

California Western Law Review

Volume 47
Number 2 *More Deliberation? Perspectives on
the California Initiative Process and the
Problems and Promise of its Reform*

Article 7

2011

Premises Liability in California: Chilling the Diffusion of Bicycle Motocross

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Recommended Citation

Powell, Christopher (2011) "Premises Liability in California: Chilling the Diffusion of Bicycle Motocross," *California Western Law Review*: Vol. 47 : No. 2 , Article 7.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol47/iss2/7>

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COMMENTS

PREMISES LIABILITY IN CALIFORNIA: CHILLING THE DIFFUSION OF BICYCLE MOTOCROSS

INTRODUCTION

When most people think of the Olympics, salient associations include honor, prestige, and human achievement. Trespass and premises liability, however, are unlikely associations. Yet for many Californian youths, the newest Olympic sport, bicycle motocross (BMX), involves just that.¹ Due to the inadequate availability of BMX facilities, participants in the sport are left with few options: travel great distances to participate, create their own facilities while trespassing, or, if they have the resources, construct facilities on private lands—which often subjects landowners to unreasonable liability.

As a society, we should promote participation in all types of sports by making facilities readily available to youths. The rigors of athletic participation prepare children for the challenges of life.² Additionally, athletic participation is socially desirable for people of all ages because it improves participants' physical and mental well-being.³ Beyond the obvious health benefits of exercise,⁴ athletics

1. See Sam McManis, *Teenage Bikers Lay Low / BMX Riders Making Tracks in Suburbia*, S.F. CHRON., Mar. 7, 2000, http://articles.sfgate.com/2002-03-09/news/17535536_1_bmx-dirt-teens; Andrea Moss, *San Marcos: BMX Riders Asking for Time at Skatepark*, N. COUNTY TIMES, Feb. 26, 2009, http://www.nctimes.com/news/local/san-marcos/article_beb59a78-1f5f-5e04-9268-56c1c7bd4cba.html.

2. C. Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1192 (2000); David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 614 (2004).

3. *Stimson v. Carlson*, 14 Cal. Rptr. 2d 670, 673 (Ct. App. 1992) (describing why participation in athletics is socially desirable).

4. Regular physical activity generally improves health by “reduc[ing] the risk of developing or dying from some of the leading causes of illness and death in the

provide opportunities to meet others with similar interests and to enjoy camaraderie in social settings.⁵ Further, sports serve as an outlet for self-expression and allow for personal development. Athletics also yield derivative benefits such as marketing opportunities for businesses,⁶ and create exciting environments where onlookers can “watch in complete fascination (and often envy).”⁷

While the personal and social benefits of sports are great, so are the risks of injury to participants in most sports.⁸ Litigation over sports-related accidents correlates to these risks.⁹ However, driven by public policy, California courts routinely refuse to impose liability for acts that, if actionable, would “chill vigorous participation” or might fundamentally alter a sport’s nature,¹⁰ such that the sport’s thrill is

United States.” U.S. DEP’T OF HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY AND HEALTH: A REPORT OF THE SURGEON GENERAL (1996), *available at* <http://www.cdc.gov/nccdphp/sgr/pdf/sgraag.pdf>. For example, exercise improves health by reducing the risk of dying from heart disease. *Id.* It also reduces the risk of developing diabetes, colon cancer, and high blood pressure. *Id.* Further, exercise reduces feelings of depression and anxiety, helps control weight, and helps build and maintain healthy bones, muscles, and joints. *Id.*

5. See *Cheong v. Antablin*, 946 P.2d 817, 819 (Cal. 1997) (describing the allure of skiing as a sport often enjoyed with others); *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 593 (Ct. App. 1997) (discussing the social benefits of golf).

6. During 2009, roughly 11.45 billion dollars were spent on sports marketing in the United States. *Sports Score with Sponsorship*, EMARKETER (Nov. 8, 2007), <http://www.emarketer.com/Article.aspx?R=1005561>. Anheuser-Busch, AT&T, General Motors, MillerCoors, Sprint, Toyota, Verizon, and Yum! each spent in excess of \$200 million on sports marketing in 2009. *Top 25 Sports Spenders, Their Ad Spending, Key Executives, Agencies and Sponsorships*, SPORTS BUS. J., May 10, 2010, at 21, *available at* <http://www.sportsbusinessjournal.com/article/65707>.

7. *Yarber v. Oakland Unified Sch. Dist.*, 6 Cal. Rptr. 2d 437, 439 (Ct. App. 1992).

8. It is estimated that more than 3.6 million sports participants in the United States were treated for injuries by hospitals in 2009. U.S. CONSUMER PROD. SAFETY COMM’N, NEISS DATA HIGHLIGHTS 2009, at 1-2, <http://www.cpsc.gov/neiss/2009highlights.pdf>.

9. Ian M. Burnstein, *Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard*, 71 U. DET. MERCY L. REV. 993, 944 (1994) (“[Recent] dramatic increase[s] in athletic participation ha[ve] inevitably resulted in comparable increases in injuries . . . [and] [c]onsequently, there has been . . . a dramatic increase in civil litigation regarding injuries sustained in recreational competition.”).

10. *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992).

“sapped.”¹¹ To promote participation, courts limit the duty of care owed to co-participants, and find that a participant assumes the risks of injury that are inherent in a sport.¹²

Although participation is encouraged by limiting the duty of care between co-participants, under California law, many recreation facility providers are faced with uncertainty as to the duty of care owed to participants.¹³ Such uncertainty leads to fear of liability, and this fear currently limits the availability of BMX facilities.¹⁴ Thus, while participation in sports is generally encouraged, California law does not provide adequate protection for landowners to incentivize making private and public lands available for BMX facilities.

This Comment analyzes why California law is inadequate to protect BMX facility providers from negligence lawsuits, and why public policy justifies conferring greater protection to facility providers to promote BMX’s diffusion within the state. Part I details a brief history of BMX and why participation in BMX is a socially desirable activity for youths. Part II examines how California’s application of assumption of risk inadequately protects commercial and non-commercial providers of BMX facilities, and why public policy justifies extending increased liability protection to BMX facility providers.

Part III examines how California’s current statutory protections for BMX facility operators are inadequate, beginning with California’s recreational use statute,¹⁵ which yields socially undesirable results. Part III also analyzes California’s statutory

11. *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 2d 265, 272 (Ct. App. 2001); *Diliger v. Moyles*, 63 Cal. Rptr. 2d 591, 593 (Ct. App. 1997).

12. *See, e.g., Knight*, 834 P.2d at 710.

13. *See Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 660-61 (Ct. App. 1996); Dean Richardson, *Player Violence: An Essay on Torts and Sports*, 15 STAN. L. & POL’Y REV. 133, 156 (2004) (discussing how uncertainty and confusion arise in practice when different standards of care for different sporting activities are applied). However, in traditional sports, such as golf, a landowner’s duty to participants is relatively settled. *E.g., Morgan v. Fuji Cnty. USA*, 40 Cal. Rptr. 2d 249, 253 (Ct. App. 1995) (holding golf course owners owe golfers a duty to provide a reasonably safe golf course).

14. Moss, *supra* note 1; Tom York, *Cunningham ‘Pops a Wheelie,’ Lands Site for Poway BMX Track*, POWAYPATCH, <http://poway.patch.com/articles/cunningham-pops-a-wheelie-lands-site-for-poway-bmx-track> (last visited Mar. 6, 2011).

15. CAL. CIV. CODE § 846 (Deering 2005).

immunity from actions arising out of hazardous recreational activities,¹⁶ and why the statute is inadequate to incentivize operation of BMX facilities on public land.

Part IV analyzes the doctrine of express assumption of risk in California, and discusses why providers of action sports facilities should not have to rely on liability waivers to confer dependable liability protection. Finally, Part V proposes a solution to the inadequacies of California law as applied to BMX through the enactment of BMX-specific legislation. As will be discussed, public policy clearly supports embracing BMX cycling. BMX-specific legislation will yield certainty in the area of premises liability for BMX providers and this will help the sport grow. Although providers will be subject to less potential liability, this legislation will ultimately lead to safer environments for participants.

I. BICYCLE MOTOCROSS

In the late 1960s, long before youth-oriented action sports received mainstream acceptance and legitimacy by becoming Olympic events,¹⁷ California children began creating motocross inspired tracks for their bicycles¹⁸—and bicycle motocross was born.¹⁹ At the time,

16. CAL. GOV'T CODE § 831.7 (Deering 2010).

17. Several action sports are now Olympic events. Snowboard slalom and half pipe debuted at the Nagano Winter Olympics in 1998, and Snowboard Cross in 2006 at the Turin Winter Olympics. *Snowboard Equipment and History*, OLYMPIC.ORG, <http://www.olympic.org/en/content/Sports/All-Sports/Skiing/Snowboard/Snowboard-Equipment-and-History/?Tab=1> (last visited Oct. 29, 2010). Skier Cross debuted in 2010 at the Vancouver Winter Olympics. Tim Mutrie, *Let the Olympic Qualification Begin*, ESPN, <http://espn.go.com/action/news/story?id=4748823> (last updated Feb. 9, 2010). BMX racing debuted at the 2008 Beijing Summer Olympics. *Cycling BMX Equipment and History*, OLYMPIC.ORG, <http://www.olympic.org/en/content/Sports/All-Sports/Cycling/Cycling-BMX/Cycling-BMX-Equipment-and-History> (last visited Oct. 29, 2010). It is rumored both freestyle BMX and skateboarding will be included in the Summer Olympics in the near future. Pete Thomas, *Skateboarding Goes for the Gold*, L.A. TIMES, June 24, 2007, at D4, available at <http://articles.latimes.com/2007/jun/24/sports/sp-olyskate24>.

18. Motocross is a form of off-road motorcycle racing involving head-to-head racing action on courses featuring high speeds, and a mix of natural terrain and manmade jumps.

19. Mike Carruth, *A Partial History of the Sport of BMX Racing*, SCBMX.ORG, http://www.scbmx.org/history_of_bmx_timeline.pdf (last visited Oct.

bicycles were not designed for off-road riding and jumping, so kids began modifying their bikes for more control and durability.²⁰ By the mid-1970s, a BMX subculture developed.²¹ Multiple sanctioning bodies began holding regular BMX races;²² bicycle manufacturers also began producing bicycles specifically made for BMX.²³ During the 1980s, mainstream America took notice as the sport's popularity rapidly increased. BMX was featured in motion pictures,²⁴ and several BMX magazines were sold nationwide.²⁵ Additionally, various forms of freestyle BMX emerged,²⁶ as not all participants were content with only racing their BMX bikes.

