintiff properly should bear some share of responsibility for the injuries he or she suffered.²³⁰

At first blush, the notion that a jury may reduce a plaintiff's damages based on his decision to take part in a risky recreational activity sounds logical. Common sense suggests that a plaintiff should pay for his injuries if he deliberately places himself in harm's way. After all, if a plaintiff "engages in classic assumption of risk conduct, he is in part responsible for his injury."²³¹ In addition, comparative fault "is a flexible, commonsense concept."²³² Courts already force juries to balance the culpability of dissimilar conduct, such as a defendant's strict liability and a plaintiff's negligence.²³³ Allowing juries to compare a defendant's negligence and a plaintiff's risky behavior simply extends this principle.

However, despite its superficial appeal, the proposition that a jury may reduce a plaintiff's recovery for hazardous but not unreasonable conduct is specious. First, although courts ask juries to compare the

226. 834 P.2d 6 (Wash. 1992).

227. *Id.* at 14.

228. *Kirk*, 746 P.2d at 291 (emphasis added). "[Secondary reasonable assumption of risk's] status has been left undecided by our earlier opinions." *Id.* at 289.

229. 834 P.2d 697 (Cal. 1992) (plurality opinion).

230. *Id.* at 707.

231. VICTOR SCHWARZ, COMPARATIVE NEGLIGENCE § 9.5, at 180 (2d ed. 1986).

232. *Knight*, 834 P.2d at 707.

233. See, e.g., Simons, *Reflections*, *supra* note 31, at 526.

blameworthiness of dissimilar conduct, such as a defendant's strict liability and a plaintiff's negligence, this procedure still conditions damage reduction on *negligence*. Because the negligence concept embodies tort law's fundamental fairness and efficiency concerns, it cannot be dispensed with cavalierly.²³⁴ In fact, tort law should require a plaintiff to exhibit *more* culpability than a defendant before he is held legally accountable. A plaintiff's decision to confront a risk often endangers only himself. This is especially true in the context of extreme sports, which are "very much individual events."²³⁵ Defendants, on the other hand, hold themselves open to the public. The defendant's behavior—providing a risky sport to many people—is more likely to cause injuries than a single plaintiff's decision to participate in such an activity. If tort law must deter one of the two forms of conduct, surely it should not be that of the plaintiff that imposes fewer social costs.²³⁶

In addition, as noted, when a defendant facilitates a plaintiff's participation in a risky sport, their conduct is closely linked. The plaintiff could never have taken part in the sport without the defendant's efforts. The defendant would not have provided the sport if the plaintiff had not chosen to participate in it. Allowing a jury to reduce a plaintiff's recovery because of his choice to engage in risky, but not unreasonable behavior is a form of plaintiff's-side strict liability.²³⁷ Yet the no duty rule allows defendants to provide an activity and avoid liability for clearly foreseeable injuries. In fact, to trigger secondary assumption of risk, not only must the defendant have been blameworthy in the same sense that the plaintiff has been—both have chosen to

234. See, e.g., Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 631 (2003).

235. See, e.g., *Talk Nation* (NPR radio broadcast Feb. 13, 2002), 2002 WL 3296805.

236. See *Rossman v. La Grega*, 270 N.E.2d 313, 317 (N.Y. 1971) ("[B]etween one whose negligent act does harm to others and one whose negligent act does harm to himself . . . the same mechanistic standard ought not to be applied undifferentially as to both."); Simons, *Puzzling Doctrine*, *supra* note 139, at 1718. As Simons notes:

A victim often faces a very difficult choice: suffer a risk of harm to his own person or property, or sacrifice some other personal interest The victim has chosen to risk suffering harm, even serious personal injury. The fact that the victim has made that painful choice gives significant reason for caution before characterizing the choice as negligent. The motive of self-protection is strong: a victim's failure to respond to that motive sometimes evidences a powerful countervailing value.

Id.

237. *Id.* at 1702, stating:

A true negligence theory of contributory fault supposes that the plaintiff should have acted otherwise by taking a specified precaution; and if we do not so suppose, but we still believe that plaintiff should be disentitled from full recovery, then plaintiff's disentanglement must rest on a kind of strict liability.

involve themselves in a hazardous activity—but the defendant must have been *additionally* negligent as well. Therefore, despite the complete interdependence of the litigants' behavior, the legal consequences that flow from party status under such a regime are at opposite ends of the tort spectrum.²³⁸

Moreover, although courts slavishly adhere to the objective reasonable person paradigm when considering an injurer's negligence, they occasionally evaluate a victim's negligence by a subjective standard. Indeed, "[w]hatever our capacities, we are expected to exercise reasonable care when we impose risks on others, but we are allowed our weaknesses and idiosyncrasies when we are protecting ourselves from the carelessness of others."²³⁹ For example, people with impaired mental abilities are held to an objective duty of reasonable care as defendants but a subjective standard for the purposes of evaluating their negligence as plaintiffs.²⁴⁰ Similar rules sometimes apply to victims with unusual religious convictions.²⁴¹ Also, just as there are defense-side no duty rules, courts occasionally decline to consider the possibility of reducing a plaintiff's recovery altogether.²⁴² For instance, many states hold that a plaintiff's decision not to wear a

238. The *Restatement (Third) of Torts* recognizes these concerns, but nevertheless provides that a "[p]laintiff's negligence is defined by the applicable standard for a defendant's negligence." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 (2003). According to the Reporter's Note, although there is a difference between "imposing risks on oneself and imposing risks on others[,] [t]he distinction is undermined by the fact that, if a defendant is liable for a plaintiff's injury, the plaintiff's conduct imposes financial risks on the defendant." *Id.* at cmt. (a). Whatever merit this reasoning has in general, it simply does not apply in the extreme sports context. A plaintiff's decision to engage in an extreme sport may "impose . . . financial risks" on a vendor, but it is also the sole source of a vendor's *financial benefits*. Indeed, without participants, vendors would not be in business.

239. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 369 (1996) ("Tort law is only tangentially about the risks that we should impose on ourselves, but centrally about the risks that we should be permitted to impose on others.").

240. *Id.* at 371 & nn.207–208.

241. *Id.* at 371.

242. See Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 996, 1029 (2003). Although Bublick does not mention risky sports, one such category is "when a jury could consider the plaintiff's choice to be unreasonable, but the choice is one that risks harm to the plaintiff alone, involves an aspect of plaintiff liberty or autonomy, and is not reckless." *Id.* at 1029–30. In these situations, "even when reasonable juries could differ as to whether the plaintiff's risk to herself was reasonable, courts may leave those decisions to the plaintiff's autonomous choice rather than to a jury decision." *Id.* at 1030. The example she provides is of a plaintiff who chooses to ride with an inexperienced driver. See *id.* (discussing *Thompson v. Michael*, 433 S.E.2d 853 (S.C. 1993)); see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. d (2003) (acknowledging the existence of plaintiff's-side no duty rules).

seatbelt cannot be introduced into evidence as failure to anticipatorily mitigate damages.²⁴³ In similar contexts, then, courts honor a plaintiff's choice to engage in a risky activity rather than relegating the nebulous question of its objective reasonableness to the jury.

Thus, there is no satisfactory solution to the secondary reasonable assumption of risk problem. On the one hand, it seems fair to reduce a plaintiff's recovery based on his decision to engage in an extreme sport. However, to do so would flout tort law's fundamental goal of reducing accidents. The fact that high risk recreational activities are impossible to characterize as either reasonable or unreasonable wreaks havoc with the no duty rule.

B. Implied Consent, Waivers, and Minors

Express assumption of risk allows a vendor to shift loss from a sport's inherent risks and its own negligence by contract. The doctrine does not apply to minors, however, because contract law regards their consent as voidable. Primary assumption of risk, on the other hand, frees vendors from a duty to protect plaintiffs against a sport's inherent risks, but forbids them from negligently increasing those risks. Some courts contend that this rule is based on the fact that sports are reasonable.²⁴⁴ Others believe that it represents a policy directive to avoid chilling athletic participation or altering a sport's fundamental nature. This section discusses yet another rationale for primary assumption of risk: that it stems from the plaintiff's "implied consent" to face certain dangers.

The conventional wisdom is that it does not matter whether primary assumption of risk is a quotidian duty analysis or a principle that springs from the plaintiff's implied consent. For example, in *Richie-Gamester v. Berkley*,²⁴⁵ the Michigan Supreme Court claimed that

[t]here are myriad ways to describe the legal effect of voluntarily participating in a recreational activity. The act of stepping onto the field of play may be described as 'consent to the inherent risks of the activity,' or . . . participants' mutual agreement to play a game may be described as an 'implied contract' between all the participants, or a voluntary participant could be described as 'assuming the risks' inherent in the sport. No matter what terms are used, the basic premise is the same: When people engage in a recreational

243. See, e.g., *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 527 (D. Md. 1987); *Churning v. Staples*, 628 P.2d 180, 181 (Colo. Ct. App. 1981).

