A Knight/Li News Update: A Detailed Analysis of the Case Law Suggests That We Should Return to a Consent-Based Assumption of Risk Defense

Christopher D. Boatman

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A Knight/Li News Update: A Detailed Analysis of the Case Law Suggests That We Should Return to a Consent-Based Assumption of Risk Defense

Christopher D. Boatman*

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I. INTRODUCTION

"Assumption of the risk" is a defense to negligence. Before Knight v. Jewett, in order for a defendant to prevail on this defense, he had to prove that the plaintiff had

* J.D. Candidate, May 2014, Western State College of Law. I would like to thank Professor Philip Merkel and Jeff Guerrera, for all of their help and support in putting this article together. I especially want to thank Professor Gregory Sergienko for instilling in me a love for Torts. Without him as a Professor, this article would not have been possible.

knowledge of the risk and chose to voluntarily encounter that risk. Intuitively, it makes sense to bar these plaintiffs from recovery in instances because he or she has agreed to accept the risk of injury.

However, in 1992, the assumption of the risk defense was radically changed with the case of Knight v. Jewett. Knight abolished this “consent-based” defense as a complete bar to a plaintiff’s recovery. The focus was no longer on the plaintiff and whether she had consented to the risk, but rather, the focus was on the defendant and whether he had a duty to use due care. As such, the court recognized two different types of assumption of risk defenses. The California Supreme Court labeled them as “primary” assumption of risk and “secondary” assumption of risk. A “primary assumption of [the] risk” case is one in which the court holds, as a legal conclusion, that the defendant owed no duty to the plaintiff. A “secondary assumption of [the] risk” case is one in which the defendant does owe the plaintiff a duty, but the plaintiff knowingly encounters this risk despite the defendant’s breach of this duty.

In Knight, the court held that the primary assumption of risk doctrine applied to coparticipants in active sports. In other words, a coparticipant defendant is not liable for “ordinary carless conduct committed during the sport.” Since Knight, the number of activities covered by the primary assumption of risk doctrine has steadily increased. The doctrine has been applied to relieve both coaches and owners of facilities of a duty to use due care and in the most recent ruling, the court stated that the doctrine applies to not only sports, but other recreational activities that involve inherent risks.

Knight’s ruling, however, is not without its problems. Thus far, it appears as though courts do not follow any consistent analytical pattern when determining if a given defendant owes a given plaintiff a duty in a particular recreational activity. This has led not only to inconsistent analytical approaches amongst the courts, but more importantly, it has led to improperly decided cases. This paper argues that we should return to the traditional consent-based assumption of the risk defense and abolish the

4. Knight, 834 P.2d at 705-06.
5. See generally id.
6. Id. at 703.
7. Id.
8. Id.
9. Id. at 703.
10. All further references to “the court” are to the California State Supreme Court unless otherwise stated.
11. Knight, 834 P.2d at 711.
12. Id. at 710.
13. See generally Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30 (Cal. 2003) (holding that a swim coach only breaches his duty to his students if he acts recklessly or intentionally).
14. See generally Am. Golf Corp. v. Super. Ct., 93 Cal. Rptr. 2d 683 (Ct. App. 2000) (holding that an owner of a golf course had no duty to protect the plaintiff from the inherent risks in golf); See generally Nalwa v. Cedar Fair, L.P., 290 P.3d 1158 (Cal. 2012) (holding that an owner of a bumper car ride had no duty to protect the plaintiff from risks inherent in bumper cars).
15. Nalwa, 290 P.3d at 1163.
"primary" and "secondary" analysis currently in place. The current approach is confusing, inconsistent and worst of all, based on incorrect interpretations of the historical case law.

Part II begins with a brief and necessary history of the assumption of risk doctrine concluding with the Supreme Court's most recent ruling, Nalwa v. Cedar Fair.\textsuperscript{17} Part III examines various problems with the current approach. Specifically, that the current approach has led to counterintuitive results, inconsistent analytical approaches, and that is a product of a flawed interpretive history. Finally in Part IV shows how a return to the consent-based approach, if applied correctly, would solve these problems.

II. HISTORY

A. Li v. Yellow Cab. Co.

\textit{Li v. Yellow Cab. Co.}, is the seminal case that changed the course of the assumption of the risk defense in California\textsuperscript{18}, thus, almost every post-\textit{Knight} "assumption of risk" article must begin with the decision of \textit{Li}.

In \textit{Li}, the plaintiff was making a left hand turn when she was struck by an oncoming vehicle.\textsuperscript{19} The trial court found that the plaintiff had been contributorily negligent, which is a finding that her own negligence was a contributing factor to her injury.\textsuperscript{20}

Before \textit{Li}, the law in California barred any recovery to a contributorily negligent plaintiff.\textsuperscript{21} The \textit{Li} court faced the decision of whether to continue to bar recovery for contributorily negligent plaintiffs or whether California would become a "comparative fault" state – where the plaintiff's recovery is reduced in proportion to her fault.\textsuperscript{22} The very first sentence of the case frames this issue:

In this case we address the grave and recurrent question whether we should judicially declare no longer applicable in California courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault.\textsuperscript{23}

Ultimately, the defense of contributory negligence as a complete bar was abandoned in favor of comparative fault principles.\textsuperscript{24}

\textsuperscript{17} See generally Nalwa, 290 P.3d 1158.
\textsuperscript{18} See generally \textit{Li v. Yellow Cab Co.}, 532 P.2d 1226 (Cal. 1975).
\textsuperscript{19} \textit{Id.} at 1229.
\textsuperscript{20} \textit{Id.} at 1230.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 1229.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} See generally \textit{Li}, 532 P.2d 1226.
The court then addressed how adopting comparative fault principles would affect other defenses. As for assumption of risk, the court began its discussion by pointing out that the "assumption of risk" defense consisted of "two distinct defenses." The first was described as, "[I]n one kind of situation, . . . where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence, plaintiff’s conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence." The second was described as, "Other kinds of situations . . . are those . . . where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him."

The court then concluded:

We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.

B. Knight v. Jewett

After Li, there was some disagreement about exactly which "type" of the assumption of risk defense Li intended to be subsumed by comparative fault principles. Thus, Knight v. Jewett sought to clarify Li court’s intent.

