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The California Supreme Court Should Take a Mulligan: How the Court Shanked by Applying the Primary Assumption of Risk Doctrine to Golf

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THE CALIFORNIA SUPREME COURT SHOULD TAKE A MULLIGAN: HOW THE COURT SHANKED BY APPLYING THE PRIMARY ASSUMPTION OF RISK DOCTRINE TO GOLF

I. INTRODUCTION

Go golfing on any Saturday at the par-three Marriott Hotel Golf Course in Manhattan Beach, California, and it is unlikely that you will get to the sixth hole without hearing at least one shout of "fore." "Fore" is standard for "look out" and is shouted when a golfer's errant swing causes a ball to go astray.[1] On the golf course, shouting "fore" is likely to have its desired effect—players within earshot will cover their heads for a moment until the threat of an incoming ball dissipates. Thus, the use of "fore" is a convenient and effective way for golfers to ensure that other players on the same course avoid serious injury.

However, despite the ease in shouting "fore," and the grave danger that it prevents, the California Supreme Court recently held that a golfer need not be so careful.[2] In *Shin v. Ahn*,[3] the California Supreme Court held that the primary assumption of risk doctrine applied to golf.[4] Under this doctrine, negligent golfers are not liable for the injuries they cause to co-participants.[5] Instead, the doctrine reduces a golfer's duty to merely refrain from recklessly or intentionally causing injury to another golfer.[6] By applying primary assumption of risk to golf, the *Shin* court ended a fifteen-year period in which the specific application of the doctrine to non-contact sports like golf had expressly been left open.[7] Consequently, it seems the *Shin* decision eliminates any vestige of the contact/non-contact distinction and expands the scope of the doctrine to protect all negligent athletes,

1. *See infra* Part III.B (discussing the use of the term "fore" when playing golf).
2. *See* Shin v. Ahn, 165 P.3d 581 (Cal. 2007); discussion *infra* Part III.A.
3. *Id.*
4. *Id.* at 582–83.
5. *See id.* at 582.
6. *Id.*
7. *Id.* at 582–83.

regardless of the sport.[8]

Although *Shin* is in line with the majority of case law across the United States,[9] this Note rejects the application of primary assumption of risk to golf. While there is a strong justification for the doctrine's application to many other sports, golf's unique nature does not raise these same concerns.[10] Typically, primary assumption of risk is an exception to the general rule of negligence, and is invoked only when specific policy concerns justify a deviation.[11] This Note asserts that these same policy considerations are not implicated in golf. Thus, golfers should be held to the same reasonable care standard that is generally applicable in all other situations.

Part II of this Note introduces the general concepts of the assumption of risk doctrine.[12] It defines the meaning of the phrase "assumption of risk" and explains both how and why it has been applied. This section also examines the doctrine's historical roots in various negligence cases, and its application in the context of sports-related injuries. Part II concludes by focusing specifically on the application of the doctrine to golf.

Part III begins with the *Shin* decision and then discusses the repercussions it will have on golf. In doing so, Part III first describes the basic factual circumstances in a typical round of golf. Next, it explains how *Shin*'s recklessness standard will apply in personal injury litigation arising from the most common forms of golfer misconduct—specifically, whether such misconduct amounts to negligence or recklessness. Ultimately, Part III endeavors to distinguish golf from those sports whose participants actually deserve a lower standard of care.

Part IV argues that in light of golf's distinct characteristics, there is no justification for limiting the duty of care golfers owe to their co-participants. This section also explains how each reason that generally supports reducing an athlete's duty of care is inapplicable in the context of golf. Part V concludes by reminding courts that the primary assumption of risk doctrine is an exception to the general duty of care rule, invoked only when certain policy considerations justify a deviation. Since the usual

8. *See Shin*, 165 P.3d at 582–83.

9. *See, e.g.*, Schick v. Ferolito, 767 A.2d 962 (N.J. 2001); Thompson v. McNeil, 559 N.E.2d 705 (Ohio 1990); Gray v. Giroux, 730 N.E.2d 338 (Mass. App. Ct. 2000); Monk v. Phillips, 983 S.W.2d 323 (Tex. Ct. App. 1998).

10. *See infra* Part II.C (discussing arguments in favor of assumption of risk applied to sports in general).

11. *See, e.g.*, Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 391 (Cal. 2006).

12. The assumption of risk doctrine should be distinguished from primary assumption of risk—the subject of this Note. This Note will explain how primary assumption of risk is a subset of the broader assumption of risk doctrine.

justifications for this exception are not present in golf, courts have no reason to excuse careless actors whose dangerous conduct causes serious harm to innocent participants.

II. THE ASSUMPTION OF RISK DOCTRINE

Golfers should be held liable when they carelessly injure other golfers; however, courts across the country have disagreed.[13] Often, courts effectuate such disagreement by applying some form of the assumption of risk defense to golf.[14] In *Shin*, for example, the Supreme Court of California applied California's *primary* assumption of risk doctrine to golf, and raised the level of misconduct required for liability to recklessness.[15] Other jurisdictions, while applying the same recklessness standard, do so without ever using the phrase "assumption of risk."[16]

Semantics aside, most courts follow the same reasoning when limiting a golfer's duty of care.[17] Such decisions are usually an extension of prior case law that applied a limited duty of care to athletes in sports like football and soccer.[18] In extending the precedential law to golf, such courts have often set forth traditional policy rationales behind the limited duty,[19] and have argued that these policies are also implicated in golf.[20] The purpose of this Note is to refute such reasoning. Since this Note focuses primarily on *Shin*, most of the arguments herein are based on the policy concerns as expressed by California courts. However, this Note also examines the reasoning and concerns of other states and argues that such concerns are likewise not implicated in golf. The discussion of non-California law is consistent with *Shin*. Indeed, the *Shin* court cited to various out-of-state

13. *See* Daniel E. Lazaroff, *Golfers' Tort Liability – A Critique of an Emerging Standard*, 24 HASTINGS COMM. & ENT. L.J. 317, 317–18 (2002) (stating "authorities have generally determined that recklessness should be the relevant threshold for liability").

14. *See, e.g.*, Thompson v. McNeil, 559 N.E.2d 705, 708 (Ohio 1990) (noting that "'the *quid pro quo* of 'an assumed greater risk' is a diminished duty.'" (quoting Hanson v. Kynast, 526 N.E.2d 327, 333 (Ohio 1987) (Milligan, J., concurring))).

15. Shin v. Ahn, 165 P.3d 581, 592 (Cal. 2007).

16. *See, e.g.*, Schick v. Ferolito, 767 A.2d 962, 963 (N.J. 2001) (applying the recklessness standard to golf); Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975) (applying the recklessness standard to soccer).

17. *See, e.g.*, *Schick*, 767 A.2d 962; *Thompson*, 559 N.E.2d 705; Gray v. Giroux, 730 N.E.2d 338 (Mass. App. Ct. 2000); Monk v. Phillips, 983 S.W.2d 323 (Tex. Ct. App. 1998).

18. *See, e.g.*, *Shin*, 165 P.3d 581; *Schick*, 767 A.2d 962; *Thompson*, 559 N.E.2d 705.

19. Generally, the traditional policy reason underlying this limited duty is the promotion of participation in sports and recreation. *See, e.g.*, Knight v. Jewett, 834 P.2d 696 (Cal. 1992) (discussed *infra* Part II.C).

20. *See, e.g.*, *Shin*, 165 P.3d 581; *Schick*, 767 A.2d 962.

decisions in support of its reasoning.[21]

Subpart A of this section begins with a basic discussion of the assumption of risk doctrine. Subpart B examines the historical roots of the doctrine, discussing both how and why it originally applied.[22] Subpart C sets forth the variation of the doctrine as it applies today in the context of sports, both in and out of California. Finally, Subpart D reviews several decisions that have applied the doctrine to golf, both in and out of California.

A. Traditional Principles of the Assumption of Risk Doctrine

The assumption of risk doctrine is a relatively new common law concept.[23] Traditionally, the doctrine has been invoked as a defense to negligence.[24] Generally stated, assumption of risk characterizes the actions of a plaintiff who takes on the risk of injury in a given situation.[25] In this way, the defense is similar to the consent defense in an intentional tort case.[26]

Originally, the formal assumption of risk doctrine only applied to certain situations.[27] However, in the last century, use of the assumption of risk defense has evolved to apply to a variety of different fact patterns.[28] In fact, assumption of risk now comes in several forms, each triggered by different conditions and leading to different consequences.[29] Countless

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21. *See Shin*, 165 P.3d at 588–91.

22. As will be shown below, the doctrine's historical application differs in California. However, California's version of assumption of risk is not entirely devoid of historical influence. Accordingly, understanding both how and why the doctrine originally applied serves the ultimate goal of proving that it should not apply now. For a compelling argument that California law regarding sports participant liability "stems from the court's carrying over terminology and concepts of the traditional assumption of the risk defense," see Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty-for-Sports Regime*, 45 SAN DIEGO L. REV. 383, 387 (2008).

23. *See* RICHARD A. EPSTEIN, TORTS § 8.6 at 198 (1st ed. 1999) (describing how assumption of risk arose during the nineteenth century).

24. Nicholas J. Cochran, Note, *Fore!* American Golf Corporation v. Superior Court*: The Continued Uneven Application of California's Flawed Doctrine of Assumption of Risk*, 29 W. ST. U. L. REV. 125, 131 (2001).

25. *See* BLACK'S LAW DICTIONARY 134 (8th ed. 2004).

26. *See* MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 151 (2nd ed. 2003) (explaining that "although many people may believe that 'consent' and 'assumption of risk' are rather different ideas, some courts discern a functional equivalence among 'implied consent,' 'implied primary assumption of risk' and 'no duty'").

27. *See* Cochran, *supra* note 24, at 131–32.