244. See, e.g., *Crawn v. Campo*, 643 A.2d 600, 604 (N.J. 1994).

245. 597 N.W.2d 517 (Mich. 1999).

activity, they have voluntarily subjected themselves to certain risks inherent in that activity.²⁴⁶

The conventional wisdom is wrong. To see why, consider *Scott v. Pacific West Mountain Resort*.²⁴⁷ In *Scott*, the twelve-year-old plaintiff enrolled in skiing lessons.²⁴⁸ His mother signed a release exonerating the company that provided the lessons from liability for inherent risks and negligence.²⁴⁹ While skiing down a slalom race course, the plaintiff veered off course, struck a tow-rope shack, and suffered severe head injuries.²⁵⁰ His parents sued the ski school and the resort that owned the slope.²⁵¹ After the trial court entered summary judgment in favor of both defendants, the Washington Supreme Court granted direct review.²⁵² The state high court explained that although it had "upheld exculpatory clauses in favor of private parties in various high risk sports-related situations," whether a parent could waive a child's claim presented "a very different question."²⁵³ Noting the myriad of protections state law accorded children, the court joined "[n]umerous cases in other jurisdictions [that] have considered the validity of preinjury releases signed by a parent and concluded that such releases do not bar the child's cause of action."²⁵⁴

The court then considered whether primary assumption of risk barred the plaintiff's claim. The court explained that in Washington the doctrine "arises where a plaintiff has impliedly consented . . . to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks."²⁵⁵ Combing the record, the court determined that the tow-rope shack may have been unreasonably close to the race course and that the plaintiff did not consent to face such negligence.²⁵⁶ Yet this should have been a foregone conclusion. After holding that the plaintiff could not expressly agree under any circumstances to relieve the defendants from liability, the court could not possibly have determined that he implicitly acquiesced to such an

246. *Id.* at 523-24.

247. 834 P.2d 6 (Wash. 1992). *Scott's* holding on the issue of secondary reasonable assumption of risk is discussed above. See *supra* Part II.A.3.

248. *Id.* at 8.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 9.

253. *Id.* at 11.

254. *Id.* at 12 (italics omitted).

255. *Id.* at 13 (italics omitted).

256. *Id.* at 12-16.

arrangement. Indeed, under Washington law, "the elements of proof are the same for both" express and primary assumption of risk.²⁵⁷

Similarly, Florida courts employ the single term "express assumption of risk" to refer both to "contracts not to sue for injury or loss . . . as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport."²⁵⁸ In *Kuehner v. Green*,²⁵⁹ the Florida Supreme Court drew parallels between liability releases and situations in which a plaintiff engages in an activity with well-known risks:

Express assumption of risk, as it applies in the context of contact sports, rests upon the plaintiff's voluntary consent to take certain chances. This principle may be better expressed in terms of waiver. When a participant volunteers to take certain chances he waives his right to be free from those bodily contacts inherent in the chances taken.²⁶⁰

Several years later, in *Dilallo v. Riding Safely, Inc.*,²⁶¹ a fourteen-year-old equestrian was hurt when her horse suddenly galloped into a tree.²⁶² A Florida appellate court struck down the liability release she had signed, reasoning that the state's strong interest in protecting minors allowed her to disaffirm the contract.²⁶³ Although courts in other jurisdictions had dismissed similar claims stemming from horseback-riding accidents under primary assumption of risk,²⁶⁴ the *Dilallo* court did not consider whether Florida's version of the doctrine applied. Nor could it. Indeed, as in *Scott*, the court's conclusion that the plaintiff could void her written promise to hold the defendant harmless would be impossible to square with the determination that she had implicitly consented to the identical arrangement. Because private exchanges maximize wealth, the law erects few impediments to contract

257. *Dorr v. Big Creek Wood Prods., Inc.*, 927 P.2d 1148, 1153 (Wash. Ct. App. 1996) (quoting *Kirk v. Wash. State Univ.*, 746 P.2d 285, 288 (Wash. 1987)).

258. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977). Most states call the latter circumstance "primary assumption of risk." See *supra* text accompanying notes 73–75.

259. 436 So. 2d 78 (Fla. 1983).

260. *Id.* at 80 (emphasis added) (citations omitted).

261. 687 So. 2d 353 (Fla. Dist. Ct. App. 1997).

262. *Id.* at 354.

263. *Id.* at 357.

264. See *Cooperman v. David*, 214 F.3d 1162, 1167 (10th Cir. 2000) (applying Wyoming law) ("A horse . . . simply begin[ning] to gallop for no apparent reason . . . clearly would qualify as [an] inherent risk . . . of horseback riding."); *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 72 (Cal. 1997) (acknowledging "established authority recognizing reasonable limitations on the responsibility of others for the risk of injury arising from the skittishness of horses").

formation.²⁶⁵ However, in the rare situation where public policy forbids the parties from binding themselves in contracts, the ban is absolute: no other doctrine can give legal effect to their intentions.²⁶⁶ Thus, express assumption of risk's prohibitions should trump primary assumption of risk.²⁶⁷ Accordingly, in states that subscribe to the contractarian implied consent rationale, a judgment that a minor plaintiff cannot be bound by a liability waiver also defeats the primary assumption of risk defense.²⁶⁸

This poses a severe problem for owners of recreational facilities. Children aged five to fourteen suffer sports-related injuries at more than twice the national rate.²⁶⁹ Medical expenses from these accidents total nearly \$500 million.²⁷⁰ In addition, the majority of extreme sports participants are under the age of eighteen.²⁷¹ Yet in jurisdic-

265. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000) (noting in contract law "there is a potentially infinite range of promises that the law will honor").

266. See Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 460 (1994) (author notes that "[w]hile contract law generally turns on the idea that people can do as they choose, as long as they do not step outside its very broad contours, tort law imposes more drastic limits on individual freedom").

267. States arguably have a stronger policy interest in striking down waivers that insulate defendants from negligently harming a child than those that simply protect them from liability stemming from an activity's inherent risks. However, when a court strikes down a waiver, it generally invalidates the entire contract. See, e.g., *Harmon v. Mount Hood Meadows, Ltd.*, 932 P.2d 92, 95 (Or. Ct. App. 1997) (entire release void absent intent to make invalid provision severable); *Farina v. Mount Bachelor, Inc.*, 66 F.3d 233, 236 (9th Cir. 1995) (same result).

268. In addition to Florida and Washington, Missouri courts recognize an explicitly contractual version of the "implied consent" doctrine. See *Sheppard v. Midway Sch. Dist.*, 904 S.W.2d 257, 261 (Mo. Ct. App. 1995) ("Implied primary assumption of risk, like express assumption of risk, is based on consent by the plaintiff, but does not possess 'the additional ceremonial and evidentiary weight of an express agreement.'") (quoting *Kirk v. Wash. State Univ.*, 746 P.2d 285, 288 (1987)). However, in *Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868 (8th Cir. 2003), the Eighth Circuit Court of Appeals, applying Missouri law, upheld the trial court's determination that primary assumption of risk barred the claim of a sixteen-year-old skier. *Id.* at 877. The plaintiff apparently argued that a special standard should apply to minors, but did not point the court's attention to the conflict between express assumption of risk's exception for minors and the state's contractarian "implied consent" rationale for primary assumption of risk. *Id.* at 874 n.5.

269. See 9 J. M. Conn, Et AL., *Sports and Recreation Related Injury Episodes in the U.S. Population, 1997-99*, Injury Prevention 123 (June 1, 2003); AMERICAN SPORTS DATA, INC., COMPREHENSIVE STUDY OF SPORTS INJURIES IN U.S. (2003), available at http://www.americansportsdata.com/sports_injury1.asp (last accessed Feb. 6, 2004) ("Youthful sports injuries are also being fueled by the increasingly popular non-traditional sector of Extreme Sports.").

270. See 9 CONN, ET AL., *supra* note 269, at 123.

271. See *supra* text accompanying notes 22-24. Sky diving, which is regulated by the Federal Aviation Administration, requires participants to be at least sixteen years old. See

tions that adhere to the contractarian implied consent rationale, sponsoring business entities have no means whatsoever to contractually bar tort claims brought by their largest class of patrons.

Other implied consent jurisdictions differentiate between the elements of proof required for primary and express assumption of risk. In these states, courts assert that “[p]rimary assumption of risk occurs when an individual, by voluntarily engaging in an activity, consents to those risks that are inherent in and arise by virtue of the nature of the activity itself.”²⁷² Because no court in these jurisdictions has addressed a minor’s claim in the sports setting, it is unclear how the rule that allows minors to void contracts will affect this conceptualization of the no duty rule. On one hand, in these states, express and primary assumption of risk technically feature different types of consent: the former involves the plaintiff’s agreement to waive a tort claim, while the latter involves the plaintiff’s agreement to “take his chances” by taking part in an activity.²⁷³

Nevertheless, there may not be meaningful differences between a child’s consent to waive a tort claim and his willingness to “take his chances”—especially when the activity involves a substantial risk of harm. The rule that allows minors to void contracts stems from the fact that such individuals “lack the capacity to evaluate critically [their] own interests and desires” and “determine which of them should be encouraged rather than suppressed.”²⁷⁴ Similarly, it is well-established that young people have little conception of their own mor-

Derek J. Moore, *Leap of Faith: Law Change Allows Santa Rosa Boy, 16, to Make First Parachute Jump*, PRESS DEMOCRAT (Santa Rosa, Cal.), Apr. 30, 2002, at 1, 2002 WL 6419254. However, children as young as five years old are permitted to ride motocross. See Will Oremus, *Participants Say Motocross Accident Just Freak Occurrence*, LAS VEGAS SUN, Aug. 22, 2003, at 1, 2003 WL 62389840.

272. *Gyuriak v. Millice*, 775 N.E.2d 391, 394 (Ind. Ct. App. 2002) (citations omitted); see also *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 510 (8th Cir. 1988) (applying Arkansas law) (“[P]rimary assumption of risk is limited to implied consent to risks that are inherent in the activity.”) (italics omitted); *Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. Ct. App. 2002) (“By voluntarily entering into a situation where there are well-known, incidental risks, the plaintiff consents to look out for himself and relieve the defendant of his duty.”).

273. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c(1) (1965). Ken Simons argues that “the term consent can be misleading . . . [C]ourts characterize [a plaintiff’s] behavior as consensual because they conclude that such a plaintiff is not entitled to relief, without regard to whether he intends to waive his tort claim.” Simons, *Full Preference*, *supra* note 4, at 224–25. Of course, this provides no explanation for *why* courts conclude that particular plaintiffs are not entitled to relief.

274. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 789 (1983).

tality and grossly underestimate the odds of being injured.²⁷⁵ Elizabeth Scott and Laurence Steinberg note that

scientific evidence indicates that teens are simply less competent decisionmakers than adults, largely because typical features of adolescent psycho-social development contribute to immature judgment. Adolescent capacities for autonomous choice, self-management, risk perception and calculation of future consequences are deficient as compared to those of adults, and these traits influence decisionmaking in ways that can lead to risky conduct.²⁷⁶

Thus, it is doubtful that this incarnation of the "implied consent" approach can justifiably give legal effect to the inference that a child's participation in a sport manifests his willingness to encounter certain dangers.²⁷⁷

One might object that this critique would have applied equally to the subjective assumption of risk defense, which some claim was also based on consent.²⁷⁸ Indeed, the rule that contracts made by minors

275. See Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHIATRY PUB. POL'Y & LAW 3, 19 (1997) ("Theory and research suggests that adolescents are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks."); Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 DUKE L.J. 1133, 1137-41 (1998) (noting that young people are aware of the dangers of smoking as a general matter, but stubbornly refuse to acknowledge that their own smoking puts them at risk).

276. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 801 (2002).

277. For example, in *Morgan v. State*, 685 N.E.2d 202 (N.Y. 1997), the New York high court adopted the duty-based implied consent rationale for primary assumption of risk. *Id.* at 207-08. Yet, rather than using the plaintiff's implied consent as a sweeping license to allow defendants to undertake fewer safety precautions, the court explicitly tied the defendant's duty of care to the plaintiff's subjective knowledge and expectations. *Id.* at 208. Thus, the court held that primary assumption of risk depends on whether a participant has "not only knowledge of the injury-causing defect but also appreciation of the resultant risk, but awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff." *Id.* at 208 (quoting *Maddox v. City of New York*, 487 N.E.2d 553, 556 (N.Y. 1985) (citations omitted)). After *Morgan*, New York courts shied away from applying assumption of risk to minors. See, e.g., *Blanco v. Elmont Union Free Sch. Dist.*, 687 N.Y.S.2d 235, 238 (N.Y. Sup. Ct. 1999) (declining to apply primary assumption of risk to eleven-year-old plaintiff who was injured during a relay race even though "it could be argued that the [danger] was generally open and obvious").

278. See *Knight v. Jewett*, 834 P.2d 696, 715 (Cal. 1992) (plurality opinion) (Kennard, J., dissenting) ("The defense of assumption of risk, whether the risk is assumed expressly or by implication, is based on consent."); Simons, *Puzzling Doctrine*, *supra* note 139, at 1704 ("[A]ssumption of risk [is] a doctrine that rests on the victim's consent.").

In addition, the New York Court of Appeals once analogized between primary assumption of risk and the defense of consent to an intentional tort. See *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986) (calling primary assumption of risk "'the same as where the plaintiff consents to the infliction of what would otherwise be an intentional tort'") (quoting PROSSER & KEETON, TORTS § 68, at 480-81 (5th ed. 1984)). Notably, however, the de-

are voidable dates back to the turn of the twentieth century.²⁷⁹ Long after it had taken root, courts saw no anomaly in barring the claims of child plaintiffs under the doctrine of assumption of risk.²⁸⁰

However, the traditional assumption of risk defense was markedly different than the modern "implied consent" approach. While the former was based wholly on the plaintiff's subjective knowledge and expectations,²⁸¹ the latter unequivocally mirrors contract law in the way that it focuses on the fact that the parties have "voluntarily entered into a relationship."²⁸² In addition, the "traditional assumption of risk doctrine was much too broad"²⁸³ and applied to situations in which a purely consensual rationale would not have reached the same result.²⁸⁴ Thus, because courts viewed the traditional assumption of risk defense as an independent principle—and not just grounded in the plaintiff's consent—they had no reason to consider whether it conflicted with the rule that juveniles may void contracts.

Also, rather than undermining the claim that the two doctrines conflict, a review of past cases reveals that courts have consistently expressed qualms about applying assumption of risk to minors. For example, courts generally presume that adults appreciate the gravity of obvious dangers, but sometimes refuse to bar children's claims in the

fense of consent to an intentional tort also carves out special protective rules for children. Indeed, in the intentional tort context, as in contract law, "the apparent consent of a person without legal capacity to give consent, such as a child . . . is ineffective." *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Ct. App. 1967); *Bonner v. Moran*, 126 F.2d 121, 122, (D.C. Cir. 1941) ("[T]here is general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights."); *Baird v. Attorney General*, 360 N.E.2d 288, 296 (Mass. 1977) (noting the general rule that minors may not consent to medical procedures in absence of emergency); *King*, *supra* note 103, at 695 ("[M]inors . . . are held legally incapable of consenting to at least some types of potentially harmful or offensive contacts."); RESTATEMENT (SECOND) OF TORTS § 892A cmt. b (noting that consent is only effective if a child is "capable of appreciating the nature, extent, and probable consequences of the conduct").

279. See, e.g., *Chambers v. Chambers*, 6 So. 659, 660–61 (La. 1889) (voiding minor's contract).

280. See, e.g., *Parzych v. Town of Branford*, 136 A.2d 223, 225 (Conn. Super. Ct. 1957) (barring claims of minor plaintiffs who were injured when they illegally entered the defendant's cabin and experimented with gunpowder they found there).

281. See RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965).

282. *Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 261 (Mo. Ct. App. 1995); *Schneider v. Erickson* 654 N.W.2d 144, 148 (Minn. Ct. App. 2002).

283. *Simons, Reflections*, *supra* note 31, at 483.

284. See *Knight*, 834 P.2d at 706 (Cal. 1992) (plurality opinion) (criticizing the notion that assumption of risk should be based on consent); *Sugarman, Assumption of Risk*, *supra* note 31, at 839 (distinguishing between "consent to the physical injury" and "consent to the legal injury").

same circumstances.²⁸⁵ Likewise, many states impose rigorous evidentiary burdens on defendants seeking to prove that a child plaintiff assumed the risk.²⁸⁶

Moreover, problems with applying assumption of risk to minor plaintiffs may extend even beyond the tension between their traditional contractual protections and the consensual justification for primary assumption of risk. For example, California courts disapprove of the "implied consent" rationale²⁸⁷ and uphold liability releases signed by minors.²⁸⁸ Nevertheless, while twenty-four of the thirty-four published California appellate decisions involving adult plaintiffs in the sports setting upheld summary judgment for the defendant,²⁸⁹ only

285. For example, in *Schentzel v. Philadelphia National League Club*, 96 A.2d 181, 186 (Pa. Super. Ct. 1953), the court applied assumption of risk to a forty-seven year-old woman who was struck by a foul ball at a baseball game. The plaintiff had only seen the sport on television. *Id.* at 183. Yet the court reasoned that she must have been aware of the hazards of attending a baseball game because:

[i]t strains our collective imagination to visualize the situation of the wife of a man obviously interested in the game, whose children view the games on the home television set, and who lives in a metropolitan community, so far removed from that knowledge as not to be chargeable with it.

Id. at 186. Conversely, in *Atlanta v. Merritt*, 323 S.E.2d 680 (Ga. Ct. App. 1984), the court declined to apply assumption of risk to bar the claim of an eight-year-old plaintiff who was injured by a foul ball because "[t]he record of the present case . . . [has] nothing in it which demands the conclusion that appellee understood the risk of occupying the place he occupied and assumed that risk." *Id.* at 682.

286. See, e.g., *DeKalb County Sch. Dist. v. Allen*, 561 S.E.2d 202, 206 (Ga. Ct. App. 2002) (noting that a seven-year-old plaintiff "can only be said to have assumed the risk if the danger was patent, obvious, and known to her and she was able to appreciate and avoid it"); *Balt. Gas & Elec. Co. v. Flippo*, 705 A.2d 1144, 1157 (Md. 1998) (upholding trial court's refusal to give assumption of risk instruction in case where eleven-year-old plaintiff was electrocuted after climbing the defendant's utility pole); *Superskate, Inc. v. Nolen*, 641 So. 2d 231, 237 (Ala. 1994) ("the question whether a child plaintiff is capable of assumption of the risk . . . requires] an even higher burden on the defendant"); *Schorah v. Carey*, 331 A.2d 383, 385 (Del. 1975) ("requiring a 'reasonable certitude,' that there is no issue of fact as to whether the child appreciated the *full* risk involved") (emphasis in original).

287. See *Knight*, 834 P.2d at 706 (Cal. 1992) (plurality opinion).

288. See *Aaris v. Las Virgenes Unified Sch. Dist.*, 75 Cal. Rptr. 2d 801, 805 (Ct. App. 1998). This is far and away the minority rule. See *supra* text accompanying note 101.

