

High-Risk Recreation: The Thrill that Creates a Statutory and Judicial Spectrum of Response and Drives the Dichotomy in Participant and Provider Liability

*“The [participant] was not seeking a retreat for meditation. Visitors were tumbling about the belt [of the ride] to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.”*¹

*“[H]e was a novice skier, skiing on a novice trail owned and maintained by the defendant. While traversing the trail at a speed equal to a fast walk, his ski became entangled in a small bush Unseen by him before the accident, it was seen shortly after by himself and his skiing companion Unlike those participants eloquently described by Chief Judge Cardozo . . . the timorous no longer need stay at home.”*²

I. INTRODUCTION

Outdoor sports represent a vital and prosperous aspect of American culture.³ As novice participation increases, recreation providers and instructors are often called upon to bring clients into expert situations despite the clients’ lack of skill and experience.⁴ When accidents occur, state courts and legislatures must consider issues of economic prosperity and accountability in determining who bears responsibility and liability.⁵ Historically, states subscribed to the doctrine

1. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (holding amusement park rider responsible after watching others risk injury).

2. *Sunday v. Stratton Corp.*, 390 A.2d 398, 401-02 (Vt. 1978) (advocating skiing open to all participants of all levels).

3. *See id.* at 402 (indicating outdoor sports attracted novice participants); Bruce Barcott, *Warning*, *OUTSIDE MAGAZINE*, July 2002, at 2, available at http://outside.away.com/outside/news/200207/200207_warning_1.adp (reporting recent trends in mountaineering and other outdoor sports).

4. *See Sunday*, 390 A.2d at 402 (indicating ski slopes no longer strictly for experienced skiers); Susan Stellin, *Liability Waiver: Read the Details*, *N.Y. TIMES*, Mar. 24, 2002, at 4 (noting increase in high-risk sport participation). Stellin highlights the difficulty in determining whether instructor misjudgment operates as part of inherent risk doctrine and whether a mistake amounts to gross negligence. Stellin, *supra*, at 4.

5. John O. Spengler & Brian P. Burket, *Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation*, 11 *J. LEGAL ASPECTS SPORT* 135, 135 (2001) (stating safety acts protect economic benefit of recreational activity); Stellin, *supra* note 4, at 4 (identifying gray area in determining when less obvious risks inherent in activity); *see, e.g.*, *Cooperman v. David*, 214 F.3d 1162, 1165 (10th Cir. 2000) (indicating participant bears more responsibility under recreation statute); *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (noting sport participation likely chilled by co-participant liability for ordinary negligence); *Scott v. Pac. West Mountain Resort*, 834 P.2d 6, 16 (Wash. 1992) (concluding participant did not assume provider’s

of *volenti non fit injuria* by employing primary and secondary assumption of risk doctrines within comparative negligence schemes.⁶ While states typically make participants accountable for inherent risks of the sport, a recent California trend holds instructors and guides to a higher standard of care.⁷

Some states first enacted recreation safety statutes in response to the landmark *Sunday v. Stratton Corp.*⁸ decision, which shifted the burden of liability to the activity provider.⁹ These statutes essentially rewrote common law by codifying the assumption of risk doctrine to protect the growing outdoor industry.¹⁰ Initially, only a few states enacted preliminary legislation and its scope was generally limited to skiing, roller skating, and equestrian sports.¹¹ Today, some form of recreation safety legislation exists in forty-five states and the statutes range from general recreation applicability to specific sport protection.¹²

Currently, Wyoming provides the greatest protection to outdoor guides and sports instructors by holding participants responsible for the intrinsic risks of the activities.¹³ Wyoming's statute also holds participants responsible for the foreseen and unforeseen risks inherent in the sport.¹⁴

In contrast, California applies common law concepts of primary and secondary assumption of risk within a comparative negligence scheme and provides participants with a cause of action for injuries that result from intrinsic risks.¹⁵ Under California common law, courts evaluate the facts of each

negligence).

6. *Murphy*, 166 N.E. at 174 (explaining sports participants assume known risks). Primary assumption of risk stands as a complete defense to a claim of negligence because the defendant owes no duty of care to the plaintiff. *Knight*, 834 P.2d at 703.

7. Barcott, *supra* note 3, at 5 (addressing two opposing notions of liability emerging in state tort law).

8. 390 A.2d 398 (Vt. 1978).

9. *Id.* at 402; Barcott, *supra* note 3, at 2 (citing economic reasons for recreation statutes). In order "[t]o survive the *Sunday* decision, outdoor-industry leaders lobbied lawmakers in recreation-dependent states . . . to pass recreation safety acts." *Id.*; see Noreen L. Slank, *A Symposium on Tort and Sport: Leveling the Playing Field*, 38 WASHBURN L.J. 847, 850 (1999) (noting initial recreation statutes enacted to protect public policy).

10. See Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming's Recreational Safety Act—An Update*, 33 LAND & WATER L. REV. 249, 251 (1998) (stating inherent risk language eliminates provider's duty to client).

11. Hansen-Stamp, *supra* note 10, at 255 (detailing types of legislation).

12. Slank, *supra* note 9, at 848-60 (detailing evolution of early safety statutes as applied to limited sports); Spengler & Burket, *supra* note 5, at 164 (identifying five states without safety acts and twenty-six states with "inherent risk" language).

13. See Hansen-Stamp, *supra* note 10, at 274-75 (indicating providers' duty does not include eliminating inherent risks); see also *Cooperman v. David*, 214 F.3d 1162, 1166 n.3 (10th Cir. 2000) (indicating legislature expanded act by eliminating provider responsibility for reasonable risks).

14. See *infra* notes 45-46 and accompanying text (detailing Wyoming statute).

15. 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, 731 (1999) (noting California retains no codified recreational assumption of risk). *But see* CAL. CIV. CODE § 846 (Deering 2004) (outlining duty of care owed by landowners). Though the California legislature did not create a recreation safety statute, it enacted a statute that considers the duty owed by landowners to those entering for recreational purposes. *Id.*

incident based on the nature of the recreational activity and the relationship between the two parties.¹⁶ This dual inquiry blurs the boundaries between primary and secondary assumption of risk doctrines by evaluating the instructor-client relationship in a manner that creates a fact-specific duty of care.¹⁷

This Note will explore the state dichotomy that exists within the realm of recreation safety by focusing on the methods employed by Wyoming and California.¹⁸ With changing attitudes towards outdoor and recreation law and increased interest in high-risk activities, the spectrum of jurisdictional approaches shift liability from providers to participants.¹⁹ This Note will also analyze the benefits, drawbacks, and potential implications of each theory of liability.²⁰ Various policy concerns presented in this Note will help explain the disparity between participant protection and provider immunization.²¹ Finally, this Note explores whether the Wyoming approach provides greater consistency and predictability in the unique setting of high-risk adventure than the theory advocated by the California courts.²²

II. HISTORY

A. Development of Outdoor Enthusiasm

Adventure, exploration, and outdoor activities are imbedded within the American character.²³ The American landscape provides the ideal setting for

16. Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 38 (Cal. 2003) (reinforcing duty encompasses sport itself and relationship between parties); West v. Sundown Little League of Stockton, Inc., 116 Cal. Rptr. 2d 849, 854 (Cal. Ct. App. 2002) (conveying standard includes analysis of activity and relationship between parties); Regents of the Univ. of Cal. v. Super. Ct., 48 Cal. Rptr. 2d 922, 924 (Cal. Ct. App. 1996) (articulating several factors used to determine duty owed by provider).

17. Knight v. Jewett, 834 P.2d 696, 706-08 (Cal. 1992) (explaining how courts misapply doctrines of primary and secondary assumption of risk); Bushnell v. Japanese-Am. Religious & Cultural Ctr., 50 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1996) (highlighting duty inquiry includes relationship between instructor and participant).

18. See *infra* Part III (explaining key differences between California and Wyoming assumption of risk in recreation setting).

19. See *infra* Part III (outlining varying approaches for outdoor liability).

20. See *infra* Part IV (drawing comparisons and differences between two regimes).

21. See *infra* Part IV.C (offering economic and geographic concerns with potential to influence tort approaches).

22. See *infra* notes 150-155 and accompanying text (stating foreseeable injury accompanies high-risk sports and provider immunity protects those sports).