28. *See, e.g.*, *infra* Part II.C (discussing the modern application of primary assumption of risk to sports cases).

29. *See* FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 21 at 231 (3d

authorities have emphasized the legal complexities stemming from the phrase's multiple meanings.[30] To compound this difficulty, the two defenses overlap, and the "defendant may at his election avail himself of either defense, or of both."[31] *Shin* provides a good example of the intertwining nature of these two forms of assumption of risk, as the court separately discussed each form at length.[32]

There are two forms of the assumption of risk defense: express and implied.[33] In express assumption of risk, a plaintiff expressly consents in advance to relieve the defendant of any duty to exercise due care on behalf of the plaintiff.[34] A plaintiff's express assumption extinguishes the defendant's duty of care in those situations encompassed by the plaintiff's agreement.[35] In this sense, express assumption of risk is contractual and will be enforced unless it violates public policy.[36]

Similarly, one may impliedly agree to relieve another of a duty of care.[37] Thus, implied assumption of risk embodies the idea that informal agreements waiving liability for unintentional harms should have the same legal effect as express agreements that are otherwise valid.[38] This same principle is reflected in contract law, which generally recognizes the validity of implied-in-fact agreements to the same extent as express agreements.[39]

Historically, implied assumption of risk applied when a plaintiff's knowledge and conduct suggested that he or she had impliedly agreed to

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ed. 2007).

30. *See, e.g.*, Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 68–69 (1943) (Frankfurter, J., concurring) (explaining that "[t]he phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law"); *see also* HARPER ET AL., *supra* note 29, at 231 (stating "[t]he term assumption of risk has led to no little confusion because it is used to refer to at least two different concepts, which largely overlap, have a common cultural background, and often produce the same legal result").

31. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 68 at 481 (5th ed. 1984).

32. Shin v. Ahn, 165 P.3d 581 (Cal. 2007).

33. Samuel Frizell, *Assumption of Risk in California: It's Time to Get Rid of It*, 16 W. ST. U. L. REV. 627, 629 (1989).

34. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1977).

35. *See* EPSTEIN, *supra* note 23, at 200–01 (explaining how the rise of litigation has led institutional parties to contract to shift risk of loss upon customers and patrons).

36. Frizell, *supra* note 33, at 629; *see generally* EPSTEIN, *supra* note 23, at 197 (providing legal theories that have compelled courts to void express agreements on policy grounds).

37. EPSTEIN, *supra* note 23, at 204.

38. *Id.* at 204; *see also* Knight v. Jewett, 834 P.2d 696, 704 (Cal. 1992) (comparing the result of both express and implied assumption of risk and finding similarity in each instance insofar as the defendant is relieved of the legal duty to plaintiff).

39. EPSTEIN, *supra* note 23, at 197.

relieve the defendant's duty of care.[40] Consequently, plaintiffs who voluntarily entered into a relationship with a defendant that had engaged in obviously negligent conduct were found to "accept and consent" to such negligence.[41] In such situations, the plaintiff was said to have agreed to "look out for himself, and relieve the defendant of that duty."[42] For the defense to apply, plaintiffs must have known and appreciated the extent and character of the risk that caused the harm.[43] Furthermore, the decision to undergo the risk must have been made "freely and voluntarily."[44] One modern court, applying the historical standard, held that the defendant could not successfully invoke the defense unless it was shown that the plaintiff had an acute awareness of the numerous risks associated with a given relationship.[45]

In many states, including California, implied assumption of risk is divided into two categories: primary and secondary.[46] As illustrated in *Shin*, primary assumption of risk is a way of stating the defendant has "no duty" to protect the plaintiff in certain situations.[47] In other words, the defendant is not negligent because he or she never owed the plaintiff a duty of care.[48] On the other hand, secondary assumption of risk is applicable when a defendant has breached a duty.[49] However, because the plaintiff has voluntarily chosen to assume the particular risk caused by this breach,

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40. KEETON ET AL., *supra* note 31, § 68 at 481. Note that while California's primary assumption of risk doctrine is a form of implied assumption of risk, California law does not inquire into a plaintiff's subjective knowledge. As will be discussed below, in *Knight v. Jewett*, the court explained that a plaintiff's subjective knowledge is not a factor in whether primary assumption of risk applies. *See* Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

41. KEETON ET AL., *supra* note 31, at 485.

42. *Id.*

43. Restatement (Second) of Torts § 496D cmt. b (1997).

44. KEETON ET AL., *supra* note 31, at 485; *see also* Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring) (explaining that primary assumption of risk applies when a party engages in an activity with "certain hazards to life and limb"); *but see* HARPER ET AL., *supra* note 29, at 262 (explaining that the doctrine may apply even when the plaintiff is completely ignorant of a specific risk).

45. *See* Tancredi v. Dive Makai Charters, 823 F. Supp. 778, 790 (D. Haw. 1993) (holding that a defendant could not invoke primary assumption of risk as a defense to an action on behalf of a deceased scuba diver who had known some, but not all, of the risks involved in diving at 140 feet).

46. *See, e.g.*, Knight v. Jewett, 834 P.2d 696, 703 (Cal. 1992).

47. Shin v. Ahn, 165 P.3d 581, 584 (Cal. 2007).

48. *Knight*, 834 P.2d at 703 (stating "'[i]n its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it. [footnote omitted] Volenti nonfit injuria'") (quoting FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 21.1 at 1162 (1st ed. 1956).

49. *See, e.g.*, *Knight*, 834 P.2d at 703.

the law reduces or eliminates the plaintiff's recovery.[50] In California, secondary assumption of risk can also be used to state that the plaintiff was negligent.[51]

B. The Historical Evolution of the Primary Assumption of Risk Doctrine

Commentators provide several explanations for the rise of the assumption of risk defense.[52] Some see the doctrine as a manifestation of the early courts' desires to promote individual responsibility.[53] Thus, the defense has been described as limiting a defendant's duty to those risks deemed "incidental to a relationship of free association between a plaintiff and a defendant."[54] Put another way, the liberty of the individual to "take or leave as he will" served to protect the defendant from those risks that the plaintiff chose to "take."[55]

This theory is supported by the way the defense once focused on the voluntary character of the plaintiff's actions in the face of a known risk.[56] Specifically, plaintiffs who voluntarily entered into certain relationships with defendants were required to protect themselves from the obvious hazards which arose from such a relationship.[57] In these situations, defendants owed a limited duty to protect plaintiffs from the obvious hazards created by the defendants' conduct.[58] At most, defendants had to

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50. Whether the plaintiff's recovery is completely negated depends on whether the state has adopted a contributory or comparative approach to negligence. *See, e.g.*, Avila v. Citrus Cmty. Coll. Dist. 131 P.3d 383, 391 (Cal. 2006) (explaining that since California is a comparative negligence state, the plaintiff's recovery is merely reduced by the degree of negligence as determined by the jury).

51. *See, e.g.*, *Knight*, 834 P.2d at 703 (explaining that in a secondary assumption of risk case, comparative fault principles would apply). Note that this Note focuses on primary assumption of risk—the doctrine that led the *Shin* court to lower the duty of care owed by golfers. *See Shin*, 165 P.3d 581. Thus, while both defenses are related and often overlap, this Note only discusses secondary assumption of risk to the extent it reduces ambiguity.

52. Though authorities provide various reasons for the original application of the doctrine, the reasons are not necessarily mutually exclusive. Since this Note primarily focuses on the *Shin* court's application of modern California law, the historical details behind assumption of risk are only briefly discussed.

53. *See* HARPER ET AL., *supra* note 29, at 250; *see also*, Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1907) (explaining that assumption of risk is one expression of the legal maxim *volenti nonfit injuria*—an "expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure").

54. HARPER ET AL., *supra* note 29, at 247.

55. *Id.*

56. *Id.* at 248; *see also*, Bohlen, *supra* note 53, at 14.

57. *See* HARPER ET AL., *supra* note 29, at 247.

58. *See id.* at 1163.

ensure that the conditions were as safe as they reasonably appeared to be.[59] There is similarity between this early articulation of the defense and California's current primary assumption of risk doctrine: both forms eliminate a defendant's duty to protect a plaintiff.[60]

This theory regarding the rise of the assumption of risk doctrine is consistent with various historic tort law principles. For instance, tort law once considered it abnormal to impose an obligation to protect others.[61] While individuals were protected from external acts of violence, they were not protected from the effects of their own personality or voluntary actions.[62]

The rise of the assumption of risk defense is also viewed as a judicial reaction to the rapid increase of workplace lawsuits brought by corporate employees during the Industrial Revolution.[63] Specifically, this theory suggests that the judiciary reacted to protect industrial interests by reducing the potential liability of emerging new and powerful corporations.[64] Judges effectuated such protection through various applications of the assumption of risk doctrine and held that such workers accepted all the usual risks of the trade.[65] However, this view also notes that, over time, society grew to disfavor the harsh result befalling industrial employees[66] and courts responded by narrowing the scope of the doctrine.[67] Such narrowing was primarily accomplished by increasing the specificity level of the plaintiff's knowledge of the risk.[68] As one commentator stated, "precise and specific knowledge of the risk was required before the employee could be found to assume the risk."[69]

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59. *See id.*

60. *See infra* Part II.C (discussing California's modern approach to primary assumption of risk).

61. Bohlen, *supra* note 53, at 14.

62. *See* HARPER ET AL., *supra* note 29, at 250.

63. *See, e.g.*, EPSTEIN, *supra* note 23, at 204 (explaining that industrialization "resulted in judge-made doctrines to handle cases of implied standards of risk"); *see also* Shahrokhfar v. State Farm Mutual Auto. Ins. Co., 634 P.2d 653, 657 (Mont. 1981) (explaining "assumption of risk is a defense which finds its roots in the employee/employer relationship").

64. *See, e.g.*, Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 58–60 (1943) (explaining that the general purpose for the doctrine of assumption of risk was to "give maximum freedom to expanding industry").