In Knight, the plaintiff and defendant were engaged in a game of touch football. The plaintiff and defendant collided and the defendant accidentally stepped on the plaintiff’s finger. The plaintiff underwent three unsuccessful operations before the finger was amputated. The plaintiff sued for negligence and the defendant claimed that the plaintiff assumed the risk.

To explain Li’s intent, the Knight court began by quoting the above passage from Li which discussed the "two distinct defenses." They then labeled these two defenses as "primary" and "secondary" assumption of risk. The court defined "primary assumption of risk" as "those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk." The court defined

25. Id. at 1240.
26. Id.
27. Id.
28. Id.
29. Id. at 1241.
31. Id. at 702-03.
32. Id. at 697.
33. Id.
34. Id. at 698.
35. Id.
36. Knight, 834 P.2d at 701; see also supra text accompanying note 26.
37. Knight, 834 P.2d at 703.
38. Id.
“secondary assumption of risk” as “those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty.”

The court proceeded by clarifying that *Li* held that secondary assumption of risk was to be merged with comparative fault principles, while primary assumption of risk continued to bar plaintiffs from recovery:

> [T]he relevant passage in *Li* provides that the category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff’s recovery continues to be completely barred involves those cases in which the defendant’s conduct did not breach a legal duty of care to the plaintiff, i.e., ‘primary assumption of risk’ cases, whereas cases involving ‘secondary assumption of risk’ properly are merged into the comprehensive comparative fault system adopted in *Li*.

### C. Shin v. Ahn

In *Knight*, the court “expressly left open the question whether the primary assumption of risk doctrine should apply to noncontact sports, such as golf.” Thus, *Shin v. Ahn* “represent[ed] the next generation of our *Knight* jurisprudence.”

In *Shin*, the plaintiff and the defendant were playing golf. The plaintiff was standing in front of the defendant while the defendant was teeing off. The defendant “inadvertently ‘pulled’ his tee shot to the left, hitting plaintiff in the temple.” The court held that “the primary assumption of risk doctrine should be applied to golf” and thus, *Knight*s rule was applicable to parties engaged in noncontact sporting activities.

### D. Nalwa v. Cedar Fair

The Supreme Court’s most recent case, officially removed the limitation that the doctrine only applied to activities labeled “sports.”

In *Nalwa*, the plaintiff was injured while she was riding the bumper cars with her son. Her hand was on the dashboard and she fractured her wrist when her car was bumped from the front and the back.

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39. Id.
40. Id.
42. Id. at 582.
43. Id. at 583.
44. Id.
45. Id.
46. Id. at 590.
48. Id. at 1160.
49. Id.
The issue the court addressed was whether the “primary assumption of risk” doctrine would apply to bumper cars, even though it is not a “sport.” The court stated, “[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities involving an inherent risk of injury to voluntary participants where the risk cannot be eliminated without altering the fundamental nature of the activity.”

III. Problems

A. Inconsistent Analytical Approaches and Counterintuitive Results

The Knight court made two important and distinct statements about the defendant’s duty – and breach of that duty – which set the foundation for an analysis of the defendant’s liability. First, the court stated,

[D]efendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, [but] it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.52

Second, the court wrote, “[A] participant in an active sport breaches a legal duty of care to other participants only if . . . the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”54

These two statements allow for three possible conditionals that courts may utilize to deny recovery. The first conditional, which follows from the first half of the first statement, is: if the risk is inherent, then the defendant generally has no duty to eliminate or protect the plaintiff from it. Courts may use this conditional to hold that the defendant had no duty, thus relieving him of liability. The second half of the first statement, “[but] it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport,” may be turned into this conditional about breach: if the defendant did not increase the risks to a participant over and above those inherent in the sport, then the defendant did not breach his duty. The third conditional, which follows from the

50. Id. at 1161.
51. Id. at 1163.
53. There is an interpretive issue to be noted here of the phrase “breaches a legal duty . . . only if” that is best evidenced when the condition goes unsatisfied and thus, one arrives at the conclusion that there has been no breach of a legal duty. The statement “X did not breach a legal duty” could mean either (1) that although X did have a duty, he did not breach it; or (2) X had no existing duty, therefore there was nothing for him to breach. If the former is the correct interpretation, then the court is performing a breach analysis, which is supposed to be decided by the fact-finder, not the court. If the latter is correct, then the court is appropriately within its authority because it is merely a declaration of when a party has a duty.
54. Knight, 834 P.2d at 711 (emphasis added).
second statement, is: if the defendant did not act intentionally or so recklessly as to be totally outside the range of the ordinary activity involved in the sport, then he did not breach his duty\textsuperscript{55} to the plaintiff. Note that if courts use either of these last two conditionals, it is actually a conclusion about whether the defendant did or did not breach his duty; a responsibility that is typically within the province of the jury.\textsuperscript{56}

As will be shown, different courts use different conditionals to determine if the defendant is liable. As a result of this lack of a consistent analytic approach, courts have a broad power to deny recovery in a multitude of circumstances. Use of one conditional over the others often produces counterintuitive results. These counterintuitive results are most prominent in cases \textit{Ford v. Gouin}\textsuperscript{57} and \textit{American Golf Corporation v. Superior Court.}\textsuperscript{58}

1. \textit{Ford v. Gouin}

In \textit{Ford}, the court used the third conditional to deny recovery and did no analysis using the first,\textsuperscript{59} leading to a counterintuitive result whereby a careless defendant was relieved of liability after exposing an innocent plaintiff to a non-inherent risk.