While the sport boomed in its early years, the momentum was short lived. Some attribute the rapid decline in participation during the

30, 2010); *Cycling BMX Equipment and History*, *supra* note 17.

20. See Carruth, *supra* note 19.

21. For an entertaining overview of BMX history, see JOE KID ON A STINGRAY (Bang Pictures 2006).

22. Participants in BMX races compete head-to-head with up to eight other racers on a defined course. BMX racetracks consist of a starting hill with a mechanism called a "gate" (the gate releases all riders simultaneously to commence the race), generally three or more straightaways filled with dirt obstacles, and banked turns linking straightaways. Simply put, the first person to negotiate the track and reach the finish line wins. For a detailed explanation of BMX racing, see LEE MCCORMACK, *PRO BMX SKILLS* 174-82 (2010).

23. Carruth, *supra* note 19. BMX bicycles have no suspension, a single speed, twenty-inch diameter wheels, compact frames, and are made of durable materials to withstand the rigors of off road use. Unlike most bicycles, BMX bikes are designed for riding in a standing, rather than seated, position. This riding posture—combined with the small size of the bike and wheels—enhances the rider's ability to transfer pedaling power and allows for maximum control when riding over obstacles. Entry-level BMX bicycles cost about \$200—while professional caliber bicycles cost \$1,200 or more. MCCORMACK, *supra* note 22, at 17. See generally *id.* at 14-49 (providing a detailed analysis of BMX bicycles).

24. *BMX BANDITS* (Filmways Australia 1983); *RAD* (TriStar Pictures 1986).

25. *BMX History Early Days*, 23MAG., <http://www.23mag.com/hist/histoire.htm> (last visited Oct. 30, 2010); *BMX History 1980-1989*, 23MAG, <http://www.23mag.com/hist/hist80.htm> (last visited Oct. 30, 2010).

26. Today, freestyle BMX includes dirt jumping (launching off sculpted mounds of compacted dirt, then performing various aerial maneuvers before landing), BMX street (riding over urban terrain and performing stunts on obstacles such as stairs, railings, and ledges), and BMX park (similar to BMX street, but instead of utilizing urban features, BMX parks consist of purpose built, manmade obstacle courses with features made of wood and/or cement).

late 1980s to the widespread diffusion of video games. It is also likely that many of the first generation BMXers simply outgrew the sport once they reached young adulthood.²⁷ It was not until the mid-1990s that BMX began experiencing a resurgence in popularity, largely due to the launch of the X-Games.²⁸ Although the X-Games put BMX back into the national spotlight, the X-Games also created a stigma that BMX is a dangerous “extreme sport” by showcasing BMX alongside activities like skydiving and street luge.²⁹ Further, to make BMX more appealing to spectators and television viewers, X-Games promoters designed courses and obstacles that bore little resemblance to the sport’s true nature. For example, typical BMX racing tracks are constructed on flat ground,³⁰ but X-Games BMX racetracks were constructed down hills to allow riders to reach speeds not normally seen on traditional tracks. The increased speed also allowed for riders to jump larger obstacles than those found on traditional tracks. Of course, the increased speeds and heightened risk of injury made racing more spectacular for television viewers.

The combined effect of made-for-television courses and showcasing BMX alongside high-risk, “extreme” sports has led to landowners’ unwillingness to allow BMX participation on their

27. Carruth, *supra* note 19.

28. The X-Games are a nationally televised “extreme sports” festival event, showcasing a broad range of non-traditional, high-risk sports. The X-Games debuted in 1995 and have been broadcasted every year since while snowballing in popularity. By drawing massive crowds of up to 200,000 people and over 35 million television viewers in recent years, the X-Games have also transformed the action sports industry by attracting corporate sponsors and making action sports athletes national celebrities. Arlie John Carstens, *X Post Facto*, L.A. WKLY., Aug. 9, 2007, available at <http://www.laweekly.com/2007-08-09/columns/x-post-facto/>; Joe Garofoli, *Extreme Goes Mainstream*, S.F. CHRON., Aug. 7, 2000, http://articles.sfgate.com/2000-08-07/news/17658747_1_x-games-sports-athletes-action-sports.

29. During the early years of X-Games, sports like BMX and skateboarding were featured alongside true “extreme sports” such as skydiving, bungee jumping, and street luge (street luge is essentially riding an oversized skateboard in the supine position down a paved hill while maneuvering through turns). Carstens, *supra* note 28. While sports like skydiving have been dropped from the schedule over the years, motor sports like motorcycle supercross, freestyle motocross, and rally car racing have been included.

30. UCI Cycling Regulations, Rule 6.1.027, UCI.CH (June 18, 2010), <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=MTkzNg&ObjTypeCode=FILE&type=FILE&id=34594&LangId=1>.

property for fear of liability—largely because of their inaccurate perception of the sport. Yet while BMX’s stigma surrounding the risks associated with the sport persists, the injury rate is relatively low in comparison to traditional sports.³¹ Moreover, up to eighty-five percent of brain injuries sustained from cycling could be prevented by helmet use.³² Despite mainstream America’s overgeneralizations and the limited availability of BMX facilities, BMX continued to gain popularity throughout the late 1990s and into the new millennium. In 2008, BMX received the ultimate recognition by becoming an Olympic event debuting at the 2008 Summer Olympics in Beijing, China.³³

Over the past decade, participation in traditional team sports has declined by twenty-five percent, while participation in action sports in general has increased more than fivefold.³⁴ Yet, there are only forty-three BMX racetracks in California—few of which are open to the public on a regular basis, and nearly all tracks operate only three days

31. There are no statistics specifically analyzing the injury rates for BMX; rather, BMX injuries are included into the larger category of cycling. However, one study suggested BMX participants tend to sustain less serious injuries than participants in other forms of cycling, and that BMX is not more dangerous than other forms of cycling. J. Worrell, *BMX Bicycles: Accident Comparison with Other Models*, 2 ARCHIVES EMERGENCY MED. 209, 209, 212-13 (1985), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1285299/pdf/archemed00008-0031.pdf>. Per participant, basketball and football participants sustain the most injuries annually—roughly two percent of such participants require medical treatment at hospitals; in comparison, only one percent of cyclists seek medical attention. U.S. CONSUMER PROD. SAFETY COMM’N, *supra* note 8; OUTDOOR FOUND., 2010 OUTDOOR RECREATION REPORT 62-63 (2010), available at <http://www.outdoorfoundation.org/pdf/ResearchParticipation2010.pdf>.

32. Richard A. Schieber & Jeffrey J. Sacks, *Measuring Community Bicycle Helmet Use Among Children*, PUB. HEALTH REP., Mar.-Apr. 2000, at 114, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497304/pdf/11847297.pdf>. California encourages helmet use by imposing fines upon minors who participate in skateboarding or bicycling on public streets without using a helmet. CAL. VEH. CODE § 21212 (Deering 2009).

33. *Cycling BMX Equipment and History*, *supra* note 17. BMX will be featured again at the 2012 London Olympic Games. The race organizers have shown their commitment to the sport by keeping the Olympic track (albeit in a tamed version) open to the public after the games. *Cycling-BMX*, LONDON 2012, <http://www.london2012.com/games/olympic-sports/cycling-bmx.php> (last visited Nov. 13, 2010).

34. Horton, *supra* note 2, at 603.

a week for a few hours each day.³⁵ Because of the limited availability of BMX tracks, many participants trespass where they can find available land to create their own tracks and obstacles.³⁶ This often leads to conflicts with landowners and authorities, and ultimately results in unauthorized tracks being bulldozed.³⁷

Beyond BMX riding in the dirt, many participants ride in urban areas in search of obstacles to challenge themselves. However, participants are often prevented from riding in urban areas due to property owners hiring security guards or calling the police. Additionally, many BMXers seek to ride in public skateboard parks,³⁸ although doing so is often, but not always, expressly prohibited. There are over 100 public skate parks in California,³⁹ but few officially allow bicycle use due to fear of accelerated wear and tear on the park's obstacles, fear of liability, and corresponding increased insurance costs.⁴⁰

Faced with these barriers, the sport cannot diffuse to a level of widespread availability. Such availability would have great societal benefits. For example, a skate park (open to both BMX and skateboards) in Long Beach, California recently opened. The surrounding areas subsequently saw a sixty percent reduction in drug related incidents and a thirty percent reduction in violent crimes.⁴¹ In

35. *ABA BMX Tracks: California*, ABA BMX, <http://ababmx.com/index.php?page=default/tracks&search=California&order=&pg=1> (last visited Nov. 13, 2010); *California NBL BMX Tracks*, NBL, http://www.nbl.org/find-track.asp?state_id=CA (last visited Nov. 13, 2010).

36. See McManis, *supra* note 1.

37. See, e.g., *id.*

38. "Free-style BMX riders who seek access to public skateparks claim that their needs are not met by dirt track racing or dirt jumping." RODNEY WOJTANIK, PUBLIC SKATEPARK MANAGEMENT OPTIONS & FREE-STYLE BMX BIKE USE 9 (2005), available at http://www.bikesbelong.org/assets/documents/uploads/BMX_Skate_Management_discussion_paper.pdf.

39. David Amell, *F@#%K Pads: The Assumption of Risk Doctrine, Liability Limiting Statutes, and Skateboarding*, 11 SPORTS L. J. 1, 4 n.11 (2004).

40. WOJTANIK, *supra* note 38, at 6-13. Although skateboarding and BMX share many similarities, most skateboard park operators perceive their skate parks as unsafe for BMX use. See Lisa Mahoney, *City Debates Letting Bikers Into Skate Park*, CONTRA COSTA TIMES, Dec. 14, 2001, at A1; Moss, *supra* note 1.

41. Susan Linerode, *Now More Than Ever Before, Municipal Skateparks are on the Chopping Block*, TRANSWORLDBMX, Nov. 8, 2010, <http://bmx.transworld>.

addition to the social advantages of public BMX facilities, promoting participation will yield numerous health benefits for our youth.

Youth participation in recreation activities has been on the decline in recent years.⁴² Correlated to this, seventeen percent of children in the United States are obese; these children are likely to become obese adults and already are at risk for developing cardiovascular diseases (such as high blood pressure, high cholesterol, and type 2 diabetes).⁴³ In response, California should promote participation in physical activities in any way possible. Specifically, promoting cycling lays the foundation for a healthy adult lifestyle.⁴⁴ Despite the fact that bicycling in general is already the most popular outdoor activity for American youths,⁴⁵ California does little to incentivize landowners to provide safe places for cycling participation. Instead, participants who do not have access to the limited number of bicycling facilities often ride on public streets where the risk of injury is greatest.⁴⁶

Considering the health, psychological well-being, and social benefits of promoting cycling sports like BMX, California needs to address the legal barriers that are preventing BMX facilities from diffusing throughout the state. As will be discussed below, while certain statutory immunities do apply for landowners, they are under-inclusive. Additionally, in situations where statutory immunities do

net/1000116505/features/public-skateparks-are-at-risk-but-you-can-help/.