65. *See* KEETON ET AL., *supra* note 31, at 568.

66. *See, e.g.*, EPSTEIN, *supra* note 23, at 206 (explaining that the "political fervor" on the issue of an employee's assumption of risk led many states to eliminate the doctrine).

67. *See generally id.* at 205 (discussing ways in which courts altered their ruling to create a more employee-friendly result).

68. *Id.* at 206.

69. *Id.*

The two views on the rise of the assumption of risk doctrine are not inconsistent.[70] Rather, the idea that the doctrine is the manifestation of early courts' desires to promote individual responsibility is consistent with the idea that employees who chose their line of work should be responsible for their own safety. Ultimately, both views shed light on the true focus of the doctrine—that plaintiffs who consciously choose to face a specific risk should not recover when the very risk they contemplated actually leads to injury. Furthermore, both views maintained that defendants have a minimum duty to ensure that plaintiffs have the opportunity to protect themselves.[71]

The assumption of risk defense no longer limits its inquiry to the plaintiff's subjective awareness.[72] Rather, courts have invoked policy reasons for limiting the duty of care owed by certain defendants.[73] Thus, while a plaintiff's subjective awareness of risk may be one factor in such policy considerations, the new approach now requires courts to articulate the policy and explain how it is achieved by limiting the duty within the context of a specific case.[74]

C. The Primary Assumption of Risk Doctrine Applied in Sports

The assumption of risk doctrine now applies in many situations outside the scope of the employee/employer relationship.[75] Since this Note focuses specifically on *Shin*'s application of primary assumption of risk to golf, the analysis now turns to application of the doctrine within the context

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70. To the extent there is inconsistency, it is with regard to when the specific use of the phrase "assumption of risk" arose. Some commentators explain that pure assumption of risk principles were tempered by the Industrial Revolution. *See, e.g.*, Bohlen, *supra* note 53, at 14–15 (explaining how the industrial revolution caused society to become more interconnected and ultimately prompted courts to temper pure notions of self sufficiency and demand "positive performance of careful service"). This suggests that some form of the doctrine had been around before the Industrial Revolution.

71. Bohlen, *supra* note 53, at 15–16 (explaining that in some situations the "obligation to do more than afford others the opportunity to protect themselves is anomalous and exceptional").

72. *See supra* note 40 and accompanying text; *see also infra* notes 74, 76, and 77 and accompanying text.

73. *See, e.g.*, Schick v. Ferolito, 767 A.2d 962, 968 (N.J. 2001) (stating "[t]he policies of promotion of vigorous participation in recreational sports and the avoidance of a flood of litigation over sports accidents are furthered by the application of [a lower duty] of care to all recreational sports.").

74. *See generally* Ursin & Carter, *supra* note 22, at 384–85 (2008) (explaining that in California courts have replaced the "consent-based" approach of assumption of risk with a regime of no-duty rules rooted in policy concerns).

75. *See, e.g.*, HARPER ET AL., *supra* note 29, at 246 (listing other situations in which assumption of risk applies beyond the master/servant context).

of sports and recreation. When applied to sports, the doctrine seemingly comports with its original purpose—limiting or excluding recovery for injuries where the plaintiff voluntarily and knowingly assumed the risks involved.

However, in contrast to the historic model, sports cases that apply this doctrine do not typically inquire into the plaintiff's actual knowledge of the risk.[76] Instead, courts justify the deviation from the general rule of duty on policy grounds.[77] Thus, to the extent courts use the phrase "assumption of risk,"[78] it may be a misnomer since the true focus of the courts' reasoning does not rely on the fact that a plaintiff knowingly volunteered to face, and thus "assumed," a risk.[79]

The idea that sports participants deserve a special rule for tort liability stems from the inherent difference between conduct occurring within sports compared to all other activities. In sports, as one court put it, "behavior that would give rise to tort liability under ordinary circumstances is accepted and indeed encouraged."[80] Courts also recognize that the "normal energetic conduct often includes accidentally careless behavior."[81] In light of these inherent differences, courts hesitate to impose an ordinary duty of care in the sports context, fearing that doing so would inhibit vigorous participation and fundamentally alter the nature of the activity.[82] Specifically, courts reason that competition would be discouraged by the threat of litigation.[83] Additionally, courts express concerns that a "flood of

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76. *See* William Powers Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L. J. 771, 778 (1999); *see also* Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992) (explaining that the proper inquiry of a sporting participant's duty does not depend on "whether plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of defendant's conduct").

77. *See* Nabozny v. Barnhill, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975); Hackbart v. Cincinnati Bengals, Inc., *601 F.2d 516, 520 (10th Cir. 1979)*; *see also Knight*, 834 P.2d at 700 (distinguishing assumption of risk defenses in the sports context from those in "other settings" and explaining that in sports the focus was on the contours of legal duty, whereas in other contexts the focus was on the plaintiff's knowing and voluntary actions).

78. As discussed in notes 14–16, not all courts use the phrase "assumption of risk" when limiting the duty of care of sports participants. *See supra* notes 14–16.

79. For an explanation why the inaccurate use of the phrase "assumption of risk" in California stems from the California Supreme Court's retention of historical assumption of risk terminology despite having abolished the traditional assumption of risk doctrine, see Ursin & Carter, *supra* note 22, at 390.

80. Thompson v. McNeil, 559 N.E.2d 705, 707 (Ohio 1990).

81. *Knight*, 834 P.2d at 710.

82. *See, e.g.*, Kahn v. E. Side Union High Sch., 75 P.3d 30, 37 (Cal. 2003) (observing "[to] [i]mpos[e] a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation").

83. *See, e.g.*, Gauvin v. Clark, 537 N.E.2d 94, 96 (Mass. 1989).

litigation" might ensue if a duty is imposed to mitigate otherwise inherent conduct.[84] Finally, some courts still cling to historic notions of assumption of risk and argue that the plaintiff's expectation of risk justifies that they be barred from recovery.[85]

Three cases illustrate these principles: *Nabozny v. Barnhill*,[86] *Gauvin v. Clark*,[87] and California's *Knight v. Jewett*.[88] All three cases held that participants in sports, while playing, deserve a reduced standard of care.[89] In each case, the respective courts held that the general rule that people must act reasonably did not apply to sports participants.[90] Instead, the courts imposed a limited duty—to refrain from causing injury by reckless or intentional conduct.[91]

In *Nabozny*, the plaintiff was a soccer goalie who was injured when the defendant collided with him inside the penalty box.[92] The court explained the inherent tension in setting forth the proper standard to govern liability: "[T]he law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete on to the playing field."[93]

In laying out the standard, the *Nabozny* court began by distinguishing between two types of rules: those designed to ensure that the game proceeds safely and those that seek to keep the game as a test of skill.[94] According to the *Nabozny* court, participants have a duty to refrain from violating safety-based rules because such violations constitute a reckless disregard for the safety of other players.[95] Importantly, in addition to promoting vigorous participation in sports, the *Nabozny* court also emphasized that the new standard would help control a "new field of injury

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

85. *See, e.g.*, Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 594 (Cal. Ct. App. 1997); *see also* Ursin & Carter, *supra* note 22, at 384–85 (2008).

86. Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975).

87. *Gauvin*, 537 N.E.2d 94.

88. Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

89. *See id.*; *Gauvin*, 537 N.E.2d 94; *Nabozny*, 334 N.E.2d 258.

90. *Gauvin*, 537 N.E.2d at 97; *Nabozny*, 334 N.E.2d at 260–61.

91. *Gauvin*, 537 N.E.2d at 97; *Nabozny*, 334 N.E.2d at 261.

92. *Nabozny*, 334 N.E.2d at 260. Note that in soccer, it is against the rules for an opposing teammate to strike a goalie while both players are within the boundaries of the penalty box.

93. *Id.*

94. *Id.*

95. *Id.* at 261.

litigation."[96]

In *Gauvin*, the plaintiff was injured while playing ice hockey when he was struck by the defendant's stick.[97] Like *Nabozny*, the defendant's conduct in *Gauvin* violated the rules of the sport.[98] However, the *Gauvin* court held that the dispositive inquiry was whether the defendant had acted with a reckless disregard toward the plaintiff's safety.[99] According to *Gauvin*, this standard, and not whether a safety-based rule had been violated, comported with the true holding in *Nabozny*.[100] *Gauvin*'s ruling reflected the policy concerns discussed above. Specifically, the *Gauvin* court explained that imposing liability only for a reckless disregard of safety would further "the policy [of] vigorous and active participation in sporting events."[101] Without this standard, the *Gauvin* court believed that participation in sports would be "chilled by the threat of litigation." [102]

Knight v. Jewett set forth California's modern approach regarding the duty of care owed by sports participants.[103] In *Knight*, the injury occurred during a game of touch football during halftime of the 1987 Super Bowl.[104] After the play, and immediately prior to the injury, the plaintiff had allegedly told the defendant, who played for the opposing team, to "not play so rough."[105] The defendant, however, recalled that the plaintiff had merely asked him to "be careful."[106] The facts of the actual injury-causing event were also disputed.[107] While both parties agreed that the defendant had stepped on the plaintiff's hand, they disagreed on the actions immediately leading up to that event.[108] Ultimately, the plaintiff's finger was amputated, and she sued for negligence.[109]

The preliminary issue in *Knight* was the validity of the assumption of

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96. *Id.*

97. Gauvin v. Clark, 537 N.E.2d 94, 95 (Mass. 1989).

98. *Id.* at 96.

99. *Id.* at 97.

100. *See id.* (observing "'*Nabozny* as establishing the standard of conduct to be willfulness or a reckless disregard of safety'") (quoting Oswald v. Twp. High Sch. Dist. No. 214, 406 N.E.2d 157, 159–60 (Ill. App. Ct. 1980)).