In \textit{Ford}, the plaintiff was water skiing both barefoot and backward.\textsuperscript{60} He was struck in the back of the head by an extended tree limb hanging from the shoreline.\textsuperscript{61} The plaintiff sued the ski boat operator for negligence, arguing that the defendant drove the boat too close to the riverbank.\textsuperscript{62} The trial court granted the defendant’s motion for summary judgment on primary assumption of risk grounds.\textsuperscript{63} This was upheld by the appellate court.\textsuperscript{64} The Supreme Court stated that the “defendant was a coparticipant in the sports activity” and could therefore only be held liable\textsuperscript{65} if he acted recklessly as opposed to negligently.\textsuperscript{66} The court found that the defendant “was, at most, careless in steering the boat”\textsuperscript{67} and thus, the defendant could not be held liable.\textsuperscript{68}

Analytically speaking, the court states,

\textsuperscript{55} The same interpretation issue explained in note 53 above also applies here.
\textsuperscript{56} See, e.g., Dilan A. Esper & Gregory C. Keating, \textit{Abusing \textquotedblleft Duty\textquotedblright}, 79 S. Cal. L. Rev. 265, 272 (2006) ("Courts are usurping traditional roles of jury and legislature, aggrandizing their own power at the expense of these more democratic institutions.").
\textsuperscript{57} Ford v. Gouin, 834 P.2d 724 (Cal. 1992).
\textsuperscript{58} Am. Golf Corp. v. Super. Ct., 93 Cal. Rptr. 2d 683 (Ct. App. 2000).
\textsuperscript{59} See generally Ford, 834 P.2d 724.
\textsuperscript{60} Id. at 726.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 727.
\textsuperscript{65} The court does not specify whether the defendant would not be liable because he had no duty that he could breach or whether he would not be liable because he did not breach a duty that he did in fact have.
\textsuperscript{66} Ford, 834 P.2d at 727-28.
\textsuperscript{67} Id. at 728.
\textsuperscript{68} Id.
The assumption of risk doctrine operates as a complete bar to a plaintiff’s action only in instances in which, in view of the nature of the activity at issue and the parties’ relationship to that activity, the defendant’s conduct did not breach a legal duty of care owed to the plaintiff.69

First, it should be noted that this statement asserts that in instances where the defendant’s conduct did not breach a legal duty, the assumption of risk doctrine operates as a complete bar to plaintiff’s action. This seems to be nothing more than a truism. It must be true that if the defendant did not breach a legal duty, the plaintiff cannot recover. The court then goes on to explain the standard for a breach (which is the same as the third conditional statement from above) as, “[I]n general the legal duty applicable to a coparticipant in an active sport simply is a duty to avoid either intentionally injuring another participant or engaging in conduct so reckless as to bring it totally outside the range of the ordinary activity involved in the sport.”70 With the standard set at intentional or reckless and the finding that the defendant was careless at most, the court correctly granted the defendant’s motion for summary judgment.

However, the question of whether the risk was inherent in the activity was never addressed.71 Nor was the issue addressed whether the defendant used due care not to increase the risks over and beyond those inherent in the sport.72 The risk to which the plaintiff was exposed – being struck by a tree limb as a result of the boat operator driving too closely to the shoreline – is not an inherent risk in the activity of water skiing. The court used the third conditional and the third conditional alone to deny recovery.

As for the counterintuitive results, at trial, the plaintiff relied on evidence “of a water ski expert – a two-time national champion – who had stated that (1) ‘it is the responsibility of the driver of the boat to watch out for the skier being towed, like a guide dog for a blind person . . . .’ ”73 Also, the plaintiff “relied on a portion of defendant’s deposition acknowledging that, prior to the accident, defendant had driven water skiers in the same area of the [channel] on more than five occasions.”74

Based on this evidence, it appears that the defendant was careless and he exposed the plaintiff to a risk that was not inherent in the activity.75 Yet the defendant was relieved of liability simply because he did not act recklessly.76 That we would

69. Id. at 726.
70. Id.
71. See generally id.
72. See generally Ford, 834 P.2d 724.
73. Id. at 727.
74. Id.
75. Even if we merely concluded that we had a possibly careless defendant, who has possibly exposed the plaintiff to a risk not inherent in the sport, this would be a moot point. The problem is the same: we are denying an innocent party recovery without even determining whether the defendant actually was careless or exposed the plaintiff to a non-inherent risk; the court would deny liability in such a situation because the defendant’s act could not be found to be reckless.
76. Ford, 834 P.2d at 728.
allow a defendant who has been careless and exposed an innocent party to a risk that is not inherent in the activity to escape liability seems wildly illogical.

Why would the court do this? The rationale from the case is: "vigorous participation in the sport likely would be chilled, and, as a result, the nature of the sport likely would be altered, in the event legal liability were to be imposed on a sports participant for ordinary careless conduct."\textsuperscript{77} The court provides an example:

Imposition of legal liability on a ski boat driver for ordinary negligence in making too sharp a turn, for example, or in pulling the skier too rapidly or too slowly, likely would have the same kind of undesirable chilling effect on the driver’s conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. As a result, holding ski boat drivers liable for their ordinary negligence might well have a generally deleterious effect on the nature of the sport of water skiing as a whole.\textsuperscript{78}

This rationale makes perfect sense where the plaintiff stands to receive some benefit from the risk. Taking sharp turns or pulling the skier too rapidly would increase the excitement and thrill for an experienced water skier, but it can hardly be said that this is somehow analogous to steering too closely to a shoreline with overhanging limbs. The skier receives no benefit by being towed too closely to the shoreline. Allowing an innocent party to recover for an injury caused by a careless defendant who steered too close to the shoreline would not chill vigorous participation in the activity; if such a result would chill anything, it would likely be the act of steering carelessly too close to the shoreline.

2. American Golf Corporation v. Superior Court

In contrast to Ford, in American Golf v. Superior Court, the court used the first and second conditional\textsuperscript{79} to relieve a golf course from the duty to use due care. The defendant hit his golf ball, which ricocheted off a yard marker and struck the plaintiff in the eye.\textsuperscript{80} The plaintiff sued the golf course “for negligent design and placement of the yardage marker.”\textsuperscript{81} The court held that the defendant owed no duty to the plaintiff\textsuperscript{82} and concluded “We hold golf is an active sport, errant shots are an inherent risk of golf, yardage markers are an integral part of the sport, and the golf course as recreation provider did not increase the risk of injury by its design and placement of the yardage marker.”\textsuperscript{83}

Analytically, the court states, “[G]olf course had no duty to protect [plaintiff] from the inherent risk of being hit by an errant shot, and the primary assumption of the