42. OUTDOOR FOUND., *supra* note 31, at 35. “[L]ess than one-third . . . of high school students meet currently recommended levels of physical activity.” *Overweight and Obesity*, CDC, <http://www.cdc.gov/obesity/childhood/causes.html> (last visited Nov. 13, 2010).

43. *Childhood Overweight and Obesity*, CDC, <http://www.cdc.gov/obesity/childhood/index.html> (last updated Oct. 20, 2009).

44. Overweight adolescents who participate in bicycling three to four days per week are eighty-five percent more likely to become normal-weight adults. David Menschik et al., *Adolescent Physical Activities as Predictors of Young Adult Weight*, 162 ARCHIVES PEDIATRICS & ADOLESCENT MED. 29, 29-33 (2008). Generally, countries with the highest levels of cyclists have the lowest obesity rates. David R. Bassett et al., *Walking, Cycling, and Obesity Rates in Europe, North America, and Australia*, 5 J. PHYSICAL ACTIVITY & HEALTH 795, 795 (2008).

45. OUTDOOR FOUND., *supra* note 31, at 60-61.

46. In 2009, eighty-eight percent of U.S. children’s bike-related deaths occurred on public streets. *Facilities Statistics*, BIKES BELONG, <http://www.bikesbelong.org/resources/stats-and-research/statistics/facilities-statistics/> (last visited Jan. 28, 2011) (citing T.J. Mehan et al., *Bicycle Related Injuries Among Children & Adolescents in the United States*, 48 CLINICAL PEDIATRICS 166 (2009)).

not apply, California's application of assumption of risk does not provide a dependable basis for protecting BMX facility operators from negligence lawsuits.

II. DUTY AND SPORTS

A. *Primary v. Secondary Assumption of Risk*

Generally, people have a duty to use reasonable care to avoid injury to others.⁴⁷ However, in certain sports settings, the California Supreme Court carved out an exception to this general rule by applying the doctrine of assumption of risk.⁴⁸ Lower courts have expansively applied the doctrine to relieve defendants from liability in numerous sporting contexts.⁴⁹

Assumption of risk troubles judges and scholars due to confusion surrounding its various meanings and applications in "a number of very different factual settings involving analytically distinct legal concepts."⁵⁰ In the seminal case *Knight v. Jewett*,⁵¹ the California

47. CAL. CIV. CODE § 1714 (Deering 2005); *Cheong v. Antablin*, 946 P.2d 817, 820 (Cal. 1997).

48. *Shin v. Ahn*, 165 P.3d 581, 586 (Cal. 2007); *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (Cal. 2003); *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992).

49. *See Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 204-05 (Ct. App. 2003) (listing numerous sports settings where the doctrine of assumption of risk has been applied). The threshold for whether an activity qualifies as a sport for which the doctrine of assumption of risk will be applicable is quite low. Assumption of risk applies to a particular sports activity "if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." *Record v. Reason*, 86 Cal. Rptr. 2d 547, 554 (Ct. App. 1999). Also, activities subject to the doctrine "match[] a participant's physical skill, strength or agility against another competitor or against some other standard such as a high score or a low time." *Childs v. Cnty. of Santa Barbara*, 8 Cal. Rptr. 3d 823, 827 (Ct. App. 2004).

50. *Knight*, 834 P.2d at 699; *Horton*, *supra* note 2, at 608.

51. *Knight* was a plurality opinion; however, within four years of the decision "*Knight* . . . bec[a]me the operative statement of . . . California law." *Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 658 (Ct. App. 1996). In fact, five years after *Knight*, the California Supreme Court again revisited assumption of risk in a sports setting and a unanimous court "restated the basic principles of *Knight*'s lead opinion as the controlling law." *Huff v. Wilikins*, 41 Cal. Rptr. 3d 754, 759 n.2 (Ct. App. 2006) (referring to *Cheong*, 946 P.2d at 820). This still holds true today. *See Shin*,

Supreme Court determined the proper application of the doctrine in sports settings in light of California's adoption of pure comparative negligence.⁵²

First, the *Knight* court distinguished primary assumption of risk from secondary assumption of risk.⁵³ Primary assumption of risk involves situations where a defendant owes no legal duty to sports participants to protect them from a sport's inherent risks—thereby completely barring a plaintiff's recovery if he or she is injured by such risks.⁵⁴ Secondary assumption of risk applies where the defendant did owe a duty (a duty not to increase a sport's inherent risks), but the plaintiff voluntarily engaged in the activity that was made more dangerous by the defendant's breach.⁵⁵ Under secondary assumption of risk, the plaintiff may recover under a pure comparative fault analysis; the jury will apportion the damages after considering the respective fault of the parties.⁵⁶ Simply stated, primary assumption of risk relates to a legal question of duty based on the sport's nature and the defendant's relationship to the sport, and secondary assumption of risk merely applies to the calculation of damages.⁵⁷

California's application of the assumption of risk doctrine renders a plaintiff's subjective awareness of the risk he or she voluntarily encountered inconsequential because it is implied that a sports participant assumes the risk of the sport's inherent dangers merely by participating.⁵⁸ If the risk is not inherent, the participant's subjective awareness is again immaterial because the jury will simply consider

165 P.3d at 584.

52. *Knight*, 834 P.2d at 697. California abandoned the harsh doctrine of contributory negligence in *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975) (“[I]n all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured . . . shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering.”).

53. *Knight*, 834 P.2d at 707-08.

54. *Id.* at 708.

55. *Id.*

56. *Id.*

57. *Shin v. Ahn*, 165 P.3d 581, 591 (Cal. 2007).

58. *Id.* at 584; *Knight*, 834 P.2d at 709.

the participant's conduct when allocating damages under a pure comparative fault analysis.⁵⁹

B. Inherent Risks

As outlined in *Knight*, a defendant in a sporting context “generally has no legal duty” to protect a plaintiff from a sport's inherent risks.⁶⁰ This “no-duty-for-sports rule”⁶¹ is driven purely by public policy in response to the personal health and societal benefits that sports provide.⁶² The obvious concern is that imposing liability for sports' inherent risks (which often include negligent conduct and even occasionally reckless or intentional acts by co-competitors) would lead to a “fundamental alteration” of sports and would chill competition by discouraging “vigorous participation.”⁶³

While a defendant may owe no duty to protect another from a sport's inherent risks, he or she does owe a limited duty not to increase the sport's inherent risks.⁶⁴ However, the scope of a defendant's limited duty in sports is dependent upon the defendant's relationship to the sport (e.g., co-competitor, coach, facility provider).⁶⁵ Only when this limited duty is breached will the jury be allowed to apportion damages after determining fault through a pure comparative fault analysis.

To determine whether a duty is owed, the sport's nature is of paramount importance; recovery depends on a judge's legal determination of the sport's inherent risks.⁶⁶ To determine a sport's inherent risks, the judge must decide if eliminating the risk would (1)

59. *Knight*, 834 P.2d at 708.

60. *Id.*

61. *Shin*, 165 P.3d at 592 (Kennard, J., dissenting).

62. *Dyke v. S.K.I. Ltd.*, 79 Cal. Rptr. 2d 775, 778 (Ct. App. 1988); *see also Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 593 (Ct. App. 1997).

63. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 394 (Cal. 2006) (holding that the risk of being “beaned” by a pitcher is an inherent risk of baseball); *Knight*, 834 P.2d at 710.

64. *Knight*, 834 P.2d at 708.

65. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 32-33 (Cal. 2003) (coach); *Knight*, 834 P.2d at 711 (co-participant); *Branco v. Kearny Moto Park*, 43 Cal. Rptr. 2d 392, 398 (Ct. App. 1995) (BMX facility operator).

66. *Shin*, 165 P.3d at 584; *Knight*, 834 P.2d at 706, 708-09.

chill vigorous participation in the sport and (2) alter the fundamental nature of the activity.⁶⁷ In theory, this analysis should be simple. In application, uncertainty exists because judges may make the legal determination of duty based on limited knowledge and experience with esoteric sports (such as BMX and other action sports).⁶⁸

If the judge has personal experience and is familiar with the sport in question, then the judge will likely accurately and fairly determine the sport's inherent risks. However, if a judge is unfamiliar with the sport, the judge is less likely to accurately determine whether a given risk is inherent. This lack of familiarity creates the potential for injustice to occur. Erroneous rulings may impose a duty for risks that should have been barred by primary assumption of risk because they were truly inherent in the sport. When a duty is imposed for risks that are inherent in a sport, the sport's fundamental nature will likely be altered.

This poses a major threat to the natural progression and diffusion of BMX by finding liability when there should be no duty under primary assumption of risk. In general, action sports such as BMX are especially susceptible to such erroneous findings because of how recently they have emerged in popular culture.⁶⁹ The relative infancy of these sports, in comparison to traditional sports that have been played for over a century or more,⁷⁰ decreases the likelihood that a judge will have personal knowledge about an action sport. Further, because action sports are generally youth-oriented,⁷¹ it is even more unlikely a judge will have experience playing an action sport. In fact, the average age of a California Superior Court judge is sixty-three years, and the average age of a California Court of Appeals judge is

67. *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 536 (Ct. App. 2002).

68. *Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 660-61 (Ct. App. 1996); Richardson, *supra* note 13, at 154, 156.

69. Action sports started gaining mainstream popularity in the mid 1990s. ACTIVE MKTG. GRP., ACTION SPORTS MARKET (2007), <http://activemarketinggroup.com/assets/amg+2009/action+sports.pdf>.

70. Golf became popular in the fifteenth century; baseball and tennis became popular in the late 1800's. DAVID G. MCCOMB, SPORTS IN WORLD HISTORY 38, 42-43 (2004).

71. Seventy percent of all BMX participants are under the age of twenty-four. ACTIVE MKTG GRP., *supra* note 69.

nearly sixty-six years.⁷² Even if a judge participated in BMX during its emergence in the 1960s and 1970s, the sport's nature has progressed so radically that there is no fair comparison to be made between the eras.

Notwithstanding judges' lack of familiarity or personal experience with BMX, because duty is a question of law, judges must determine the sport's inherent risks regardless of whether the judge has knowledge of the sport.⁷³ California courts have recognized this can be a potential problem, but are split on how to address it because the California Supreme Court remains silent on the issue.