101. *See id.*

102. *Gauvin*, 537 N.E.2d at 97 (internal quotations omitted).

103. Shin v. Ahn, 165 P.3d 581, 590–91 (Cal. 2007). Here, "modern" refers to the application of the doctrine since California became a comparative negligent state.

104. Knight v. Jewett, 834 P.2d 696, 697 (Cal. 1992).

105. *Id.*

106. *Id.*

107. *Id.* at 697–98.

108. *Id.* at 697.

109. *Id.* at 698 (discussing the plaintiff's theories for recovery, including assault and battery).

risk doctrine in light of California's adoption of comparative fault principles in *Li v. Yellow Cab.*[110] In *Li*, the court repealed the traditional "all or nothing" contributory negligence doctrine that barred plaintiffs from recovery whenever the plaintiffs' own careless actions contributed to the plaintiffs' injury.[111] In its place, the *Li* court announced that the plaintiffs' negligence would be merged into a comparative fault scheme, whereby the jury could apportion blame based on the relative responsibilities of the parties.[112] This new approach to negligence affected several defenses that had once served as a total bar to a plaintiff's recovery.[113]

Prior to *Li*, California courts applied variations of the assumption of risk doctrine as a total defense to liability in cases involving sports-related injuries.[114] However, assumption of risk actually precluded the plaintiff's recovery for two distinct reasons, which *Knight* explained were really applications of primary and secondary assumption of risk.[115] Prior to *Li*'s switch to comparative negligence, there was no practical need to distinguish between the two types of assumption of risk because either could bar the plaintiff's recovery.[116]

Knight thus sought to articulate the distinctions between the two defenses. It explained that in one sense, assumption of risk referred to situations where the plaintiff and the defendant had engaged in activity such that the defendant owed a limited duty of care to the plaintiff.[117] In such cases, a plaintiff cannot recover if the defendant did not breach a duty of care owed to the plaintiff.[118] California courts commonly refer to this defense as primary assumption of risk.[119] *Knight* explained that secondary assumption of risk referred to situations where the plaintiff was negligent for actively encountering the risk posed by the defendant's breach of duty.[120] The fact that such conduct was negligent would bar the plaintiff from recovery in a contributory negligence sense.[121] After *Li*, however, the fact finder would determine a plaintiff's negligence and apportion liability

110. *Knight*, 834 P.2d at 697 (citing to Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975)).

111. *Li*, 532 P.2d at 1243. Notably, *Li* involved a car accident, not sports. *See id.* at 1229.

112. *Id.* at 1243.

113. *Knight*, 834 P.2d at 701–02 (discussing how before the adoption of comparative fault in *Li*, there was no need to distinguish between different assumption of risk cases).

114. *Id.* at 700.

115. *Id.* at 703.

116. *Id.* at 700.

117. *Id.* at 703.

118. *Id.* at 708.

119. *Knight*, 834 P.2d at 703.

120. *Id.*

121. *Id.*

based on each party's relative fault in causing the injury.[122]

Having addressed the *Li* court's impact on both forms of the assumption of risk doctrine, the *Knight* court applied the primary assumption of risk doctrine and affirmed the trial court's decision to grant the defendant's motion for summary judgment.[123] After reviewing the record, the *Knight* court found that the evidence established that the defendant had been no more than careless in causing the plaintiff's injury.[124] *Knight* then held that participants in active sports owe a duty of care to avoid intentionally injuring another player or engaging "in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."[125] The defendant's conduct in *Knight* during the touch football game did not breach the legal duty of care owed to the plaintiff.[126]

The reasoning in *Knight* was based on the court's general understanding of the assumption of risk doctrine at common law.[127] The *Knight* court determined that whether the defendant owed a legal duty to protect the plaintiff depended on the "nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport."[128] Underlying this was the idea that sometimes dangerous conditions are integral to certain sports.[129] The *Knight* court explained that there should be no duty to eliminate such inherent risks[130] and emphasized that the determination of the existence and scope of a defendant's duty of care were legal questions for the judge.[131]

In limiting sports participants' duty of care, the *Knight* court provided the same justifications articulated in *Thompson* and *Gauvin*.[132] The *Knight* court explained that in the heat of *active* sporting events, like baseball and football, it was normal for participants to occasionally act carelessly.[133]

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122. *Id.*

123. *Id.* at 712.

124. *Id.*

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

126. *Id.*

127. *Id.* at 697 (explaining that the court's consideration for the application of the assumption of risk doctrine started with *Li*, but the court then proceeded to discuss various secondary authorities).

128. *Id.* at 704.

129. *Id.* at 708.

130. *Id.*

131. *Knight*, 834 P.2d at 706 (italicizing the word "legal" to emphasize that defendant's duty of care is decided by the court).

132. *See supra* notes 91–101 and accompanying text.

133. *Knight*, 834 P.2d at 710 (emphasis added).

Proceeding from this factual premise, the *Knight* court argued that it would be contrary to reason to require players engaged in active sports to act with more care than that which is ordinary in the context of the sport.[134] The court argued that imposing such a standard would make it difficult to play the sport without concern for liability.[135] Thus, in order to prevent the chilling of vigorous participation in sports, a participant should not be held to the heightened standard of care that governs everyday conduct.[136]

The *Knight* court also theorized that a regular standard of care would alter the fundamental nature of the game because there can be a fine line between permissible and impermissible conduct under the rules of certain sports.[137] The court surmised that under a regular standard of care, participants would be leery of engaging in an activity that could possibly be viewed as impermissible.[138] The court argued that the nature of the game itself would change because players would take extra precaution to avoid such impermissible conduct.[139]

Importantly, the *Knight* court expressly noted that its decision to limit duty in the context of sports did not apply to less active sports like golf.[140] While this wording did not necessarily bar the application of the primary assumption of risk doctrine to golf, it does suggest that the *Knight* court had reservations regarding the applicability of the doctrine to golf. Furthermore, in each of the cases described above, the defendants were involved in what seemed to be a "contact" sport—touch football in *Knight*,[141] soccer in *Nabozny*,[142] and hockey in *Gauvin*.[143] Thus, in assessing the detrimental effects that a regular standard of care may have on the players in sports, the recklessness standard had only been considered in the context of contact sports.

Golf is arguably not a contact sport[144] and it must be questioned whether the same policy considerations applied by the earlier courts would

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Knight*, 834 P.2d at 710.

140. *Id.* at 711.

141. *Id.* at 696.

142. Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975).

143. Gauvin v. Clark, 357 N.E.2d 94 (Mass. 1989).

144. *See* Zurla v. Hydel, 681 N.E.2d 148 (Ill. App. Ct. 1997); *but see* Dilger v. Moyles, 63 Cal. Rptr. 2d 591 (Cal. Ct. App. 1997) (discussing how the fact that a golfer may come into contact with a golf ball compels the conclusion that it is a contact sport because of the risk of injury).

apply in the golf context. Would golfers participate less vigorously if required to be careful? Would a return to a regular standard of care cause a massive rush of litigation and overflow in the court systems? The next section examines cases that considered these issues and applied the assumption of risk doctrine to golf.

D. Variations of the Assumption of Risk Doctrine as Applied to Golf

The majority of cases dealing with golf-related injuries have chosen to apply a recklessness standard.[145] These cases follow similar patterns of reasoning by expanding on a prior decision that applied the recklessness standard in the context of more active sports and concluded that golf also warrants this limited standard of care.[146]

Thompson v. McNeil[147] is considered one of the leading cases for the proposition that golf merits special treatment.[148] In *Thompson*, a golfer was injured when another player's misfired ball struck her in the eye.[149] The trial court dismissed the plaintiff's ensuing negligence action for failing to state a cause of action.[150] On appeal, the issue was the degree of care owed between participants in golf.[151] Ultimately, the *Thompson* court held that to state a cause of action for injuries in sporting events, a plaintiff must show reckless or intentional conduct.[152]

The *Thompson* court justified its deviation from the general standard of care by explaining that certain athletic conduct may be tortious in non-athletic settings, but acceptable within the context of sports.[153] The *Thompson* court argued, like the cases discussed above,[154] that the recklessness standard would ensure that "the rewards of athletic competition" were not stifled. [155] The court also added that "[s]hanking the ball is a foreseeable and not uncommon occurrence in the game of golf."[156]

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145. Lazaroff, *supra* note 13, at 319.

146. *See, e.g.*, *Dilger*, 63 Cal. Rptr. 2d at 593 (applying primary assumption of risk to golf based on the court's understanding of *Knight*).

147. Thompson v. McNeil, 559 N.E.2d 705 (Ohio 1990).

148. *See, e.g.*, Shin v. Ahn, 165 P.3d 581, 588 (Cal. 2007) (stating "[t]he first court to apply the reckless disregard . . . standard to golf appears to have been the Supreme Court of Ohio in *Thompson v. McNeil*").

149. *Thompson*, 559 N.E.2d at 706.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 707.

154. *See supra* Part II.C.

155. *See supra* Part II.C.

156. *Thompson*, 559 N.E.2d at 709.

