

COMMENT

A TALE OF TWO EXTREME SPORT LOCALES: CALIFORNIA'S NO-DUTY RULE IN EXTREME SPORTS AND SWITZERLAND'S EVEN-HANDED APPROACH

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INTRODUCTION

Imagine being on summer vacation in one of the most beautiful, natural sceneries in the world—Interlaken, Switzerland. From the snow-dusted mountains, surrounded by deep lush forests, to the clear turquoise waters: Interlaken is a true paradise. As a young, adventurous tourist, you pick an activity out of a local excursion-booking agency called “canyoning.” As the booking agent explains, canyoning typically involves jumping from, or rappelling down, forty-foot cliffs into mountain canyon water. The booking agent assures you there will be a few guides onsite to lead and ensure your safe return.

On the day of the activity, there are dark clouds above, but the guides do not mind them and assure you that the clouds will not be an issue. Halfway through your canyoning adventure, deep in the middle of the canyon, rain begins pouring down. The waters swell, and members of your group are swept away deep into the canyon without any hope of escape. Tragically, of the forty-five expeditionists, the flash flood claims the lives of eighteen tourists and three guides.¹ The flood becomes an issue of material fact. Should the guides have known a flash flood was probable? What duty do guides owe their participants? California and Switzerland have different answers to these questions, and this Comment will discuss both approaches.

This Comment advocates for a more even-handed approach to California’s extreme sport tort liability by applying principles from Switzerland’s approach. Part I provides background information and examples of extreme sports. Part II explains how California treats assumption of risk cases and the problems presented with the current “no-duty” rule for extreme sports tort cases. Part III analyzes how Switzerland regulates extreme sport liability through Switzerland’s federal law, case examples, and culture. Finally, Part IV applies Switzerland’s approach, and offers suggestions to improve California’s treatment of extreme sports tort cases.

1. Elizabeth Olson, *Swiss Judge Convicts Six in Deaths of Adventurers Lost in Flood*, N.Y. TIMES (Dec. 12, 2001), <http://www.nytimes.com/2001/12/12/world/swiss-judge-convicts-six-in-deaths-of-adventurers-lost-in-flood.html>.

I. BACKGROUND

California and Switzerland are both tourist hotspots that boast beautiful outdoor activities and scenery. These outdoor activities often fall into the category of sports or extreme sports. Sports are defined as activities “done for enjoyment or thrill, requir[ing] physical exertion as well as elements of skill, and involv[ing] a challenge containing a potential risk of injury.”² Extreme sports are defined as “high risk recreational activities.”³ California not only offers water-based extreme sports like surfing, parasailing, and scuba diving, but also snow-based extreme sports like skiing and snowboarding. This list is not limited to the activities mentioned above, and includes any popular, reasonable, and socially acceptable, activity that is labeled an “extreme sport.”⁴

Extreme sports, and other high-risk activities, are on the rise in California. In particular, rock-climbing and obstacle races, like the “Spartan Race” and “Tough Mudder,” are becoming increasingly popular.⁵ There are at least seventy-seven rock-climbing gyms in the state of California alone.⁶ From 2011 to 2016, rock-climbing gyms across the United States have been growing between 6 to 11% percent each year.⁷ California’s own Yosemite National Park is also considered “one of the world’s greatest [rock] climbing areas.”⁸

2. Shannon v. Rhodes, 112 Cal. Rptr. 2d 217, 221 (Ct. App. 2001) (quoting Record v. Reason, 86 Cal. Rptr. 2d 547, 554 (Ct. App. 1999)).

3. David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F.L. REV. 599, 600–03 (2004).

4. *Id.*

5. TOUGH MUDDER, <https://toughmudder.com/tough-mudder-half-obstacles> (last visited June 7, 2018). Spartan Race and Tough Mudder are obstacle course races consisting of a various amount of miles and obstacles per race. Obstacles vary from crawling beneath wire to scaling ten-foot walls. *Id.*

6. CALIFORNIA CLIMBING GYMS, <https://www.indoorclimbing.com/california.html> (last visited June 7, 2018).

7. *Gyms and Trends of 2016*, CLIMBING BUS. J. (Jan. 3, 2017), <http://www.climbingbusinessjournal.com/gyms-and-trends-of-2016/>.

8. *Yosemite Rock Climbing*, NAT’L PARK SERV., <https://www.nps.gov/yose/planyourvisit/climbing.htm> (last updated Feb. 5, 2018).

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Similarly, as of September 2017, two million people have participated in Tough Mudder.⁹ Tough Mudder consists of twenty obstacles over the course of ten miles.¹⁰ The obstacles range in difficulty from running in the mud to crawling beneath barbed wire.¹¹ When Tough Mudder began operating in 2012, it boasted a “10,000 volt” electric shock obstacle, which surprisingly, did not initially deter participation.¹² However, in 2016, Tough Mudder eliminated the senseless painful obstacle because the obstacle course industry had become more like a sport, encouraging competition based on skill, rather than pain tolerance.¹³

These types of dangerous activities are indicative of the increasing interest in high-risk sports. Despite the apparent risks, people continue to embrace the various thrills and adrenaline rushes associated with extreme sports. Yet, the California legal system has placed a “no-duty” rule on sports, and by extension, extreme sports.¹⁴ Thus, due to express and primary assumption of the risk, participants in these events are left with no legal recourse if the sponsor is ordinarily negligent, and can only recover if the sponsor is intentionally harmful or reckless.¹⁵ This Comment analyzes the characteristics of California’s no-duty rule, primary and secondary assumption of the risk, express assumption of the risk,¹⁶ and attempts to learn from Switzerland’s approach to extreme sports.

Switzerland actively encourages a wealth of extreme sports, some of which are illegal in California.¹⁷ The Swiss landscape has long been

9. *Press Room*, TOUGH MUDDER, <https://toughmudder.com/press-room> (last visited June 7, 2018).

10. *Tough Mudder Full*, TOUGH MUDDER, <https://toughmudder.com/events/what-is-tough-mudder> (last visited June 7, 2018).

11. *New Obstacles Are Here*, TOUGH MUDDER, <https://toughmudder.com/obstacles> (last visited June 7, 2018).

12. Erin Beresini, *Obstacle Racing Is Losing Its Electrified Obstacles*, OUTSIDE (Jan. 5, 2016), <https://www.outsideonline.com/2044756/obstacle-racing-losing-its-electrified-obstacles>.

13. *Id.*

14. *See generally* Regents v. Roettgen, 48 Cal. Rptr. 2d 922 (1996).

15. Knight v. Jewett, 3 Cal. 4th 296, 318 (1992).

16. *See id.* at 309 n.4.