23. Barcott, *supra* note 3, at 4 (reporting adventure popularity rose dramatically in 1970s); see Sunday v. Stratton Corp., 390 A.2d 398, 400-01 (Vt. 1978) (indicating several slopes available for novice skiers); Lura Hess, Note, *Sports and the Assumption of Risk Doctrine in New York*, 76 ST. JOHN'S L. REV. 457, 457-58 (2002) (illustrating competitive sports encouraged at early age). See generally Hofflich v. Mendell, 652 N.Y.S.2d 659 (N.Y. App. Div. 1997) (noting accident occurred while plaintiff used fifty-foot-high climbing tower); Vodopost v. MacGregor, 913 P.2d 779 (Wash. 1996) (noting participants engaged in high-risk activity to explore breathing techniques at high altitudes).

adventure pursuits.²⁴ For example, skiing became popular in the United States in the 1920s due to increased instruction.²⁵ Hospitable terrain in states such as Vermont and Colorado offers exciting opportunities for snow sports.²⁶ The number of “on-slope” skiers and snowboarders approached 10.4 million in the 1998-1999 season.²⁷ Likewise, with the advent of commercial providers, more climbers headed for Mt. McKinley (Denali), the highest point in North America.²⁸ Intrigued by the sense of danger and thrill, Dr. Frederick Cook was the first to endure the hazards of Denali’s extreme environment where temperatures regularly fall between -40 and -60 degrees Fahrenheit.²⁹ By the 1970s, over 22,000 mountaineers, most of whom were inexperienced, had attempted the summit with the help of mountain guides.³⁰ The inception and rising popularity of “adventure racing” further demonstrates that risk is increasingly a part of American culture.³¹ These multi-sport events span several days and require participants to navigate a course through difficult terrain in the backcountry.³² As participation in recreation sports increases, the legislatures and the courts must decide who is liable in the event of injury.³³

B. The Steeplechase Approach to Recreation Liability

In 1929, the New York Court of Appeals rendered a monumental decision that set the national tone for liability in participant and instructor/provider relationships.³⁴ In *Murphy v. Steeplechase Amusement Co., Inc.*,³⁵ the plaintiff,

24. See Robert Keiter, *The National Park System: Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 650-51 (1997) (reporting National Park Service goal to keep all 369 designated parks pristine).

25. Morten Lund, *A Short History of Alpine Skiing: From Telemark to Today*, 8 SKI HIST. Q. 1 (1996), <http://www.skiinghistory.org/history.html> (describing few resorts in United States with Norwegian ski instructors).

26. See generally COLO. REV. STAT. § 33-44-109 (2003) (evidencing skiing’s popularity by devoting statute to its risks); VT. STAT. ANN. tit. 12, § 1037 (2003) (noting legislative intent specifically concerned with skier responsibility).

27. *NSAA Report on Skiing/Snowboarding Safety*, SKI MAG., Oct. 1999, <http://www.skimag.com/skimag/instruction/article/0,12795,324513,00.html> (providing statistics about sport participation rates). Among high-risk activities, snow boarding and skiing have the proportionally highest injury and participation rates, over swimming, scuba diving, boating, and bicycling. *Id.*

28. BILL SHERWONIT, *TO THE TOP OF DENALI: CLIMBING ADVENTURES ON NORTH AMERICA’S HIGHEST PEAK 2* (2000) (indicating increased access to Denali through professional services).

29. *Id.* at 2, 14-15 (highlighting controversy over first successful summit bid).

30. *Id.* at 3 (reporting more attempts by inexperienced climbers assisted by professional guides).

31. Beth A. Easter et al., *Legal Issues Related to Adventure Racing*, 13 J. LEGAL ASPECTS SPORT 253, 253-54 (2003) (identifying growing trend in high-risk outdoor activities).

32. *Id.* at 254-55 (reporting some events propose to test personal limits and stamina).

33. See also Barcott, *supra* note 3, at 4 (indicating *Sunday* decision simultaneous with increase in outdoor activities). Compare *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (ruling participant responsible for conceivable risks), with *Sunday v. Stratton Corp.*, 390 A.2d 398, 402 (Vt. 1978) (holding “timorous no longer need stay at home”).

34. *Steeplechase*, 166 N.E. at 174 (articulating standard for participant foreseeability and responsibility); see also Hess, *supra* note 23, at 459-60 (indicating modern assumption of risk doctrine explained in decision);

“a vigorous young man,” voluntarily took a turn on an amusement ride after several moments of watching it in action.³⁶ In an unsympathetic and unforgiving manner, the court determined that because the plaintiff witnessed the jerks and twists of the ride, he was responsible for the fractured knee that he sustained when he fell.³⁷ Judge Cardozo wrote “the risk at greatest was a fall. This was the very hazard that was invited and foreseen.”³⁸

C. The Sunday Doctrine of Greater Participant Protection

After most jurisdictions adopted the *Steeplechase* approach, many states also largely switched philosophies fifty years later following *Sunday*.³⁹ The *Sunday* plaintiff, a novice skier, tangled with a small bush on the slope and sustained an injury.⁴⁰ The Supreme Court of Vermont employed the doctrine of assumption of risk to decide against the ski mountain resort.⁴¹ The court declared that the ski resort’s duty included removing the bush from the slope.⁴² While indicating that risks inherent to the sport fall outside the scope of the duty owed by the ski resort, the court resoundingly placed a burden on the defendant for those risks not related to the sport.⁴³ Since this landmark decision, various jurisdictions have taken different views about recreation liability and have implemented varying methods to apportion responsibility for participants’ injuries.⁴⁴

Barcott, *supra* note 3, at 4 (describing decision as “precursor to Modern adventure lawsuit”).

35. 166 N.E. 173 (N.Y. 1929).

36. *Steeplechase*, 166 N.E. at 174 (laying out case facts). Judge Cardozo’s opinion reports that the plaintiff’s personal observation of the “Flopper” played a significant role in his injury. *Id.* at 173-74.

37. *Id.* (ruling *volenti non fit injuria* controlled liability for recreation injuries); see Hess, *supra* note 22, at 460 (explaining plaintiff liable if contemplated possible harm).

38. *Steeplechase*, 166 N.E. at 173-74 (noting plaintiff witnessed potential hazards while observing ride).

39. See *Sunday v. Stratton Corp.*, 390 A.2d 398, 402 (Vt. 1978) (deciding to limit participant responsibility); see also Easter, *supra* note 31, at 253 (indicating increased participation in high-risk sports).

40. *Sunday*, 390 A.2d at 401 (indicating novice trails tailored for inexperienced skiers); Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 99 (1993) (suggesting skier’s inexperience contributed to shift in delegation of responsibility).

41. *Sunday*, 390 A.2d at 402 (explaining change in ski industry). The court, having found a breach of duty in slop maintenance, did not address whether the skier assumed a known and specific risk. *Id.* at 402-03.

42. *Id.* at 403 (ruling some conduct falls outside scope of inherent risks); see Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 736 (1992) (noting increase in plaintiff verdicts for tort claims between 1965 and 1980s).

43. *Sunday*, 390 A.2d at 402 (stating primary assumption of risk implicates no duty on defendant to mitigate inherent risks); see also Barcott, *supra* note 3, at 4 (linking increase in inexperienced participants with change in thought about outdoor recreation).

44. See Judges, *supra* note 40, at 100 (explaining legislative response to *Sunday* created statutes limiting providers’ responsibility); see also Hansen-Stamp, *supra* note 10, at 255 (sampling current methods to accommodate inherent risk liability). In articulating various standards, Hansen-Stamp suggests that state legislatures employ sport-specific legislation, specific inherent risk statutes, general inherent risk liability appropriated to participant, or a combination of the above. Hansen-Stamp, *supra* note 10, at 255.

D. The Middle Ground: A Sampling of State Thought

Most jurisdictions maintain some form of recreation statute.⁴⁵ They vary, however, in degree of specificity and scope with regards to the activities covered.⁴⁶ Only five states lack any form of sport legislation and rely on common-law principles to determine liability.⁴⁷ Within the remaining jurisdictions, the statutes vary widely; some provide broad protection for the large economic benefit derived from recreational activities while others cover specific sports or risks.⁴⁸ Five statutes contain omnibus clauses granting blanket protection for any risk that the courts deem inherent, whereas others specify standard risks in order to limit the judiciary's discretion.⁴⁹ Within the United States, each jurisdiction handles recreation liability in its own unique way, with Wyoming and California representing opposite ends of the spectrum.⁵⁰

45. Spengler & Burket, *supra* note 5, at 164 (reporting five states lack any form of specific legislation. Compare HAW. REV. STAT. § 663-1.54 (2003) (listing examples of recreational activities while holding participant generally liable for damages), and WYO. STAT. ANN. § 1-1-123 (Michie 2003) (holding any participant in any recreational activity responsible for inherent risks), with COLO. REV. STAT. § 33-44-109 (2003) (providing limited list of risks for which skier takes responsibility), and MONT. CODE ANN. § 23-2-736 (2003) (addressing specific risks for which ski resort not liable).