Noting that judges are forced to make determinations of duty based upon limited or no personal knowledge of an uncommon sport's inherent risks, the First District ruled expert testimony may assist the court by explaining the factual nature of an esoteric sport—but experts cannot provide testimony on ultimate legal questions of inherent risks and duty.⁷⁴ At a minimum, this approach ensures the judge will at least have background information about the sport's nature before making a legal determination of the sport's inherent risks. Under this approach, the judge's duty determination will ultimately be based on the judge's subjective belief about the sport's nature.

In comparison, the Second District has stated, “[I]t is for the court to decide . . . the inherent risks of [a] sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport. . . . [E]xpert opinion may inform the court on these matters.”⁷⁵ This approach prevents the possibility of a completely uninformed duty determination. Still, it may not produce an accurate assessment of the sport's inherent risks. Allowing experts to educate a judge about a sport's nature and its inherent risks will require the judge to weigh each expert's opinion to make a duty determination.

Because of the nature of adversarial proceedings, it is unlikely both parties' experts will agree on the nature of a sport and its inherent risks. Instead, each party will have likely found an expert that

72. Mike McKee, *Calif. Judges Choose the Long, Gray Stay*, LAW.COM (July 10, 2008), <http://www.law.com/jsp/article.jsp?id=1202422859714>.

73. *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 204 (Ct. App. 2003).

74. *Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 662 (Ct. App. 1996).

75. *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 688-89 (Ct. App. 2000).

advances its own position. A judge must then determine—possibly with little or no personal knowledge—which expert was most accurate about the sport’s true nature and inherent risks. Even with an expert witness assisting the judge in determining the sport’s inherent risks, judges “still may have no idea how imposing liability w[ould] affect or ‘chill’ the sport—which is a major factor in making a determination of duty. Nevertheless, under . . . *Knight*, [judges] must somehow make such a determination.”⁷⁶

The Fourth District allows expert opinion to assist judges in determining whether a defendant increased a sport’s inherent risks, but not in initially determining the sport’s inherent risks.⁷⁷ Therefore, similar to the First District, judges must determine duty based upon their common knowledge without assistance from an expert.⁷⁸ Such blind decision-making is very likely to lead to an inaccurate assessment of an uncommon sport’s inherent risks.

None of these three approaches provides sufficient guarantees that a judge will make a factually informed decision regarding duty. To say there is uncertainty in how the determination of duty will be made, and how accurate such a determination will be, is an understatement. As one California judge eloquently wrote, “The [California] Supreme Court would do well to provide further guidance by clarifying the rule book.”⁷⁹

C. Scope of Limited Duty

Once the court has determined a sport’s inherent risks, the scope of the defendant’s limited duty not to increase the sport’s inherent risks will vary depending on the defendant’s relationship to the sport.⁸⁰ Thus, different duties of care will be placed upon defendants

76. *Moser*, 130 Cal. Rptr. 2d at 204 (citations omitted).

77. *Huffman v. City of Poway*, 101 Cal. Rptr. 2d 325, 340 n.23 (Ct. App. 2000) (holding that expert testimony may assist the court in determining whether the inherent risks in an “esoteric activity . . . were increased by the defendant’s conduct”); see also *Branco v. Kearny Moto Park*, 43 Cal. Rptr. 2d 392, 395, 398 (Ct. App. 1995).

78. *Rosencrans v. Dover Images, Ltd.*, 122 Cal. Rptr. 3d 22, 32 (Ct. App. 2011) (citing *Staten*, 53 Cal. Rptr. 2d at 661).

79. *Staten*, 53 Cal. Rptr. 2d at 662.

80. *Knight v. Jewett*, 834 P.2d 696, 709 (Cal. 1992).

based on their role in the sport. The California Supreme Court has provided guidance for three different classifications of defendants in sports-related lawsuits: (1) co-participants,⁸¹ (2) coaches,⁸² and (3) facility providers.⁸³

1. Co-Participants

Co-participants are shielded from simple negligence actions.⁸⁴ Negligence among co-participants has consistently been deemed an inherent risk of sports, regardless of the type of sport—active or not—and regardless of the level at which the participants were playing (i.e., casual, amateur, or professional).⁸⁵ Instead, co-participants will only breach a “legal duty owed to other participants . . . if the participant *intentionally* injures another player or engages in conduct that is so *reckless* as to be totally outside the range of ordinary activity involved in the sport.”⁸⁶ This limited duty of care is driven purely by public policy, which seeks to avoid altering the fundamental nature of sports, discouraging vigorous participation, or “sapping” the thrill of sports.⁸⁷

2. Coaches

Similar to co-participants, sports coaches only incur liability to their students if they intentionally cause injury, or engage in conduct that is so reckless as to be totally outside the range of ordinary coaching activity involved in the sport.⁸⁸ Again, public policy justifies

81. *Id.* at 711.

82. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (Cal. 2003).

83. *Morgan v. Fuji Cnty. USA*, 40 Cal. Rptr. 2d 249, 253 (Ct. App. 1995).

84. *Knight*, 834 P.2d at 711.

85. *E.g.*, *Shin v. Ahn*, 165 P.3d 581, 584 (Cal. 2007); *Knight*, 834 P.2d at 711.

86. *Knight*, 834 P.2d at 711 (emphasis added). “[C]onduct is totally outside the range of ordinary activity involved in [a] sport if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.” *Freeman v. Hale*, 36 Cal. Rptr. 2d 418, 422 (Ct. App. 1994). Thus, reckless conduct may not be actionable if such conduct is considered inherent in the sport.

87. *Knight*, 834 P.2d at 710; *Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883, 889 (Ct. App. 2003); *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 265, 272 (Ct. App. 2001).

88. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (Cal. 2003)

a relaxed standard of care because of participants' need for instruction when learning how to participate or advance their skill levels.⁸⁹ Attaching liability to coaches for simple negligent acts may "inhibit adequate instruction and learning or eventually alter the nature of [a] sport."⁹⁰ Coaches' liability for simple negligence would expose them to potentially limitless liability to students who feel they were pushed beyond their boundaries at the time they were injured.⁹¹

3. *Sports Facility Providers*

Sports facility providers do not benefit from the relaxed standards of care that co-participants and coaches owe to participants. While sports facility providers incur no liability for injuries that result from a sport's inherent risks, providers generally must not *negligently* increase a sport's inherent risks by providing unreasonably unsafe facilities.⁹² In fact, "recent trends in the law recognize duties on the part of the operators of sports facilities to ensure participant safety."⁹³

Applying this general rule to traditional sports makes sense. For example, participants do not play basketball seeking the challenge of a slippery floor. Moreover, with the exception of golf, playing fields for traditional sports such as baseball, soccer, tennis, and football remain relatively constant.⁹⁴ Thus, in most traditional sports, the thrill of

(holding that a sports coach can be liable for pushing a sports participant to perform beyond his or her capabilities only if the coach's intent was to cause injury, or the coach's conduct "was totally outside the range of ordinary conduct involved in teaching or coaching the sport").

89. *Id.*

90. *Id.*

91. *Id.* at 42-43.

92. *Morgan v. Fuji Cnty. USA*, 40 Cal. Rptr. 2d 249, 253 (Ct. App. 1995) (golf course owner has a duty to golfers to provide a reasonably safe golf course, such that the inherent risk of getting struck by an errant ball is not increased by the course's design); *Branco v. Kearny Moto Park*, 43 Cal. Rptr. 392, 398 (Ct. App. 1995) (BMX track owner owes a duty to participants to design reasonable jumps that do not expose riders to an extreme risk of injury).

93. *Rotolo v. San Jose Sports & Entm't, L.L.C.*, 59 Cal. Rptr. 3d 770, 790 (Ct. App. 2007).

94. Of course, variations exist with respect to field conditions. But dimensions, if not constant, are prescribed to be within certain ranges. For an example, see *Official Baseball Rules*, Rules 1.04-1.06, MLB.COM, http://mlb.mlb.com/mlb/downloads/y2010/official_rules/2010_OfficialBaseballRules.pdf (last

competition stems from direct competition with co-competitors rather than from the field of play itself. In contrast, BMX's allure is the challenge and danger posed by BMX obstacles—much of the sport's thrill is derived from competing on challenging courses that test the rider's ability.⁹⁵

In *Branco v. Kearny Moto Park*,⁹⁶ a California Court of Appeal set precedent that has chilled the progression of BMX course design and has effectively limited the availability of BMX facilities by imposing unnecessary liability. In *Branco*, a seventeen-year-old novice BMX rider was seriously injured while practicing at his local BMX track; plaintiff Branco crashed while attempting to ride over a “double jump.”⁹⁷ To determine whether primary assumption of risk barred Branco's claim, the court broadly ruled that jumps and falls are inherent risks in BMX, and that a BMX course has “no duty to protect from injury arising from reasonably designed jumps.”⁹⁸ The court then examined whether the track's operator *negligently* increased those inherent risks by constructing an unreasonable jump.⁹⁹

Branco's expert alleged the jump was designed too steep, and the distance between the takeoff mound and landing mound was too great, such that the rider had to be travelling at a very high rate of speed to traverse the jump.¹⁰⁰ The expert further alleged the combination of these two factors put riders “at the very end of their envelope of ability.”¹⁰¹ In contrast, the BMX track's expert opined that the jump was similar to ones that could be found at any BMX track and the jump was within the guidelines determined by the track's sanctioning body.¹⁰² After weighing the experts' testimony, the court found the

visited Nov. 11, 2010).

95. This is especially true in freestyle BMX disciplines where riders do not compete head-to-head against each other.

96. 43 Cal. Rptr. 2d 392 (Ct. App. 1995).

97. *Id.* at 394-95 & n.6. A “double jump” refers to an obstacle comprised of two dirt mounds separated by a gap; the BMX rider may simply roll over both mounds, “manual” (riding on only the rear wheel) the mounds, or jump from the face of the first mound across the gap to the backside of the second mound.

98. *Id.* at 398.

99. *Id.*

100. *Id.* at 395.