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} See supra, p. 8 (explanation of three conditional statements).
\textsuperscript{80} Am. Golf Corp. v. Super. Ct., 93 Cal. Rptr. 2d 683, 686 (Ct. App. 2000).
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 690.
\textsuperscript{83} Id. at 685.
risk doctrine bars [plaintiff’s] action."84 This sounds as if it is an application of the first conditional 85 from above, arriving at the conclusion that the defendant owed no duty to the plaintiff. However, the case also states, “The duty of a golf course towards a golfer is to provide a reasonably safe golf course. This duty requires the golf course owner ‘to minimize the risks without altering the nature of the sport.’ “86 The court goes on to say that “the owner of a golf course has an obligation to design a golf course to minimize the risk that players will be hit by golf balls,”87 which makes it sound as if the golf course owner did have a duty, though the court did not address whether there was a triable issue of fact whether the defendant did or did not breach this duty of reasonable design.88 Instead, the court used the second conditional 89 to arrive at the conclusion that there was no triable issue of fact as to “whether golf course increased the risk to [plaintiff] of being hit by an errant shot by its design and placement of the yardage marker.”90 Thus, using both the first and second conditional, the court arrives at the conclusion that the defendant had no duty to protect the plaintiff from this inherent risk and also that the defendant did not breach his duty not to increase the risks beyond those inherent. As pointed out above, the use of this second conditional to arrive at the conclusion that the golf course did not breach its duty not to increase the risks beyond those inherent in the sport is a breach analysis and thus, should have been determined by the factfinder as a “secondary assumption of risk” claim.

The counterintuitiveness of the conclusion that the golf course owner owed no duty is perhaps best highlighted in the analogous situation a baseball stadium. In Ratcliff v. San Diego Baseball Club of Pacific Coast League,91 cited favorably by the Knight court,92 the court states, as a usual rule that applied in such a case, that “[a]ll that is required is the exercise of ordinary care to protect patrons against such injuries. . . .”93 By this sentence alone we see that the owner does in fact owe a duty to its patrons as a legal conclusion and thus, this is not a primary assumption of risk situation.

The Ratcliff court continues, “The essence of these rules seems to be that those in charge of such games are not insurers of their patrons, that they are required to exercise ordinary care to protect their patrons from such injuries. . . .”94 Again, this is clearly not a case where, as a legal conclusion, the owner owes “no duty” to its

84. Id. at 690.
85. See supra, p. 8 (explanation of three conditional statements).
86. Am. Golf Corp., 93 Cal. Rptr. 2d at 689 (quoting Morgan v. Fuji Country USA, Inc., 40 Cal. Rptr. 2d 249, 253 (Ct. App. 1995)) (citations omitted).
87. Id.
88. See generally id. at 689-90.
89. See supra, p. 8 (explanation of three conditional statements).
90. Am. Golf Corp., 93 Cal. Rptr. 2d at 689.
93. Ratcliff, 81 P.2d at 626 (citation omitted).
94. Id.
patrons. However, in American Golf, the court undoubtedly used the primary assumption of risk doctrine to deny recovery. 95

As described above, the courts’ use of either conditional has lead to results contrary to our general intuitions. To make matters worse, each court arrived at its result using a different analytical approach. American Golf also sets a precedent to relieve owner-defendants of an obligation to use reasonable care in providing a reasonably safe design so long as the owner-defendant does not increase the risks beyond those that are inherent in the sport. Even if these cases do not lead to future unjust results, it is evident that the current approach will continue to lead to inconsistent analytical patterns stymying judicial predictability.

B. The Law is as it Stands Today Because of Poor Case Interpretation

Perhaps the biggest problem with the current approach is that it is the product of case misinterpretation after case misinterpretation. Because the Knight decision was based on the Li opinion, and the Li opinion is based on the case of Grey v. Fibreboard, 96 in discussing the interpretive flaws I will begin with Grey, proceed to Li, and conclude with Knight.

1. Grey v. Fibreboard

In Grey, the plaintiff was a machinist who was employed to repair the defendant’s paper cutting machine. 97 After working on the machine for two to three hours, the plaintiff was injured when he got too close to a “roller” and his hand was pulled into the machine. 98 The trial court refused to instruct the jury on the assumption of risk doctrine, leading to the defendant’s appeal. 99 The Grey court made the following statement (which should look familiar because it is the quote from which the Li court based its opinion):

While contributory negligence and assumption of risk are two different legal doctrines, one being based on a failure to exercise due care in the circumstances and the other being based upon voluntary exposure to a known risk, it is nevertheless true that the two doctrines overlap. The commentators universally recognize that the term “assumption of risk” has been used by the courts to describe several kinds of situations whose real differences should demand different kinds of treatment. To simplify greatly, it has been observed that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence, plaintiff’s conduct, although he may

95. Am. Golf Corp., 93 Cal. Rptr. 2d at 685.
98. Id.
99. Id.
encounter that risk in a prudent manner, is in reality a form of contributory negligence which may be defined as follows: "... conduct on the part of the plaintiff which falls below the standard which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." (Rest.2d Torts, s 463, p.506) Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of a defendant's duty of care.100

The reasonable interpretation of the Grey quote from above is that in cases where the defendant unreasonably assumes a risk, such a situation is actually a form of contributory negligence. However, this rule statement by Grey is incorrect.101 Cases in which a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence is not in reality a form of contributory negligence. Rather, it is in reality a form of both contributory negligence and assumption of the risk.

As stated in Grey, the defenses of contributory negligence and assumption of the risk often "overlap," meaning that a particular fact pattern can give rise to both defenses. The Grey case fell within this "overlap." In a situation where the defenses overlap, the defendant would claim both that the plaintiff encountered a specific known risk imposed by the defendant's negligence and that it was unreasonable for the plaintiff to have assumed such a risk. That the fact pattern lends itself to both defenses, does not make a defendant's claim of "assumption of risk" a variant of "contributory negligence" any more than it would make the defendant's claim of "contributory negligence" a variant of "assumption of the risk." Because this situation falls within the overlap, the court should not have simply concluded this was a form of "contributory negligence." Instead, the court should have analyzed both whether the plaintiff assumed the risk as well as a whether the plaintiff was contributorily negligent.

Grey's implication – that the first scenario is a form of contributory negligence and not really assumption of the risk – is misleading. This is best evidenced by Li which, as I will explain, interpreted Grey's statement in precisely that manner.