289. See *Cheong v. Antablin*, 946 P.2d 817, 820-21 (Cal. 1997); *Ford v. Gouin*, 834 P.2d 724, 728 (Cal. 1992) (plurality opinion); *Knight*, 834 P.2d at 712 (Cal. 1992) (plurality opinion); *Moser v. Ratnoff*, 130 Cal. Rptr. 2d 198, 205-206 (Ct. App. 2003); *Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883, 890 (Ct. App. 2003); *Nemarnik v. L.A. Kings Hockey Club*, 127 Cal. Rptr. 2d 10, 17-18 (Ct. App. 2002); *Rodrigo v. Koryo Martial Arts*, 122 Cal. Rptr. 2d 832, 839-41 (Ct. App. 2002); *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 190-91 (Ct. App. 2001); *Kane v. Nat'l Ski Patrol Sys., Inc.*, 105 Cal. Rptr. 2d 600, 605-06 (Ct. App. 2001); *Distefano v. Forester*, 102 Cal. Rptr. 2d 813, 831 (Ct. App. 2001); *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 689-90 (Ct. App. 2000); *Record v. Reason*, 86 Cal. Rptr. 2d 547, 556 (Ct. App. 1999); *Shelly v. Stepp*, 73 Cal. Rptr. 2d 323, 327-28 (Ct. App. 1999); *Domenghini v. Evans*, 70 Cal. Rptr. 2d 917, 919 (Ct. App. 1998); *Dilger v. Moyles*, 63 Cal.

six of the fifteen cases brought by child plaintiffs reached that result.²⁹⁰ In an early important article on assumption of risk, John Diamond noted that jurisdictions that take different approaches to

Rptr. 2d 591, 594 (Ct. App. 1997); *Mosca v. Lichtenwalter*, 68 Cal. Rptr. 2d 58, 61 (Ct. App. 1997); *Bushnell v. Japanese-American Religious & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 676 (Ct. App. 1996); *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813, 822 (Ct. App. 1996); *Regents of Univ. of Cal. v. Superior Court*, 48 Cal. Rptr. 2d 922, 926 (Ct. App. 1996); *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 858-59 (Ct. App. 1995); *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 70 (Ct. App. 1995); *O'Donoghue v. Bear Mountain Ski Resort*, 35 Cal. Rptr. 2d 467, 469 (Ct. App. 1994); *Harrold v. Rolling J Ranch*, 23 Cal. Rptr. 2d 671, 677 (Ct. App. 1993); *Stimson v. Carlson*, 14 Cal. Rptr. 2d 670, 673 (Ct. App. 1992).

Cases in which courts denied summary judgment include: *Saffro v. Elite Racing, Inc.*, 119 Cal. Rptr. 2d 497, 502 (Ct. App. 2002); *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 2d 265, 274 (Ct. App. 2001); *Van Dyke v. S.K.I. Ltd.*, 79 Cal. Rptr. 775, 779 (Ct. App. 1998); *Lowe v. Calif. League of Prof'l Baseball*, 65 Cal. Rptr. 2d 105, 111-12 (Ct. App. 1997); *Morgan v. Fuji Country USA, Inc.*, 40 Cal. Rptr. 2d 249, 252 (Ct. App. 1995); *Freeman v. Hale*, 36 Cal. Rptr. 2d 418, 423 (Ct. App. 1994); *Yancey v. Superior Court*, 33 Cal. Rptr. 2d 777, 781-82 (Ct. App. 1994); *Bush v. Parents Without Partners*, 21 Cal. Rptr. 2d 178, 182 (Ct. App. 1993); *Galardi v. Seahorse Riding Club*, 20 Cal. Rptr. 2d 270, 271-72 (Ct. App. 1993); *Tan v. Goddard*, 17 Cal. Rptr. 2d 89, 93 (Ct. App. 1993).

290. See *Lupash v. City of Seal Beach*, 89 Cal. Rptr. 2d 920, 926-27 (Ct. App. 1999) (barring claim of thirteen-year-old lifeguard); *Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 660 (Ct. App. 1996) (primary assumption of risk applies to sixteen-year-old ice skater); *Lilley v. Elk Grove Unified Sch. Dist.*, 80 Cal. Rptr. 2d 638, 640-41 (Ct. App. 1993) (barring claim of fourteen-year-old plaintiff who broke his arm during wrestling meet); *Aaris v. Las Virgenes Unified Sch. Dist.*, 75 Cal. Rptr. 2d 801, 803 (Ct. App. 1998) (barring claim of "sophomore in high school injured during gymnastic meet"); *Balthazor v. Little League Baseball, Inc.* 72 Cal. Rptr. 2d 337, 339-40 (Ct. App. 1998) (primary assumption of risk applies to eleven-year-old plaintiff); *West v. Sundown Little League*, 116 Cal. Rptr. 2d 849, 853-54 (2002) (primary assumption of risk bars claim of ten-year-old little league baseball player hit by fly ball during practice).

Cases which denied summary judgment include *Kahn v. E. Side High Union Sch. Dist.*, 75 P.3d 30, 44 (Cal. 2003) (primary assumption of risk does not apply to fourteen-year-old plaintiff injured during swim meet); *Childs v. County of Santa Barbara*, 8 Cal. Rptr. 3d 823, 827 (Ct. App. 2004) (primary assumption of risk does not apply to eleven-year-old riding scooter); *Giardino v. Brown*, 120 Cal. Rptr. 2d 77, 87 (Ct. App. 2002) (primary assumption of risk does not apply to eleven-year-old plaintiff injured when her horse spooked); *Shannon v. Rhodes*, 112 Cal. Rptr. 2d 217, 224 (Ct. App. 2001) (holding that primary assumption of risk does not apply to six-year-old plaintiff who fell out of water-skiing boat but reserving question as to whether the doctrine could ever apply to a child that young); *Bjork v. Mason*, 92 Cal. Rptr. 2d 49, 50 (Ct. App. 2000) (primary assumption of risk does not apply to fifteen-year-old plaintiff struck by tow-rope while riding in inner tube being pulled by powerboat); *Campbell v. Derylo*, 89 Cal. Rptr. 2d 519, 521 (Ct. App. 1999) (primary assumption of risk does not apply to an eleven-year-old skier struck by defendant's snowboard); *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 2d 392, 399 (Ct. App. 1995) (primary assumption of risk does not apply to seventeen-year-old BMX bike rider); *Wattenbarger v. Cincinnati Reds*, 33 Cal. Rptr. 2d 732, 736 (Ct. App. 1994) (primary assumption of risk does not apply to seventeen-year-old plaintiff who was injured during baseball tryout); *Lucas v. Fresno Unified Sch. Dist.*, 18 Cal. Rptr. 2d 79, 79-80 (1993) (primary assumption does not apply to ten-year-old plaintiff injured while engaging in an impromptu game that involved throwing dirt clods).

assumption of risk sometimes reach identical results in certain clusters of cases.²⁹¹ Diamond posited that this “suggests the possibility that there are normative principles governing the appellate courts that are not articulated in the current alternative doctrine.”²⁹² California’s lenient treatment of minors may reflect a “normative consensus”²⁹³ that barring such plaintiffs’ claims under primary assumption of risk embodies outmoded tort principles.²⁹⁴ At the very least, on a pragmatic level, this suggests that vendors cannot rely on either express or primary assumption of risk to bar claims brought by child plaintiffs. Accordingly, a standard that would allow vendors greater certainty but also incorporates the fairness concerns noted above is proposed by this Article.

III. Proposal: The Duty to Inform

The fact that extreme sports are impossible to classify as either reasonable or unreasonable creates many problems. This section contends that holding purveyors of such activities to an additional duty to take reasonable steps to inform participants of an activity’s danger would eliminate these difficulties. This minor doctrinal adjustment would allow vendors to cater solely to risk-preferrers and other sensation-seekers. Warnings would sort out this class of participants in the fairest possible manner: by letting them vote with their feet. Although what suffices as reasonable information would depend on the circumstances, it should be geared towards assisting potential extreme sports participants in making a measured judgment about whether a particular activity is worthwhile. Therefore, at a bare minimum, warnings should contain statistical information about the sport’s injury rates. In turn, an individual’s decision to engage in an activity despite full

291. See Diamond, *supra* note 62, at 741–42.

292. *Id.* at 742. Similarly, Peter Schuck has suggested that “assumption of risk, notwithstanding its ostensible and legally institutionalized character as a ‘fact,’ is in reality a culturally constructed and highly normative doctrine, one that is highly responsive to changing social values.” Schuck, *supra* note 148, at 912.

293. Diamond, *supra* note 62, at 741.

294. The period in which jurisdictions adopted duty-based approaches to assumption of risk witnessed a “collection of . . . cases [that] could be referred to as ‘plaintiffs’ greatest hits.” Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603 (1992). Indeed, these changes included abolition of the contributory negligence defense and the recognition of the doctrine of strict products liability. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962). In addition, many jurisdictions streamlined complex landowner duty rules into all-encompassing standards of reasonable care under all the circumstances. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968). In light of these pro-plaintiff changes, many judges may feel that applying assumption of risk to children is anachronistic.

knowledge of its dangers indicates that, for him, its benefits outweigh its risks. This kind of deliberate cost-benefit balancing fully accords with the utility-maximizing purpose of tort law. In addition, there is a strong argument that providing high risk sports to a self-selected group of willing participants is normatively reasonable. Thus, because conditioning participation in a risky activity on unambiguous acceptance of its dangers is also reasonable, defendants would ensure that they too would come down on the right side of the negligence line. Accordingly, the duty to inform would introduce extreme sports into the reasonableness concept.