17. Pablo Lopez, *He leaps off Yosemite cliffs, knowing its illegal. Can his court case make BASE jumping legit?*, THE FRESNO BEE (Aug. 7, 2017),

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a haven for adrenaline seekers offering activities such as sky-diving, mountaineering,¹⁸ canyoning, parasailing, rock-climbing, and BASE jumping^{19,20} These extreme sports present a higher degree of risk than common sports, such as surfing, snowboarding, and skiing. For example, mountain sports like mountaineering, mountain hiking, climbing, and hiking, amounted to nearly twice as many fatalities as winter sports in Switzerland measured from 2010 to 2014.²¹ Defining a sport as “extreme” is subjective, based on the perceived amount of risk.²² This subjectivity affects the primary assumption of the risk analysis under California’s no-duty rule.²³

<http://www.fresnobee.com/news/local/article166303332.html>. In 1936, Switzerland believed stricter regulations would make extreme sports and high-risk activities safer. Following the deaths of four men attempting to scale a mountain’s more difficult face, the canton of Bern banned climbing on that specific face. Yet, the ban only lasted four months “when it became clear that it wasn’t the least bit effective at keeping mountaineers away.” Celia Luterbacher, *In Switzerland, look before you leap*, SWISSINFO.CH (Oct. 2, 2015), https://www.swissinfo.ch/eng/sports-liability_in-switzerland—look-before-you-leap/41690714.

18. *Mountaineering*, DICTIONARY.COM, <http://www.dictionary.com/browse/mountaineering> (last visited June 7, 2018) (Mountaineering is simply defined as “the sport of climbing mountains”).

19. *Base Jump*, DICTIONARY.COM., <http://www.dictionary.com/browse/base-jumping> (last visited June 7, 2018) (BASE jumping involves “a parachute jump from the top of a building, bridge, cliff, etc., usually at a height of 1,000 feet (305 meters) or less”).

20. *From Skiing to Skydiving – Pick the Tour You Want!*, MYSWISSALPS.COM, <https://www.myswissalps.com/activities/sports> (last visited June 7, 2018).

21. *Fatalities by Type of Sport and Residential Location (Location of Accident: Switzerland), Ø 2006–2010*, SWISS COUNCIL FOR ACCIDENT PREVENTION, https://www.bfu.ch/en/Documents/04_Forschung-und-Statistik/02_Statistik/2012/PDF/E_USP_T_16.pdf (last visited June 7, 2018).

22. Horton, *supra* note 3.

23. *See infra* Discussion Part.III.A.

II. CALIFORNIA'S "NO-DUTY" RULE AND TREATMENT OF SPORT LIABILITY

A. *Primary and Secondary Assumption of the Risk through Knight and Shin*

Assumption of the risk is divided into two categories in California: primary and secondary.²⁴ Primary assumption of the risk cases typically involve waivers, releases of liability, or express assumption of the risk, wherein the defendant seeks to owe no duty to the plaintiff.²⁵ Thus, a plaintiff, in a primary assumption of the risk case, cannot recover from the defendant, regardless of any ordinary negligence by the defendant that resulted in the plaintiff's injury.²⁶ Conversely, in secondary assumption of the risk cases, a duty of care is owed to the plaintiff, and an injured plaintiff can recover through the comparative fault model by apportioning liability based on each person's negligence.²⁷ The court looks to the nature of the activity to determine whether the defendant owed a legal duty to the plaintiff.²⁸ Accordingly, the reasonableness, or lack thereof, of the plaintiff's conduct is irrelevant.²⁹

The breakdown of assumption of the risk in *Knight v. Jewett*, led California to adopt a "no-duty" rule for sports, and by extension, extreme sports.³⁰ In *Knight*, the plaintiff sued for injuries that occurred during a touch football game.³¹ The sport's overall rules and potential roughness of the game were not discussed because the social context indicated the game would not be a serious athletic competition.³² Plaintiff's hand and little finger were damaged, resulting in an

24. *Knight*, 3 Cal. 4th at 309.

25. *Id.*

26. *Id.*

27. *Id.* at 314.

28. *Id.* at 309.

29. *Id.*

30. Michael J. Fabrega, Note, *The California Supreme Court's Insertion of a No-Duty Rule Into the Field of Sports Torts: A Futile Exercise Achieving Inequitable Results*, 33 WHITTIER L. REV. 181, 182 (2011).

31. *Knight*, 3 Cal. 4th at 300-01.

32. *Id.* at 302.

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amputated finger after three operations attempted to restore its mobility.³³

In *Knight*, the Court had to determine whether the plaintiff assumed the risk of a broken hand when she consented to play touch football.³⁴ In the case, she testified, “[T]he only type of injury [she] . . . reasonably anticipated would have been something in the nature of a bruise or bump.”³⁵ Thus, the plaintiff argued for comparative fault principles to apply, since the all or nothing approach of contributory negligence no longer applied in California.³⁶ However, the Court reasoned the plaintiff assumed the risk of bodily contact, no matter how severe, when she consented to play a casual game of touch football.³⁷ For the plaintiff to have recovered, she needed to prove the defendant acted intentionally or recklessly “to be totally outside the range of the ordinary activity involved in the sport.”³⁸ Thus, it is within the judge’s discretion to define which risks are inherent in a sport to assess a plaintiff’s ability to recover.³⁹ With this ruling, the no-duty rule for contact sports was born.

The no-duty rule applies to both co-participants and coaches alike.⁴⁰ Although a coach’s role is different from a co-participant’s, neither owes other participants any duty.⁴¹ The Court reasoned a coach’s role could be “improperly chilled by too stringent a standard of potential legal liability.”⁴² If a coach provides adequate instructions to an athlete, theoretically, the coach’s role may require this “no-duty” rule to shield him or her from liability. Moreover, in *Shin v. Ahn*, the California Supreme Court noted the potential concern will be determining what is within the range of ordinary activity “involved in

33. *Id.* at 300–01.

34. *Id.* at 301–02.

35. *Id.* at 302.

36. *Id.* at 301.

37. *Id.* at 320–21.

38. *Id.* at 320.

39. *Id.* at 315–16.

40. *Shin v. Ahn*, 42 Cal. 4th 482, 490–91 (2007) (citing *Kahn v. E. Side Union High Sch. Dist.*, 31 Cal. 4th 990, 995 (2003)).