Notably, the court did not explain how the promotion of vigorous participation related to the fact that a shanked shot by another golfer was foreseeable.[157]

Another example of a court applying a reckless standard to golf is *Schick v. Ferolito*,[158] which one author called the "most comprehensive endorsement of a recklessness standard for golf tort cases."[159] In *Schick*, the plaintiff was injured by the defendant's poorly hit tee shot.[160] In applying a recklessness standard of care to golf, the *Schick* court explained that this heightened standard would allow for liability only in cases of "clearly unreasonable" behavior.[161] The *Schick* court reasoned that such a standard would ensure that participants would not be liable for conduct inherent to the game.[162]

Similar to the *Thompson* decision, the holding in *Schick* was based on the policy of promoting the vigorous participation in sports and avoiding a "flood of litigation."[163] Unfortunately, the *Schick* court did not specify how golfers would participate less vigorously if they were liable for their carelessness. The court did argue, however, that whether golf was a contact sport was irrelevant and instead, focused on the fact that "coming in contact with wayward golf shots" was a risk that a golfer "accepts."[164] As in *Thompson*, the court did not explain how awareness of such a risk is relevant to the policy considerations of promoting vigorous athletic participation.[165]

In *Dilger v. Moyles,* the California Court of Appeal decided whether *Knight*'s version of the primary assumption of risk doctrine applied to golf.[166] In *Dilger*, the plaintiff and two friends were golfing on the fifth

157. As discussed *infra* in the text accompanying notes 165 and 183, the *Thompson* court is not alone in failing to connect the foreseeability of risk to the fundamental policy concern of promoting vigorous participation in sports. For an explanation as to why courts fail to make this connection, see Ursin & Carter, *supra* note 22, which describes the aftermath of *Knight v. Jewett* and how some California courts have erroneously applied a second no-duty rule that focuses on the inherent risk of harm within that activity. Specifically, Ursin and Carter argue that such decisions "endors[e] a no-duty rule that is independent of the framework and policies of the intentional injury/recklessness no-duty rule." Ursin & Carter, *supra* note 22, at 418.

158. Schick v. Ferolito, 767 A.2d 962 (N.J. 2001).

159. Lazaroff, *supra* note 13, at 325.

160. *Schick*, 767 A.2d at 963.

161. *Id.* at 965; *see also* Crawn v. Campo, 643 A.2d 600, 607 (N.J. 1994).

162. *Schick*, 767 A.2d at 965; *see also Crawn*, 643 A.2d at 607.

163. *Schick*, 767 A.2d at 968.

164. *Id.*; *see also* Thompson v. McNeil, 559 N.E.2d 705, 709 (Ohio 1990).

165. *See supra* note 157 and accompanying text.

166. Dilger v. Moyles, 63 Cal. Rptr. 2d 591 (Cal. Ct. App. 1997).

hole.[167] As the plaintiff prepared for her tee shot, she was injured when the defendant's ball, hit from another fairway, struck her in the mouth.[168] The defendant claimed he was unable to see the plaintiff because a row of trees separating the fifth and sixth fairways obstructed his view.[169] The parties disputed whether the defendant had "yelled 'fore' upon hitting his errant shot."[170] The trial court granted the defendant's motion for summary judgment on the ground that the primary assumption of risk doctrine applied and therefore, barred the suit.[171] On appeal, the issue was whether the doctrine of the primary assumption of risk should apply to golf—an issue that was expressly left open by the *Knight* decision.[172]

The *Dilger* court concluded that the primary assumption of risk should apply to golf.[173] According to the court, the justifications for the limited duty owed by participants in active sports, such as flag football, applied equally to golf.[174] *Dilger* recognized that golf is not as physically demanding as basketball or football,[175] but nevertheless reasoned that because there is a level of risk inherent in the sport, the doctrine should apply to limit a co-participant's duty to other players.[176] The *Dilger* court articulated the risk inherent to golf:

> Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. If every ball behaved as the golfer wished, there would be little "sport" in the sport of golf. That shots go awry is a risk that all golfers, even the professionals, assume when they play.[177]

The *Dilger* court justified its holding by explaining that a limited duty would serve to preclude lawsuits and permit players to continue to enjoy the sport.[178] The court reasoned that social policy required that players should not be discouraged from participating in a sport that bestowed

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167. *Id.* at 592.

168. Id.

169. *Id.*

170. *Id.*

171. *Id.* at 592–93.

172. *Dilger*, 63 Cal. Rptr. 2d at 592–93.

173. *Id.*

174. *Id.* at 593.

175. *Id.*; *see also* Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992) (using these two sports to justify the court's position).

176. *Dilger*, 63 Cal. Rptr. 2d at 594.

177. *Id.* at 593.

178. *Id.*

numerous benefits to both the players and the surrounding community.[179] To substantiate its position, the court cited *Stimson v. Carlson*,[180] a case in which the Court of Appeal applied the doctrine to limit the duty of a "captain of a sailboat who failed to warn his passenger of an intended change in course."[181] The *Dilger* court explained that "[w]hile golf and sailing may involve less strenuous activity than touch football . . . [the] risk of injury is still a real possibility."[182] Thus, it appears that the *Dilger* court treated the mere risk of injury while participating in the sport as a separate justification for applying primary assumption of risk to such a sport.[183]

Finally, *Dilger* refuted the notion that traditional golf etiquette should serve any role in imputing a certain level of care on a player.[184] Thus, *Dilger* held that while it may have been proper golf etiquette to shout "fore," there was no legal duty to do so.[185] In justifying this conclusion, the court stated that whether a duty exists "depends on whether the activity in question was an 'inherent risk' of the sport."[186] The *Dilger* court cited *Morgan v. Fuji County USA, Inc.*, which held that being hit on the head by an errant golf ball was an inherent risk of golf.[187] Notably, *Dilger* did not explore whether traditional golf etiquette was relevant to what golfers may expect to encounter on the golf course.

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179. *Id.* Specifically, the court explained the benefits of golf: "Golf offers many healthful advantages to both the golfer and the community. The physical exercise in the fresh air with the smell of the pines and eucalyptus renews the spirit and refreshes the body. The sport offers an opportunity for recreation with friends and the chance to meet other citizens with like interests. A foursome can be a very social event, relieving each golfer of the stresses of business and everyday urban life. Neighborhoods benefit by the scenic green belts golf brings to their communities, and wild life enjoy and flourish in a friendly habitat." *Id.*

180. *Id.*; *see also* Stimson v. Carlson, 14 Cal. Rptr. 2d 670 (Cal. Ct. App. 1992).

181. *Dilger*, 63 Cal. Rptr. 2d at 593; *see also Stimson*, 14 Cal. Rptr. 2d at 673.

182. *Dilger*, 63 Cal. Rptr. 2d at 593–94.

183. *See supra* note 157 and accompanying text.

184. *Id.*

185. *Id.*

186. *Id.*; *see also* Knight v. Jewett, 834 P.2d 696, 707 (Cal. 1992).

187. *Dilger*, 63 Cal. Rptr. 2d at 594; *see also* Morgan v. Fuji Country USA, Inc., 40 Cal. Rptr. 2d 249, 253 (Cal. Ct. App. 1995) (analyzing secondary assumption of risk, though not in the context of co-participants).

III. *SHIN*, GOLF, AND RECKLESSNESS

A. The Decision

In *Shin v. Ahn*, the plaintiff and the defendant were golfing together.[188] The defendant was the first player to complete the twelfth hole and had advanced to the thirteenth hole while the plaintiff and another player remained behind to finish putting.[189] By the time the defendant lined up for his shot from the thirteenth tee box, the plaintiff had finished the twelfth hole and, by way of shortcut, ended up to the front and left of the defendant.[190] According to the plaintiff, prior to the defendant's tee shot, the two made eye contact.[191] The defendant, however, claimed that during his practice swing he had looked in the area where he was aiming to make sure it was clear of people.[192] After the defendant took a practice swing and saw no one, he stepped forward and focused on the ball for fifteen to twenty seconds before taking his real swing.[193] The defendant testified that at the moment he struck the ball he did not know the plaintiff's location.[194] In any event, the plaintiff was injured when the defendant's ball hit him in the head.[195] At the time of the accident, the plaintiff had been at a forty to forty-five degree angle from the intended path of the ball, and some twenty-five to thirty-five feet in front of the defendant.[196]

In the plaintiff's suit for negligence, the trial court initially granted the defendant's motion for summary judgment finding that the doctrine of primary assumption of risk barred the suit.[197] Later, the court reversed itself and held that triable issues still remained as to whether the defendant was reckless.[198] The Court of Appeal "applied general negligence principles and concluded that the defendant breached the general duty of care owed" to the plaintiff when the defendant failed to ascertain the

188. Shin v. Ahn, 165 P.3d 581, 583 (Cal. 2007).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Shin*, 165 P.3d at 583.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 584.

plaintiff's location before teeing off.[199] Consequently, it affirmed the denial of summary judgment, "holding that the primary assumption of risk doctrine did not apply" to golf.[200]

The California Supreme Court rejected the Court of Appeal's duty analysis and ruled that the primary assumption of risk doctrine *does* apply to golf.[201] It held that the defendant's motion for summary judgment had been properly denied, but that the trial court would still have to determine whether the defendant had breached the limited duty of care he owed to other golfers.[202] On remand, the factual inquiry was whether the defendant's conduct was "so reckless as to be totally outside the range of ordinary activity involved in golf."[203] The court stated that the record was "too sparse" for it to ascertain whether, as a matter of law, the defendant had breached this duty of care to the plaintiff.[204]

Shin recognized that its decision went beyond *Knight v. Jewett*,[205] which expressly left open the issue of whether the primary assumption of risk doctrine should apply to golf.[206] However, the court examined its own prior decisions applying the doctrine in various recreational cases and found that its conclusion was appropriate.[207] It cited several lower court and out-of-state decisions to support its application of the doctrine specifically to golf.[208]

The *Shin* court criticized the Court of Appeal's heavy reliance on the rules of etiquette in golf to justify setting a reasonable person standard of care.[209] The *Shin* court argued that such traditional, *within-the-game* rules should not impose legal liability when their violation causes injury to a co-participant.[210] The court justified this position by analogy to other sports where the violation of a rule within the game does not authorize liability for injuries caused by such violations.[211]

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199. *Id.*

200. *Shin*, 165 P.3d at 584.

201. *Id.*

202. *Id. at 592.*

203. *Id. at 590.*

204. *Id.* at 592.

205. *Id.* at 582 (stating "[t]his case represents the next generation of our *Knight* jurisprudence").

206. *Shin*, 165 P.3d at 582-83.