2. Li v. Yellow Cab Co.

Li failed to realize Grey's misstatement of the law and it made things worse by misstating the Grey opinion. Li begins its discussion of assumption of risk with the sentence, "As for assumption of risk, we have recognized in this state that this defense

100. Id. at 156 (citations omitted).
101. This is significant because it is this statement that forms the foundation of the Li opinion.
overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses."\textsuperscript{102}

This holding is misstated. The \textit{Li} court seemed to be under the impression that this somehow came from the \textit{Grey} opinion, as \textit{Li} cites to \textit{Grey} as authority for this point.\textsuperscript{103} Yet, the \textit{Grey} opinion did not conclude that assumption of risk is made up of at least two distinct defenses. The \textit{Grey} opinion with respect to this point only said, "The commentators universally recognize that the term 'assumption of risk' has been used by the courts to describe several kinds of situations whose real differences should demand different kinds of treatment."\textsuperscript{104} Simply because the term has been used to describe several situations, it does not logically follow that such uses were \textit{correct} uses of the term. In a case of an overlap, the defendant's assertion that the plaintiff "unreasonably assumed the risk" is a defense that is made up of "two distinct defenses," but it is made up of the defenses of assumption of the risk and contributory negligence. The defense of assumption of the risk alone, although it may have been used to describe several situations, was – and therefore should today be – one distinct defense, not two. Further support for this view – that the assumption of risk defense is only one defense and it is the overlap that is made up of two defenses – contrary to the \textit{Li} opinion, is found in a case cited by \textit{Li}: \textit{Fonseca v. County of Orange}.\textsuperscript{105}

In \textit{Fonseca}, the plaintiff was an employee of a construction company, Lomar Construction.\textsuperscript{106} Lomar Construction was an independent contractor hired by the County of Orange.\textsuperscript{107} The plaintiff slipped on some excess cement, fell from the bridge he was working on, and sustained permanent injuries to his left arm.\textsuperscript{108} Despite being required by law, his employer had not put up any railings around the perimeter of the bridge to prevent the employee's fall.\textsuperscript{109} As a result, the plaintiff sued the county, arguing that it was "vicariously liable . . . for the negligence of its contractor."\textsuperscript{110}

\textit{Fonseca} begins by explaining the differences between a contributory negligence claim and an assumption of risk claim:

It has been repeatedly noted that contributory negligence and assumption of risk are separate and distinct defenses. Assumption of risk involves the negation of defendant's duty; contributory negligence is a defense to a breach of such duty; assumption of risk may involve perfectly reasonable conduct on plaintiff's part; contributory negligence never does; assumption of risk typically embraces the voluntary or deliberate incurring of known peril;

\textsuperscript{102} Li v. Yellow Cab Co., 532 P.2d 1226, 1240 (Cal. 1975).
\textsuperscript{103} Id.
\textsuperscript{104} Grey, 418 P.2d at 156.
\textsuperscript{105} Fonseca v. Cnty. of Orange, 104 Cal. Rptr. 566 (Ct. App. 1972).
\textsuperscript{106} Id. at 567.
\textsuperscript{107} Id. at 568.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
contributory negligence frequently involves the inadvertent failure to notice danger.\textsuperscript{111}

The court continues on to explain the "overlap:"

The courts have frequently recognized that there is an area of overlap between the two doctrines, so that identical facts may give rise to both defenses. The overlap has been described as follows: "[The] plaintiff's conduct in encountering a known risk may be in itself unreasonable, because the danger is out of all proportion to the advantage which he is seeking to obtain . . . . [If] that is the case, his conduct is a form of contributory negligence, in which the negligence consists in making the wrong choice and voluntarily encountering a known unreasonable risk. In such cases, it is clear that the defenses of assumption of risk and contributory negligence overlap, and are as intersecting circles, with a considerable area is common, where neither excludes the possibility of the other."\textsuperscript{112}

The court then concludes, "the facts of this case fall squarely within the area of the 'overlap.' All of the elements of assumption of risk are present."\textsuperscript{113} This case makes clear that it is the overlap that is made up of two distinct defenses.

The \textit{Li} court – because of Grey's own incorrect assertion – believed that Grey was in fact distinguishing between a type of assumption of risk that was in actuality contributory negligence and another kind of assumption of risk.\textsuperscript{114} Unbeknownst to Grey, it was actually making a distinction between an "overlap" (i.e. an unreasonable assumption of risk) and a solitary assumption of risk defense (i.e. an assumption of risk that was not unreasonable). Due to Grey's misstatement, \textit{Li} was under the false impression that there existed a variant of assumption of the risk that was in actuality merely a form of contributory negligence.

After \textit{Li} adopted comparative fault principles and eliminated a complete bar for recovery when the plaintiff had been contributorily negligent, \textit{Li} logically came to the conclusion that the defense of assumption of risk that was "in reality a form of contributory negligence" should be subsumed by comparative fault principles – just as the defense of contributory negligence had been subsumed.\textsuperscript{115}

\textit{Li} however, did not provide any greater clarity than that. The entire discussion on this point states only:

As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simply greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he

\textsuperscript{111} Fonseca, 104 Cal. Rptr. at 571. (citations omitted).
\textsuperscript{112} \textit{Id}. (citations omitted).
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Li} v. Yellow Cab Co., 532 P.2d 1226, 1240-41 (Cal. 1975).
\textsuperscript{115} \textit{Id}. 
may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . . ] Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involved contributory negligence, but rather a reduction of defendant’s duty of care.”. We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.\(^{116}\)

Li made no attempt to clarify what Grey held and as a result, was unable to recognize its flaw. The Li court simply quoted Grey and followed the quote with the conclusion that of the two kinds of assumption of risk, the version of assumption of risk that is no more than a variant of contributory negligence ought to be subsumed by comparative fault principles.