Admittedly, this proposal rests on a series of sweeping behavioral assumptions. Treating a plaintiff's informed decision to engage in an activity as evidence that he has consciously weighed risks and benefits ignores the fact that even people who are aware that injuries occur in certain activities often systematically underestimate the chance of being personally affected.²⁹⁵ Also, people who are prone to making rash or impulsive decisions may wrongly decide that engaging in a particularly risky activity maximizes their net "good."²⁹⁶ Finally, situational pressures—such as disapproval from one's peers or the inconvenience of canceling plans at the last minute—might cause people to participate in a dangerous activity despite their better judgment.²⁹⁷

But these criticisms are less persuasive than they first seem. First, the no duty rule subscribes to an even farther-reaching assumption:

295. See Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 Nw. U. L. Rev. 1165, 1180 (2003) (noting that while "smokers overestimate the link between lung cancer and smoking in general, they simultaneously underestimate their own risk of dying from lung cancer"); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. Rev. 1051, 1091 (2000), noting:

Even when actors know the actual probability distribution of a particular event, their predictions as to the likelihood that that event will happen to them are susceptible to the 'overconfidence bias': the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us.

296. The potential for poor decision-making may be accentuated by the "conformation bias, . . . which is 'the tendency to seek information to confirm our original hypotheses and beliefs.'" Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1310 (2003) (quoting ELLIOT ARONSON, *THE SOCIAL ANIMAL* 147 (6th ed. 1992)). Thus, people who make rash decisions may not internalize even strongly-worded warnings.

297. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136 (2003) ("Our proclivity is to under-estimate the role of situational influences, and to over-estimate the influence of individual dispositions in explaining people's behavior" is commonly known as "fundamental attribution error.").

that the benefits of any sport outweigh its risks. Also, the objections noted above do not apply to risk-preferrers, who clearly gain positive utility from engaging in dangerous sports.²⁹⁸ In addition, research about the way people process information suggests that warnings may be an accurate way to sort out the risk-averse from other participants. For example, because of a cognitive illusion known as the “availability heuristic,” people tend to overestimate the incidence of high-profile accidents.²⁹⁹ The media blitz that propelled extreme sports to prominence has emphasized their risk of serious injury.³⁰⁰ Thus, it is doubtful that extreme sports participants would underestimate the likelihood of being hurt, especially when confronted with specific data about an activity. Psychologists have also documented that perceptions of an activity’s risks generally lower an activity’s perceived benefit.³⁰¹ Forcing people to make decisions under time pressure accentuates this phenomenon.³⁰² Thus, there is good reason to believe that individuals will not follow through with an initial decision to engage in an extreme sport—despite peer pressure or the hassle of bowing out at the last minute—unless they truly believe that the activity’s benefits outweigh its risks.

Furthermore, despite the exact same flaws, tort law recognizes a duty to inform in two similar contexts. Dangerous medical procedures are difficult to label as either reasonable or unreasonable. Health care, of course, possesses enormous social value. Yet many forms of treatment also hold the potential for serious adverse effects. Tort law resolves this conflict through the doctrine of informed consent, which requires doctors to disclose the material risks involved with each po-

298. See *supra* text accompanying notes 143–44.

299. The “availability heuristic” refers to the idea that people tend to “rely on the ease to which an instance of a target event can be called to mind,” and thus over-estimate the occurrence of high-profile events. See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 556 (2002).

300. See Ramsey, *supra* note 18, at 1650 (noting that despite widespread media representations to the contrary, “scholastic football causes fatal injury or paralysis more often than rock climbing or sky diving”); Moore, *supra* note 271 (noting that thirty-five people in the United States were killed last year while sky diving); Jen Fish, *Woman Recorded Her 200th Skydive Before Fatal Jump*, PORTLAND PRESS HERALD, July 6, 2002, at 1, 2002 WL 3881112.

301. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 671 (1999) (“[W]here a risk is perceived as posing high costs, it tends also to be perceived as posing low benefits . . .”).

302. See Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 771 (2003) (reviewing HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al., eds., Cambridge, 2002)).

tential course of action.³⁰³ Although the doctrine originally rested on the fiction that an unwanted medical procedure was a battery, courts eventually incorporated the obligation to educate the patient as one aspect of the physician's overarching duty of reasonable care.³⁰⁴ It is only by facilitating the plaintiff's informed choice that the physician's actions become reasonable. Likewise, manufacturers of dangerous products do not fit neatly into the negligence concept. Many goods—chainsaws, prescription drugs, and household chemical cleaners, for instance—both serve important societal functions and frequently cause grave injuries. Again, tort law places the onus on the manufacturer to provide reasonable warnings about the product's risks.³⁰⁵ In sharp contrast to the no duty rule, these two doctrines reflect the "well established . . . cognate notion that consent must be informed or knowledgeable in some meaningful sense if we are to accord it legal or moral significance."³⁰⁶

303. See, e.g., *Pettengill v. United States*, 867 F. Supp. 380, 383 (E.D. Va. 1994) ("[T]he doctrine of informed consent . . . requires physicians to 'disclose to patients the alternative to and risks of a particular treatment.'" (quoting *Bly v. Rhoads*, 222 S.E.2d 783, 785 (Va. 1976))).

304. See, e.g., *Matthies v. Mastromonaco*, 733 A.2d 456, 460–61 (N.J. 1999) (while "[t]he physician's need to obtain the consent of the patient to surgery derived from the patient's right to reject a nonconsensual touching," many courts now believe that "the decisive factor is not whether a treatment alternative is invasive or noninvasive, but whether the physician adequately presents the material facts so that the patient can make an informed decision."). But see *Kenny v. Wepman*, 753 A.2d 924, 926 (R.I. 2000) (limiting the doctrine to surgical procedures under the battery rationale).

305. See *Deviner v. Electrolux Motor*, 844 F.2d 769, 773 (11th Cir. 1988) (holding that chainsaw manufacturer discharged its duty to warn by informing the plaintiff's employer about its risks); *Figueroa v. Boston Scientific Corp.*, 254 F. Supp. 2d 361, 371 (S.D.N.Y. 2003) (finding the existence of material facts as to whether manufacturer discharged duty to warn); *Zeigler v. CloWhite Co.*, 507 S.E.2d 182, 184 (Ga. Ct. App. 1998) (reversing trial court's determination that maker of lemon-scented bleach had no duty to warn about its dangerous propensities); Robert G. Knaier, Note, *An Informed-Choice Duty to Instruct?* Liriano, Burke, and the Practical Limits of Subtle Jurisprudence, 88 CORNELL L. REV. 814, 820 (2003) ("Warnings and instructions not only inform consumers as to how to use or consume a product more safely, but also provide consumers with information from which to decide whether to use or consume the product at all.") (italics omitted).

For example, in *Prince v. Parachutes, Inc.*, 685 P.2d 83 (Alaska 1984), a sky diver broke his neck while using a specialty parachute with a triangular-shaped canopy that was manufactured by the defendant. The Alaska Supreme Court reversed the trial court's grant of summary judgment for the defendant, noting that the record did not establish whether the company had done enough to highlight the fact that the parachute was not suitable for novice sky divers. *Id.* at 88.

306. Schuck, *supra* note 148, at 900. Of course, there are meaningful differences between medicine, dangerous products, and high-risk sports. Doctors have fiduciary relationships with their patients; their decisions also directly impact a patient's physical integrity. Product manufacturers, on the other hand, only interact at arm's length with customers. However, as Peter Schuck argues, tort law accommodates these concerns by requiring doc-

A. Defining "Extreme Sports"

The term "extreme sport" is "increasingly amorphous."³⁰⁷ Indeed, it has been used to describe forms of motorcycle racing,³⁰⁸ bull riding,³⁰⁹ running,³¹⁰ diving,³¹¹ surfing,³¹² and even pogo-stick-hopping.³¹³ Thus, an important threshold issue is for which recreational activities the proposed rule should govern.

Judges already are tasked with determining which recreational activities are "sports."³¹⁴ Employing similar principles, courts should decide which activities qualify as "extreme sports" as a matter of law. This determination should reflect the duty to inform's objective of bringing activities that are difficult to classify as reasonable back within the ambit of the negligence concept. Thus, extreme sports should include

tors to discharge significantly more onerous duties to warn than sellers of dangerous products. *Id.* at 920–23. Indeed, doctors must discuss the risks and benefits of all possible treatment methods, while products manufacturers may simply rely on mass-produced warnings to discharge their duty of due care. *Id.* at 922. Thus, this Article's proposed standard would account for the vast difference between medicine and high risks sports by holding purveyors of such activities to a less arduous duty to inform patrons of an activity's danger.

307. Chris Baiocchi, *X Marks the Spot*, VILLAGE VOICE (New York), Oct. 11, 1999, at 34. For an article chronicling the ubiquitous use of the word "extreme" in media titles, see Tom Kuntz, *Buzzwords*, N.Y. TIMES, Oct. 19, 2003, at A2. Recent newspaper articles have detailed "extreme ironing" and "extreme reading." See Cassell Bryan-Low, *Extreme Ironing: Adding New Wrinkles to an Age-Old Chore*, WALL ST. J., Oct. 1, 2003, at A1; *Good Morning America* (ABC television broadcast, Oct. 2, 2003), 2003 WL 2674405 (describing people who iron while sky diving or climbing Mount Everest); La Canada Flintridge, *New Sport: Extreme Reading*, L.A. TIMES, Nov. 11, 2003, at F2, 2003 WL 2447450. Similarly, the conservative Christian group "The Promise Keepers" dubbed their new youth-outreach movement "extreme faith." See Karen Rivedal, *Promise Keepers Down, Not Out*, CHI. TRIB., June 22, 2001, at 1, 2001 WL 4086592. Likewise, 60,000 people attended Harvest Ministries' Summerfest, which featured prayer and extreme sports. See Sarah Linn, *God-fest Takes Place of Crusade: Evangelist Palau Thinks Young to Reach the Young*, CHI. TRIB., Oct. 31, 2003, at 10, 2003 WL 66439451.