41. *Id.*

42. *Id.*

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teaching or coaching the sport.”⁴³ However, should this “no-duty” approach extend to guides and instructors who are solely responsible for their participant’s safety? California does not seem to treat a guide or instructor’s duty any different than a coach or co-participant.⁴⁴ Conversely, Switzerland does hold their guides and instructors to a higher level of care when it comes to participant safety.⁴⁵

Shin subsequently extended the no-duty rule to non-contact sports as well.⁴⁶ In *Shin*, the Court held the no-duty rule of contact sports also applied to golf and other non-contact sports.⁴⁷ The main issue in *Shin* was whether being hit by a stray golf ball was an inherent risk in the sport of golf.⁴⁸ The Court held golf inherently involves the risk of a stray ball; if the ball went exactly where you wanted every time, there would be little “sport” left in golf.⁴⁹ Conversely, the Court cited *Hemady v. Long Beach Unified School District* to state being hit by a golf club was not an inherent risk in the sport of golf, and thus, a typical duty analysis with comparative fault applied in *Hemady*.⁵⁰ Consequently, in determining whether primary or secondary assumption of the risk applies, a court determines whether the risk is inherent in the sport or not; if the risk is inherent, then primary assumption of the risk applies.⁵¹ The primary reason behind the no-duty rule in sports is to prevent a chilling effect on participation solely based on a participant’s ordinary careless conduct.⁵² Thus, to protect sport participation, the no-duty rule applies to all sports, including extreme sports.

In both *Knight* and *Shin*, Justice Kennard’s dissented against the imposition of the no-duty rule because of the issues trial courts will face

43. *Shin*, 42 Cal. 4th at 491 (quoting *Kahn*, 31 Cal 4th at 996).

44. *Regents*, 48 Cal. Rptr. 2d 932.

45. *See infra* Discussion Part.IV.B.2.

46. *Shin*, 42 Cal. 4th at 486.

47. *Id.*

48. *Id.*

49. *Id.* at 492.

50. *Id.* at 493 (citing *Hemady v. Long Beach Unified Sch. Dist.*, 49 Cal. Rptr. 3d 464, 467 (2006)).

51. *Shin*, 42 Cal. 4th at 489.

52. *Knight*, 3 Cal. 4th at 318.

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when discerning what risks are inherent in a given sport.⁵³ One of the reasons the no-duty rule exists is for judicial economy, elimination of the need for a jury trial in these cases to alleviate overburdened trial courts.⁵⁴ Yet, a trial court's difficulty in determining what risks are within amateur and recreational activities may outweigh the no-duty rule's benefit to judicial economy.⁵⁵ Whether the defendant owes a duty to the plaintiff is determined by the inherent risks of the activity, which then decides if the plaintiff can recover under the no-duty rule.⁵⁶

B. Express Assumption of the Risk

California's no-duty rule is further supported by waivers and express assumption of the risk. Waivers, or liability releases, relieve a co-participant, or recreational sport provider, of any duty owed to the plaintiff.⁵⁷ Thus, express assumption of the risk, as a defense, is very similar to primary assumption of the risk.⁵⁸ However, a waiver's content often does not reflect the law on what liability can be released. For example, standard waiver language often requires participants to "release from all liability . . . including claims of [sponsor's] negligence, resulting in any physical or psychological injury (including paralysis and death)[.]"⁵⁹ Consenting to paralysis or death from ordinary negligence may be lawful depending on the level of negligence, yet serious injuries are often the result of recklessness or gross negligence. For that reason, California law prohibits participants from waiving gross negligence because it violates public policy.⁶⁰ Gross negligence is defined as a "want of even scant care . . . or an

53. *Id.* at 337 (Kennard, J., dissenting).

54. *Id.*

55. *Id.*

56. *Shin*, 42 Cal. 4th at 502 (Kennard, J., dissenting).

57. *Knight*, 3 Cal. 4th at 309 n.4.

58. *Id.*

59. *Release of Liability, Promise Note to Sue, Assumption of Risk and Agreement to Pay Claims*, S.F. ST. U., https://dos.sfsu.edu/sites/default/files/PDFs/Release_Assumption-Risk_5K%20Campus%20Rec_2017_OVER%2018.pdf (last visited June 7, 2018).

60. *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 753 and 758 (2007).

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extreme departure from the ordinary standard of conduct.”⁶¹ This definition of gross negligence is the same as the “recklessness” standard in *Knight*, which falls outside of primary assumption of the risk.⁶²

The discrepancy between the language of the waiver and the law misleads participants into believing they have no right to sue, no matter what befalls them, and falsely convinces providers they are immune from suit. Yet, modern liability waivers for modern extreme sports seem to accurately reflect the law, or at the very least, avoid overly broad claims of release. For example, Tough Mudder’s liability waiver for their “Toughest Mudder” obstacle race specifically mentions that ordinary negligence is released, while being silent on reckless or intentional misconduct.⁶³ Mesa Rim’s waiver, an indoor rock-climbing gym, accurately reflects the law by explicitly mentioning that “recklessness, willful and wanton conduct or intentional wrongdoing of Mesa Rim . . .” is not included in the release.⁶⁴

The need for extreme sport providers to have more accurate waivers could reflect a growing interest in extreme sports and, consequently, a growing interest in participants’ rights. Common sense would suggest the riskier the activity is, the more likely a participant would read the waiver before signing. The issue of distinguishing ordinary negligence from gross negligence mirrors the issue of determining which risks are inherent under the “no-duty” rule. Although express and primary assumptions of the risk are similar defenses, Justice Kennard’s argument against the “no-duty” rule in her dissent only speaks to primary assumption of the risk arising from an implied agreement.⁶⁵ Thus, to make any effective change to California’s no-duty rule in extreme sports, California’s express assumption of the risk must also be changed.⁶⁶

61. *Id.* at 754.

62. *Knight*, 3 Cal. 4th at 318.

63. *Participant Legal Liability Agreement*, TOUGHEST MUDDER 2017, <http://web.toughmudder.com/2017%20TM%20TMH%20Los%20Angeles/2017%20RTM%20Participant%20Waiver.pdf> (last visited June 7, 2018).

64. *Mesa Rim Climbing Center Visitors Agreement*, MESA RIM CLIMBING & FITNESS CTR., <https://www.smartwaiver.com/w/59a7070e6f98c/web/> (last visited June 7, 2018).

65. *Knight*, 3 Cal. 4th at 328–32 (Kennard, J., dissenting).

66. *See infra* Discussion Part.V.C.

C. Inconsistent Rulings Caused by “No-Duty” Rule

The challenge of determining which risks are within the range of ordinary activity in the sport has led to inconsistent rulings on extreme sport cases.⁶⁷ The following two cases will be discussed to highlight this issue.

Regents v. Roettgen involved a rock-climbing accident where a fairly experienced climber fell to his death because the instructor's rope anchor system detached from the wall.⁶⁸ The court ruled that falling, no matter the cause, was an inherent risk in the sport of rock climbing.⁶⁹ However, as *Knight* reasoned, the defendant has a duty not to increase these inherent risks.⁷⁰ Again, the court noted, “[P]rimary assumption of the risk [exists] to avoid imposing a duty which might chill vigorous participation . . .” in the sport.⁷¹ By ruling that falling, no matter the cause, is an inherent risk in rock climbing, the court has made it nearly impossible to recover from the negligence of another climber. The defendant violated safety protocols by not checking the climb site's anchors and setting a risky rope system in place, but still did not establish a duty owed to the plaintiff.⁷²

This all or nothing approach to recovery is indicative of the “no-duty” rule and mirrors the old inequitable approach of contributory negligence. California's tort laws treat extreme sports the same as they do non-extreme sports, such as football and golf. However, the vast difference in degree of “extremeness” makes it too difficult to hold them both to the same standard. Falling may be a risk in rock climbing, but plaintiff's fall would have been perfectly safe if the anchor system had been placed correctly. If violating safety protocols is not increasing the risk inherent in the sport of climbing, or even gross negligence, then nothing short of intentional misconduct would allow the plaintiff to recover under the current no-duty rule.