46. *Supra* note 45 and accompanying text (providing differing examples of recreation legislation). Wyoming's recreation safety statute, for example, provides broad protection for providers and states "[a]ny person who takes part in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown . . . [and a] provider of any sport or recreational opportunity is not required to eliminate, alter, or control the inherent risks . . ." WYO. STAT. ANN. §§ 1-1-123(a)-(b). By comparison, Colorado's ski liability statute mandates skier responsibility for approximately ten categories of risk, including duty "to maintain control of his speed and course . . . stay clear of snow-grooming equipment, . . . heed all posted information and other warnings . . . [and avoid] moving skiers already on the ski slope or trail." COLO. REV. STAT. § 33-44-109(2), (4)-(5), (8).

47. Spengler & Burket, *supra* note 5, at 164 (describing scope of recreation statutes across state jurisdictions). As most states enacted these statutes to afford providers more protection from liability, the acts also strive to maintain participation in outdoor recreation as a viable means for economic growth. *Id.* at 135; see also Hess, *supra* note 23, at 467-72 (illustrating varying jurisdictional approaches and noting no identifiable reason for varied approaches); Roseman-Orr, *supra* note 15, at 730-31 (indicating many states enact legislation to sustain economic prosperity of outdoor sports).

48. *Supra* note 45 and accompanying text (comparing jurisdictional approaches); see also Spengler & Burket, *supra* note 5, at 163-65 (addressing non-uniformity among state approaches to outdoor liability). While most legislation typically addresses risks regarding skiing, roller skating, and equine events, individual state concerns inconsistently address various sports and accompanying risks. Spengler & Burket, *supra* note 5, at 164.

49. See Spengler & Burket, *supra* note 5, at 163 (indicating Hawaii, Vermont, Utah, Wyoming, and Wisconsin statutes all maintain catch-all clauses); see also Hansen-Stamp, *supra* note 10, at 255 (arguing statutory listing of risks forces judiciary to categorize risk to prevent summary judgment). See generally HAW. REV. STAT. ANN. § 663-1.54 (limiting provider liability when risk inherent). Hawaii's recreation liability statute states "owners and operators of recreational activities shall not be liable for damages for injuries to a patron resulting from inherent risks associated with the recreational activity . . ." *Id.*

50. See Spengler & Burket, *supra* note 5 (addressing inconsistent state approaches to recreation liability); see, e.g., Hansen-Stamp, *supra* note 10, at 255-59 (noting Wyoming statute applies to all inherent risks of every sport); Daniel E. Larzaroff, *The Influence of Sports Law on American Jurisprudence*, 1 VA. SPORTS & ENT. L.J. 1, 44-49 (2001) (noting *Knight* decision influential in subsequent sport tort claims); Hess, *supra* note 23, at

III. KEY DIFFERENCES BETWEEN WYOMING AND CALIFORNIA

While various factors influence state tort law, noteworthy geographical and economic differences exist between Wyoming and California and are reflected in state law.⁵¹ In geographic and economic terms, California relies on different industries to create a diversified base for the world's fifth largest economy.⁵² Wyoming's industries, however, are more homogenous and tend to stem from the State's landscape.⁵³

In light of their divergent approaches to recreation tort cases in recent years, these pioneering states may influence other jurisdictions in the middle ground.⁵⁴ As a result, analysis of this dichotomy is crucial to understanding state recreation law.

A. California Regime

California courts rely on common law comparative fault principles to determine tort liability.⁵⁵ With no general recreation statute, California courts determined that primary assumption of risk remains a complete barrier to a plaintiff's recovery, while secondary assumption of risk simply apportions fault between the plaintiff and defendant.⁵⁶ The courts also tailored the ordinary reasonable person standard to sport and recreation settings to protect the fundamental nature of these activities.⁵⁷

467-68 (arguing California possesses most developed comparative fault scheme).

51. See generally State of California, *Portrait of California: State Icons & Facts-Economy*, at http://gocalif.ca.gov/state/tourism/tour_homepage.jsp (last visited Mar. 16, 2005) (highlighting various state industries); State of Wyoming, *Wyoming 2004—Just the Facts*, at http://eadiv.wy.state.us/Wy_facts/facts04.pdf (last visited Mar. 16, 2005) (reporting state statistics for demographics, tourism, and agriculture).

52. State of California, *supra* note 51 (noting tourism, entertainment, and manufacturing among top economic producing industries). California's rich and diverse economy derives ninety-eight percent of its employment from small businesses and boasts 5.4 million acres of state and federal parks. *Id.*; State of California, *Portrait of California: State Icons and Facts-Geography*, at http://gocalif.ca.gov/state/tourism/tour_homepage.jsp (last visited Mar. 16, 2005).

53. State of Wyoming, *supra* note 51 (indicating farming as primary industry). While Wyoming's population in 2003 amounted to just over 500,000, half worked on farms while the government employed about 68,000 workers. *Id.* The Federal Government, including the National Park Service and the United States Forest Service, owned 29 million acres of land in 2002. *Id.*

54. See Barcott, *supra* note 3, at 5-6 (reasoning California tends to set nationwide trends).

55. *Knight v. Jewett*, 834 P.2d 696, 701 (Cal. 1992) (making reference to California's comparative fault approach).

56. *Id.* at 704, 707 (noting assumption of risk breaks into two categories of defenses); see also *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 67 (Cal. Ct. App. 1995) (explaining primary assumption of risk indicates no duty owed to plaintiff).

57. *Knight*, 834 P.2d at 710 (ruling public policy of preserving fundamental nature of these activities paramount); *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 205 (Cal. Ct. App. 2003) (noting people partake in sports and recreation for thrill and challenge); *Ferrari*, 38 Cal. Rptr. 2d at 67-68 (expressing overriding concern avoids "chill[ing] vigorous participation" in sports).

1. *Groundwork for California Tort Principles*

In adopting comparative fault theory, California recognizes that a plaintiff's contributory negligence will reduce recovery but not bar liability.⁵⁸ The secondary assumption of risk defense effectively merges into proportional fault shares.⁵⁹ To implicate this doctrine, the defendant must breach the duty of care and the plaintiff must have accepted a known and specific risk apart from the defendant's negligence.⁶⁰ Primary assumption of risk survives because the court can make a legal determination that the defendant owed no duty of care to the plaintiff and, hence, the defendant's actions do not constitute negligence.⁶¹ Aside from comparative negligence, California common law does not consider the plaintiff's subjective knowledge or intent in determining duty of care.⁶²

2. *Assumption of Risk as Applicable to Recreational Settings*

While acknowledging a general duty of ordinary care, California courts have determined that sport and recreational activities warrant a unique standard to accommodate their inherent risks.⁶³ Ordinarily, factors such as potential for harm, certainty of injury, causation, policy considerations, and prevention of future harm all determine the reasonable conduct that one person owes to another.⁶⁴ Sports, outdoor activities, and recreational events present different

58. *Knight*, 834 P.2d at 704-05 (explaining effect of comparative fault on secondary assumption of risk). The *Knight* decision further explained that secondary assumption of risk merges into comparative fault when both parties contribute to plaintiff's injury. *Id.* Thus, all parties accountable should be held accountable. *Id.*

59. *Knight*, 834 P.2d at 703 (distinguishing primary from secondary assumption of risk). The California Supreme Court acknowledged that the adoption of comparative fault principles eliminated the barring of plaintiff's recovery when he or she "knowingly encounters a risk of injury caused by the defendant's breach of that duty." *Id.* at 703.

60. *See id.* at 712 (Mosk, J, dissenting) (arguing adoption of comparative fault principles abolishes defense of assumption of risk); *Bushnell v. Japanese-Am. Religious & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1996) (noting people owe ordinary standard of care to others and carelessness can cause liability); *Ferrari*, 38 Cal. Rptr. 2d at 67 (requiring voluntary, including specific risks such as "carelessly extended elbow in basketball"); *Larazoff*, *supra* note 50, at 48-49 (stating California played influential role in distinguishing primary from secondary assumption of risk).

61. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Cal. 2003) (recognizing existence of duty and determining scope remains with court). The *Kahn* court reiterated that determination of duty exists outside the realm of the jury as a question of law. *Id.*; *see Giardino v. Brown*, 120 Cal. Rptr. 2d 77, 84 (Cal. Ct. App. 2002) (articulating standard to determine duty incorporates nature of activity and relationship between plaintiff and defendant). Focusing on policy considerations, the *Giardino* court held the defendant liable for providing a "head shy" horse to novice, young rider. *Giardino*, 120 Cal. Rptr. 2d at 85.

62. *Knight v. Jewett*, 834 P.2d 696, 704 (Cal. 1992) (noting factors such as plaintiff reasonableness have no bearing on existence of duty); *Bushnell*, 50 Cal. Rptr. 2d at 530 (stating court determines duty based not on competitive nature of activity but on its inherent risks).

63. *Regents of the Univ. of Cal. v. Sup. Ct.*, 48 Cal. Rptr. 2d 922, 924-25 (Cal. Ct. App. 1996) (ruling sport settings eliminate general, reasonable person duty); *see also Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 205 (Cal. Ct. App. 2003) (delineating sports as exception to ordinary duty because entered into for challenge and thrill).

64. *Regents*, 48 Cal. Rptr. 2d at 924-25 (listing factors used to determine reasonable person standard); *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 69 (Cal. Ct. App. 1995) (identifying foreseeability of

considerations for the court because risk is an integral part of these activities.⁶⁵

Often, inherent risks in sports and other similar activities draw people to participate.⁶⁶ A person should expect, for example, that during a game of touch football a participant may inadvertently tackle them in the spirit of sport.⁶⁷ Consequently, California courts have reduced the standard of care and determined that as long as a participant, coach, or provider does not recklessly or intentionally increase the risks associated with the sport or activity, they do not breach their duty.⁶⁸

As policy concerns drive this exception to the general duty of care, the court makes a dual inquiry to ensure that prosperity of these activities thrives.⁶⁹ The court considers the nature of the activity, and the relationship between the defendant and plaintiff.⁷⁰ Inquiries into the plaintiff's subjective intent, reasonableness of plaintiff's conduct, and implied consent remain notably absent from the duty determination.⁷¹ As the inherent risk determination rests with the court, the duty of care depends on the specific facts of each activity.⁷² After the court ascertains the nature and scope of the duty of care, it asks whether this duty would reduce participation and zest for the sport.⁷³ The

harm as prominent factor in determining duty).

65. *Knight*, 834 P.2d at 710 (noting public policy concern in maintaining participation in sports and recreational activities). The *Knight* court altered the ordinary reasonable person standard because "vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed . . . on basis of . . . ordinary careless conduct." *Id.* Despite increased injuries associated with inherent risks of these activities, California does not want to "alter fundamentally the nature of the sport by deterring participants." *Id.*; see *Ferrari*, 38 Cal. Rptr. 2d at 67-68 (emphasizing policy concerns of reducing participation in sports).

66. *Moser*, 130 Cal. Rptr. 2d at 205 (attempting to explain why sports and recreational activities require lower standard of care); see *Bushnell v. Japanese-Am. Religious & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 530 (Cal. Ct. App. 1996) (pressing importance of vigorous participation as integral part of game).

67. See *Knight*, 834 P.2d at 697-98 (reiterating facts of case). As one participant ran into another, the court determined that rough play operates as an inherent risk of touch football. *Id.* at 711-12. *But see* *Giardino v. Brown*, 120 Cal. Rptr. 2d 77, 87-88 (Cal. Ct. App. 2002) (holding provider liable for spooked horse); *Saffro v. Elite Racing, Inc.*, 119 Cal. Rptr. 2d 497, 500-02 (Cal. Ct. App. 2002) (holding commercial provider's duty includes minimizing inherent risks).

68. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 39 (Cal. 2003) (stating coach has duty not to increase risk of sport); *Regents*, 48 Cal. Rptr. 2d at 1046 (explaining liability does not automatically impute to instructor by virtue of label); see *Bushnell*, 50 Cal. Rptr. 2d at 676-77 (stating challenging students inherent in any sport); *Lazaroff*, *supra* note 50, at 44-45 (explaining California eliminated most negligence claims against co-participants with *Knight* decision).

69. *Kahn*, 75 P.3d at 38 (asking whether duty imposed inhibits sports and activities in light of dual inquiry); *Knight v. Jewett*, 834 P.2d 696, 704 (Cal. 1992) (articulating a dual standard).

70. See *supra* note 16 and accompanying text (indicating factors considered to determine scope of duty).

71. *Knight*, 834 P.2d at 708 (ruling these factors have no bearing on duty determination); see also *id.* at 716 (Kennard, J., dissenting) (expressing concern over radical departure of not considering plaintiff's subjective intent). *But see* *Giardino*, 120 Cal. Rptr. 2d at 87-88 (noting horse lessor not required to provide "ideal" horse, but rider's inexperience may contribute to claim).

72. See *Bushnell v. Japanese-Am. Religious & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 675 (Cal. Ct. App. 1996) (reasoning court must find coach acted recklessly in specific circumstance); *Regents of the Univ. of Cal. v. Super. Ct.*, 48 Cal. Rptr. 2d 922, 925 (Cal. Ct. App. 1996) (indicating commercial operator's liability turns on specific facts of event).

73. *Bushnell*, 50 Cal. Rptr. 2d at 673-74 (owing to two-tier inquiry, court asks whether defendant's

defendant's duty does not include an obligation to reduce the risks associated with the activity, but incorporates a duty not to increase those risks.⁷⁴ Acknowledging that inherent risks are fundamental to some recreational activities, the duty of care that puts liability on the participant does not force providers to reduce innate danger.⁷⁵

California common law recognizes a difference between the co-participant relationship and the instructor-provider relationship.⁷⁶ While co-participants vigorously partake in the activity, coaches and providers may indirectly participate in the event.⁷⁷ As the second inquiry rests on the relationship between the defendant and the plaintiff, formal titles or labels will not automatically give rise to a higher or lower standard of care.⁷⁸ California courts have also highlighted that "pushing" and encouraging participants to move beyond their comfort level rests within the bounds of the role of instructors.⁷⁹ The courts reason that if every coach were held responsible for injuries that athletes sustained while learning new skills, sports would suffer.⁸⁰ The coaches' ability to challenge students remains fundamental to instructing.⁸¹ Co-participants and coaches are legally grouped together and enjoy the same lower standard of recklessness.⁸² As long as coach's advice does not fall

conduct composes part of inherent risk).

74. *Randall v. Mammoth Mountain Ski Area*, 63 F. Supp. 2d 1251, 1253 (E.D. Cal. 1999) (following state law of duty not to increase risks of sport or activity); *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 37 (Cal. 2003) (expressing no obligation to reduce inherent risks of sport); *West v. Sundown Little League of Stockton, Inc.*, 116 Cal. Rptr. 2d 849, 860 (Cal. Ct. App. 2002) (furthering reckless standard for instructors).

75. *See Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 205 (Cal. Ct. App. 2003) (stressing challenge and potential harm lure participants to sports and recreational activities); *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 69-70 (Cal. Ct. App. 1995) (concluding "challenging nature" and possibility of accidents draws whitewater rafting participants).

76. *Supra* note 68 and accompanying text (distinguishing coach from co-participant because former not directly participating).

77. *See Kahn*, 75 P.3d at 49 (Werdegar, J., concurring) (highlighting coach does not vigorously participate in game); *Moser*, 130 Cal. Rptr. 2d at 206-07 (noting conduct outside ordinary realm of sport breaches coach's duty); *Bushnell*, 50 Cal. Rptr. 2d at 675 (stating "to instruct is to challenge").

78. *Bushnell v. Japanese-Am. Religious & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 675 (Cal. Ct. App. 1996) (indicating coach/provider status relevant but not determinative); *Regents of the Univ. of Cal. v. Super. Ct.*, 48 Cal. Rptr. 2d 922, 925 (Cal. Ct. App. 1996) (indicating duty determination looks behind coach and participant labels to instant facts of case); *see also Saffro v. Elite Racing, Inc.*, 119 Cal. Rptr. 2d 497, 500-02 (Cal. Ct. App. 2002) (noting dual inquiry with additional requirement of conduct of commercial providers). The court restated "the steps [that] the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport." *Id.* (quoting *Knight v. Jewett*, 834 P.2d 696, 709 (Cal. 1992)).