308. See Benjamin Olivo, *Motorcycle Riders Go to Extremes in Dome*, SAN ANTONIO EXPRESS-NEWS, Jan. 25, 2002, at H23, 2002 WL 709498.

309. See Jeff Dick, *Cowboy Up: Inside the World of Bull Riding*, BOOKLIST, Nov. 1, 2002, at 511, 2002 WL 101221798 (reviewing COWBOY UP: INSIDE THE EXTREME WORLD OF BULL RIDING (Lighthouse Pictures 2002)).

310. See Robert Remington, *Eco-Challenge Race Takes A Toll on Competitors*, NAT'L POST (Toronto), Aug. 15, 2002, at A10, 2002 WL 24861249.

311. See Allan Laing, *Widower Sets 558-Foot Diving Record*, HERALD (U.K.), Oct. 14, 2003, at 12, 2003 WL 65750765.

312. See Mike Wise, *Hang 10!*, INT'L HERALD TRIB., Nov. 13, 2003, at 16, 2003 WL 64831950.

313. See Ramsey, *supra* note 18, at 1648 & 1648 n.36 (noting that a contestant on MTV's "Jackass" knocked himself out on "a state of the art pogo stick that allows users to do a double rotation").

314. See *Record v. Reason*, 86 Cal. Rptr. 2d 547, 554–55 (Ct. App. 1999); *Shannon v. Rhodes*, 112 Cal. Rptr. 2d 217, 223–24 (Ct. App. 2001).

activities like BASE jumping, which do not possess the same bundle of virtues—exercise, teamwork, and skill-building—that make most other sports reasonable. The extreme sports label should also extend to activities like motocross, which exact an enormous social cost by injuring so often. Courts should therefore define extreme sports as recreational activities in which risk is the primary allure or those where serious injuries occur frequently enough to cast doubt on the sport's reasonableness. Finally, this inquiry should focus on the precise nature of the activity in question. Thus, BMX may not be an extreme sport when it involves the relatively tame goal of leaping over small objects on flat surfaces,³¹⁵ but may be an extreme sport when offered on a course laden with moguls, obstacles, and steep embankments.³¹⁶

B. Benefits of the Proposed Rule: Integrating Extreme Sports into the Negligence Regime

1. Balancing Autonomy and Accident Prevention

A duty to inform would strike a better balance between individual autonomy and accident prevention than the no duty rule. Recent studies have legitimized risk-preference by suggesting that it has a physiological basis.³¹⁷ In addition, researchers have discovered “[t]hat much antisocial and self-destructive conduct springs from the wish for sensation.”³¹⁸ Preserving opportunities for recreational risk-taking helps funnel such behavior into socially-acceptable outlets. Individuals also possess powerful claims to further their sovereign values as they see fit. At the same time, however, a chief purpose of the tort system is to discourage excessively risky behavior.³¹⁹

One manner in which the no duty rule attempts to accommodate this tension is by determining that all sports are reasonable as a matter of law. This approach only makes sense when applied to traditional recreational activities, which boast tremendous social value and in which well-established conventions limit the universe of potentially injurious conduct.³²⁰ Extreme sports are markedly different. Yet the no

315. The sport began as such. See Clark, *supra* note 21.

316. This sport now generally takes this form. See Josh Ward, *BMX Enjoys Renaissance: Competition is Thrilling, Sport's Participants Say*, DAILY OKLAHOMAN, Apr. 27, 2003, at 10C, 2003 WL 17310559.

317. See *supra* text accompanying note 137.

318. Heidt, *supra* note 99, at 442.

319. See, e.g., DAN B. DOBBS, THE LAW OF TORTS §§ 11–12, at 19–21 (2000) (discussing the purposes of tort law).

320. See *supra* Part II.A.2.

duty rule dubiously concludes that the benefits of any sport outweigh its risks, regardless of its particular circumstances or the characteristics of the participant. This blanket assumption is especially problematic in light of the fact that marketing experts predict that extreme sports will feature an increasingly diverse clientele in coming years.³²¹ The duty to inform would add a necessary disincentive to offset the heightened risk of injury in such activities. The ability to distinguish between risk-preferrers, those who value sensation-seeking, and the risk-averse will be particularly valuable as the extreme sports demographic expands.

The no duty rule also sometimes excuses defendants from taking safety measures that "would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events."³²² Notably, this justification for the no duty rule does not try to weigh autonomous interests against accident prevention at all. However, this rationale contains a limiting principle: courts should be able to ask defendants to take precautions that would *not* affect the way a sport is played. The duty to inform is precisely that kind of step. By merely changing vendors' pre-activity interactions with customers, it would allow extreme sports to stay on the market in unadulterated forms. The proposed regime would thus deter unreasonably risky conduct without diminishing autonomy values or altering the way dangerous recreational activities are conducted.

2. Providing a Sound and Reliable Basis for Barring Claims

One of the most remarkable aspects of the current state of the law is that it manages both to be unnecessarily harsh to plaintiffs and yet not offer vendors a predictable mechanism for barring unmeritorious lawsuits. The no duty rule does not require sponsoring business entities to take additional precautions for risky activities. At the same time, despite the no duty rule and an arsenal of waivers and inherent risk statutes, sponsoring businesses remain at the mercy of an area of

321. See Jamie Doward, *The World Turned Upside Down*, THE OBSERVER (Eur.), Apr. 6, 2003, at P46, at 1, 2003 WL 17842328 ("You see more and more people getting involved because the sports continue to grow, people are starting these sports younger and advertisers want that demographic.") (statement of Melissa Gullotti, ESPN Director of Media Services); Kellie Dixon, *X Games Continuing to Mature*, ARIZ. REP., August 16, 2003, at C1, 2003 WL 61274413 (noting that the National Sporting Goods Association is reporting a seventy percent increase in age twelve and under participation in skateboarding since 1992); Sarah Treffinger, *A Way of Life: People of All Ages Flock to Action Sports Looking for Speed, Fun or a Natural High*, PLAIN DEALER (Cleveland, Ohio), Sept. 7, 2003, at 1, 2003 WL 2873479.

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

law that often generates unpredictable results. Under the proposed rule, in the absence of additional negligence, a fully-informed extreme sports participant's claim will fail. However, this result will flow not from a perceived need to subsidize high risk sports or a mechanical determination that a participant's decision to take part in the activity manifests his consent to face its dangers, but rather from the fact that the defendant has done nothing unreasonable. Grounding the no duty rule in the tenets of reasonableness would provide a superior rationale for barring claims.

a. Putting the Emphasis Back on Tort's Basic Standard

The reasonableness concept dominates torts.³²³ Deviations from the rule that liability attaches when a defendant's unreasonable conduct proximately causes a plaintiff's injury are few and far between.³²⁴ Yet to the extent that the no duty rule shields defendants from the legal consequences of an activity that would otherwise be tortious, it subsidizes their conduct. The more the sport in question departs from the reasonableness standard, however, the harder it becomes to justify such an entitlement. Indeed, it makes little sense to subsidize activities that do not confer powerful benefits in return.

It is little wonder that courts have occasionally expressed qualms about extending the subsidy rationale to especially dangerous sports. For example, in *Foronda v. Hawaii Intern. Boxing Club*,³²⁵ a Hawaii appellate court reluctantly applied the no duty rule to a tort suit brought against a boxing promoter for a participant's death. The court noted that the purpose of the no duty rule was to avoid putting "burdens on the free and vigorous participation in the sport."³²⁶ Yet the court was troubled by the "unique nature of the sport of boxing."³²⁷ Nevertheless, the court's concerns about extending the no duty rule to conduct that "[i]n any other context . . . would be . . . criminal"³²⁸ evaporated when it considered the fact that the plaintiff was an experienced boxer who had continued to participate after experiencing the sport's risks first-hand.³²⁹ Thus, one reading of *Foronda* is that the court ap-

323. See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 265 (1990).

324. See Sugarman, *Assumption of Risk*, *supra* note 31, at 844.

325. 25 P.3d 826 (Haw. Ct. App. 2001).

326. *Id.* at 841.

327. *Id.*

328. *Id.*

329. *Id.* at 842 (noting that the plaintiff "was not a complete neophyte" who had both been knocked out and knocked others out).

plied the no duty rule in order to subsidize the sport of boxing. But this interpretation is hard to square with the court's misgivings about the activity. A better reading is that the court barred the plaintiff's negligence claim because boxing was *reasonable* for him, thus making the defendant's provision of the sport reasonable as well.³³⁰

b. Stabilizing the Duty Not to Increase Inherent Risks Inquiry

Courts have struggled to apply the duty not to negligently increase inherent risks to high risk sports because it is difficult to define what constitutes "negligence" during the course of activities that cause injuries so often.³³¹ The duty to inform would solve this problem by aligning the parties' conduct in the first instance. Under the proposed rule, both a properly-warned plaintiff's decision to take part in a risky sport and the defendant's facilitation of the activity would be reasonable. Requiring vendors to take an additional, pre-activity safety measure would assuage some of the concerns that animated the *Lamp* court, which found a motocross track owner's failure to remove a hidden obstacle culpable enough to constitute willful and wanton misconduct.³³² Although such a lapse would still be classically negligent conduct, a court would be less likely to assign such a high degree of blame to a vendor that initially ensured that all participants were aware of the incidence of accidents during the sport. Courts generally consider a defendant's risk-creation to be less blameworthy if the defendant took steps to make sure the plaintiff knew of the danger.³³³ Although the duty to inform would saddle sponsoring business entities with an additional obligation, it would also reduce the odds of courts finding them guilty of gross negligence or willful and wanton misconduct. As *Lamp* illustrates, vendors have strong incentives to

330. That courts are more comfortable applying a reasonableness rationale than a subsidy rationale in high risk sports cases explains why they frequently highlight the plaintiff's experience with a particular sport. For example, in *Dare v. Freefall Adventures*, 793 A.2d 125 (N.J. 2002), the court noted that the plaintiff had parachuted 137 times. *Id.* at 128. Although this would have been a dispositive fact under the traditional assumption of risk defense, *see supra* text accompanying note 44, it is largely irrelevant for duty analysis, which centers on the "relationship between the parties," not the plaintiff's subjective impressions. *See, e.g.,* *Crawn v. Campo*, 643 A.2d 600, 604 (N.J. Super. Ct. App. Div. 1994). Thus, *Dare*, like *Foronda*, can also be explained by the fact that sky diving was reasonable for the plaintiff, thereby making the defendant's provision of sky diving also reasonable.