67. See *Regents*, 48 Cal. Rptr. 2d at 928; *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 3d 392, 394 (1995).

68. *Regents*, 48 Cal. Rptr. 2d at 928.

69. *Id.*

70. *Knight*, 3 Cal. 4th at 316.

71. *Regents*, 48 Cal. Rptr. 2d at 930.

72. *Id.* at 1047.

Conversely, *Branco v. Kearny Moto Park* involved an expert caliber BMX jump that was designed by the defendant, which injured the plaintiff.⁷³ In ruling on a motion for summary judgment, the court ruled there was a triable issue of fact regarding whether the defendants had negligently designed this jump; thus increasing the risk of BMX racing.⁷⁴ Both *Regents* and *Branco* involved conduct by the defendant that arguably increased the risk of the sport, but only *Branco* survived summary judgment.⁷⁵ The court in *Branco* stated the jump could have been negligently designed, however, in *Regents*, the court neglected to consider that the rope anchor system could have been negligently placed. The general risk of falling after a BMX jump seems to be the same as the general inherent risk of falling while rock climbing. The distinction between falling while climbing and crashing after a BMX jump seems miniscule, at best, when determining the risk inherent in each respective sport. The conflicting results of these cases validate Justice Kennard's concern with the difficulty judges face when interpreting what risks are inherent in sports.

D. California's "No-Duty" Rule Applied to Canyoning Incident

As mentioned earlier, California's "no-duty" rule applies to co-participants, coaches, and instructors.⁷⁶ This Comment will assume a "guide" will be treated as an "instructor" under California law. If a guide is protected from ordinary negligence, the participant can only recover if the guide breaches his duty by increasing the risk inherent in the sport, or if the risk itself is not inherent in the sport.⁷⁷ Flash floods are a well-known danger to canyoneers; consequently, a California court may very well rule that flash floods are an inherent risk in canyoning, just as falling is an inherent risk in rock climbing.⁷⁸ However, if the guides fully knew the risk of a flash flood and deliberately chose to go

73. *Branco*, 43 Cal. Rptr. 3d at 394.

74. *Id.*

75. *Id.*

76. *Shin*, 42 Cal. 4th at 490–91.

77. *Knight*, 3 Cal. 4th at 320.

78. Paul Lashmar & Imre Karacs, *Swiss River Disaster: Black Wall of Water Swept Down the Gorge, Crushing Everyone in its Path*, INDEP. UK (July 28, 1999), <http://www.independent.co.uk/news/swiss-river-disaster-black-wall-of-water-swept-down-the-gorge-crushing-everyone-in-its-path-1109256.html>.

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ahead anyway, then that may be considered increasing the inherent risk of the sport or gross negligence.⁷⁹

According to a Swiss news outlet, the actual trial of that accident revolved around whether the guides should have known the flash flood was foreseeable.⁸⁰ Essentially, under California law, this case would have turned on whether the guide's conduct was reckless (thereby increasing the risk of the sport) or whether the flash flood itself was an inherent risk of the sport.⁸¹ If the flash flood was an inherent risk of canyoning, and the guides acted reasonably, then the participants could not recover.⁸² On the other hand, if the guides' conduct was reckless, then the participants could recover under a comparative fault model, because the guide's breached their limited duty.⁸³ Similarly, if the flash flood was determined a risk not inherent in canyoning, then secondary assumption of the risk would apply, triggering a comparative fault analysis for recovery.⁸⁴ Under California's no-duty rule, those responsible for the accident are relieved of liability if the risk is inherent in the sport, or if the injury is the result of ordinary negligence.⁸⁵ Thus, the victims, or their heirs, are left without any potential recovery. Switzerland, on the other hand, holds the wrongdoer criminally liable and guarantees civil recovery through insurance and comparative fault.⁸⁶

III. SWITZERLAND'S APPROACH TO HIGH-RISK ACTIVITIES AND EXTREME SPORTS

A. Switzerland's Political Structure

Switzerland's political structure is similar to the United States; Switzerland has been a federal state since 1848, predated only by the

79. *Knight*, 3 Cal. 4th at 316.

80. *Former Adventure World Manager Takes the Stand*, SWISSINFO.CH (Dec. 4, 2001), <https://www.swissinfo.ch/eng/former-adventure-world-manager-takes-the-stand/2408320>.

81. *See supra* Discussion Part.III.A.

82. *Id.*

83. *Knight*, 3 Cal. 4th at 300–01.

84. *Id.*

85. *Id.* at 320.

86. *See infra* Discussion Part IV.B.

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United States.⁸⁷ Switzerland, as a Confederation, consists of twenty-six cantons and half-cantons, which are akin to states in the United States.⁸⁸ The Confederation has a federal constitution as its legal foundation, guaranteeing basic rights of the people and public participation.⁸⁹ And, much like the United States Constitution, Switzerland's federal constitution specifically designates authority over "foreign and security policy, customs and monetary policy . . . and in other areas that are in common interest to Swiss citizens."⁹⁰ Similarly, "each canton and half-canton has its own constitution, parliament, government, and courts."⁹¹

Overall, the political structure of the Swiss government is similar to the United States. The system utilizes precedent and federal hierarchy, where the federal constitution prevails over cantonal constitutions, constitutional rules prevail over ordinary statutes, and legislative statutes take priority over administrative regulations.⁹² With this background, Swiss federal law will be examined to provide legislative examples of how Switzerland treats extreme sports and extreme sport accidents.

B. Swiss Federal Law's Treatment of High-Risk Activities

1. Canyoning Accident

The canyoning accident mentioned in the introduction resulted in the criminal convictions of six Adventure World employees for the deaths of the eighteen tourists and three guides.⁹³ The employees of Adventure World were prosecuted, under a theory of negligent

87. Gregory M. Bovey, *The Swiss Legal System and Research*, HAUSER GLOBAL L. SCH. PROGRAM (Nov. 2006), http://www.nyulawglobal.org/globalex/Switzerland.html#_The_political_structure_of_Switzerl.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Olson, *supra* note 1.