79. *Regents*, 48 Cal. Rptr. 2d at 925-26 (affirming coach breached duty if pushing excessive).

80. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (Cal. 2003) (ruling ability to question judgment after event opens up instructors to immense liability); *West v. Sundown Little League of Stockton, Inc.*, 116 Cal. Rptr. 2d 849, 856 (Cal. Ct. App. 2002) (citing coaches' mistakes about student ability natural part of sport or activity); *Bushnell*, 50 Cal. Rptr. 2d at 675 (holding instructor's judgment not evaluated in hindsight).

81. *Kahn*, 75 P.3d at 43 (touching on importance of coach's role in analyzing liability); *see West*, 116 Cal. Rptr. 2d at 856.

82. *Kahn*, 75 P.3d at 43 (refusing to adopt reasonable person standard for coaches and providers). The *Kahn* court expressed concern over defining "a duty of care in terms that would inhibit adequate instruction and

“outside the range of ordinary activity for the sport, [they] are not liable if injuries result from their missteps.”⁸³

B. Wyoming Principle

The State of Wyoming offers a statutory perspective on recreation and sport liability.⁸⁴ The Wyoming Recreation Safety Act (Act), enacted in 1989 and subsequently amended, provides extensive protection for providers and instructors.⁸⁵ In codifying the assumption of risk doctrine, the legislature ensured that participants take responsibility for the inherent risks of the activities in which they engage.⁸⁶

I. Adoption of Recreation Legislation

In an effort to sustain new increases in industry and limit provider liability, the Wyoming legislature enacted the Act in 1989.⁸⁷ State tourism revenue grew with participation in horse-packing, mountain climbing, dude ranching, and skiing.⁸⁸ After two major amendments, the Act currently protects instructors and providers from those risks associated with the activity.⁸⁹ The courts’ primary inquiry remains to determine what constitutes an inherent risk.⁹⁰

Amendments to the 1989 Act created greater coverage for providers and

learning or eventually alter the nature of the sport.” *Id.* Further, the court held that the plaintiff must prove that the instructor acted intentionally or recklessly in causing harm to the athletes. *Id.*

83. *West*, 116 Cal. Rptr. 2d at 856 (indicating misjudgment in student ability natural part of sport or recreation activity).

84. WYO. STAT. ANN. § 1-1-123(b) (Michie 1997) (explaining Wyoming Recreation Safety Act). The Act specifically refers to recreational providers by stating “a provider of any sport or recreational opportunity is not required to eliminate, alter, or control the inherent risks within the particular sport or recreational opportunity.” *Id.*

85. Spengler & Burket, *supra* note 5, at 135 (articulating rationale for recreation safety statutes to provide protection to outdoor guides and instructors); see *Cooperman v. David*, 214 F.3d 1162, 1165 (10th Cir. 2000) (explaining Wyoming Supreme Court interpreted safety act to protect providers); see also *Sapone v. Grand Targhee, Inc.*, 308 F.3d 1096, 1101 (10th Cir. 2002) (indicating original legislative intent of recreation safety to provide protection for alpine ski industry).

86. WYO. STAT. ANN. § 1-1-123(a) (stating “any person who takes part in any sport or recreational opportunity assumes . . . inherent risks”).

87. See *Hansen-Stamp*, *supra* note 10, at 251-52 (observing two amendments since 1989 provide clearer protection for providers); see also *Sapone*, 308 F.3d at 1101 (citing desire to protect ski industry as motivating factor in enacting statute).

88. Spengler & Burket, *supra* note 5, at 135 (pointing to economics as prominent reason behind recreation statutes); see *Roseman-Orr*, *supra* note 15, at 718 (reporting Hawaii legislature enacted recreation statute to maintain revenue from recreation).

89. *Compare Halpern v. Wheeldon*, 890 P.2d 562, 564 (Wyo. 1995) (suggesting providers must eliminate reasonable risks), with *Madsen v. Wyo. River Trips, Inc.*, 31 F. Supp. 2d 1321, 1326-27 (D. Wyo. 1999) (commenting on elimination of “reasonable” in past decisions).

90. *Hansen-Stamp*, *supra* note 10, at 270 (explaining inherent means integral or intrinsic); see *Madsen*, 31 F. Supp. 2d at 1327 (adopting two types of inherent risks).

attempted to eliminate some ambiguity for the courts.⁹¹ The original Act protected providers from liability for risks that “cannot reasonably be eliminated, altered, or controlled.”⁹² Initial court decisions interpreting the Act identified ambiguity regarding what risks were reasonable to eliminate or control, and prompted the legislature to eliminate the word “reasonably” from the body of the Act.⁹³ Currently, instructors and providers do not owe a duty to eliminate those risks inherent in the sport.⁹⁴

2. Assumption of Risk in Wyoming

Similar to other states’ decisions, Wyoming decisions note confusion over the difference between primary and secondary assumption of risk doctrines.⁹⁵ The Act, however, essentially codifies the theory that providers are not liable when they do not owe a duty of care.⁹⁶ Although Wyoming adopted a comparative negligence scheme, primary assumption of risk remains a complete bar to plaintiff recovery when the defendant does not owe a duty of care.⁹⁷ Similar to California common law, secondary assumption of risk survives in Wyoming as a component in determining contributory fault shares.⁹⁸ As a result, the plaintiff’s voluntary assumption of a known risk directly reduces the defendant’s negligence.⁹⁹

91. Hansen-Stamp, *supra* note 10, at 264-65 (recognizing *Halpern* and *Walters* demonstrate ambiguity in 1989 version of Act); see *Sapone v. Grand Targhee, Inc.*, 308 F.3d 1096, 1101 (10th Cir. 2002) (detailing legislative amendments intended to clarify application of inherent risk doctrine).

92. WYO. STAT. ANN. § 1-1-122(a)(i) (Michie 1989) (creating dual inquiry to qualify as inherent risk); see *Halpern*, 890 P.2d at 565 (explaining standard created by 1989 statute).

93. See Hansen-Stamp, *supra* note 10, at 266-67 (noting *Halpern* highlighted ambiguity in defining inherent risk); *supra* note 91 and accompanying text (discussing ambiguity in original statute).

94. See *Walters v. Grand Teton Crest Outfitters, Inc.*, 804 F. Supp. 1442, 1445 (D. Wyo. 1992) (identifying primary assumption of risk survives as complete bar because no duty owed); see also *Sapone*, 308 F.3d at 1104 (analyzing whether falling from “bolting” horse included in scope of inherent risk); *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1327 (D. Wyo. 2001) (declaring providers not liable for “conditions which are characteristic of” activity).

95. See *Halpern v. Wheeldon*, 890 P.2d 562, 565 (Wyo. 1995) (observing “generic use of the expression leads to much confusion”). Often, Wyoming courts mixed primary and secondary risk assumption terms and blurred use of the doctrines leading to the amendment of the statute. *Id.*

96. *Id.* (noting “Act employs assumption-of-risk language”); see *Madsen v. Wyo. River Trips, Inc.*, 31 F. Supp. 2d 1321, 1326 (D. Wyo. 1999) (reiterating “Act was akin to primary assumption of risk”); Terrence J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1, 21-23 (2000) (noting no duty means participant bears responsibility for inherent risk).

97. Centner, *supra* note 96, at 23 (indicating participant-plaintiffs succeed when risk determined non-inherent); Hansen-Stamp, *supra* note 10, at 259 (stating Wyoming adopted comparative negligence scheme and created duty inquiry for primary assumption of risk); Slank, *supra* note 9, at 864 (explaining non-inherent risks give rise to negligence claims); see *Sapone v. Grand Targhee, Inc.*, 308 F.3d 1096, 1104 (10th Cir. 2002) (deciding jury could find risk not integral part of activity).