331. *See supra*, Part II.A.2.

332. *See Lamp v. Reynolds*, 645 N.W.2d 311, 314 (Mich. Ct. App. 2002).

333. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 cmt. c (2000) ("Whether the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it may be relevant to whether the defendant acted reasonably.").

avoid being deemed culpable at that level because such determinations override otherwise valid liability waivers.³³⁴

In addition, the duty to inform would allow courts to articulate specific criteria for what it means to negligently increase a hazardous sport's inherent risks without sidestepping powerful fairness concerns. Under a negligence analysis, even a vendor's minor carelessness would create a high probability of grave injury and thus be unreasonable. *Branco* and *Dare* therefore establish tests for negligence that allow vendors to make trivial mistakes and still avoid liability, respectively holding them to duties not to "create an extreme risk of injury"³³⁵ and not to "materially increase" the odds of injury "beyond those reasonably anticipated by skydiving participants."³³⁶ But because the no duty rule does not impose an obligation on sponsoring business entities to sort out participants who would not take part in an extreme sport if they were aware of the risk of injury, shifting the duty line in this manner further immunizes unreasonable conduct from liability. By creating a trade-off whereby vendors must take an additional *ex ante* precaution in return for the protection of specialized duty rules during the course of the activity, the duty to inform would place *Branco* and *Dare* on solid ground.

A related problem is that many extreme sports seem to be precisely what the duty not to increase inherent risks prohibits: traditional recreational activities that have been modified to accentuate their dangerous attributes. However, while the duty not to increase inherent risks forbids a vendor's operational negligence, it apparently does not proscribe *intentionally* increasing a sport's inherent risks. Not accounting for intentional risk-creation allows a great deal of risky conduct to go undeterred. Thus, the no duty rule distinguishes between reasonable and unreasonable mascot behavior at a baseball game³³⁷ and reasonable and unreasonable signpost placement on a ski run.³³⁸ Yet it treats skateboarding as a singular enterprise, whether it takes place on the street or a skate-park's half-pipe—a U-shaped ramp where an accident is like "jumping off of a four-story building."³³⁹ The duty to inform would take these shifting levels of risk into

334. *Id.*

335. *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 2d 392, 398 (Ct. App. 1995).

336. *Dare v. Freefall Adventures*, 793 A.2d 125, 133 (N.J. Super. Ct. App. Div. 2002).

337. *See Lowe v. Cal. League of Prof'l Baseball*, 65 Cal. Rptr. 2d 105, 111–12 (Ct. App. 1997).

338. *See Van Dyke v. S.K.I. Ltd.*, 79 Cal. Rptr. 2d 775, 779 (Ct. App. 1998).

339. Gina Piccalo, *Scare Masters*, L.A. TIMES, Aug. 16, 2003, at E1 (statement of Dan Colburn, co-founder of socalskateparks.com). Indeed, skateboarding achieved modest

account by letting participants make informed choices between a sport's myriad of forms. Within a few parameters,³⁴⁰ a participant's informed consent should make a sport with intentionally increased risks reasonable. In addition, by instituting disclosure requirements, the duty to inform would discourage the risk-averse from participating in activities with intentionally-increased risks.

c. Resolving Minors' Claims

The conflict between contractual protections enjoyed by minors and primary assumption of risk means that vendors in some jurisdictions cannot bar the claims of child plaintiffs.³⁴¹ Courts in other states seem to recognize this tension on an intuitive level.³⁴² This subsection contends that the duty to inform would solve this problem. However, a doctrinal caveat is necessary: a sponsoring business entity must provide information to both a minor and his parents to discharge its legal obligation. Because the duty to inform assumes that participants will make choices that effectuate their internal cost-benefit balancing, requiring parental approval would avoid placing this decision in the hands of individuals who may be incapable of fully understanding the ramifications of their decision.³⁴³

Courts should insist upon parental approval even in jurisdictions that do not allow parents to waive a child's tort claim.³⁴⁴ Without such a system, sponsoring business entities in some states would have no means whatsoever to combat tort claims.³⁴⁵ In addition, the rule that parents cannot waive a child's tort claim touches upon a general distrust of liability releases. Seizing upon defects in language or presentation, courts often invalidate waivers even in light of clear evidence that the plaintiff knew the legal effect of the document.³⁴⁶ Underlying

popularity in the 1970s as a street-based sport. Eventually, participants began skating in abandoned swimming pools. See Jenkins, *supra* note 23.

340. Of course, some activities, like Russian roulette, may be so far removed from furthering values that society is prepared to recognize that, even with informed consent, they will not be reasonable.

341. See *supra* Part II.B.

342. See *supra* Part II.B.

343. See, e.g., Scott & Steinberg, *supra* note 276, at 801.

344. See *supra* text accompanying note 101.

345. See *supra* Part II.B.

346. Indeed, "[i]t is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." *Paralift, Inc. v. Superior Court*, 29 Cal. Rptr. 2d 177, 180 (Ct. App. 1993) (quoting *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Ct. App. 1992)); see also *Moore v. Hartley Motors, Inc.*, 36 P.3d 628, 634 (Alaska 2001) (holding that an issue of material fact remained whether all-terrain-vehicle student's injury resulted from negligence); *Mauldin v. Coupe*, No. C041511, 2003 WL 22430206, at *6-*7

these decisions is a reluctance to place too much significance on an agreement not to sue. For many people, recourse to the courts is an abstraction, easily surrendered. However, a decision reached by a parent and a child in concert to face a particular sport's specific, enumerated hazards is more meaningful than a parent's release of a child's tort claim. Thus, there is nothing inconsistent in forbidding parents from waiving a child's tort claim but giving legal effect to the child's fully-informed decision, with parental imprimatur, to take part in an activity.

In turn, the duty to inform would become the cornerstone of a far more forceful doctrine. The current implied consent justification for primary assumption of risk posits that any time an individual participates in a sport, he agrees "to take his chances."³⁴⁷ Yet commentators have long complained that "the nature of this 'agreement' is woefully ambiguous."³⁴⁸ The unacceptable level of generality at which the consensual rationale for the no duty rule operates may explain its ineffectiveness when applied to minors.³⁴⁹ High risk sports compound the problem: it is one thing to "take chances" with bumps and bruises and another thing entirely to "take chances" with serious injury or death. The duty to inform would substitute a far more specific inquiry—whether the plaintiff chooses to engage in an activity despite knowing how frequently injuries occur—for the vague notion of consent upon which the current doctrine rests. As such, the no duty rule would become a far more significant doctrine: one that judges may apply in good conscience to plaintiffs of all ages.

3. Facilitating Fault Comparison

When a vendor's negligence injures an otherwise non-negligent extreme sports participant, the no duty rule forces courts to choose between two flawed options. First, courts can let juries reduce the plaintiff's recovery under secondary reasonable assumption of risk. This approach does violence to basic tort principles.³⁵⁰ In fact, it is exactly backward: a plaintiff's decision to engage in a risky sport endangers only himself, while a sponsoring business entity's provision of the sport imperils many others. Courts can also allow the plaintiff to

(Cal. Ct. App. Oct 27, 2003) (concluding that motocross track operator's release was too wordy and complex to be enforced).

347. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1) (1965).

348. Simons, *Full Preference*, *supra* note 4, at 227.

349. *See supra* text Part II.B.

350. *See supra* text Part II.A.3.

recover full damages. Because the plaintiff has consciously decided to gamble with his physical integrity, however, this approach seems inequitable.

This unfortunate dichotomy is a result of the fact that the law currently forges no relationship between a sponsoring business entity's efforts to discharge its legal obligation and the reasonableness of the plaintiff's decision to engage in a dangerous sport. The no duty rule frames a defendant's task in negative terms: not to increase risks. A vendor may diligently fulfill this responsibility or completely disregard it. Either way, the defendant's actions have no bearing on the culpability of the plaintiff's choice to take part in the activity. Juries in states that allow damage reduction based on risky but not unreasonable conduct will thus always be forced to compare two different forms of behavior, each conducted in a vacuum. Quantifying and comparing the blameworthiness of a vendor's design choices or operational conduct and an individual's predilection for risk will always possess a distasteful *ad hoc* quality.

The duty to inform would bridge this gap by placing the parties' behavior on a continuum. Indeed, the degree to which a defendant discharges its duty would directly impact the reasonableness of a plaintiff's decision to participate in the activity. Under the cost-benefit definition of reasonableness, both a vendor that provides insufficient warnings and a plaintiff who would not have engaged in a sport if he had been fully aware of its risks are negligent. Examining a single interaction and determining which party should bear the lion's share of responsibility is a far more sensible manner of apportioning fault than letting a jury reduce a plaintiff's recovery for risky but not unreasonable conduct.