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homicide,⁹⁴ for breaching their duty of care to their participants.⁹⁵ The Swiss Criminal Code explicitly states, “[I]f the person concerned could have avoided the error had he exercised due care, he is liable . . . for his negligent act”⁹⁶ Essentially, the employees, including the canyoning guides, breached their duty to their participants because they continued the canyoning expedition despite evidence of the incoming storm.⁹⁷ During the trial, the general manager and vice president both made statements that the staff was well trained and the accident could not have been prevented.⁹⁸ Ironically, when the accident occurred in 1999, canyoning guide training was still considered voluntary.⁹⁹

2. Swiss Federal Law

After the 1999 canyoning accident, Switzerland looked to improve the safety of extreme sports while protecting the sports’ integrity. Under Swiss federal law, waivers of liability, even for mere negligence, can be void when the waiver purports to release operators of commercial activities requiring an official license.¹⁰⁰ Similarly, waivers attempting to “exclude liability for unlawful intent or gross negligence in advance [are also] void.”¹⁰¹ Thus, Switzerland’s express assumption of the risk doctrine is not as strong as California’s, where even mere negligence waivers can be void. Instead of relying on primary assumption of the risk like California, Switzerland deals with

94. *Pour assurer la sécurité des sports extrêmes Une commission du Conseil national propose une nouvelle loi* [To ensure the safety of extreme sports National Council commission proposes new law], SCHWEIZERISCHE DEPESCHENAGENTUR AG (SDA), Feb. 2006 (Switz.).

95. SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311 (1938), art. 12, para. 2 (Switz.).

96. *Id.* art. 13, para 2.

97. *See Former Adventure World Manager Takes the Stand, supra* note 80.

98. *Id.*

99. Olson, *supra* note 1.

100. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Mar. 30, 1911, SR 220, art. 100 (Switz.) [hereinafter Swiss Civil Code]; *see also* Martin Wragg, *Climbing Wall Accidents and Litigation*, INT’L CLIMBING & MOUNTAINEERING FED’N, at 3 (July 2012), http://theuiaa.org/documents/declarations/LEWG_CLIMBING_WALL_ACCIDENTS_AND_LITIGATION_PAPER.pdf.

101. *Id.*

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accidents—even in extreme sports—under a comparative fault model, similar to California’s secondary assumption of the risk doctrine.¹⁰²

However, like most of Europe, Switzerland uses an “acknowledgement of the risk” form to inform the participant of the risk they are about to take.¹⁰³ These forms do not operate as waivers, but rather raise the “threshold which must be overcome to assert a claim of negligence” based on the participant’s level of experience in the high-risk activity.¹⁰⁴ In other words, the level of experience directly impacts the participant’s duty. If the claim passes the required threshold, liability is apportioned via comparative fault.¹⁰⁵ For example, an outdoor adventure company in Interlaken, Switzerland uses the following language in its terms and conditions: “Damage claims against the organizer or the assistants are excluded, as far as the damage was not caused by negligence or intentionally.”¹⁰⁶ Typically, negligence claims with an acknowledgment of the risk form are “based upon a failure to train or supervise” as the breach of duty.¹⁰⁷ This approach seems to indicate a higher duty for instructors or guides when instructing or supervising their participants. As a hotspot for extreme sport enthusiasts and outdoor adventurers, Switzerland had every reason to improve the safety of these sports and prevent accidents from occurring.

Nearly thirteen years after the 1999 canyoning tragedy, Switzerland enacted an ordinance specifically addressing extreme sports and high-risk activities.¹⁰⁸ This ordinance also seems to indicate a higher duty of care for guides and instructors by requiring licenses to lawfully offer certain high-risk activities.¹⁰⁹ Along with the license, public liability insurance is also required for certain activities.¹¹⁰ These activities

102. Swiss Civil Code, *supra* note 100, art. 44.

103. Wragg, *supra* note 100.

104. *Id.*

105. *Id.*

106. *General Terms and Conditions, OUTDOOR INTERLAKEN*, <https://www.outdoor-interlaken.ch/en/information/terms> (last visited June 7, 2018).

107. *See* Wragg, *supra* note 98.

108. RISIKOAKTIVITÄTENVERORDNUNG, HIGH RISK ACTIVITIES ORDINANCE, Nov. 30, 2012, SR 935.911, art. 3 (Switz.).

109. *Id.*

110. *What are the Legal Requirements for Commercially Offered Risk Activities?*, SWISS COUNCIL FOR ACCIDENT PREVENTION, <https://www.bfu.ch/de/>

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include: mountaineering above a certain difficulty, multi-pitch rock climbing, ice climbing, white water rafting above a certain difficulty, vie ferrate,¹¹¹ canyoning, and bungee jumping.¹¹² Additionally, to receive a license, instructors must be of a certain skill level and pass required tests for the specific sport's regulatory association.¹¹³ For example, mountain guides must "pass[] the aspirant course of the Swiss Mountain Guide Association" or equivalent course, while climbing instructors must have a Federal PET Diploma or a foreign equivalent.¹¹⁴ Requiring instructors and guides to acquire a license through a specific sport's association effectively raises the standard of care these trained professionals operate under while rendering services to their participants.

Switzerland's approach protects participants by providing risk forms that are not waiver, but rather acknowledgement forms based on their skill level. Additionally, both employers and participants are protected because extreme sport instructors are held to the standard of a licensed professional. Given the risk in participation of these high-risk activities, protecting participants is crucial.¹¹⁵ Instead of extinguishing a duty via a no-duty rule, Switzerland has increased the duty of care demanded of guides, instructors, and more experienced participants, in an effort to enhance the safety for sport participants.

3. Swiss Federal Supreme Court Examples

ratgeber/ratgeber-recht/sport-und-bewegung/bergsport/bergsteigen/risikoaktivitaeten-recht (last visited June 7, 2018).

111. Paula Hardy, *Braving the "Iron Ways": A Beginner's Guide to Climbing Italy's Vie Ferrate*, LONELY PLANET (July 2013), <https://www.lonelyplanet.com/travel-tips-and-articles/braving-the-iron-ways-a-beginners-guide-to-climbing-italys-vie-ferrate/40625c8c-8a11-5710-a052-1479d277b8b4>. Vie Ferrate is Italian for "Iron Ways", and consist of preset mountain routes equipped with fixed ladders, steel cables, bolted anchors, and suspended bridges that allow climbers and hikers to ascend or descend the mountain. *Id.*

112. High Risk Activities Ordinance, *supra* note 108, art. 3.

113. *Id.* arts. 5–6.

114. *Id.*

115. See generally Volker Lischke et al., *Mountaineering accidents in the European Alps: Have the Numbers Increased in Recent Years?*, WILDERNESS & EVT'L MED. 12, 74 (2001), [http://www.wemjournal.org/article/S1080-6032\(01\)70697-7/pdf](http://www.wemjournal.org/article/S1080-6032(01)70697-7/pdf).