98. Hansen-Stamp, *supra* note 10, at 253 (explaining difference between primary and secondary assumption doctrines). Secondary assumption of risk does not operate as a complete bar to recovery, but can be raised to reduce the defendant’s negligence. *Id.*

99. See *supra* notes 59-60 and accompanying text (discussing secondary assumption of risk in

3. Issue of Law Versus Fact

The Act creates guidelines for determining what duty, if any, the defendant owes to the plaintiff.¹⁰⁰ The key to determining what duty the defendant owes rests on whether the risk is inherent in the specified activity.¹⁰¹ Generally, Wyoming courts conclude that this inquiry remains an issue of law.¹⁰² Some decisions, however, suggest that where a dispute of material fact exists, the jury must decide whether each risk is inherent.¹⁰³

As two types of inherent risks exist, the trier-of-fact determines duty based on the specific facts of the incident.¹⁰⁴ These two types of inherent risks are: those that positively contribute to the allure and thrill of the activity, and those that “simply exist.”¹⁰⁵ Similarly, courts do not decide the integral nature of each risk based upon a generalized idea of how it relates to the activity.¹⁰⁶ Instead, courts determine whether each risk comprises a natural part of the activity relative to the specific facts surrounding each claim.¹⁰⁷

4. Consequences to Providers and Participants

The Act does not preclude plaintiff recovery in all circumstances.¹⁰⁸ In accordance with the primary assumption of risk doctrine, the Act requires plaintiffs to produce evidence proving that defendants owed them a duty.¹⁰⁹ If

comparative fault jurisdiction).

100. Hansen-Stamp, *supra* note 10, at 260 (determining court first makes duty analysis and then examines negligence only if duty exists); *see* Carden v. Kelly, 175 F. Supp. 2d 1318, 1322 (D. Wyo. 2001) (holding plaintiff must show non-inherent of risk in specific activity to establish duty).

101. Cooperman v. David, 214 F.3d 1162, 1167 (10th Cir. 2000) (determining fact-specific analysis critical and “can not [sic] look at risk in a vacuum”); Carden, 175 F. Supp. 2d at 1328 (stressing need to look further than “abstract character” of risks of activity); Slank, *supra* note 9, at 864 (opining court must make fact-specific inquiry to determine defendant’s obligation).

102. Carden, 175 F. Supp. 2d at 1328 (holding duty generally determined by court as matter of law); *see also* Centner, *supra* note 96, at 25 (articulating summary judgment appropriate if risk inherent); Roseman-Orr, *supra* note 15, at 734-35 (articulating Hawaii recreation act allows duty decided as matter of law).

103. Halpern v. Wheelodon, 890 P.2d 562, 565 (Wyo. 1995) (illustrating dispute of material fact allows jury to decide duty); *see also* Cooperman, 214 F.3d at 1166 (articulating specific instances where duty becomes issue of fact). *But see* Centner, *supra* note 96, at 25 (reinforcing statute allocates risk determination to judiciary); Hansen-Stamp, *supra* note 10, at 273, 276 (arguing duty determination always matter of law and not in jury’s province).

104. Hansen-Stamp, *supra* note 10, at 251 (identifying two categories of inherent risks that eliminate defendant’s duty); *see* Madsen v. Wyo. River Trips, Inc., 31 F. Supp. 2d 1321, 1327 (D. Wyo. 1999) (noting Hansen-Stamp’s classification of inherent risks determinative).

105. Hansen-Stamp, *supra* note 10, at 251; *see also supra* notes 90, 104 and accompanying text (discussing two types of risk Wyoming statute encompasses).

106. *Infra* note 107 and accompanying text (noting duty determination remains fact-specific).

107. *See* Carden v. Kelly, 175 F. Supp. 2d 1318, 1322 (D. Wyo. 2001) (emphasizing duty remains fact-specific); Walters v. Grand Teton Crest Outfitters, Inc., 804 F. Supp. 1442, 1445 (D. Wyo. 1992) (noting no duty arises when risk defined as “characteristic” of activity).

108. *See* Hansen-Stamp, *supra* note 10, at 272 (finding legislature did not limit claim when defendant breached duty); *see also* Carden, 175 F. Supp. 2d at 1328 (holding statute provides for negligence claims).

109. *See* Cooperman v. David, 214 F.3d 1162, 1165 (10th Cir. 2000) (holding plaintiff’s recovery depends

defendants owed a duty, the defense of primary assumption of risk dissipates and plaintiffs can attempt to prove their negligence claims.¹¹⁰ Under comparative negligence principles, defendants can raise a second defense that plaintiffs negligently contributed to their injuries.¹¹¹ Regardless of his or her contribution to the harm, the plaintiff still has a cause of action for negligence and the Act underscores the existence of liability when the defendant owes a duty of care to the plaintiff.¹¹²

Wyoming's Act extends broad protection to various activities and does not limit the court's discretion in determining what risks are inherent.¹¹³ Wyoming is only one of five states that does not cap outdoor liability by limiting the legislation to certain sports.¹¹⁴ Most states that list specific sports also list various inherent risks associated with these sports, leaving the courts to match the actual risk with one enumerated in the statute.¹¹⁵ By not limiting the Act's scope to certain sports, Wyoming protects a larger number of activities and areas of recreation to match the "explosion of recreational activity" occurring within its borders.¹¹⁶

C. Recent Trends in Recreation Responsibility

Over the last several years, two distinct trends have emerged in risk allocation in high-risk activities.¹¹⁷ First, California has increasingly held

on evidence of duty); *Carden*, 175 F. Supp. 2d at 1327 (explaining plaintiff's burden to establish duty element); *Halpern v. Wheeldon*, 890 P.2d 562, 565 (Wyo. 1995) (stating plaintiff's burden to establish duty).

110. See *Carden*, 175 F. Supp. 2d at 1328 (declaring intent of legislature "not to preclude parties from suing for a provider's negligence"); Hansen-Stamp, *supra* note 10, at 272 (indicating plaintiff must first pass duty inquiry to succeed on negligence).

111. See *supra* notes 58, 60 and accompanying text (articulating affirmative defenses available to defendant in comparative fault jurisdiction); see also *supra* note 45 and accompanying text (illustrating affirmative defenses codified in recreation safety statutes).

112. See Hansen-Stamp, *supra* note 10, at 253 (explaining difference between primary and secondary assumption of risk). Hansen-Stamp articulates that the Act is the first hurdle a plaintiff must overcome to succeed on a negligence claim. *Id.* at 272. Where a plaintiff proves that the defendant owes a duty of care, the defendant can point to the plaintiff's contribution to his or her injury to reduce or eliminate the plaintiff's claim. *Id.* at 265.

113. Slank, *supra* note 9, at 864-65 (commenting on plaintiffs' difficulty in overcoming Act because inherent risks not confined to statutory list); Spengler & Burket, *supra* note 5, at 163 (highlighting Wyoming's broad protection for outdoor providers because statute covers "all recreational activities"); see also Centner, *supra* note 96, at 36 (illustrating Wyoming's case-by-case analysis to determine liability if participant could have controlled risk).

114. Slank, *supra* note 9, at 864 (noting Wyoming does not limit protection to certain sports listed in statute); Spengler & Burket, *supra* note 5, at 161-63 (asserting five states use omnibus clauses covering all risks inherent in all types of activities).

115. Hansen-Stamp, *supra* note 10, at 255-56 (noting broad definition of risks allowed for broad protection of providers).

116. Hansen-Stamp, *supra* note 10, at 252 (indicating safety act provides greater protection to Wyoming's growing outdoor industry).

117. Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1641-45 (2003) (recognizing more prosecutors

recreation providers responsible for injuries to clients.¹¹⁸ Second, as the gap between the Wyoming and California approaches widens, there is a growing trend in favor of criminal punishment for injuries caused by co-participants.¹¹⁹

As a relatively new concept, states are imposing criminal liability for negligence.¹²⁰ In Colorado's *People v. Hall*,¹²¹ the court affirmed a jury verdict of manslaughter where the defendant recklessly collided with another skier, resulting in his death.¹²² The court relied on Colorado's ski safety statute to determine whether the defendant acted recklessly by skiing down a vacant slope at an excessive speed until colliding with the victim, who was traversing the run near the bottom of the mountain.¹²³ While the ski safety statute does not specifically provide for criminal prosecution, skiers fall vulnerable to criminal charges when their actions go beyond its scope.¹²⁴

Retribution and deterrence explain why recreation participants may be criminally prosecuted for reckless participation in sports.¹²⁵ Although potential civil liability encourages providers and co-participants to avoid reckless behavior, criminal punishment forces both parties to carefully evaluate their actions.¹²⁶ Retribution fulfills society's desire to hold someone accountable for

choosing to criminally charge co-participants and providers for participant injury). The increase in prosecutions appears grounded in social pressure to blame some entity for the injury to the participant and simultaneously place a greater burden on activity providers. *Id.* at 1642-44; *see also* Barcott, *supra* note 3, at 5 (indicating California and Wyoming represent growing divergent, risk-allocation trends).