101. *Id.*

102. *Id.*

jump may have created an “extreme risk of injury,” and such “extreme risk” is not an inherent risk of BMX.¹⁰³ Thus, building an obstacle that created an extreme risk to a rider subjected the track owner to liability under secondary assumption of risk.¹⁰⁴ Further, the court ruled that because of the “degree of control exercised over the creation” of man-made obstacles, facility providers should be required to build reasonably safe obstacles.¹⁰⁵

Branco has many implications that inhibit the progression of BMX cycling and limit the availability of BMX facilities due to fear of liability. First, the court’s “extreme risk” standard gives little guidance as to what creates an “extreme risk.” The opinion’s introductory paragraph states there was a triable issue of fact as to whether the BMX track operator built a negligently designed jump.¹⁰⁶ Thus, it is plausible that the court believed a negligently designed jump would create an extreme risk of injury. Yet, throughout the remainder of the opinion, the court reiterates that a BMX facility operator has a duty not to construct any jumps that create an extreme risk of injury.¹⁰⁷

When considering California Government Code section 831.7—which states that the mere act of racing or jumping a bicycle is considered a per se hazardous activity that “creates a substantial . . . risk of injury to a . . . participant”¹⁰⁸—the court likely intended its “extreme risk” standard to apply to situations where a provider negligently constructed a BMX obstacle. Regardless, in application, there is no clear understanding of what constitutes an “extreme risk.” This makes *Branco*’s extreme risk standard a pleading guide for

103. *Id.* at 398.

104. The California Court of Appeals, Fourth District, decided *Branco*. *Id.* at 392. In the Fourth District, courts allow the jury to determine whether a defendant has increased a sport’s inherent risks, thus subjecting the defendant to liability under secondary assumption of risk. *Id.* at 398. However, not all California courts make this decision as a matter of law. *Infra* Part II.D.

105. *Branco*, 43 Cal. Rptr. 2d at 393, 398. While this paper focuses on BMX bicycling, *Branco*’s holding has far-reaching implications for any action sport that requires manmade obstacles—such as motocross, skateboarding, snowboard-cross, and freestyle skiing/snowboarding.

106. *Id.* at 393.

107. *Id.* at 396, 398.

108. CAL. GOV’T CODE § 831.7(b) (2010).

plaintiffs to avoid summary judgment. As occurred in *Branco*, plaintiffs can plead that the facility provider's negligence created an extreme risk of injury, and then support the assertion with an expert witness. This will ensure there is a triable issue of fact and avoid summary judgment.¹⁰⁹

Second, *Branco* holds that a BMX provider owes a duty to not create an extreme risk of injury to a beginner in the sport. In reality, all obstacles will pose an extreme risk to someone—especially a beginner. Thus, when beginners share the same facilities with experts or professionals, a BMX facility provider must ensure the track is designed in such a way that the track is safe for someone with no prior experience or proficiency in the sport. Because availability of facilities is already limited, it is difficult from a financial and land availability standpoint to create multiple tracks to separate beginner style jumps from expert style jumps.

Rather than compromise between the levels of difficulty, providers must err on the side of caution and construct features that are safe for total beginners. This chilling effect undoubtedly leads to burnout in more advanced riders who quickly become tired of riding obstacles they do not find challenging. It also deters many participants from utilizing existing, beginner-friendly facilities. Instead, advanced riders often resort to trespassing to create their own obstacles that better challenge their advanced abilities. Rather than create a subjective “extreme risk” standard of care, the court should have taken into account that “the risks associated with *learning* a sport may themselves be inherent risks of the sport.”¹¹⁰

D. Breach of the Limited Duty

It is clear that if a defendant increases a sport's inherent risks, he or she has breached a legal duty owed to a sports participant.

109. *Contra* *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683, 689 (Ct. App. 2000) (“It will always be possible for a plaintiff who suffers a sports injury to obtain expert testimony that . . . the recreation provider increased the inherent risks of the sport. Such expert opinion . . . does not raise a triable issue of fact.”). However, in esoteric sports, if the judge has no prior knowledge of the sport and the determination of whether a defendant increased the sport's inherent risks is a question of fact, such expert testimony likely will raise a triable issue of fact.

110. *Kahn v. E. Side Union High Sch. Dist.*, 75 P. 3d 30, 40 (Cal. 2003) (emphasis added).

However, California courts are split regarding who determines whether a defendant's conduct increased a sport's inherent risks. Some hold it is a matter of law; others hold it is a question of fact.¹¹¹ As discussed above, the judge may be forced to make a factually uninformed decision with regards to the sport's inherent risks. If the court also determines whether the defendant increased the sport's inherent risks, then the inquiry will be considered part of the *duty* analysis. Therefore, if the court determines as a matter of law whether a defendant increased a sport's inherent risks, the judge again may make a factually uninformed determination. Under this scenario, the jury's only role will be in apportioning fault to allocate damages.

In districts allowing the jury to determine whether the defendant's conduct increased the sport's inherent risks, the inquiry into the matter will be to determine if there was a *breach* of duty. While the analysis of duty may require judges to make uninformed determinations of whether a duty was owed, at minimum, letting the jury determine whether the defendant breached a duty likely ameliorates that problem. The jury will be able to consider all admissible evidence at trial before determining if a defendant breached a legal duty owed to a sports plaintiff. Further, because juries are randomly selected from the general population,¹¹² it is likely some members of the jury will have personal experience with action sports—if not BMX directly. Thus, the jury's determination of breach is likely to be more informed than a judge's determination of the same issue under the analysis of duty.

E. Public Policy Considerations

California's justification for developing the "no-duty-for-sports rule" was to preserve sports' fundamental natures through promoting vigorous participation.¹¹³ Not holding co-competitors liable for

111. Question of *law*: *Huff v. Wilikins*, 41 Cal. Rptr. 3d 754, 763 (Ct. App. 2006); *Hemedy v. Long Beach Unified Sch. Dist.*, 49 Cal. Rptr. 3d 464, 468-69 (Ct. App. 2006). Question of *fact*: *Vine v. Bear Valley Ski Co.*, 13 Cal. Rptr. 3d 370, 382 (Ct. App. 2004); *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 538 (Ct. App. 2002); *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 2d 265, 273 (Ct. App. 2001); *Branco*, 43 Cal. Rptr. 2d at 398.

112. *Jury Information Resource Center*, CAL. CTS., <http://www.courtinfo.ca.gov/jury/faq.htm> (last visited Mar. 6, 2011).

113. *Knight v. Jewett*, 834 P.2d 696, 710, 722 (Cal. 1992).

negligence ensures competition is not “chilled,” and thus advances these public policy goals.¹¹⁴ However, in sports like BMX where the course itself is an integral part of the challenge, imposing liability upon facility providers for negligently increasing the sport’s inherent risks does not advance the same public policy considerations.

When participants engage in a sport like football, they know co-competitors are likely to play aggressively against them. Similarly, when participants engage in BMX racing, they know that they may lose control of their bicycle due to contact with other riders while racing to the finish line. California law will provide immunity for negligent acts, and even reckless acts of co-competitors, so long as their recklessness is normal for the type of competition. Rather than “chill” competition by imposing liability upon co-competitors for “ordinary careless conduct committed during the sport,” courts prefer to let a sport’s internal sanctions provide deterrence for such conduct.¹¹⁵

It follows that when playing sports, a participant assumes the risk of injuries—even the extreme risk of injuries—caused by co-participants whose actions the participant cannot control. Yet in BMX, where the field of play is dangerous in itself, the participant may recover from a facility provider even when rider’s error caused his own accident. This is true even when the risks posed by the BMX course’s design were knowingly and voluntarily encountered.

To illustrate, compare *Knight* and *Branco*. In *Knight*, plaintiff Knight participated in an impromptu game of coed touch football with defendant Jewett and few other friends.¹¹⁶ After playing for less than ten minutes, Jewett ran into Knight during a play.¹¹⁷ Uncomfortable with Jewett’s aggressiveness, Knight told Jewett “not to play so

114. *Id.*

115. *Id.* (“[I]n . . . sport[s], even when a participant’s conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.”). In BMX racing, “[a]ny rider determined by an official as maliciously forcing another rider off the track may be disqualified.” AM. BICYCLE ASS’N, 2010 RULE BOOK 27 (2010), available at http://www.ababmx.com/pdf/2010_aba_rulebook.pdf.

116. *Knight*, 834 P.2d at 697.

117. *Id.*

rough,” or else “[she] would have to stop playing.”¹¹⁸ On the next play, Jewett collided with Knight, severely injuring Knight’s hand.¹¹⁹ Notwithstanding Knight’s unwillingness to play with aggressive participants and her belief that Jewett would no longer “play so rough,” the court ruled that primary assumption of risk barred Knight’s claim.¹²⁰ The court feared imposing liability for Jewett’s actions would fundamentally alter the sport’s nature by deterring vigorous participation.¹²¹

In contrast, a BMX racer’s claim against a BMX track was not barred by primary assumption of risk—even though the rider voluntarily encountered a known danger.¹²² In *Branco*, plaintiff Branco, a novice BMXer, knew a jump on the defendant’s track, dubbed the “million dollar jump,” was “too dangerous” if he traversed it in a manner that exceeded his abilities.¹²³ However, peer pressure combined with Branco’s desire to “go fast” resulted in Branco losing control while traversing the million dollar jump; he sustained severe injuries.¹²⁴ Despite this, the court held Branco’s claim was not barred by primary assumption of risk because the BMX track may have negligently increased the sport’s inherent risk of falling by building a jump that created an extreme risk of injury.¹²⁵

As a result of *Branco*, BMX facility providers design obstacles that are not challenging for most riders to avoid liability. This effectively “chills” competition, limits the sport’s progressive “fundamental” nature, and deters vigorous participation. Such results are contrary to the public policy justifications of assumption of risk as applied to traditional sports. California law should allow participants to make an autonomous decision to challenge their abilities without subjecting BMX facility providers to liability when a rider exceeds his or her ability and has an accident.

118. *Id.*

119. *Id.* at 697-98.

120. *Id.* at 712.

121. *Id.* at 710.

122. *Branco v. Kearny Moto Park*, 43 Cal. Rptr. 2d 392, 393-95 (Ct. App. 1995).

123. *Id.* at 394-95.

124. *Id.* at 394-95 & nn. 9 & 11.

125. *Id.* at 393, 398.

Despite assumption of risk's uncertain application, for many facility providers, it is the only basis of protection from negligence actions. California does have liability-limiting statutes, which do confer greater protection for landowners than the doctrine of assumption of risk; however, the statutes' scope of protection is too limited to effectively confer a dependable basis of immunity.