207. *Id.* at 588 (explaining, specifically, that the court's decision was consistent with *Cheong v. Antablin*, 946 P.2d 817 (Cal. 1997)).

208. *Id.* at 588–90.

209. *Id.* at 590.

210. *Id.*

211. *Shin*, 165 P.3d at 590.

B. Golf: A Gentleman's Game (Before Shin)

Joel Parkinson is one of the world's best surfers.[212] In his quest to win a world championship, this young Australian has surfed some of the world's most dangerous waves, including the Bonzai Pipeline, a deadly wave on the North Shore of Oahu.[213] In light of his surfing heroics, some may see it as ironic that Parkinson, when given free rein as a guest editor at *Surfer Magazine* (thus enabling him to say anything about anyone), simply had this to say about former world champion Andy Irons: "Whatever you do, don't ever go golfing with Andy Irons. In fact, it's best to stay off the course entirely if he's on it, because he's likely to hit you."[214] Parkinson went on to discuss how Irons was the one who "never yells 'fore'" and that on a recent golfing outing, Irons had shanked a ball and hit another golfer.[215]

Parkinson's anecdote about golf might seem out of place for a surf magazine, but his comments perfectly capture the concerns of a typical golfer. As a professional surfer, there is no doubt that Parkinson has a propensity for risky conduct.[216] Yet, his commentary about Irons highlights an important point—there is no place for risk on the golf course. Furthermore, in criticizing Irons' failure to say "fore," Parkinson's comment implies that even surfers who spend the majority of their time traveling to remote locations are aware of traditional golf etiquette. Finally, Parkinson's caveat to stay off the golf course to avoid the risk created by Irons' presence signifies the potential for the fear of injury to dictate the choices made by otherwise risk-seeking people.

Though Parkinson's comments provide insight into the normal expectations of a golfer, a more complete background of golf is needed to understand the impact of *Shin*'s holding. *Shin* held that golfers must at least act recklessly to be found liable for the injuries they cause.[217] Thus, to understand *Shin*'s impact, one must first understand what amounts to reckless conduct—a factual inquiry which will depend on the specific

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212. *See* SURFLINE ASP WORLD TOUR ZONE, http://www.surfline.com/wctcontestzone/ (last visited Jan. 17, 2009) (posting the results of the ASP World Tour in which Parkinson finished third in the Power Rankings).

213. *See* WIKIPEDIA, http://en.wikipedia.org/wiki/Banzai_Pipeline (last visited Oct. 26, 2008) (explaining that more people have died surfing there than anywhere else in the world).

214. SURFER MAGAZINE, Jan. 2008, Vol. 49, No. 1 at 121.

215. *Id.*

216. *See* Paul Caprara, *Surf's Up: The Implications of Tort Liability in the Unregulated Sport of Surfing*, 44 CAL. W. L. REV. 557, 557–59 (2008) (discussing the risks associated with surfing).

217. Shin v. Ahn, 165 P.3d 581, 582–83 (Cal. 2007) (discussed *supra* Part III.A).

circumstances of the case.[218] Additionally, the basic facts and rules of golf must be illuminated for the purpose of demonstrating how recklessness may be assessed in a golf-related injury case.

Though the fundamentals of golf are straightforward, the game is challenging because it requires meticulous skill and technique. In general, players swing their golf club at a golf ball in an attempt to propel the ball towards a distant hole in as few strokes as possible.[219] There are three types of shots in golf—long, medium, and short. While each type of shot requires hand-eye coordination, the intensity and form of the swing varies. For instance, while the golfer's first swing involves a forceful backswing to "drive" the ball, their final "putt" is a manipulation of angles and touch. The enjoyment of the game stems from mastering these skills.[220]

Golf is usually played in groups of two, three, or four. Due to the sport's popularity, it is not uncommon for at least one group to be playing on each hole at a given course. To maximize land usage, most golf courses are designed so that holes abut one another.[221] Consequently, the tee of one hole may be relatively close to the putting green of another. Accordingly, players preparing to take their tee shot on one hole are relatively close to the intended path of players shooting toward the green from another hole.

The combination of a golfer's inability to hit long-distance shots precisely, the high population of players on a given course, and the fact that the holes are usually adjacent to each other creates the risk of injury from a misfired ball.[222] However, golf is an ancient game,[223] and over the years its players have developed various rules to minimize risks.[224] Though many of

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218. *Id.*

219. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 n.39 (2001) (citing KENNETH G. CHAPMAN, RULES OF THE GREEN: A HISTORY OF THE RULES OF GOLF, 14–15 (1997)).

220. *See, e.g.*, Benjamin v. Nernberg, 157 A. 10, 11 (Pa. Super. Ct. 1931) (explaining "[i]t is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost. It is common knowledge, at least among players, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatsoever").

221. *See* Gyuriak v. Millice, 775 N.E.2d 391, 396 (Ind. Ct. App. 2002) (noting that golf courses are designed so that holes are adjacent to one another).

222. *Id.* (stating "[g]iven the nature of golf course design . . . the fact that courses are frequently crowded, often with more than one group playing each of a course's holes at a given time; and the nature of the game itself, involving shots traveling in excess of 200 yards, it would appear that a good number of golfers playing a course on a given day would be within each other's potential range for mis-hit shots").

223. *See PGA Tour, Inc.*, 532 U.S. at 683 n.39; Gleason v. Hillcrest Golf Course, Inc., 265 N.Y.S. 886, 888 (N.Y. Mun. Ct. 1933).

224. *See* Getz v. Freed, 105 A.2d 102, 103 (Pa. 1954) (noting "[w]hile few players know all the rules of golf, there are three rules and customs which all golfers know: (1) It is the duty of

these rules are well-known and are considered forms of etiquette, the United States Golf Association transcribed them into a formal rulebook.[225]

One such rule deems it improper to hit a shot when another player is within the intended range of the ball's path.[226] Obviously, this rule addresses the concern that such a shot may strike the person within that range. Interestingly, this rule echoes traditional tort principles of negligence. Like negligence, which imposes liability for the failure to take precaution when the burden of doing so is outweighed by the potential severity of injury that may otherwise result,[227] this rule of etiquette weighs the burden of precaution against the harm it is designed to prevent.

Another longstanding golf custom, known even by Australian surfers,[228] requires that players shout a warning whenever their ball travels in such a way that it has the potential to hit someone.[229] As Mr. Parkinson indicated, the word to be shouted is "fore," and its usage is so widespread that any reasonable person who hears it is likely to heed its message and take care to avoid being hit in the head.[230]

C. Golf and Recklessness: The Implications of Shin

Shin's specific holding—that the primary assumption of risk doctrine applies to golf—significantly limits the standard of care owed by golfers to co-participants.[231] Under the doctrine, the court explained that defendant golfers have breached their duty of care owed to co-participants only if the golfer intentionally injured a co-participant or engaged in conduct that was "so reckless as to be totally outside the range of the ordinary activity involved in golf."[232] In other words, a defendant has a duty to avoid acting

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every player to give timely and adequate warning—usually by the word 'fore'—of a shot which he is about to make and which he has reasonable grounds to believe may strike another player, caddy or spectator, either on the same hole or on a different hole").

225. *See* U.S. GOLF ASS'N RULES OF GOLF (2008).

226. *See id.* at 1.

227. *See* U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (applying the "Hand Formula" to determine breach of duty in a maritime collision case).

228. *See supra* Part III.B.

229. *Getz*, 105 A.2d at 103 (noting that giving adequate warning is one of three rules and customs that all golfers know).

230. *Id.* ("It is the duty of every player to give timely and adequate warning—usually by the word 'fore'—of a shot which he is about to make and which he has reasonable grounds to believe may strike another player, caddy or spectator, either on the same hole or on a different hole"); *see also* Brent Kelly, *Golf History FAQ: Why Do Golfers Yell "Fore" for Errant Shots?*, http://golf.about.com/cs/historyofgolf/a/hist_fore.htm (last visited Jan. 24, 2009).

231. Shin v. Ahn, 165 P.3d 581, 582 (Cal. 2007).

232. *Id.*

recklessly.[233] Understanding the difference between reckless and negligent conduct highlights the impact of this different standard as applied to golf. Importantly, the majority of misconduct that causes accidental injury to innocent golfers would not amount to recklessness and thus would not lead to liability under *Shin*.

The difference between reckless and negligent conduct often depends on the actor's knowledge of the amount of risk of danger created by their conduct.[234] The Second Restatement of Torts explains that the risk involved in reckless conduct is "substantially in excess of that necessary to make the conduct negligent."[235] Thus, the difference between the risks involved in the two types of misconduct is one of degree.[236] The closer the risk of harm is to substantial certainty, the more likely the conduct will be deemed reckless.[237] Since one "intends" the consequences of his or her act when the consequence is a "substantial certainty," courts have noted that recklessness is on a continuum between intentional and negligent conduct.[238]

In evaluating the defendant's awareness of the degree of risk of harm involved in a given activity,[239] courts do not inquire as to whether the defendant was subjectively aware of the risk.[240] Instead, the focus is on whether, in light of the circumstances surrounding the defendant's conduct, the defendant either knew or should have known that the conduct created a high degree of danger.[241] Thus, courts will apply a reasonable person standard to determine whether the actor is deemed to have known the danger associated with the conduct.[242]

Furthermore, implicit in the concept of recklessness is that the risk

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233. Admittedly, this conclusion may simplify the specific language in *Shin*, which seems to suggest that the recklessness must be evaluated within the context of golf. However, as discussed *infra* at note 255 and its accompanying text, California courts have applied the Second Restatement of Torts to sports-related personal injury lawsuits. The Restatement evaluates an actor's conduct within the circumstances in which it takes place. Consequently, a determination of recklessness would focus on the circumstances of the sport anyway.

234. *See, e.g.*, KEETON ET AL., *supra* note 31, § 8 at 36.

235. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965).

236. RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965); KEETON ET AL., *supra* note 31, § 8 at 36.

237. KEETON ET AL., *supra* note 31, § 8 at 36.

238. Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 31 (Wis. 1993).

239. *See generally* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

240. *See, e.g., id.* § 500 cmt. c.

241. *See* HARPER ET AL., *supra* note 29, at 443.

242. RESTATEMENT (SECOND) OF TORTS § 500 cmt. c (1965). It should be emphasized that the reasonable person standard used here only relates to what a reasonable person would have known. It does not relate to whether the person's conduct was reasonable. *See id.*

itself must be unreasonable under the circumstances.[243] Thus, what is reckless conduct in one situation is not necessarily negligent in another.[244] This idea is particularly important when discussing the differences between recklessness and negligence in the context of sports. As one court explained, the unreasonableness of risk in a given sporting event requires a factual understanding of the way certain sports are played (i.e., the rules and customs of the game).[245] Therefore, when golfers' conduct creates a substantial degree of dangerous risk to their co-participants, such conduct is only reckless if it is unreasonable in light of the circumstances normally associated with the sport (i.e., the rules and customs governing the sport).[246]

Golf, as evidenced by factually similar cases with contrasting holdings, presents a particularly difficult context for analyzing whether certain conduct is reckless or negligent.[247] Nevertheless, in most instances, unintentional harm on the golf course arises from negligent, not reckless, activity.[248] The following subsections analyze whether the two common forms of golfer misconduct—hitting the ball when another player is within range and failing to give warning when one's ball approaches a co-participant[249]—are reckless or negligent.

1. In Most Cases, Hitting a Long-distance Shot when Others Are in the Potential Range of the Ball Is Negligent but Not Reckless

Established custom forbids players to hit the ball when another player is within the range of the shot.[250] But, does a golfer who fails to heed this custom and ultimately causes injury act with reckless disregard of the other player's safety?

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243. *Id.* § 500 cmt. a.

244. *See id.* § 500 cmt. a; *see also* Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (arguing that the "negligence standard, properly understood and applied, accomplishes the objectives sought by the courts adopting the recklessness standard").

245. Thompson v. McNeil, 559 N.E.2d 705, 708 (Ohio 1990).

246. *Id.*

247. *Compare id.* at 707 (explaining that it may be reckless to fail to say "fore" despite the fact that the golfer knows another is within the line of flight), *with* Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 594 (Cal. Ct. App. 1997) (finding that the failure to yell "fore" is not reckless conduct as contemplated by the *Knight* court).

248. *See Dilger*, 63 Cal. Rptr. 2d at 594 (holding that the failure to yell "fore" was not reckless). *See supra* Part III.B (arguing the failure to yell "fore" is one of the two greatest instances of misconduct and concluding that much of the accidental harm in golf arises from negligent conduct).

249. *See supra* Part III.B.

250. *See supra* Part III.B.

California courts, when characterizing the conduct of a golfer who hits a shot while others are in the intended path of the ball, are likely to apply the standard of recklessness as set forth in the Second Restatement of Torts (the "Restatement").[251] Under the Restatement, the existence of recklessness will depend on whether a defendant knew or should have known that their shot created a substantial degree of risk to others. Thus, one factor a court is likely to consider is the defendant's proximity to the plaintiff at the time of the stroke. Not only must the court determine that the conduct created an unreasonable risk, but that risk must also be "substantially greater than that which is necessary" to constitute negligent conduct.[252]

This demonstrates that the difference between negligent and reckless conduct is a matter of degree.[253] For example, when a swinger is closer to the plaintiff, there is a greater risk that the ball will hit the plaintiff and thus a greater chance a court will find such conduct reckless. Nevertheless, at the time of swinging the club, the defendant will usually be far enough from the plaintiff that it cannot be sufficiently certain that the defendant's ball would be substantially likely to hit the plaintiff.[254] Thus, although when and how the defendant swings may be unreasonable and therefore negligent, the defendant has arguably still not acted recklessly.

2. In Most Cases, Failure to Shout "Fore" Is Negligent but Not Reckless.

The next issue is whether the second form of misconduct—failing to shout "fore"—is negligent or reckless. Certainly, it seems logical that it would be negligent for golfers to fail to say "fore" when their ball appears to be headed toward another golfer. In most circumstances, a reasonably prudent person would find that saying "fore" is a minimum burden substantially outweighed by the risk of harm.[255] However, is the failure to

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251. *See, e.g.*, Stimson v. Carlson, 11 Cal. Rptr. 2d 670, 673 (Cal. Ct. App. 1992) (applying the Restatement's definition of recklessness to a primary assumption of risk case arising out of sailing); Towns v. Davidson, 54 Cal. Rptr. 3d 568 (Cal. Ct. App. 2007) (applying the Restatement's definition of recklessness to a primary assumption of risk case arising out of skiing); *but see* Cohen v. Five Brooks Stable, 72 Cal. Rptr. 3d 471, 486–91 (Cal. Ct. App. 2008) (Haerle, J., dissenting) (refusing to apply the Restatement's definition of recklessness in favor of "Knight 'recklessness,'" which looks at what is "totally outside the range of the ordinary activity involved in the sport").

252. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

253. *Id.* § 500 cmt. g (noting that the difference between negligence and recklessness depends on the likelihood of harm arising from the activity).

254. *See id.*

255. This comparison of burden to benefits is commonly known as the Hand Formula. *See* U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

say "fore" reckless?

To begin, the conduct must be assessed at the moment a reasonable person would have realized the ball was headed toward another. The existence of recklessness will depend on whether the defendant knew or should have known that the failure to shout "fore" placed the plaintiff at an unreasonable risk of physical harm. The Restatement asks whether the defendant had knowledge of the facts creating the risk.[256] The relevant inquiry focuses on the apparent trajectory of the defendant's golf ball and the defendant's knowledge of the plaintiff's location in relation to the ball.[257] However, even when an airborne ball appears to be heading in the general vicinity of another golfer, the odds of it actually striking him or her are still low. Consequently, there would not be a sufficiently "high" degree of risk, as required by the Restatement, for a finding of recklessness. Thus, even though relaying a warning can avoid or minimize the risk of being struck by the defendant's ball, it still seems unlikely that defendant's failure to yell "fore" amounts to reckless conduct.[258]

The two hypothetical situations discussed above—the act of swinging when another player is within range of one's shot, and the failure to shout "fore" when one's ball appears to be headed toward another player—are common instances of misconduct leading to golf-related injuries.[259] However, because neither amounts to recklessness, liability would not result under *Shin* against any golfer engaging in such misconduct.[260]

IV. THE UNDERLYING PURPOSE OF THE PRIMARY ASSUMPTION OF RISK EXCEPTION IS NOT FURTHERED BY THE APPLICATION OF THE DOCTRINE TO GOLF

As discussed above, *Shin v. Ahn* departs from the general California rule that requires people to exercise reasonable care under the circumstances to avoid causing reasonably foreseeable harm.[261] By

256. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965).

257. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

258. *See, e.g.*, Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 594 (Cal. Ct. App. 1997) (holding that "the failure to yell 'fore'" was not "reckless or intentional conduct contemplated by the *Knight* Court").

259. *See supra* Part III.B.

260. Notably, *Shin* was remanded to the lower court on the issue of recklessness. However, based on the reasoning above, it is likely that future courts will conclude that such conduct does not amount to recklessness.

261. CAL. CIV. CODE § 1714, cmt. a (West 2004) (stating "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his [or her] want of ordinary care or skill in the management of his [or her] property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself [or

definition, however, a general rule is subject to exceptions. In California, for example, courts have explained that the "existence of '[d]uty' is not an immutable fact of nature but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[262]

California courts emphasize this mutable nature of duty when dealing with the duty of care owed by a sporting participant.[263] As one court stated, "[w]hen the injury is to a sporting participant, the considerations of policy and the question of duty necessarily become intertwined."[264] This Note has discussed the policy considerations of both historic and modern California courts.[265] However, golf does not raise these considerations and, thus, there is no need to stray from the regular rules of care that generally govern society. Accordingly, a golfer should not suddenly shed the obligation to take care simply by stepping onto the golf course.

A. The Policy Reasons Underlying the Historical Notions of Assumption of Risk Do Not Compel the Application of the Doctrine to Protect a Careless Golfer

1. Historic Ideals Favoring the Promotion of Individualism Do Not Suggest the Doctrine Should Be Applied to Golf.

Various policy reasons are given to explain the rise of the assumption of risk defense at common law.[266] For example, some view the doctrine as a manifestation of the desire to compel people to take individual care to avoid danger.[267] When applied to golf, this policy may, at first glance, seem to suggest that golfers should be responsible for their own self-protection. However, even historically there were no absolute obligations to avoid all danger.[268] At a minimum, defendants were obliged to afford others the opportunity to protect themselves.[269]

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herself]."); *see also* Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 391 (Cal. 2006) (citing Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)).

262. *Avila*, 131 P.3d at 391 (citing Parsons v. Crown Disposal Co., 936 P.2d 70, 80 (Cal. 1997)) (internal quotations and emphasis omitted).

263. *See, e.g.*, *Avila*, 131 P.3d at 391.

264. *Id.*

265. *See supra* Part II.

266. *See supra* Part II.

267. *See supra* Part II.B.

268. *See supra* Part II.B (discussing how ideas of individual care were tempered as society grew more interdependent upon one another for care as a result of industrialization).

269. Bohlen, *supra* note 53 at 15–16.

It is unlikely that principles of individualism would compel a court to reduce the liability of a negligent golfer who engages in one of the two hypothetical examples of misconduct described above.[270] For instance, when a defendant swings while another player is within the intended range of the shot it would be very difficult for the other player to take any care to avoid getting hit by the ball. To do so would require them to incessantly scan the sky for airborne balls. This would be distracting and burdensome and could cause some golfers to stay home instead of playing.