118. *See* Barcott, *supra* note 3, at 5 (demonstrating California imposing stricter standards in recent years). *See generally* Kahn v. E. Side Union High Sch. Dist., 73 P.3d 30, 39-40 (Cal. 2003) (questioning whether standard for instructors adds second tier to duty inquiry).

119. Ramsey, *supra* note 118, at 1641-42 (noting increase in criminal prosecutions based on recreation safety statutes). With growing participation in high-risk and high-injury sports, society's desire for accountability expands beyond civil remedies for injured participants to criminal prosecution based on civil state statutes. *Id.* at 1692-1700; *see also* State v. Hall, 59 P.3d 298, 298-99 (Colo. Ct. App. 2003) (determining whether defendant maintained culpable mental state when skiing down mountain).

120. *See* Gregory G. Jackson, *Punishments for Reckless Skiing—Is the Law Too Extreme?*, 106 DICK. L. REV. 619, 625-26 (2002) (explaining courts use civil standards to determine criminal culpability); Ramsey, *supra* note 117, at 1703 (weighing benefits to imposing criminal liability even where no civil claims exist).

121. 999 P.2d 207 (Colo. 2000), *aff'd on appeal after remand*, 59 P.3d 298 (Colo. Ct. App. 2002).

122. *Id.* at 211 (stating defendant skied at excessive speed and caused accident). At the close of the day, the ski lift operator-defendant sped to the bottom of the hill at a high rate of speed and with an elevated blood alcohol level. *Id.* He collided with the victim, who was traversing near the bottom of the slope, and caused severe head trauma that led to the victim's death. *Id.*

123. *Id.* at 216 (noting defendant not criminally punished unless he maintained culpable mental state); Jackson, *supra* note 120, at 623-26 (noting defendant's subjective knowledge of risk factored into mens rea determination).

124. *See* Hall, 999 P.2d at 223 (citing legislative intent to impose liability on co-participants for reckless behavior); *see also* Jackson, *supra* note 120, at 624-25 (noting recreation safety statutes assist criminal punishment determinations); Ramsey, *supra* note 117, at 1643-44 (identifying unrest with expanding traditional tort remedies to criminal punishment in recreation safety).

125. *See* Jackson, *supra* note 120, at 634-37 (explaining retribution and deterrence theories to justify criminal punishment). Retribution derives its justification from society's desire to assign blame and accountability for the wrong committed, while deterrence serves as a preventive vehicle to dissipate future harm. *Id.*

126. Jackson, *supra* note 120, at 634-37 (theorizing deterrence forces skiers to weigh thrill of excessive

the injury.¹²⁷ The courts attempt to strike a delicate balance of satisfying the need to provide participants with safer conditions in high-risk activities and preventing a decline in these activities.¹²⁸

IV. ANALYSIS

A. California's Agenda of Participant Protection

While California maintains a two-tier inquiry to ascertain inherent risk, California state courts recently have applied a more stringent standard for coaches and instructors than for participants.¹²⁹ Where providers and coaches are granted some reprieve for injuries stemming from “encouraging” and “pushing” athletes to reach beyond their comfort levels, the courts do not offer a concrete method for determining liability.¹³⁰ As the test remains fact-sensitive, predictability of liability dissipates.¹³¹

The standard of the California courts does not provide a measuring device to predict liability because it is applied differently in each case.¹³² With respect to recreation providers and coaches, the courts do not frame the issue consistently,

speed with potential punishment). *But see* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1881 (1992) (arguing fear of prosecution for personal activities outweighs deterrence effect).

127. Jackson, *supra* note 120, at 634-35 (stating retribution attempts to make victim and society whole by punishing wrongdoer). *But see* Ramsey, *supra* note 117, at 1682-87 (indicating apparent weakness of society's desire to punish co-participants for recreation injuries).

128. *See* Coffee, *supra* note 126, at 1881-82 (noting imbalance creates “environment in which all are safe but none is free”); Ramsey, *supra* note 117, at 1703 (stating consequences of too much or too little criminal prosecution); Slank, *supra* note 9, at 861 (explaining legislative intent of statutes to protect economic viability).

129. *Knight v. Jewett*, 834 P.2d 696, 704 (Cal. 1992) (explaining two-tier standard for assumption of risk). The *Knight* court plainly indicates that imposition of strict liability for participant injuries would decrease participation in that sport or activity. *Id.* at 319-20; *see also* *West v. Sundown Little League of Stockton, Inc.*, 116 Cal. Rptr. 2d 849, 854 (Cal. Ct. App. 2002) (describing dual inquiry for assumption of risk in sports settings). The *West* court indicates that, where a coach-participant relationship exists, a coach must not increase the risks associated with the activity. 116 Cal. Rptr. 2d at 854-55.

130. *See Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (Cal. 2003) (noting imposition of liability on coach's for performing task of job would “chill” participation); *Bushnell v. Japanese-Am. Religious & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 676-77 (Cal. Ct. App. 1996) (asserting that part of instructor's job includes challenging students to move beyond comfort levels). Though the *Kahn* court determined a coach can push students without incurring liability, it remanded to determine how far the coach pushed his student and whether he reached beyond the requirements of his job. *Kahn*, 75 P.3d at 44.

131. *See Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 68 (Cal. Ct. App. 1995) (indicating scope of duty depends on relationship between parties). *But see Knight*, 834 P.3d at 318-19 (stating test in objective terms). In theory, the *Knight* standard articulates an objective, two-part test without accounting for plaintiff's subjective knowledge of the risk, but in application, the court defines the relationship narrowly to create a fact-based inquiry into the relationship between the parties. *See Kahn*, 75 P.3d at 44.

132. *Compare Kahn*, 75 P.3d at 44 (noting degree of instruction, promises made, and attention to participant fear factor into duty definition), *with Saffro v. Elite Racing, Inc.*, 119 Cal. Rptr. 2d 497, 501-02 (Cal. Ct. App. 2002) (considering whether organizer provided enough water along marathon course when determining liability).

but rather apply a broader or narrower interpretation depending on the circumstances.¹³³ Although the standard remains dependent on the specific activity and the relationship between the parties, its application is subject to judicial manipulation.¹³⁴

While California tort law does not impose provider liability in all cases, the courts have indicated that their decisions are influenced by a policy of participant protection.¹³⁵ The nature of the test provides built-in participant protection when the court inquires as to the nature of the relationship between the parties.¹³⁶ After the courts determine that either a coach/provider-participant relationship exists, they must determine, as a third level of inquiry, whether the defendant acted outside the range of ordinary activity by increasing the inherent risk of harm associated with the activity.¹³⁷ Despite its overarching goal of not trampling “vigorous participation” in the activity, the third level of inquiry does not appear to provide any additional layer of protection for the providers and instructors.¹³⁸

B. Wyoming's Consistent Support for Recreational Providers

Wyoming provides more protection to its recreational providers than does California.¹³⁹ Recreational providers receive statutory immunity when the court finds the risk inherent in the sport or activity.¹⁴⁰ Even though the statute provides a somewhat rigid standard, courts imply flexibility when making the

133. See *supra* note 129 and accompanying text (describing different factors in determining scope of duty under dual inquiry). For example, the *Kahn* court remanded for the lower court to apply several factors that affect the determination of the coach's duty, while the *Saffro* court simply framed the issue of whether the organizers provided enough water for participants. *Supra* note 132 and accompanying text.

134. Compare *West*, 116 Cal. Rptr. 2d at 855-56 (noting sun in little leaguer's eyes part of inherent risk of sport), and *Saffro*, 119 Cal. Rptr. 2d at 500-01 (stating organizer breached duty by not providing enough water to keep participants hydrated), with *Kahn*, 75 P.3d at 44 (describing issues of fact for determination on remand).

135. *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (highlighting overarching concern to prevent “chilling” participation in sports and recreation activities if liability imposed).

136. See *supra* note 131 and accompanying text (outlining additional inquiry for coaches and providers).

137. *Saffro*, 119 Cal. Rptr. 2d at 500-01 (explaining organizers cannot increase inherent risks of marathon); *Regents of the Univ. of Cal. v. Super. Ct.*, 48 Cal. Rptr. 2d 922, 1046-47 (Cal. Ct. App. 1996) (noting providers cannot expose participants to risks not inherent in activity); *Ferrari v. Grand Canyon Dories, Inc.*, 38 Cal. Rptr. 2d 65, 68-69 (Cal. Ct. App. 1995) (noting recreational commercial providers cannot increase inherent risk of activity).