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In a negligence claim arising out of an indoor climbing gym in Switzerland, a novice climber recovered damages after falling about fourteen feet and suffering serious injuries.¹¹⁶ She recovered from her—slightly more experienced—climbing partner because the court reasoned he should have known the knot he tied for his novice partner was faulty, thus putting her safety at risk.¹¹⁷ In fact, the more experienced climber had attended a climbing safety session taught by the gym, and thus, should have known that the knot was improperly tied.¹¹⁸ Interestingly, the federal court noted that the more experienced climber could still have breached his duty of care even if the climbing gym's employees had insufficiently instructed him.¹¹⁹ The court further reasoned the more experienced climber, even if taught insufficiently, still had a duty to not put another climber's safety at risk. The implication is that if he lacked the ability to tie the knot correctly he should have asked an instructor, and thus, would still be liable for breaching his duty of care even if he was insufficiently taught. This highlights Switzerland's standard of care, which favors their participants even to the clear detriment of the operator.

In a different canyoning accident, the Federal Insurance Court ordered insurer Suva to pay the full amount of recovery despite the activity involved.¹²⁰ Suva provides compulsory public insurance operated through Switzerland's social security system, covering accidents for certain activities.¹²¹ Suva argued it should only pay half

116. *Summary of the Selected Federal Supreme Court Decision (Top-Rope Climbing)*, SWISS COUNCIL FOR ACCIDENT PREVENTION (Oct. 1, 2004), <http://www.bfu.ch/de/Seiten/Ratgeber/Bundesgerichtsentscheide/BGE-Detailseite.aspx?ObjektID=513>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Summary of the Selected Federal Supreme Court Decision (Canyoning-Risk?)*, *supra* note 116.

121. *Suva About Us*, SUVA, <https://www.suva.ch/en/the-suva/about-us/suva> (last visited June 7, 2018); *see also* “*Encadré Dévaler le Gothard sur planche à roulettes n’est pas téméraire La SUVA pointe du doigt toute une série de sports dangereux*” [Framed Ride the Gotthard on skateboarding is not foolhardy SUVA points the finger at a whole series of dangerous sports], SCHWEIZERISCHE DEPESCHENAGENTUR AG (SDA), Nov. 21, 2006. (Switz.) [hereinafter Gotthard Article].

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of the costs because the participant was injured while canyoning.¹²² Yet, the Federal Insurance Court ordered Suva to pay the full recovery because: (1) the canyoning was only moderate in difficulty; (2) the participant had plenty of experience; (3) a guide was present; (4) conditions were perfect; and (5) the gear was in good condition.¹²³

The nature of the activity affects Suva's obligation to pay for recovery after an insured participant is injured.¹²⁴ Certain activities like boxing, karate competitions, motocross, motorcycle racing, and downhill mountain bike racing are "qualified as 'absolute' reckless enterprises."¹²⁵ Suva has no obligation to pay for accidents from absolute reckless enterprises. However, canyoning is classified as a "relative reckless enterprise," and the potential coverage is based on "training, experience, weather, equipment," and other decisive factors.¹²⁶ Thus, Suva had to pay the full amount because the decisive factors favored the injured participant. The use of factors to assess Suva's obligation to pay reflects Switzerland's treatment of extreme sports.

C. Swiss Culture's Treatment of High-Risk Activities

Switzerland, even on a federal level, supports and welcomes a variety of extreme sports within its borders.¹²⁷ Through the Federal Act on the Promotion of Sport and Exercise, Switzerland has pledged its support to "ensure that international sports associations encounter favor[ab]le conditions for their activities in Switzerland."¹²⁸ As a bastion for extreme sports, Switzerland endorses sports associations as a means to support tourism.

However, this influx of tourism comes with a downside. The Swiss Alpine Club states that forty to fifty percent of all accidents, including ski touring and hiking in the high mountains, are due to foreign

122. *Summary of the Selected Federal Supreme Court Decision (Canyoning-Risk?)*, *supra* note 116.

123. *Id.*

124. *See* Gotthard Article, *supra* note 121.

125. *Id.*

126. *Id.*

127. SPORTFÖRDERUNGSGESETZ [SPOFÖG], SPORT PROMOTION ACT [SPOPA], June. 11, 2011, SR 415, arts. 3–5 (Switz.).

128. *Id.* art. 4.

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tourists.¹²⁹ Furthermore, in 2013, Switzerland documented 25,100 injuries in mountain sports.¹³⁰ With such a need for deterring accidents, it is no surprise that the Swiss Council for Accident Prevention has been operating since 1938.¹³¹ The council researches statistics on injuries and uses the data to prioritize accident prevention, while aiding the development of Swiss sports policy.¹³² This research is often referred to as “accidentology,” the scientific study of accidents in an attempt to prevent them.¹³³ The goal of this research is to make the sport safer without undermining the sport’s value.

This focus on research over regulation is consistent with the opinions of extreme sport athletes, especially BASE jumpers.¹³⁴ Essentially, BASE jumpers are still likely to jump even if regulations prohibit them.¹³⁵ Likewise, athletes of other extreme sports are likely to participate in their sport even if there are regulations that prohibit it. This scenario presents two problems with over-regulation of extreme sports: (1) enforcement and (2) the risk that prohibitions can increase the risk of injury or death if athletes attempt to circumvent them.¹³⁶ Because Switzerland is so accepting of extreme sports, many athletes would seemingly put themselves at risk by attempting to circumvent additional regulations. Thus, Switzerland aims to prevent accidents by

129. Simon Bradley, *August Marks Deadly Period in Swiss Alps*, SWISSINFO.CH (Sept. 4, 2011), <https://www.swissinfo.ch/eng/august-marks-deadly-period-in-swiss-alps/31055384>.

130. *Development of Persons Injured, by Type of Sport, 2000–2013*, SWISS COUNCIL FOR ACCIDENT PREVENTION, https://www.bfu.ch/en/Documents/04_Forschung-und-Statistik/02_Statistik/2016/PDF/E_USP.T.01.pdf (last visited June 7, 2018).

131. *The bfu- History*, SWISS COUNCIL FOR ACCIDENT PREVENTION, <https://www.bfu.ch/en/the-bfu/organization/history> (last visited June 7, 2018).

132. See generally “*Sport accidents need more attention*”, SWISSINFO.CH, <https://www.swissinfo.ch/eng/sport-accidents-need-more-attention/975918> (last visited June 8, 2018).

133. Bastien Soulé et al., *Accidentology of Mountain Sports*, PETZL FOUND. (Dec. 2014), https://www.petzl.com/fondation/fondation-accidentologie-livret_EN.pdf.