B. Counterarguments

1. The Duty to Inform Is Too Burdensome

This proposal may inconvenience vendors. However, sponsoring business entities could implement reasonable warnings with minimal hassle. Indeed, virtually every extreme sports company makes patrons sign liability releases.³⁵¹ Vendors could thus fulfill their legal obligation by printing data about injury rates in the specific sport in a prominent place on waivers. Also, many companies already take great pains to reinforce the fact that the plaintiff has agreed not to sue. Some sky diving outfits require participants to watch a presentation in which an

351. See *supra* text accompanying note 98.

attorney explains the legal effect of a waiver.³⁵² Vertical Visions makes BASE jumpers swear on video tape that both they and their estate will hold the company harmless.³⁵³ Rather than thrusting upon vendors an additional responsibility, the proposed regime would thus merely ask them to recalibrate steps that they already often take.

2. Complications with Fault Comparison

One might object that under the proposed rule, if a vendor *does* discharge its duty to inform, but nevertheless engages in unreasonable conduct during the course of the activity, the plaintiff should recover in full. However, if the vendor *does not* fulfill its duty to inform and is negligent during the course of the activity, the jury has free reign to reduce the plaintiff's damages under comparative fault. This creates perverse incentives.

But this issue is a chimera. It is extremely doubtful that a sponsoring business entity would deliberately fail to inform a patron of an activity's risks in order to create the potential for fault comparison. Because defense costs can be high,³⁵⁴ vendors have much stronger incentives to stay out of court completely than attempt to mitigate the plaintiff's potential comparative fault recovery. Moreover, a jury would not likely look kindly upon such efforts and allocate a greater share of damages in response.

3. Fear of Greater Liability

Another concern is that, under the proposed rule, a fully-informed extreme sports participant who is injured by a vendor's negligence has behaved "reasonably" in the eyes of the law and should recover full damages. This could increase a vendor's liability exposure. But it does not follow that every plaintiff who is injured by a vendor's negligence would automatically recover his entire share of damages. Participants could still engage in behavior during the course of the activity that deviates from informal norms and is thus deemed unreasonable. For example, two motocross riders at the 2003 X Games were injured while attempting stunts that had previously never

352. See *Manning v. Brannon*, 956 P.2d 156, 157 (Okla. Civ. App. 1997) (noting that the plaintiff underwent six hours of training, including viewing the video tape and signing the exculpatory contract in fourteen places); Moore, *supra* note 271 (profiling a sky diving company that makes participants watch a video that explains the liability waiver they must sign).

353. See O'Donnell, *supra* note 98, at 4.

354. See Heidt, *supra* note 99, at 392.

been successfully completed.³⁵⁵ Likewise, some sky diving companies ask participants not to engage in a maneuver called "swooping," in which a participant quickly decelerates before landing, allowing him to glide over the ground at high speed.³⁵⁶ Participants who engage in such conduct would have their damages reduced. In addition, in states with "modified" comparative fault systems, under which a plaintiff must be found less culpable than the defendant to receive damages in the first place,³⁵⁷ juries could find such behavior sufficiently blameworthy to bar recovery.

To receive any damages, a plaintiff must also prove that a defendant's breach of duty caused his harm.³⁵⁸ Reconsider the facts of *Dare v. Freefall Adventures*.³⁵⁹ Before his accident, the plaintiff had parachuted 137 times.³⁶⁰ If the sky diving company had failed to provide reasonable warnings, it would still have a meritorious argument that the plaintiff would have engaged in the sport regardless of the amount of information he received. Because risk-preferrers and repeat players tend to participate in risky sports habitually, causation would be a potent weapon to mitigate claims that a sponsoring business entity breached its duty to inform.

Thus, even though some extreme sports participants would recover full damages under the duty to inform, it is unlikely that it would greatly increase vendors' liabilities.

4. The Duty to Inform Would Increase Defense Costs

This Article has argued above that the duty to inform would only affect sponsoring business entities' liability in a narrow band of cases—generally where a plaintiff has little experience with the activity in question. However, by giving plaintiffs another basis to allege that a defendant has been negligent, the proposed rule might increase the number of tort claims, thus increasing potentially ruinous defense costs. Yet, although negligence questions are generally for the jury,

355. See Peter Yoon, *Big Air Final Tests Limits*, L.A. TIMES, Aug. 18, 2003, at D13. Similarly, Travis Pastrana claims that "[e]very time I've gotten hurt . . . has been my fault." *Motor Sport*, *supra* note 2.

356. See Nathaniel McGrath, *Skydivers Come to Mid America Sport Parachute Club to take a Flying Leap*, ST. J.-REG. (Springfield, Ill.), Apr. 7, 2002, at 13, 2002 WL 9746087; see also Christine Dempsey, *Parachute Landing Goes Awry: Manchester Man, 34, Dies Early Today*, HARTFORD COURANT, July 19, 2002, at B1, 2002 WL 24223657 ("High performance landings are becoming popular, but even some experts believe they are dangerous . . .").

357. See Horton, *supra* note 4, at 350 n.5.

358. See, e.g., FRANKLIN & RABIN, *supra* note 63, at 341.

359. 793 A.2d 125, 128–29 (N.J. Super. Ct. App. Div. 2002).

360. *Id.* at 128.

some states let courts make such determinations as a matter of law in the sports setting.³⁶¹ If states are willing to entrust appellate judges with intensely fact-specific questions on cold records, then they should also allow judges to consider whether vendors have taken adequate steps to inform patrons of a sport's risks as a matter of law. Courts will often be able to examine the document and its exact language because sponsoring business entities will presumably memorialize warnings on waivers, videotape, or other tangible forms. Accordingly, the proposed rule would not necessarily transform every extreme sports-related accident into an issue for the jury. This would be in keeping with one of the no duty rule's main purposes: encouraging summary judgment in appropriate cases.³⁶² It would also limit the number of cases that proceed to trial, alleviating the financial burden on recreational vendors.

Conclusion

The extreme sports movement continues to gather momentum. This penchant for recreational risk-taking may be the defining characteristic of an entire generation of young people. Many believe that it will change the face of recreation forever and become a fertile source of litigation. Yet, at a time when clarity and certainty in the law is vital, tort law stands in disarray. The doctrine of assumption of risk, a high risk sport purveyor's foremost defense against lawsuits, has long been marred by conceptual confusion. What once was a single rule has now splintered into a host of doctrines, none of which provide a predictable mechanism for defeating a plaintiff's claims.

Assumption of risk's current incarnation holds defendants to no duty to protect plaintiffs from a sport's inherent risks. Yet this rule is a relic of a time when "sports" were well-established activities with indisputable social value and limited dangers. Indeed, courts have offered three rationales for the no duty rule, none of which seem to justify applying it to high risk sports. Some courts believe that the no duty rule stems from the fact that sports are inherently reasonable. How-

361. See, e.g., *Estes v. Tripson*, 932 P.2d 1364, 1367 (Ariz. Ct. App. 1997) (holding as a matter of law that base-runner was not negligent for sliding into catcher in softball game); *Allen v. Dover Co-Recreational Softball League*, 807 A.2d 1274, 1287 (N.H. 2002) (finding no breach of duty as a matter of law).

362. See *Knight v. Jewett*, 834 P.2d 696, 706 (Cal. 1992) (plurality opinion) (If assumption of risk was a jury question, "summary judgment rarely would be available" because "it frequently will be easy to raise factual questions with regard to a particular plaintiff's subjective expectations as to the existence and magnitude of the risks the plaintiff voluntarily chose to encounter.") (italics omitted).

ever, extreme sports are impossible to categorize as either reasonable or unreasonable. Other courts opine that the no duty rule is necessary to avoid changing sports through safety regulation. Nevertheless, to the extent that the no duty rule allows sponsoring business entities to avoid liability for conduct that would otherwise be tortious, it raises the question of why society should subsidize activity that often lacks the same benefits—exercise, competition, and skill-building—that characterize traditional sports. Still other jurisdictions adhere to the notion that the plaintiff's implied consent to face certain dangers frees defendants from a legal obligation to eliminate them. But because children cannot waive liability by contract, it is not clear why courts should allow them to implicitly do so through the no duty rule. Indeed, no matter what version of the no duty rule a state follows, courts seem reluctant to bar the claims of minor plaintiffs. Finally, the no duty rule problematizes fault comparison by forcing states to decide whether to let risk-preferring plaintiffs recover in full or reduce their damages based on behavior that is not necessarily unreasonable.

This Article proposes a way out of this labyrinth. Holding vendors to an additional duty to inform patrons of an extreme sport's risks would allow them to cater solely to those for whom the benefits of such activity outweigh its risks. It would also make the act of providing a high risk sport reasonable itself as a matter of law. In turn, incorporating high risk sports into the reasonableness concept would bring such activities back in line with the no duty rule's underlying assumptions. It would also reinstitute negligence as the benchmark of fault comparison. Finally, courts would likely be more comfortable applying a rule that focuses on a more robust form of consent than the current doctrine—one that finds legal significance in a plaintiff's fully-informed decision to engage in an activity rather than just any decision, informed or otherwise. Thus, the duty to inform would both provide vendors with a dependable means of defense and incorporate the fairness concerns that lurk beneath the surface of the current rule's doctrinal instability. In this manner, courts could bring order to an important area of law that has been long reviled as a sprawling mess.