138. See *Knight*, 834 P.2d at 710 (noting legal liability reduces participation); *West v. Sundown Little League of Stockton, Inc.*, 116 Cal. Rptr. 2d 849, 358 (Cal. Ct. App. 2002) (noting placement of liability on school creates economic and social considerations).

139. Compare *Barcott*, *supra* note 3, at 4 (noting two divergent trends in state tort law), and *supra* note 34 and accompanying text (highlighting two-tier standard plus inquiry for providers), with WYO. STAT. ANN. § 1-1-123 (Michie 1997) (providing no liability for inherent risks), and *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1322 (D. Wyo. 2001) (articulating single standard in Wyoming).

140. See *Cooperman v. David*, 214 F.3d 1162, 1165 (10th Cir. 2000) (noting statute intended as limitation on scope of duty for provider); *Walters v. Grand Teton Crest Outfitters, Inc.*, 804 F. Supp. 1442, 1445 (D. Wyo. 1992) (noting statute acts as exception to assumption of risk principles).

duty determination fact-specific.¹⁴¹

The issue for the trier-of-fact hinges on what constitutes an inherent risk of the activity.¹⁴² Two types of risk that can comprise inherent characteristics of the sport are those that the participant wants to confront and those that happen by accident or mistake.¹⁴³ As the statute accounts for mistakes by providers in their subjective judgment, the trier-of-fact must afford providers some leniency.¹⁴⁴

Where the Act provides that inherent risks immunize providers from liability, Wyoming's statutory approach resembles the third inquiry in California common law.¹⁴⁵ Notwithstanding this flexibility, the Act provides a reasonable amount of certainty in determining liability by affording participants little recovery if their injury resulted from an inherent risk of the sport.¹⁴⁶

C. Explaining the Dichotomy Between Wyoming and California

While both states correctly disregard the participant's subjective awareness, the Wyoming and California doctrines reflect two different policy concerns.¹⁴⁷ Most of Wyoming's industry remains land-dependent, and economic concerns over losing revenue from recreation participation seem to drive the legislative concern for providers' protection.¹⁴⁸ In California, the courts' concern with limiting sport participation is diminishing as the state shifts more liability to providers.¹⁴⁹

141. *Cooperman*, 214 F.3d at 1167 (reiterating trier-of-fact must not look at provider's duty within "vacuum"); *Carden*, 175 F. Supp. 2d at 1328-29 (indicating court cannot determine duty based solely on abstract nature of activity); *Madsen v. Wyo. River Trips, Inc.*, 31 F. Supp. 2d 1321, 1329 (D. Wyo. 1999) (arguing proper duty inquiry does not ignore factual circumstances of event).

142. See *Hansen-Stamp*, *supra* note 10, at 251, 270 (indicating inherent risks remain distinctive to activity and take two forms).

143. *Hansen-Stamp*, *supra* note 10, at 251 (stating statute refers to desired and undesired risks); see also *Cooperman*, 214 F.3d at 1166 (reinforcing *Hansen-Stamp*'s characterization of inherent risks).

144. *Hansen-Stamp*, *supra* note 10, at 251 (stating inherent risks "simply exist"); see also *Cooperman*, 214 F.3d at 1168 (stating risks include misjudgments by instructors). In fact, the *Cooperman* court classifies instructor misjudgments as an "undesirable risk which is simply a collateral part of the sport." *Cooperman*, 214 F.3d at 1168.

145. See WYO. STAT. ANN. § 1-1-123(b) (Michie 2003) (stating recreation providers not "required to eliminate . . . inherent risks"). Compare *Cooperman*, 214 F.3d at 1166-68 (explaining misjudgments part of inherent risk), with *supra* note 135 and accompanying text (providing examples where defendant determined to be provider).

146. See *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1328 (D. Wyo. 2001) (validating plaintiff's claim of non-inherent risk); *Hansen-Stamp*, *supra* note 10, at 272 (stating plaintiff's claim survives if risk not inherent part of activity); *Slank*, *supra* note 9, at 865 (stating Wyoming tough for plaintiffs in recreation liability claims).

147. Compare *Hansen-Stamp*, *supra* note 10, at 252 (noting explosion of recreational activity in Wyoming), and *Slank*, *supra* note 9, at 861 (indicating Wyoming's purpose to protect economic prosperity), with *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (explaining California's desire to prevent decrease in participation), and *Larazoff*, *supra* note 49, at 44-45 (indicating court concerned with co-participant liability).

148. *Slank*, *supra* note 9, at 861 (stating statute secures economic benefit); State of Wyoming, *supra* note 51 (providing statistics to demonstrate Wyoming's economy primarily land-based).

149. See *Barcott*, *supra* note 3, at 5 (noting new trend to place liability on providers); see also State of

Though neither regime takes the participant's subjective awareness of risk into account, Wyoming's approach offers a viable, consistent solution to the problem of accidents in high-risk sports.¹⁵⁰ When risk draws participants to a sport, providers should not be held accountable for the foreseeable injuries.¹⁵¹ Thrill-seekers should not be able to willingly seek out providers for extreme adventures and then recover damages for predictable accidents.¹⁵² Though the Wyoming legislature permits the judiciary to determine what risks are inherent, it recognizes that some extreme sports offer no guarantees for safety.¹⁵³ Conversely, California seems to insure participants against any mishap despite the foreseeability of the risk.¹⁵⁴

V. CONCLUSION

Wyoming and California represent the most conservative and liberal approaches in recreation liability. Wyoming offers a conservative approach in that it protects providers from liability when participants incur injury due to an inherent risk. Leaving this inherent risk determination to the judiciary, the legislature provides blanket immunity to providers by excluding inherent risk from the scope of their duty. Conversely, California relies on common law comparative fault principles to determine when inherent risks comprise part of the provider's duty.

Several interesting issues arise upon closer examination of these approaches. First, Wyoming and California rely on different industries for their economic prosperity. Wyoming depends on its landscape for its financial well-being, while California's economy remains more diversified and, as a result, not as dependent on high-risk recreation for economic viability. Second, criminal prosecution based on these tort principles creates an interesting dilemma. Both

California, *supra* note 51 (demonstrating diverse industries support its strong economy).

150. See WYO. STAT. ANN. § 1-1-123(a) (indicating providers not responsible for inherent risks); *Madsen v. Wyo. River Trips, Inc.*, 31 F. Supp. 2d 1321, 1326-27 (D. Wyo. 1999) (noting legislative amendment to Act eliminated ambiguity); *Hansen-Stamp*, *supra* note 10, at 266-67 (noting legislative desire to erase ambiguity in judicial interpretation of Act).

151. See *Barcott*, *supra* note 3, at 3 (reporting increased claims for injuries raise provider insurance and put many out of business); see also *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (indicating participant responsible because foresaw possible injury).

152. *Steeplechase*, 166 N.E. at 174 (indicating participant responsible for own actions when risk predictable).

153. WYO. STAT. ANN. §§ 1-1-121 to -123 (Michie 1997) (stating providers not liable for inherent risks of recreational activities); *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1327-28 (D. Wyo. 2001) (highlighting judicial interpretation of inherent risk); see also *Hansen-Stamp*, *supra* note 10, at 270 (explaining inherent risks occur in two contexts).

154. See *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Cal. 2003) (indicating court, not jury, determines scope of duty); *Giardino v. Brown*, 120 Cal. Rptr. 2d 77, 830 (Cal. Ct. App. 2002) (stating dual inquiry includes relationship of parties to activity). Compare *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 1221 (Cal. Ct. App. 2003) (noting sports setting requires special consideration), with *Kahn*, 75 P.3d at 39 (indicating additional burden for coaches).

California and Wyoming explicitly exclude the participant's subjective knowledge of the risk from consideration when determining the scope of the provider's duty. California's recent increase in provider liability appears to incorporate coaches' knowledge of the risk, thereby resembling the mens rea required in criminal prosecution.

Finally, Wyoming's approach provides the best answer for the problem of increasing participation by inexperienced participants in high-risk recreation. While providing the judiciary with less discretion, the legislature immunizes providers from liability based on inherent risk. Given the unique nature of high-risk recreation, providers cannot be expected to insure participants from the very risks that draw participants to the activity. As novice participation in extreme sports increases, courts and legislatures must weigh varying and valid policy considerations in order to achieve a just result.

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