III. STATUTORY IMMUNITY

A. Private Lands: Recreational Use

Landowners in California owe a duty of reasonable care to *any* person who enters upon their land, with no distinction based on the entrant's status as a trespasser, licensee, or invitee.¹²⁶ Thus, a landowner owes a person with an express invitation to be upon the land the same duty of reasonable care as owed a trespasser.¹²⁷ While this progressive approach to premises liability seeks to ensure landowners take reasonable measures to not expose *any* entrants to unreasonable risks of harm, it deters landowners from making their land available for use by others. Imposing a reasonable duty to all entrants, regardless of their classification, has decreased the amount of

126. CAL. CIV. CODE § 1714 (Deering 2005); *Rowland v. Christian*, 443 P.2d 561, 567-68 (Cal. 1968) (abandoning the rigid common law entrant classifications because “[a] man’s life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose [F]ocus[ing] upon . . . the status of the injured party . . . in order to determine . . . if the [possessor] owed a duty of care, is contrary to our modern social mores and humanitarian values.”). California was the first state in the nation to abolish the entrant categories in favor of a reasonable person standard. DAN B. DOBBS, *THE LAW OF TORTS* 616 (2000). Most states have not followed California’s lead; rather, they still apply the common law distinctions where possessors generally owe a reasonable person standard of care only to invitees—while trespassers and licensees must only be protected from intentional or reckless injuries (subject to certain exceptions). *Id.* at 591-92, 597, 602-03.

127. *Silva v. Union Pac. R.R. Co.*, 102 Cal. Rptr. 2d 668, 670 (Ct. App. 2000). However, an entrant’s status does still bear on the issue of foreseeable risks, which may ultimately lead to finding duty in less situations when the entrant is a trespasser when compared to an invitee or licensee. *Id.*

private land available for recreational use due to fear of liability from injured entrants.¹²⁸

In response to the growing “tendency of private landowners to bar public access to their land for recreational uses out of fear of incurring tort liability,” California’s legislature enacted a recreational use statute to give private landowners immunity from the negligence claims of uninvited, non-paying entrants who were injured while participating in recreational activities on their land.¹²⁹ The legislature’s goal was to encourage private landowners to make their land available to the public for recreational uses.¹³⁰ In application, California’s recreational use statute confers vast immunity for landowners¹³¹ —even shielding

128. *Calhoon v. Lewis*, 96 Cal. Rptr. 2d 394, 398 (Ct. App. 2000).

129. CAL. CIV. CODE § 846 (Deering 2005); *Calhoon*, 96 Cal. Rptr. 2d at 398. Section 846 contains a list of recreational activities, ranging from ordinary activities such as picnicking, gardening, and sightseeing, to extreme activities such as parachuting and hang gliding. CIV. § 846. However, section 846’s list of recreational activities is “merely illustrative” and is not exclusive. *Valladares v. Stone*, 267 Cal. Rptr. 57, 60 (Ct. App. 1990). In application, “[t]he definition of ‘recreational purpose’ in section 846 is so extensive it includes nearly any leisure activity.” *Shipman v. Boething Treeland Farms*, 92 Cal. Rptr. 2d 566, 569 (Ct. App. 2000) (overruled on an unrelated matter). While not enumerated as recreational activities in section 846, bicycling and skateboarding have both been deemed recreational activities encompassed by section 846. *Calhoon*, 96 Cal. Rptr. 2d at 397 (applying section 846 to skateboarding, but finding immunity eviscerated by an express invitation onto the premises); *Domingue v. Presley of S. Cal.*, 243 Cal. Rptr. 312, 315 (Ct. App. 1988) (applying section 846 to bicycling, but distinguishing bicycle riding for transportation from riding for recreational purposes).

130. However, “the legislative history for Civil Code section 846 is sparse.” *Klein v. United States*, 235 P.3d 42, 51 (Cal. 2010). Nevertheless, it is apparent that the “California Legislature sought to strike a fair balance between the interests of private landowners” (who were closing private lands to recreational users because of liability concerns), and “those of recreational users.” *Id.* Yet, by “carving out an exception” for users personally invited upon the land, the “[l]egislature showed it did not have a similar concern with encouraging property owners to provide access for the owner’s personal guests. . . . [P]roperty owners do not need governmental encouragement to permit guests to come onto their land.” *Calhoon*, 96 Cal. Rptr. 2d at 398.

131. Owners of any interest in real property will benefit from statutory immunity under section 846 unless (1) the owner’s conduct amounted to a “willful or malicious failure to guard or warn against a dangerous condition,” (2) the owner granted permission to use his or her land in return for consideration, or (3) the owner expressly invited the entrant upon his land—rather than merely permitting entry for recreational purposes. CIV. § 846. California courts have also extended section 846

landowners from liability when their land is not suitable for recreational purposes.¹³²

While California's recreation statute provides vast immunity to landowners, its effectiveness in promoting participation in BMX is limited. First, by nature of California's population density, undeveloped land (which is suited for recreation) is typically located in less densely populated areas. Therefore, the statute will be most effective in the least populated regions of California.

The statute's effectiveness is minimal in densely populated urban areas where sports facilities are sparse due to limited available space.¹³³ BMX facilities would have the greatest impact for promoting participation in the sport in such densely populated areas. Also, in urban areas, owners of smaller parcels are unlikely to construct BMX facilities on their land for the public to use. Instead, such landowners generally keep their facilities private and allow only invited guests to participate in BMX on their land. Unfortunately, express invitations will eviscerate immunity under the statute,¹³⁴ thereby forcing the landowner to depend on the unreliable doctrine of assumption of risk. Because the policy behind conferring statutory immunity upon landowners for uninvited, non-paying entrants was aimed at promoting participation in recreation, the legislature should have considered ways to encourage participation in urban areas where most California citizens reside.

to shield land possessors from liability against "nonpaying recreational trespasser[s]." *Charpentier v. Von Geldern*, 236 Cal. Rptr. 233, 236, 240 (Ct. App. 1987) ("The recreational trespasser on private land assumes the risk of injury . . . absent willful or malicious misconduct by the landowner."). However, the scope of immunity under section 846 only extends to a land possessor's duties that arise out of his property ownership; therefore, if a land possessor and a recreational user are "engaged in the same activity on the same land at the same time . . . each . . . owe[s] the same duty of care to the other." *Klein*, 235 P.3d at 51. In this situation, analyzing each co-participant's duties under the doctrine of assumption of risk would be necessary.

132. *Ornelas v. Randolph*, 847 P.2d 560, 568 (Cal. 1993) ("One who avails oneself of the opportunity to enjoy access to the land of another for . . . recreational activities . . . may not be heard to complain that the property was inappropriate for the purpose.").

133. Roughly eighty percent of Californians live in major cities, or in surrounding urban areas. See *CA County Population*, CAL. COUNTIES, <http://www.counties.org/default.asp?id=399> (last visited Nov. 14, 2010).

134. Civ. § 846.

Even when the statute does apply, it has the negative effect of placing participants in higher risk situations because landowners have no incentive to ensure obstacles are suited for their intended use. Thus, landowners can construct BMX facilities and allow the public to participate on their land without any care for the condition of the obstacles or the obstacles' suitability for the range of riders' proficiencies. Further, if a landowner passively allows others to construct BMX facilities on his or her land for use by the general public, supervision of participants is highly unlikely. This is problematic, because many riders do not wear helmets unless they are required to. If no one requires riders to wear helmets, many riders may sustain preventable brain injuries.¹³⁵

When immunity under the recreational statute does apply, it encourages potentially unsafe, and often unsupervised, participation in BMX. Thus, competing public interests conflict. On one hand, public policy supports making land available to the general public for recreational activities. On the other hand, public policy should also support a framework that allows for limited liability to recreational participants, while encouraging participation in a safe environment.

B. Public Lands: Hazardous Recreational Activities

Possibly the largest barrier preventing BMX facilities from becoming widely available is the inadequacy of California's "ultra-hazardous activity" statute.¹³⁶ The statute provides immunity to public entities and public employees from liability to persons participating in activities that "create[] a substantial risk of injury" to the participant.¹³⁷ All types of bicycle racing and bicycle jumping (which therefore encompass any BMX related activity without regard to the skill level of the rider) are per se hazardous recreational activities as such activities are enumerated in the statute.¹³⁸

135. Up to eighty-five percent of bicycle-related brain injuries could be prevented by helmet use. Schieber & Sacks, *supra* note 32.

136. CAL. GOV'T CODE § 831.7(a) (Deering 2010) (conferring immunity to public agencies and actors from negligence claims arising out of activities that "create a substantial risk of injury to a participant").

137. *Id.* § 831.7(a).

138. *Id.* § 831.7(b)(3).

Pertinent to BMX, liability can attach for injuries arising out of hazardous recreational activities when a public entity or public employee (1) fails to guard or warn against a known danger that is not reasonably inherent in the activity; (2) fails to construct or maintain any structure or “substantial work of improvement utilized in the hazardous recreational activity out of which the danger or injury arose,” or (3) charges the participant a fee for the use of the specific recreational facilities (a fee distinct from a general park admission).¹³⁹

In theory, such blanket protection should be adequate to ensure public lands, such as city parks, are available for BMX facilities. Yet the hazardous recreational activity statute does not provide adequate protection to make construction of BMX facilities on public lands feasible. In contrast, other action sports like skateboarding are able to thrive under the statute. There are a few problems with the ultra-hazardous activity statute as applied to BMX, and each uniquely contributes to the statute’s inadequate protection for BMX.

First, as discussed in Part II, determining what risks are reasonably inherent in BMX creates uncertainty as to what types of course and obstacle designs will create liability. Fortunately, under the hazardous recreational activity statute, a warning sign may preclude a participant’s claim. Second, and most problematic for BMX, the government’s failure to keep any BMX facilities or obstacles in good repair may eviscerate immunity. BMX racing and freestyle jumping utilize compacted dirt mounds to create challenging obstacles. When obstacles are made out of dirt, erosion from heavy use and natural forces, such as rain, are common. Under the statute, erosion from natural wear and tear may give rise to liability if the damage is not fixed. Therefore, public providers of BMX facilities likely must constantly maintain BMX obstacles to keep them in “good repair.”

Further, due to the ease of modifying dirt obstacles, without constant supervision of BMX parks anyone may easily modify obstacles. Thus, jumps that may have been reasonably designed but were subsequently changed may also subject public entities to liability by eviscerating immunity under the statute. Given California’s budget

139. *Id.* § 831.7(c)(1)-(3). A public entity or employee may also be liable for recklessly or gross negligently promoting an activity, or for causing injury through gross negligence. *Id.* § 831.7(c)(4)-(5).

deficit and spending cuts for parks and recreation,¹⁴⁰ it is unlikely cities will dedicate public land for BMX dirt facilities because they lack the money to ensure such facilities are supervised and maintained.