134. Luterbacher, *supra* note 17.

135. *Id.*

136. *Id.*

informing the participants; this follows the notion that the more informed people are, the less likely accidents will occur.¹³⁷

However, an article written by the Swiss Council for Accident Prevention advocates for more administrative law, including the aforementioned High-Risk Sports Ordinance, to prevent accidents in extreme sports.¹³⁸ These administrative increases could include temporarily or permanently barring areas when the sport's activities prove to be too dangerous.¹³⁹ The article favors administrative increases over criminal or civil liability because administrative law, much like safety information in general, aims to prevent, rather than deter, others from making the same accident.¹⁴⁰ Administrative prevention differs from general safety information by barring particular areas for certain sports; however, if the sport's participants disagree with the ban, these same administrative measures may increase extreme sport accidents.¹⁴¹

The aforementioned article also acknowledges the preventative effects of "special deterrence," or the type of deterrence arising from civil or criminal punishments.¹⁴² Yet, "general deterrence," the type of deterrence that occurs from social norms, is likely founded on the need for information; the individual's knowledge informs his ability to ascertain and avoid the risk.¹⁴³ General deterrence is also aided by "soft law," which utilizes the role of sports clubs and associations to implement and enforce measures barring irresponsible behavior within the sport.¹⁴⁴ These different methods of preventing sports accidents reflect the competing interests of an athlete's desire to participate in their extreme sports, and the government's desire to protect its people from unnecessary risks.

137. *See generally id.*

138. *See generally Sport accident prevention from a legal perspective*, SWISSINFO.CH, https://www.bfu.ch/sites/assets/Shop/bfu_2.091.08_bfu-report%20no.%2067%20E2%80%93%20Sport%20accident%20prevention%20from%20a%20legal%20perspective.pdf (last visited June 7, 2018).

139. *Id.* at 24.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See generally id.*

144. *Id.* at 25

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Furthermore, “the intervention of law in sports is guided by two mutually limiting principles: the principle of athletic self-protection . . . and the principle of athletic personal responsibility.”¹⁴⁵ The principle of athletic self-protection protects the “physical integrity of the people involved in the sporting activity,” while the principle of athletic personal responsibility holds the athletes “solely responsible for damages which arise when a so-called basic risk occur[s]”¹⁴⁶ Switzerland’s efforts to prevent sports accidents are achieved by striking a balance between maintaining the sport’s integrity and protecting athletes by placing sole responsibility on the athlete for any negligent conduct. Although California’s tension in sport law is similar, California law differs from Switzerland by prioritizing the protection of the sport at the cost of forgiving a co-participant’s negligence.

IV. SWITZERLAND’S APPROACH TO EXTREME SPORTS AS A MODIFIER TO CALIFORNIA’S NO-DUTY RULE

A. Common Ground in Yosemite

As indicated above, California and Switzerland approach tort liability in extreme sports quite differently. However, Yosemite National Park is one area in California where tort liability for extreme sports resembles Switzerland’s approach. In 2016, Yosemite National Park had over five million visitors, which resulted in 329 search and rescue operations and sixteen fatalities.¹⁴⁷ These statistics forced additional regulations to protect visitors.¹⁴⁸ The National Park Service’s form for Commercial Guiding requires the applicant to have liability insurance to cover actions, or omissions by the commercial guide, and requires the client to sign a visitor acknowledgement of risk form.¹⁴⁹ Like Switzerland, these acknowledgment of risk forms require

145. *Id.* at 26.

146. *Id.*

147. *Yosemite Park Statistics*, NAT’L PARK SERV., <https://www.nps.gov/yose/learn/management/statistics.htm> (last visited June 7, 2018).

148. *Id.*

149. *Commercial Use Authorization Application*, at iii, NAT’L PARK SERV. (Nov. 2016), <https://www.nps.gov/yose/planyourvisit/upload/guidingapplication-2.pdf>.

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the client to know of the risk and the necessary skills to participate in the activity. The acknowledgment thereafter affects the commercial guide's duty to the client. Furthermore, the commercial guide cannot have the client sign a waiver of liability or indemnification agreement that would waive the client's right to hold the guide responsible.¹⁵⁰ It is not clear why Yosemite would bar commercial guides from having their clients sign liability waivers, when California holds liability waivers of ordinary negligence as legally valid. Yosemite's approach to commercial guides, in resemblance of Switzerland's approach, indicates a current domestic solution to addressing the issues California's no-duty rule presents for extreme sport cases.

B. The No-Duty Rule's Problem with Extreme Sports

Justice Kennard's dissents, in both *Knight* and *Shin*, warned about judges determining what risks are inherent in the sport.¹⁵¹ The less known the extreme sport, the more likely the judge will struggle with determining the inherent risks associated with that sport. For example, in *Knight* and *Shin*, sports like football or golf receive a much longer and deeper analysis of what the inherent risk is for each sport. On the other hand, as shown in *Regents* and *Branco*, the short analysis of inherent risks in rock climbing or BMX racing reflects the judges' lack of knowledge in these sports. A judge, even with expert witness testimony, cannot be expected to learn the nuances and risks in an extreme sport in such a short amount of time. Yet, this is exactly what the no-duty rule requires California judges to do. This determination presents a problem for extreme sports and creates inconsistent rulings depending on the judge's perceived risks of the sport.¹⁵²

When it comes to sports and extreme sports, California seems to have strayed away from the traditional tort framework. Ordinarily, everyone has a duty to act as a reasonably prudent person exercising ordinary care.¹⁵³ Although the standard is not raised when an individual possesses special training or skill, the assessment of what is ordinary

150. *Id.*

151. *See supra* Discussion Part.III.A.

152. *See supra* Discussion Part.III.C.

153. 46 Cal. Jur. 3d Negligence § 26.

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for an individual is affected by their training or skill.¹⁵⁴ Ordinary care also includes not placing another individual in “an unreasonable risk of harm through . . . reasonably foreseeable conduct.”¹⁵⁵ California’s no-duty rule opposes this traditional tort framework by ignoring a participant’s skill or experience when assessing the existence of a duty. Thus, participants can act outside the ordinary standard of care, even by unintentionally placing another participant at risk, and still escape liability in sports and extreme sports.

Furthermore, the no-duty rule, in the context of extreme sports, is inapposite to the purposes of tort law. The objectives of tort law are commonly known to be: compensation, corrective justice, deterrence, and loss distribution.¹⁵⁶ The no-duty rule bars injured innocent parties from bringing a claim simply because they assumed the risk by participating in the sport. The no-duty rule leaves an increasing number of participants in extreme sports with no recourse because a judge subjectively determines the risk inherent in each sport. Moreover, a co-participant who negligently injures an innocent co-participant can avoid any liability toward the injured party if the causing risk is inherent in the sport itself. By barring innocent parties from bringing claims against negligent co-participants, there is no deterrence or prevention of future harm when the risk is inherent in the sport.