3. Knight v. Jewett

Before the Knight opinion, many appellate decisions interpreted Li as contrasting an “unreasonable assumption of the risk” with a “reasonable assumption of the risk.”\(^{117}\) The Knight court disagreed:

A number of appellate decisions. . .have concluded that Li properly should be interpreted as drawing a distinction between those assumption of risk cases in which a plaintiff “unreasonably” encounters a known risk imposed by a defendant’s negligence and those assumption of risk cases in which a plaintiff ‘reasonably encounters a known risk imposed by a defendant’s negligence . . . . In our view, these decisions . . . have misinterpreted Li.\(^{118}\)

The Knight court then states, in reference to Li: “[T]his portion of our opinion expressly contrasts the category of assumption of risk cases which “ ‘involve contributory negligence’ “ (and which therefore should be merged into the comparative fault scheme) with those assumption of risk cases which involve “ ‘a reduction of defendant’s duty of care.’ ”\(^{119}\)

The Knight court then explained its understanding of Li’s intended distinction,

. . . the distinction in assumption of risk cases to which the Li court referred . . . was not a distinction between instances in which a plaintiff unreasonably encounters a known risk imposed by a defendant’s negligence and instances in which a plaintiff reasonably encounters such a risk. Rather, the distinction to which the Li court

116. Id.
118. Id. at 702.
119. Id. at 702-03.
referred was between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is “no duty” on the part of the defendant to protect the plaintiff from a particular risk . . . and (2) those instances in which the defendant does owe a duty of care to the plaintiff, but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty.120

Scholarly support for Knight’s distinction between cases of “duty” and “no duty” can be found in Professor Gregory Sergienko’s article, Assumption of Risk as a Defense to Negligence.121 He writes,

Knight’s lead opinion correctly observed that Li decided that assumption of risk, where it was only a species of contributory negligence should be treated as contributory negligence. Knight’s lead opinion is also correct in describing this as a ‘no duty’ rule determined by the court, not the finder of fact.122

As an example of a defendant that owes no duty to the plaintiff as a rule of law, Professor Sergienko explains that in some jurisdictions landowners owe no duty of care to trespassers.123 He relates this situation to Li’s quote of “in one kind of situation . . . where a plaintiff unreasonably undertakes to encounter a specific known risk . . . [it] is in reality a form of contributory negligence.”124 Professor Sergienko writes, “In the sort of situation that the [c]ourt described, the court is dealing with an ‘assumption of risk’ that occurs as a consequence of legal rules that have nothing to do with voluntarily accepting a known risk.”125

Though I agree that a prime example of a “no duty” ruling is that of an injured trespasser, it is unlikely that this was the sort of situation Grey had in mind when it described, “in one kind of situation . . . where a plaintiff unreasonably undertakes to encounter a specific known risk . . .”126 The facts of Grey itself were supposed to be an example of this first kind of situation.

In Grey, the defendant was:,

a machinist for 30 years, [who] was experienced in the operation and characteristics of heavy machinery of the type here involved, . . . [and who] had worked with this particular machine for approximately three hours before the accident, . . . [and] knew that none of defendant’s employees who might assist him in the event of an emergency were in the immediate area, and that he failed to position himself near a cut-
off switch so that he could stop the machine should an emergency arise.\(^{127}\)

The Grey court writes, "it is evident that the instant case presents an example of the first of the forgoing situations" referring to the "kind of situation... where a plaintiff unreasonable undertakes to encounter a specific known risk imposed by a defendant's negligence..."\(^{128}\)

The facts of Grey could hardly be described as a form of assumption of risk "that occurs as a consequence of legal rules that have nothing to do with voluntarily accepting a known risk."\(^{129}\) True, Grey denied recovery independent of whether the plaintiff voluntarily accepted the risk, but not as a result of some legal rule, but rather because the Grey court incorrectly believed the defendant's assumption of the risk claim was no more than a variant of a contributory negligence claim and the jury found that the plaintiff was not negligent.\(^{130}\)

The distinction the Grey court actually described was of an "overlap," (which the Grey court incorrectly concluded was merely a "variant" of contributory negligence) and a solitary assumption of risk defense; a defense that "will negative liability regardless of the fact that plaintiff may have acted with due care."\(^{131}\) Grey, Li, and then Knight failed to recognize that this was the distinction that was actually being made in the description of the two kinds of situations.

It is easy to understand why the Knight court came its misinterpretation; Grey incorrectly stated that when a plaintiff unreasonably assumes a risk, this is actually contributory negligence; Li held that comparative fault principles would take the place of contributory negligence and therefore, a plaintiff who "unreasonably assumed the risk" – which was in actuality a form of contributory negligence – would only have his recovery reduced in proportion to his liability. If a consent-based defense of assumption of risk continued to bar recovery, an unreasonable plaintiff could recover due to the adoption of comparative fault, but a reasonable plaintiff could not. Such a rule of law could hardly be justified. Accordingly, Knight had to remedy this by performing legal gymnastics rather than criticizing the preceding case law.

Though the Knight court is not entirely to blame for the current state of the law, the crux of this section is that the only reason the law stands as it does today is because of poor case interpretation.

**IV. Solutions**

The best solution to these problems is to 1) eliminate the terms "primary assumption of risk" and "secondary assumption of risk" – if the defendant does not
owe a duty to the plaintiff, we ought simply describe the situation as such; 2) reestablish that everyone, except in unique scenarios, does in fact have a duty to use reasonable care under the circumstances once he or she acts; 3) return the assumption of the risk defense back to its original state and; 4) have courts analyze whether the defendant has voluntarily assumed a known risk before analyzing whether the plaintiff was unreasonable in accepting such a risk.

First, I will explain how this will resolve the problems with the current approach described above. Then, I will address – and hopefully successfully negate – the criticisms assailed at this approach to show that these criticisms are unwarranted.

A. How a Return Would Solve the Counterintuitive Results and Historical Inaccuracy Problems

1. Counterintuitive Results

If the above solution were in place, the plaintiff in Ford would not have been precluded from recovery simply because the defendant was not reckless. The first issue analyzed would have been whether the plaintiff voluntarily accepted a known risk. The plaintiff would likely not have been held to have assumed a risk of injury as a result of the boat operator steering too close to the shoreline. Only then would we proceed to analyze the question of to what degree, if at all, was the plaintiff himself negligent.

In American Golf, the owner of the golf course would not have been absolved from liability simply because a third party’s carelessness is an inherent risk in the sport. Instead, to be absolved from liability, the golf course would need to show either 1) it did in fact exercise reasonable care and thus, was not negligent, or 2) that “the facts are such that the plaintiff must have had knowledge of the hazard.” Putting the onus on the defendant to show that he used reasonable care or that the plaintiff must have had knowledge of the risk is not too tall an order for those defendants who rightfully ought to be free from liability.

A perfect example of how this process would work is in the case of Nalwa. It should not be too bold a claim to state that all reasonable minds would agree that the plaintiff must have had knowledge of the risk of minor injury as a result of a bump when she chose to ride the bumper cars. A plaintiff who must have had knowledge is treated as having actual knowledge and it is clear that the plaintiff manifested her assent to these risks when she chose to ride the bumper cars.