This exception also prevents BMX bicycles from being allowed entry into skate parks where obstacles are constructed of wood or concrete. Generally, skate parks are designed and constructed for skateboards; bicycles of any kind are not allowed.¹⁴¹ Most public skate park operators are unwilling to allow bicycles in the parks because they believe bicycles will damage the parks and therefore may subject operators to liability if they fail to repair damage.¹⁴² Yet, while studies examining deterioration of skate park obstacles due to bicycle use have shown that BMX bicycles neither damage the parks nor accelerate their normal wear, operators still conveniently cite increased potential liability as a reason for not allowing bikes into the parks.¹⁴³ Further, due to budget restrictions, if bicycles did cause damage (thus requiring repair to retain immunity), cities would not have the money to continually maintain the skate parks.

Simply charging admission to the parks and using the proceeds to monitor and maintain the parks would likely solve any budget constraints by making the parks self-sufficient. However, doing so would eviscerate immunity and would force cities to rely upon express or implied assumption of risk.¹⁴⁴ Thus, an admission fee is an unlikely resolution. Additionally, while cities cannot afford constant monitoring and supervision of BMX parks, volunteers may be willing to spend time ensuring the facilities are kept in good repair. Yet immunity under the statute is not extended to private actors,¹⁴⁵ making

140. See *Budget Cuts Leave Skateparks Unsupervised*, 10NEWS.COM (Jan. 13, 2009), <http://www.10news.com/news/18469706/detail.html>.

141. For example, San Diego has five public skateparks—all of which expressly prohibit the use of any bicycles. *Recreation Centers: City of San Diego Skate Parks*, CITY OF SAN DIEGO, <http://www.sandiego.gov/park-and-recreation/centers/skateparks.shtml> (last visited Nov. 22, 2010).

142. Moss, *supra* note 1.

143. *Id.*; see also Mahoney, *supra* note 40.

144. CAL. GOV'T CODE § 831.7(c)(2).

145. Neither volunteers nor independent contractors can benefit from statutory immunity under section 831.7. *Id.* § 831.7(d).

volunteering uncommon, as it exposes the volunteer to potential liability via *Branco*'s extreme risk standard.

IV. CONTRACTUAL PROTECTION: EXPRESS ASSUMPTION OF RISK

As discussed in Parts II and III, liability under assumption of risk for BMX facility providers is uncertain, and the statutory protections for such providers are under-inclusive to promote the diffusion of BMX. Because of these shortcomings, for-profit BMX providers are forced to rely on liability waivers to protect themselves from litigation.¹⁴⁶ Currently, the viability of the action sports industry as a whole depends on the enforcement of waivers. In California, contract law and public policy govern the enforceability of liability waivers.¹⁴⁷

Waivers precluding claims of future negligence will generally be upheld (assuming the waiver formed a valid contract) if the release "is clear, unambiguous, explicit, and . . . express[es] an agreement not to hold the released party liable for negligence."¹⁴⁸ Additionally, the waiver must not violate "public interest."¹⁴⁹ However, race organizers

146. Indeed, most hazardous recreational activity providers must rely on express assumption of risk. See *Nat'l & Int'l Bhd. of St. Racers v. Superior Court*, 264 Cal. Rptr. 44, 46-47 (Ct. App. 1989) ("In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.").

147. *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 443 (Cal. 1963) (holding that an exculpatory provision may be enforceable under contract law so long as the clause does not involve "the public interest"). For a detailed discussion of the enforceability of waivers shielding providers of "high risk" sports facilities in California, see Leslie Hastings, *Playing with Liability: The Risk Release in High Risk Sports*, 24 CAL. W. L. REV. 127, 137-50 (1988).

148. *Buchan v. U.S. Cycling Fed'n*, 277 Cal. Rptr. 887, 894 (Ct. App. 1991) (upholding a liability waiver in the context of a road cycling race). Recently, the California Supreme Court held that a waiver only shields the released party from ordinary negligence. *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1097, 1115 (Cal. 2007) ("[A]n agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy."). Thus, if protection is sought for claims beyond mere negligence, the Legislature is "the proper forum . . . to seek broad protection." *Id.*

149. Generally, activities that involve a "public interest" are ones that are "of

and providers of cycling facilities need not worry about their waivers violating public interest, because bicycle racing is not an activity that affects public interest.¹⁵⁰ Further, unlike the majority of states, California courts will “enforce[] agreements, signed by parents, releasing liability for future ordinary negligence committed against minor children in recreational . . . settings.”¹⁵¹

In the context of youth oriented sports like BMX cycling, liability waivers confer the most protection for private BMX facility providers. However, with respect to publicly operated BMX facilities, there is uncertainty as to the scope of coverage that waivers will provide against personal injury actions.¹⁵² Forcing BMX providers to resort to contractual agreements for dependable protection from negligence liability will not promote the sport’s diffusion throughout the state. Rather, forcing providers to rely on waivers will merely preserve the status quo. This leaves BMX, an Olympic sport, in a state of limited availability.

Currently, for-profit providers of BMX facilities rely on waivers to operate their businesses. Alternatively, landowners who merely build BMX facilities on their land may also make use of liability waivers. Yet, for various reasons, this is not a common occurrence. For many, BMX is a family-like environment. Requiring an invited guest to sign a waiver before being allowed to participate furthers the

great importance to the public, which [are] often a matter of practical necessity for some members of the public.” *Tunkl*, 383 P.2d at 444-46. However, other characteristics, such as inequalities of bargaining power or adhesion contracts that do not provide the purchaser with an option to pay extra fees to receive more protection, may render a waiver void for being against the public interest. *Id.*

150. *Buchan*, 277 Cal. Rptr. at 897 (“[B]icycle racing, no matter how important it is claimed to be by any particular participant, is not a matter sufficiently affected with the public interest so as to void clear and unambiguous exculpatory clauses.”).

151. *City of Santa Barbara*, 161 P.3d at 1110-11 (noting that this position is a minority view: “[a] clear majority of courts . . . have held that a parent may not release a minor’s prospective claim for negligence”).

152. *Mahoney*, *supra* note 40. Moreover, because waivers only protect against negligence actions, it is possible for a judge to make a decision about a sport’s nature (without the aid of an expert), and then rule that a defendant’s conduct amounted to gross negligence—thus eviscerating the provider’s contractual protection. *Rosencrans v. Dover Images, Ltd.*, 122 Cal. Rptr. 3d 22, 32-33 (Ct. App. 2011) (ruling that a motorcycle track may have been grossly negligent by failing to provide a caution flagger near a jump, which is customary for the sport).

sport's unfortunate stigma as a very dangerous sport. While it may be prudent to have all invited guests waive any claims to future negligence, it can be uncomfortable for many to require their friends to sign a waiver before participating.

Additionally, because BMX is a youth-oriented sport, requiring a parent to be present to sign a waiver for his or her child before the child can participate limits access for many youths. One of the advantages of BMX riding is mobility. In theory, kids should be able to ride from their schools or homes to BMX facilities without relying on parents for transportation. Requiring a parent's presence to sign a waiver severely limits minor's freedom to participate.

While waivers generally provide a dependable basis of protection for providers of BMX facilities, landowners should not be forced to rely upon them for adequate protection from negligence actions. Without a source of adequate statutory or common law protection, availability of BMX facilities likely will not increase to the amount necessary for the sport to thrive and offer minors a viable alternative to traditional sports.

V. PROPOSAL

California's application of assumption of risk and current statutory protections for BMX facility providers are insufficient to promote the sport's diffusion. The California legislature should promote this socially desirable activity by enacting sport-specific legislation that compensates for the current laws' shortcomings. In other states, sport-specific legislation addressing the needs of particular sports is not uncommon.¹⁵³

California has yet to enact a statute specifically addressing the needs of a particular sport; instead, it relies on blanket protection provided by the State's recreational use and hazardous recreational activity statutes. However, as the participation rates in skateboarding

153. Most states have enacted sport-specific statutes defining a given sport's inherent risks. See John O. Spengler & Brian P. Burket, *Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation*, 11 J. LEGAL ASPECTS SPORTS 135, 135 (2001). The most common sport-specific statutes "provide legislative protection for snow skiing, roller skating, and equestrian activities." *Id.* For a specific example, see OR. REV. STAT. §§ 30.970–30.990 (2009) (skiing).

have rapidly grown in the past decade,¹⁵⁴ the legislature responded by specifically defining when skateboarding will be considered a hazardous recreational activity.¹⁵⁵ By doing this, the legislature has taken action to ensure that skateboarding facilities on public land will be shielded from liability under the state's hazardous recreational use statute under certain circumstances.¹⁵⁶ This shows the legislature's willingness to encourage participation in youth-oriented action sports. Without such protection, it is unlikely skateboarding would flourish as it has, and the availability of public skateboarding facilities would be greatly diminished. Unfortunately, BMX has yet to capture the legislature's attention.

Because of the legislature's action with regard to skateboarding, there is hope that with public demand, legislation to address the unique needs of BMX may be possible. It has been noted that in circumstances where recreational sports service providers believe the "viability of their particular industry" rests upon the ability to gain more protection from liability than currently afforded, the legislature is "the proper forum . . . to present that [public] policy argument."¹⁵⁷ Certainly, the long-term viability of the BMX industry and the profession of BMX riding depend on the sport's expansion through increased participation, as the status quo merely contains this Olympic sport to a niche market.

Legislative protection conferring predictable standards of care to public and private BMX facility providers would remove many of the legal roadblocks that are currently restraining the sport from diffusing to a state of widespread availability. To achieve this, the legislature—with the assistance of BMX experts—should define BMX's inherent risks. These risks should be compiled after inquiring into what

154. Horton, *supra* note 2, at 603.

155. If a person twelve-years-old or younger is injured while performing a trick or stunt at a public skateboard park, the act may be considered a hazardous recreational activity so long as the requirements of section 831.7 of the California Government Code are satisfied. CAL. HEALTH & SAFETY CODE § 115800 (Deering 2010).

156. *Id.*

157. See *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1115 (Cal. 2007) (holding that regardless of a contract's language, liability waivers will not shield recreational providers from gross negligence).

“dangers or conditions are an integral part of the sport”¹⁵⁸ such that they cannot be eliminated without altering the sport’s nature. While such a list should not be exclusive, it should be broad enough to provide guidance to judges who are currently required to make these determinations without sufficient knowledge of the sport’s true nature. Further, when the statute does not enumerate a particular risk, judges should be allowed to consider expert opinion as to whether a risk is inherent in the sport. This will help ensure that any determination of duty accurately reflects the sport’s true nature.

While the current protection under California’s assumption of risk doctrine generally provides sufficient liability protection for co-participants of the sport,¹⁵⁹ BMX could nevertheless benefit from legislative guidance as to what types of conduct by co-participants are inherent in the sport. To illustrate, when racing in head-to-head competition, often there is contact between racers while jockeying for track position in order to beat their competitors to the finish line. Thus, aggressive contact is commonplace and riders often lose control after coming into contact with each other.