However, proponents of the no-duty rule argue it is necessary to prevent a negative “chilling effect” on sport participation.¹⁵⁷ This may be true for injuries that result from contact sports like football, where a negligent tackle may be difficult to distinguish from an ordinary tackle; but in non-contact extreme sports, negligent behavior is often easier to distinguish. For example, a climber who violates safety codes by negligently climbing too close to another climber, causing them to fall, would leave the victim without recovery because falling is an inherent risk in rock climbing.¹⁵⁸ With an increasing interest and popularity in extreme sports, like rock climbing or obstacle races like Tough Mudder, many injured people will be left without any chance of recovery. Thus, the interest of preventing a “chilling effect” in the sport must be

154. *Id.* § 43.

155. *Id.* § 26.

156. 74 Am. Jur. 2d Torts § 2.

157. *Knight*, 3 Cal. 4th at 318.

158. *See supra* Discussion Part.III.C.

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weighed against protecting the individual participants. Switzerland's approach to extreme sports shows how prioritizing participant safety can be achieved while also protecting the sport's integrity.

*C. Replacing the No-Duty Rule with Comparative
Fault for Extreme Sports*

In *Knight* and *Shin*, Justice Kennard argued a pure comparative fault approach to sports tort cases should replace the no-duty rule.¹⁵⁹ If California adopted a pure comparative fault model, under secondary assumption of the risk, extreme sports torts would be treated much like they are in Switzerland. As previously mentioned, Switzerland apportions liability and holds those with experience in the sport to higher standards of care. A model where experience affects the duty owed to a co-participant seems logical. The standard of care then becomes what a reasonable person, with similar experience, would have done while participating in the extreme sport. Applying this approach in the extreme sport context makes sense, because extreme sport injuries are often serious. Accordingly, participants with more experience should be held to a duty proportionally relative to their experience level.

Moreover, with the growing interest in extreme sports, denying any possibility of legal recovery for participants does not seem equitable. The California Supreme Court faced a similar equitability issue when deciding that contributory negligence would be replaced with comparative negligence.¹⁶⁰ Transitioning from a complete bar on legal recovery for co-participants' negligent acts inherent within the extreme sport, to a comparative fault model that can apportion fault based on each individual's respective negligence seems to follow the same reasoning.

A pure comparative fault approach in the extreme sport context solves the challenge of assessing what risk is inherent in the sport or not. This approach better serves the purposes of tort law, allowing the loss to be distributed proportionally among each negligent participant. With the loss distributed accordingly, the wrongful conduct can be properly deterred, and an incentive to prevent the type of harm is

159. See generally *Knight*, 3 Cal. 4th at 333 (Kennard, J. dissenting).

160. *Id.* at 328.

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established. Further, a comparative fault approach allows more tort cases to survive a motion for summary judgment, which enables those injured to air their grievances and potentially recover. Indeed, allowing more parties to litigate these issues would have an impact on the courts and erode the sole benefit the no-duty rule offers: prioritizing judicial economy by alleviating an already burdened court system. However, the potential increased caseload on California courts must be weighed against the general interest of providing participants the opportunity to recover by having their day in court.

California's express assumption of the risk doctrine also needs to change to reflect this comparative model. Otherwise, this proposed change to extreme sports tort cases would only apply to implied assumption of the risk cases, when no waiver has been signed. Under a pure comparative model, waivers or releases of liability would no longer be able to release ordinary negligence from co-participants or operators. However, drastically reworking the current express assumption of the risk doctrine to hold both operators and co-participants accountable for their own negligence would be a bit extreme. Switzerland's treatment of acknowledgment of the risk forms shows how co-participants may have a duty to one another, while still indemnifying the sponsor or operator. Reworking California's express assumption of the risk doctrine to hold co-participants liable for their own negligent conduct under comparative fault would better reflect the purposes of tort law. Thus, a pure comparative fault model is not without its own flaws, but would still be an improvement over the no-duty rule.

D. Extreme Sport Safety Statutes to Define Risks Inherent in Extreme Sports

The major flaw with applying the no-duty rule in the extreme sport context is the difficulty of determining what risks are inherent in the sport.¹⁶¹ A less drastic approach to this issue would be to implement extreme sport safety statutes to define the inherent risks in various extreme sports.¹⁶² Sport safety statutes define inherent risks to "protect

161. See *supra* Discussion Part.III.C.

162. Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. CONTEMP. PROBS. 81, 94 (2012).

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sport and recreation providers from liability.”¹⁶³ By using legislative protections, the integrity of the sport is maintained while prioritizing athletes’ safety, much like Switzerland’s use of administrative protections in the extreme sport context.¹⁶⁴ In other words, safety statutes for extreme sports would reflect Switzerland’s licensing requirement for extreme sport operators.¹⁶⁵ These types of legislative protections focus on “maintaining a balance between economics and athlete safety;” thereby decreasing the costs of litigation to keep sport providers in business.¹⁶⁶ Yet, “few inherent risk statutes address extreme sports” and even inherent risk statutes for non-extreme sports lack specificity and are often open to interpretation.¹⁶⁷

To specifically address the inherent risks of extreme sports, professional extreme sport athletes should act as consultants to the legislature in drafting each safety statute. Professional rock climbers, BMX racers, and snowboarders are more cognizant of the inherent risks in their sports than anyone else. With specific legislative protections in place, the court would not have to deliberate as to the inherent risks within each extreme sport. Although it may be an upfront cost to have the legislature, alongside professional athletes, identify the inherent risks in extreme sports, the process would result in the ability for judges to point to the language of the statute in resolving extreme sport tort disputes. Furthermore, proactive identification of the inherent risks of sports also protects participants and reflects Switzerland’s approach of information over regulation. Even if a debate should arise on whether the statute classifies a certain risk as inherent or not, the statute would provide a reasonable starting point for any judge. In other words, the specificity of inherent risks in extreme sports is “vital to a court’s analysis of primary assumption of the risk.”¹⁶⁸ As extreme sports continue to rise in popularity in California, so does the need to define the associated inherent risks.

163. *Id.*

164. *See supra* Discussion Part.IV.C.

165. *Id.*

166. Greer, *supra* note 162.

167. *Id.*

168. *Id.* at 95.

CONCLUSION

California's no-duty rule exists to protect sports' integrity, at the cost of the participant. However, at the cost of preventing a "chilling-effect" on participation in sports, athletes are left without a means of recovery if the risk is inherent in the sport. For extreme sports, defining the inherent risks often leads to inconsistent results between different extreme sports. Judges cannot be expected to identify the inherent risks of extreme sports they have never participated in, much less a sport they were unaware even existed. Switzerland's approach to preventing accidents through information and administrative regulation protects both the sport's integrity and participants. Relieving the duty owed to co-participants and sponsors violates the goals of tort law by preventing innocent parties from recovering, spreading the loss, or deterring wrongful conduct. Instead of relieving the duty owed to act reasonably to one another, the duty should be based on experience in the context of extreme sports. Participants should not be barred from recovery based on their participation alone. The no-duty sports rule has its flaws, and leads to inequitable results in the context of extreme sports.

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