Even if the above is somehow too bold a claim, the court still has the ability to grant the defendant’s motion for summary judgement if no reasonable factfinder could

132. As in the case of a landowner and a trespasser.
133. Grey, 65 Cal. 2d at 155.
134. Id.
find that the defendant breached his duty to the plaintiff, in other words, that the
defendant was not actually negligent.

In Nalwa, the facts with respect to the owner were:

The Rue le Dodge ride was inspected annually for safety by the California's Department of Industrial Relations, Division of Occupational Health and Safety, and was inspected every morning by defendant's maintenance and ride operations departments. On the morning of plaintiff's injury, it was found to be working normally. Fifty-five injuries were reported occurring on or around the Rue le Dodge ride in 2004 and 2005, including contusions, lacerations, abrasions and strains. Plaintiff's was the only fracture reported. Head-on bumping was prohibited on the Rue le Dodge ride, a safety rule the ride operators were to enforce by lecturing those they saw engaging in the practice and, if a guest persisted in head-on bumping, by stopping the ride and asking the person to leave. At the time of plaintiff's injury, defendant operated the bumper car rides at its four other amusement parks so that the cars could be driven in only one direction.135

With such facts at the courts disposal, it would not have been controversial for the court to hold that no reasonable factfinder could have found that the defendant breached his duty.

2. History

If we use the proposed solution we will also be back on the correct historical and analytical track. There must surely be something inherently good about realigning ourselves with the intent of the prior cases. Additionally, a return to the consent-based defense would give us three distinct defenses asserted by the defendant. A defendant would claim – and a court would analyze those claims in this order – that 1) he owed the plaintiff no duty (which should not be labeled as any sort of "assumption of risk"); 2) if the defendant did have a duty, then the plaintiff voluntarily accepted a known risk relieving the defendant of his duty; and 3) if not "1" or "2" then at the very least, the plaintiff failed to use due care in looking out for her own protection.

With three possible claims, analyzed in this order, it will be much easier to describe and scrutinize precisely what claim the defendant is asserting. Courts and law students alike will benefit from greater clarity and understanding. Also, this would lead to greater judicial predictability, which is precisely what the current approach lacks.

B. The Unwarranted Criticisms

In *Knight*, the court gave and explained three criticisms against returning to a consent-based assumption of risk analysis.\(^{136}\) Here, I will address each criticism brought forth by the *Knight* opinion. Additionally, I will address the criticism that such a return would overload the already swollen California court dockets.

1. Incompatible with *Li*

*Knight*‘s first criticism is that the “implied consent” theory, would apply as much to a plaintiff who *unreasonably* has chosen to encounter a known risk, as to a plaintiff who *reasonably* has chosen to encounter such a risk . . . *Li* explicitly held that a plaintiff who ‘unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence’ is *not* completely barred from recovery . . . [t]hus, the dissenting opinion’s implied consent argument is irreconcilable with *Li* itself.\(^{137}\)

The first point with regard to this quote is that the *Li* court did not explicitly hold, “a plaintiff who ‘unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence’ is not completely barred from recovery.”\(^{138}\)

The second point is that *Knight* has the false impression that if assumption of risk was consent-based, an *unreasonable* plaintiff could recover while a *reasonable* plaintiff could not.\(^{139}\) If this were true, such a rule of law would undoubtedly be illogical. But, if the court follows the analytical framework I have provided above, such a result would never occur. If the court determined whether the plaintiff had consented *before* determining the plaintiff’s reasonableness in consenting, both unreasonable and reasonable risk assuming defendants would be treated equally: both would be barred from recovery.

2. Untenable Legal Fiction

The second argument *Knight* presents is that “the implied consent rationale rests on a legal fiction that is untenable, at least as applied to conduct that represents a breach of the defendant’s duty of care to the plaintiff.”\(^{140}\) The court explains, “[I]t is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that

\(^{137}\) *Id.* at 705 (quoting *Li* v. Yellow Cab Co., 13 Cal. 3d 804, 824).
\(^{138}\) See Sergienko, *supra* note 121, at 8 (arguing specifically that this conclusion was a product of the *Knight* court, not the *Li* decision).
\(^{139}\) *Knight*, 834 P.2d at 702.
\(^{140}\) *Id.* at 705.
increases the risks inevitably posed by the activity or sport itself.” The Knight court then gives this example:

[A]lthough every driver of an automobile is aware that driving is a potentially hazardous activity and that inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another, a person who voluntarily chooses to drive does not thereby “impliedly consent” to being injured by the negligence of another, nor has such a person “impliedly excused” others from performing their duty to use due care for the driver’s safety.

In her dissent in Knight, Justice Kennard specifically addressed this criticism. She wrote, “The normal risks inherent in everyday life, such as the chance that one who uses a public highway will be injured by the negligence of another motorist, are not subject to the defense, however, because they are general rather than specific risks.”

In Hook, the plaintiff was a voter who fell and injured herself at her local polling place. She left one room and went into another where the floor was nine inches higher than the floor of the first room. The trial court gave an instruction on assumption of risk and the plaintiff appealed. The court then addressed the issue of “whether the danger or risk contemplated by the doctrine of assumption of risk is a specific or particular one.” The court stated:

The daily affairs of life are fraught with danger. The prospect of the risk of injury is inherent in the activities of human beings, whether in the home, at work, at play, or in transit. In the legal sense, however, assumption of risk presupposes that one has placed himself in a place of known danger with knowledge and appreciation of the risk.

Thus, plaintiffs do not assume all risks inherent in daily life; it is only particular and specific risks that are subject to the defense. Therefore, the majority’s example that “every driver . . . is aware that . . . inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another” is far too general for the doctrine to apply; it would open up the door to use the assumption of risk defense in almost any activity in life because a risk of injury is “inherent in the activities of human beings.”