In a racing context, this type of conduct is inherent and integral to the sport—even if the conduct seems reckless. Further, when overaggressive contact occurs, internal sanctions within the sport punish racers and deter such conduct.¹⁶⁰ In contrast, in freestyle variations of BMX where participants do not compete head-to-head, contact may occur through negligence on the part of the participants, but reckless conduct, which may be acceptable and inherent when racing, is not inherent in the freestyle context.

The inherent risks posed by BMX obstacles also need to be defined. BMX participants engage in the sport in various settings (e.g., on dirt, wooden ramps, or concrete structures). It would be prudent to

158. OR. REV. STAT. § 30.970(1) (2009) (defining the inherent risks of skiing). According to the statute, the inherent risks of skiing include, “changing weather . . . surface conditions . . . collisions with other skiers . . . and a skier’s failure to ski within the skier’s own ability.” *Id.* (emphasis added).

159. Co-participants owe a “legal duty of care to other participants . . . if the participant *intentionally* injures another player or engages in conduct that is so *reckless* as to be totally outside the range of ordinary activity involved in the sport.” *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992) (emphasis added).

160. For example, a rider found to have maliciously forced another rider off track may be disqualified. AM. BICYCLE ASS’N, *supra* note 115.

outline what risks are associated with each type of BMX riding. For example, when riding on dirt obstacles, deterioration of compacted dirt naturally occurs over time, especially with heavy usage. Thus, changes in the condition of the dirt that may give rise to an increased risk of injury should be considered an inherent risk. Conversely, when riding on wooden or concrete structures, deterioration of such structures should not be deemed an inherent risk of the sport, as such structures, when built properly, are designed to withstand heavy usage and should not deteriorate.

Most importantly, the legislature should acknowledge that “the risks associated with *learning* a sport may themselves be inherent risks of the sport.”¹⁶¹ Further, a rider’s failure to ride within his ability should be considered an inherent risk of the sport. The allure of BMX is competing on obstacles that push riders’ abilities. This is true for novices and professionals who all seek to continually push their abilities to achieve progression. Under *Branco*’s subjective “extreme risk” standard, progression is effectively halted (and competition is therefore “chilled”) because obstacles must be safe for anyone who may use the facilities, regardless of their proficiency in the sport. When obstacles must be safe for total beginners, the thrill of the sport for more advanced participants is effectively “sapped.” Legislative abrogation of *Branco*’s extreme risk standard would allow for participants to make the autonomous decision to test their abilities while attempting to progress their skills.

Abrogating *Branco*’s restrictive extreme risk standard would rightfully shift responsibility for the participant’s injury from the landowner back onto the participant who made the autonomous decision to engage in the activity. While this may be viewed as “subsidiz[ing] pure risk taking,”¹⁶² participants who voluntarily seek the thrill of a sport while challenging their abilities should be held accountable for their actions.

Rather than attaching liability for obstacles that create an extreme risk to any particular participant, a standard should be developed that imposes liability upon landowners only in situations that truly warrant deterrence and retribution. Such a standard will allow landowners to

161. *Kahn v. E. Side Union High Sch. Dist.*, 75 P. 3d 30, 40 (Cal. 2003) (emphasis added).

162. *Horton*, *supra* note 2, at 628.

build obstacles that challenge advanced riders without fear of incurring liability to a novice who was injured because he simply rode beyond his ability level. However, landowners should have some accountability for their actions. It is perfectly reasonable to hold landowners liable for negligence when an injury is caused by a non-inherent risk; this proposal merely limits liability for landowners' actions with respect to the design of BMX obstacles.

To develop a standard that would limit liability by shifting responsibility onto the participant, the policy justifications that warrant the relaxed standard of care owed by participants to co-participants should guide the legislature.¹⁶³ Rather than impose liability on landowners for building obstacles that create an extreme risk to a participant, a better approach would be to impose liability on landowners for building an obstacle that is "totally outside the norms of the sport." Thus, an obstacle should be deemed unreasonable not if it created an extreme risk for any particular participant, but only if the obstacle was beyond what is typical for the sport. Whether an obstacle is totally outside the norms of the sport should be a question of fact for the jury to determine as part of the *breach* analysis in the negligence *prima facie* case.

This standard is inherently flexible and can allow for the sport to naturally progress over time, as the difficulty of obstacles gradually increases as each generation of riders continue to push the limits of what is achievable. Under the current extreme risk standard, such progression is not possible. Further, shifting from the subjective risk posed to a particular participant to an objective inquiry as to whether an obstacle was reasonably within the norms of the sport allows landowners to directly compare their obstacles to others who provide similar facilities. Additionally, because progression is inherent in the sport, obstacles that challenge and push the limits of professional BMXers would still be considered within the norms of the sport.

However, to avoid unnecessary injury due to BMXers riding dangerously above their current abilities, the legislation should impose on commercial and public operators of BMX facilities a duty to provide a warning that would inform participants of BMX's inherent

163. The "no-duty-for-sports" rule ensures that vigorous competition will not be chilled and sports will not fundamentally be altered. *Knight*, 834 P.2d at 710.

risks,¹⁶⁴ and of the dangers of riding beyond one's current abilities. Such a warning sign should be placed at the entrance of commercial and public BMX facilities. This duty will insure participants can make an informed decision as to whether they should attempt an obstacle.

Under the "norms of the sport" proposed standard, landowners' decisions when designing BMX facilities would organically control themselves. Without fear of incurring liability for constructing challenging obstacles, providers can cater their facilities to their target markets. Because most riders' skills range from beginner to intermediate, it is likely most facilities would be designed with such riders in mind. Thus, it is unlikely this proposed legislation would result in the creation of BMX facilities that are unnecessarily dangerous for most participants.

If facilities were designed solely to satisfy the needs of experts or professionals, it is unlikely such facilities would be popular attractions, and thus would not be a wise business decision or efficient use of public resources. Indeed, with respect to racing, there are already sanctioning body regulations that require tracks to be designed with riders of all abilities in mind.¹⁶⁵ The proposed standard merely allows for facility providers to offer uniquely challenging obstacles if they desire to cater their facilities toward more advanced riders, while also protecting facility providers who cater to beginners and

164. One commentator previously proposed imposing a duty upon *commercial* "extreme sports" providers to warn participants of such activities' dangers. Horton, *supra* note 2, at 648-49. However, the commentator overgeneralized "extreme sports" and grouped BMX, skateboarding, and snowboarding with sports such as skydiving, bungee jumping, hang-gliding and rock climbing. *See id.* at 602. Unlike the commentator, I would not classify BMX, skateboarding, or snowboarding as "extreme sports." Regardless, the underlying justifications behind requiring warnings carry great merit: Participants should be fully aware of the risks they will encounter when they engage in an activity like BMX.

165. UCI Cycling Regulations, Rule 6.1.032: Turns & Obstacles, UCI.CH, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=MTkzNg&ObjTypeCode=FILE&type=FILE&id=34594&LangId=1> (last visited Nov. 24, 2010) ("All obstacles on the track must be constructed with the safety of all riders, regardless of age, in mind. Consideration must be given to the abilities of the youngest riders in competition when designing obstacles intended to present special challenges to older competitors Tracks may be designed to include alternate sections to be traversed only by championship categories. These sections may offer obstacles which are inherently more challenging than those found on the course's main circuit.").

intermediates. The cumulative effect of this should be increases in both the availability of facilities and participation rates by riders of all abilities.

In application, the “norms of the sport” standard for course design will compensate for the shortcomings of California’s statutory protections and fix the misguided application of assumption of risk. Private landowners who expressly invite BMXers onto their land and commercial operators will be adequately protected, even though their “recreational use” immunity was eviscerated. Also, public entities should be more inclined to approve construction of BMX facilities on public land due to reduced concerns about liability.

Providing a dependable basis of protection for public and private landowners should remove one of the largest barriers preventing BMX from reaching participation rates similar to those of traditional sports. Decreasing liability would result in an increase in BMX facilities that will allow participants to engage in the sport without having to trespass or travel great distances.

VI. CONCLUSION

The social utility of sports is so overwhelming that, as a matter of public policy, California’s courts are willing to hold co-participants to a relaxed standard of care.¹⁶⁶ Additionally, California’s legislature has conferred immunity upon many sports facility providers in an attempt to encourage participation by decreasing liability.¹⁶⁷ While public policy has justified these blanket protections, their application does not adequately protect BMX cycling.¹⁶⁸

Liability waivers provide BMX operators with the only dependable basis of protection from negligence actions. However, it is impractical for BMX facilities—especially public facilities that are often unsupervised—to rely on waivers.¹⁶⁹ Absent a waiver or statutory protection, BMX facility providers must rely on the uncertain and misguided application of assumption of risk. In short, this framework is insufficient to facilitate the sport’s growth because

166. *E.g.*, *Knight*, 834 P.2d at 710.

167. CAL. CIV. CODE § 846 (Deering 2005); CAL. GOV’T CODE § 831.7 (Deering 2010).

168. *See supra* Parts II, III.

169. *See supra* Part IV.

inadequate liability protection decreases the amount of facilities available for participants.

It is likely the current legal protections for BMX providers are inadequate because the legal framework was developed with traditional sports in mind. Given the differences between the fields of play and natures of traditional sports versus action sports such as BMX, California law incentivizes participation in traditional sports while simultaneously discouraging participation in BMX by limiting the availability of BMX facilities.

California should encourage participation in BMX by increasing the liability protection available to BMX facility providers. This could be achieved by enacting BMX-specific legislation that accurately addresses the sport's unique needs and compensates for the misguided application of assumption of risk. To adequately protect BMX facility providers, their duty to participants should be determined by whether an obstacle was reasonably within the norms of the sport, rather than whether an obstacle posed an extreme risk to a particular participant. This will protect BMX providers from liability when a participant rides beyond his or her abilities.

However, to minimize unnecessary injuries, BMX providers should have a duty to warn participants of an obstacle's difficulty. This will ensure BMXers are able to make informed decisions about whether to encounter the risks posed by any given obstacle. This new framework would remove the legal barriers that are currently preventing private and public landowners from utilizing their lands for BMX facilities, and give California's youth a safe place to participate in the Olympic sport of BMX.

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* J.D. Candidate, California Western School of Law, 2012. I wish to thank Josh Fox, Lee McCormack, and Katelyn Wendell for their help on earlier drafts of this Comment. Thanks also to Adam Doyle and his team of editors, and to Professor William Lynch for his guidance and encouragement. Last, thank you to my parents, Nelson and Diana, and to my wife, Tiffany, for their unwavering support while I have pursued my dreams.