141. Id.
142. Id.
143. Id. at 715 (Kennard, J., dissenting).
144. Id. (citing to Hook v. Point Montana Fire Protection Dist., 28 Cal. Rptr. 560 (Ct. App. 1963)).
145. Hook, 28 Cal. Rptr. at 562.
146. Id.
147. Id.
148. Id. at 563.
149. Id. at 563-64.
151. Hook, 28 Cal. Rptr. at 564.
There is yet another way to leap this theoretical hurdle provided by *Knight*. Though the hypothetical of the driver fits all the elements of an assumption of risk claim – voluntary acceptance of a known risk – this issue of over-application is overcome if we only allowed the use of an assumption of risk defense in situations where the plaintiff gains a benefit for assuming the risks imposed by the defendant.\(^{152}\)

The facts of *Knight* and the automobile example are completely different in this respect. In *Knight*, the plaintiff received a benefit by assuming the risk; she was able to partake in the enjoyment of playing football with her friends. Similarly in *Nalwa*, the plaintiff received the benefit of the enjoyment of the bumper car ride from the owner of the amusement park. The typical, every day automobile accident resulting from a defendant’s carelessness would not be covered by the doctrine because the plaintiff does not receive any benefit from the defendant-driver. This change would give us the intuitive results we seek: plaintiffs would not be barred from recovery in a typical every day car accidents, yet, in particular recreational activities – depending on the facts – plaintiffs could be.\(^{153}\)

3. Unfair to Equal Defendants

The third criticism put forth in *Knight* is that if liability were to stem on the plaintiff’s subjective knowledge, then defendants who engage in the same conduct could possibly be treated inconsistently.\(^{154}\) *Knight* asserts,

> [W]ere its implied consent theory to govern application of the assumption of risk doctrine in the sports setting, the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant frequently would have no way of ascertaining . . . . As a result there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct . . . .\(^{155}\)

One point worthy of mentioning – although this does not necessarily persuade in favor of returning to the consent-based approach – is that the current doctrine fares no better in this regard. In the post-*Knight* cases cited above, the defendant’s liability also depends on factors he has no way of ascertaining. Under the current approach, instead of the “variable factors” being the plaintiff’s subjective knowledge, the “variable factors” that the defendant has no way of ascertaining are the factors that determine whether the “primary assumption of risk” doctrine applies to the given activity that the defendant and the plaintiff are engaging in. It seems that over the years, the doctrine’s application to a given activity and its application to a particular defendant has been somewhat of a guessing game. Even after twenty years, we are

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152. This argument was espoused in Professor Greg Sergienko’s Torts I class in October, 2011 at Western State University Law School.
153. This would also fit our intuitions with *Knight’s* hypothetical of an experienced skier assenting to the risks imposed by moguls on a ski slope. See *Knight*, 834 P.2d at 705.
154. Id. at 706.
155. Id.
still learning new activities and new types of defendants that the primary assumption of risk doctrine applies to.\textsuperscript{156}

Aside from the current approach faring no better, the conclusion, “as a result, there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct ...,”\textsuperscript{157} is true only if what is meant by “precisely the same conduct” is that the acts performed by the particular defendants are the same. However, if we were more detailed in describing our explanation of “the conduct” of a given defendant, we would find that there would not be drastic disparities of treatment for defendants that engage in the “same conduct.”

This can be shown using the facts of the Knight case applied to two hypothetical plaintiffs: one plaintiff, who knows and accepts the risks in the game of touch football and one a plaintiff who does not know of and accept these risks. If the defendant were to act carelessly and injure the plaintiff in the first instance, the defendant would not be held liable, while a defendant who performs the same careless acts and injures the second plaintiff would be liable. Yes, the acts themselves have not changed – both defendants were careless which resulted in an injury – however, in one scenario the defendant exposed risks to a plaintiff who has consented to accept these risks while in the other, the defendant exposed risks and injured a non-consenting plaintiff. If our definition of “conduct” is more nuanced so as to recognize that there is a difference between these two situations, the law would not treat similarly situated defendants differently.

4. Overload of Cases

If a court is unable to deny a motion for summary judgment based on a holding of “no duty,” these cases will proceed to trial so that the finder of fact can appropriately apportion liability. We need not fear an overload of cases, however, because by reviving the traditional consent based doctrine of assumption of risk, courts would actually recapture a tool to deny a plaintiff recovery. By returning to the old approach, a court could deny recovery to a plaintiff for one of three reasons: 1) the defendant owed no duty to the plaintiff; 2) the plaintiff voluntarily accepted a known risk or; 3) no reasonable factfinder could find that the defendant breached his duty to act with due care. If California courts were to make full use of options 2 and 3, then they could continue to grant summary judgment motions in situations where all reasonable minds would agree that the defendant should not be liable.\textsuperscript{158}

The ability to deny recovery based on a holding of “no duty” would still be an option for the court, although it should only be used in very limited circumstances. It is an ability that is entirely within the court’s authority and purview, thus, the

\textsuperscript{156} See e.g., Nalwa v. Cedar Fair, L.P., 290 P.3d 1158, 1163-64 (Cal. 2012).
\textsuperscript{157} Knight, 834 P.2d at 706.
\textsuperscript{158} Also, by adhering to one analytical pattern, there would be more judicial predictability in such cases, which would provide California attorneys with a better understanding of whether a given case should even be filed.
criticisms that the court has somehow exceeded its authority by doing so are unwarranted. Such a holding – that the defendant owed no duty to the plaintiff regardless of the plaintiff’s knowledge – should, however, be limited to unique circumstances, such as a trespasser who is injured while trespassing and it undoubtedly should not be described as any sort of an “assumption of risk” defense.

How reviving a consent-based doctrine of assumption of risk would give a court another tool to deny recovery is self-explanatory. If the court were to make full use of Grey’s explanation of the traditional assumption of risk doctrine by recognizing that, “Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk . . . ,”159 the court would have a robust and capable tool for denying plaintiffs recovery in these scenarios.

Lastly, the court still has the ability to determine that the defendant has not breached his duty owed to the plaintiff. Courts should not be hesitant to utilize this option. The facts of Nalwa provided a perfect opportunity to reassert this ability.

V. Conclusion

It is time for the court to return to the traditional consent-based assumption of risk defense. Despite the passing of twenty years since Knight’s holding, we are still finding new activities to which the “primary” assumption of risk doctrine applies. Additionally, we are only in this position because of numerous misinterpretations of the case law. So long as its applied according to the analytical framework above – 1) did the defendant have a duty?; 2) did the plaintiff voluntarily assume a known risk?; 3) did the plaintiff contribute to his own injury? – a return would make the law and the analysis simpler, consistent, more predictable, and yield results more aligned with our intuitions.