Furthermore, common law imposed, at the very least, the requirement that the defendant give the plaintiff the opportunity to engage in self-protection.[271] In the context of golf, this would involve one of two actions: the defendant may wait for the other golfer to leave the green, or the defendant could shout "fore" to warn the other golfer of the incoming ball.[272] Either way, a defendant's historic obligations would be virtually identical to the obligations imposed by modern-day rules of etiquette, which, as described above,[273] also require a golfer to wait before hitting and give adequate warnings of incoming balls.[274]

In the second example of potential misconduct, the defendant failed to shout "fore" when their ball unintentionally heads toward another player. Here, the misconduct is the failure to provide warning. This misconduct breaches the historic obligation to afford the plaintiff the opportunity to seek protection from the potential injury. Assuming that the defendant shouts "fore" loud enough to be heard,[275] the plaintiff will have the opportunity to avoid the ball.[276] Nevertheless, under California's new standard of care for golfers, the effect of *Shin* will be to negate any obligation on the part of the defendant to shout "fore."

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270. *See supra* Part III.B.

271. *See supra* Part II.B.

272. *See supra* Part II.B.

273. *See supra* Part III.B.

274. This Note does not focus on the outcome if the defendant had warned the plaintiff about his or her intention to swing, and the plaintiff was aware of the warning but was injured when he or she failed to move out of the way. Such a scenario would present issues of express assumption of risk (if the defendant expressly warned the plaintiff) or secondary assumption of risk (if the defendant breached a duty but the plaintiff voluntarily faced the risk caused by such breach).

275. It will usually be the case that the sound of a player's voice will carry at least as far as the distance in which the ball travels.

276. Again, this Note does not focus on the results if the defendant had given the appropriate warning and the plaintiff nevertheless failed to take proper precautions. Clearly, the defendant would argue that the plaintiff was negligent in failing to heed the warning. This would be a secondary assumption of risk issue.

2. Historic Concerns Regarding the Protection of Industry Do Not Apply to Golf

The rise of assumption of risk is also explained as the manifestation of the policy of nineteenth century courts to protect growing industries from the threat of employee lawsuits.[277] Under this view, American and English courts placed paramount importance on the economic success of growing industries.[278] For this historic principle to justify the application of the doctrine today, it would have to be assumed that courts view the golf industry in the same light as they viewed the industrial giants of the nineteenth century.

This is hard to believe for two reasons. First, today's golf industry is miniscule compared to the industries protected by the assumption of risk doctrine in the nineteenth century. Second, holding a golfer liable for his negligent conduct would not necessarily burden the golf industry. To begin, the golf industry has nothing to gain directly from a legal doctrine that applies only to co-participants since, in either situation, a single member of the golfing community will be stuck with the loss. The only way the rule could affect the industry is if it substantially affects the total number of people who golf. As will be argued *infra*, a golfer could be as affected by the fear of uncompensated injury as by the fear of liability.[279] In light of these reasons, it appears that applying a regular standard of care to golfers would not frustrate the historic concern of protecting big industry. Again, the *Shin* ruling finds no historic support for its departure from the traditional rule.

3. Even if a Court Were to Apply Assumption of Risk to Golf, It Would Likely Find That the *Shin* Plaintiff Had Not Assumed the Risk

Assuming a court applied the historic version of assumption of risk to a golf injury case, the likely result would still differ from *Shin*. Historically, the assumption of risk doctrine focused on whether the plaintiff had voluntarily faced a known specific risk.[280] Arguably, an injured golfer would not have had any knowledge that he faced a particular risk from any particular ball on any particular play. Though a plaintiff may understand that it is possible to be struck by a ball, such understanding is

277. *See supra* Part II.B.

278. *See supra* Part II.B.

279. *See infra* Part IV.B.1 (arguing that more players would golf under the negligence standard).

280. *See* HARPER ET AL., *supra* note 29, at 248; *see also* Bohlen, *supra* note 53, at 14.

different from, and not as specific as, consenting to being struck by a negligently hit ball.[281]

Thus, two of the historic reasons for applying this limited standard of care are not applicable to golf. Nevertheless, California law is different. California's primary assumption of risk doctrine is guided by different considerations.[282] To the extent these policy reasons are not implicated in golf, *Shin* has arguably erred in its application of California precedent.

B. California Precedent Does Not Support the Application of Assumption of Risk to Golf

In *Knight*, the California Supreme Court delineated several justifications for limiting the standard of care owed by a participant in a game of football.[283] The *Knight* court's reasoning for this deviation is best understood by first explaining how and when it intended the doctrine of primary assumption of risk to be applied. In the context of sports, the court explained that primary assumption of risk applies by limiting duty to preclude liability for injuries arising from an inherent risk of the sport.[284] The court held that some risks are so inherent to the nature of the sport that the plaintiff is deemed to have assumed the risks by deciding to play.[285] The defendant's duty was limited to avoid increasing those risks.[286]

The court explained how this limitation of duty would promote certain policies.[287] The court's reasoning began with the premise that participants in active sports, like baseball and football, sometimes act carelessly in the "heat" of competition.[288] Proceeding from this factual premise, the court reasoned that the imposition of liability for such careless behavior would lead to two negative outcomes.[289] First, it could cause players to "chill" their vigorous participation to avoid liability for what

281. *See* Tancredi v. Dive Makai Charters, 823 F. Supp. 778, 790 (D. Haw. 1993) (holding that a defendant could not invoke primary assumption of risk as a defense to an action on behalf of a deceased scuba diver who had known some, but not all, of the risks involved in diving at 140 feet).

282. *See supra* Part II.C.

283. *See supra* Parts II.C-D.

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

285. *Id.* at 708–09.

286. *See id.*

287. *Id.* at 710.

288. *Id.*; *see also* Zurla v. Hydel, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997) (explaining that the elevated reckless standard was based on the fact that the competitive nature of contact sports led people to be less careful than they otherwise would be).

289. *Knight*, 834 P.2d at 710.

would otherwise be ordinary conduct within the sport. [290] This, in turn, leads to the second negative repercussion—when athletes stop participating vigorously in their sport, the sport itself changes. The court characterized this second negative outcome as fundamentally altering "the nature of the sport."[291]

Thus, to merit the application of the *Knight* standard of care to the sport of golf, it must likewise be shown that the imposition of a regular standard of care would cause the fundamental nature of golf to change. Golf, however, does not posses the same characteristics present in the active sports discussed in *Knight,* and consequently, its fundamental nature would not change by imposing a regular standard of care. To demonstrate how golf differs from the sports contemplated in *Knight*, consider how a sport like tackle football would change if its participants had to act carefully.

1. Football Is Not "Fore" Everyone.

> "At the base of it was the urge, if you wanted to play football, to knock someone down, that was what the sport was all about, the will to win closely linked with contact." - George Plimpton[292]

Unless George Plimpton thinks that golfers have an underlying urge to knock down an opposing player, it sounds like he would disagree that golf and football are similar. This distinction is critical because, as previously discussed, the question of duty is highly contextual and dependent on whether the factual nature of a given sport justifies a lower standard of care.[293] This section describes a typical football play in order to demonstrate how football, unlike golf, would truly suffer if its players were subjected to the traditional rule requiring them to take reasonable care. By using a sport of such physical nature, it is possible to see the ways in which a sport's fundamental character would change with the application of normal duty rules. Consequently, by showing the ways in which the doctrine was intended to apply, it is then easier to substantiate the argument that it should not apply to golf.

Consider football through a hypothetical play. Suppose, for example,

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290. *Id.*

291. *Id.*

292. 10k Truth Football Quotes, http://www.10ktruth.com/the_quotes/football.htm (last visited Oct. 8, 2008).

293. *See, e.g.*, *Knight*, 834 P.2d at 700 (distinguishing assumption of risk defenses in the sports context from those in "other settings").

that the defensive coach calls a play requiring the linebacker to "blitz" the quarterback. This play requires the linebacker to run full-speed toward the quarterback. The linebacker's purpose is to either tackle the quarterback before the ball is thrown or to disrupt the quarterback's concentration enough to force a bad pass. Yet, under the rules of football, a defensive player is not allowed to hit the quarterback who has already released the ball.[294] The sport enforces this rule by assessing a penalty against the defensive team and awarding the offensive team extra yards and a first down.[295] But, should a blitzing linebacker who hits the quarterback after the ball has already been thrown be civilly liable if the quarterback is injured? [296]

To answer the question, consider how this play may differ if civil liability were imposed. First, assume the linebacker knows the law on civil liability.[297] Next, recall the discussion in *Knight* regarding the fact that certain sports naturally involved some careless conduct.[298] Consider how this is true in football, where a defensive player's performance has been said to hinge on the ability to play with "reckless abandon."[299] Now, think about how the imposition of civil liability for such inherent misconduct would affect the linebacker. *Knight* suggests that the threat of litigation

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294. *See* NFL Rules Digest: Protection of the Passer, http://www.nfl.com/rulebook/protectionofpasser (last visited Oct. 8, 2008) (explaining the rules regarding protection of the passer with possession of the ball).

295. *See* NFL Rules Digest: Summary of Penalties, http://www.nfl.com/rulebook/penaltysummaries (last visited Sept. 19, 2008) (listing all penalties by category). Note that, technically, the violation would be "roughing the passer" and subject to the most severe penalty, 15 yards.

296. This analysis assumes that the linebacker's hit on the quarterback was not late or egregious enough to constitute the intentional tort of battery. For a case where battery was found, see Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979).

297. Admittedly, this may be a big assumption. A simple Google search for "football player" and "arrested" demonstrates why. *See, e.g.*, Geoffrey P. Miller & Lori S. Singer, *Handicapped Parking*, 29 HOFSTRA L. REV. 81 (2000) (discussing the UCLA handicap parking scandal in which members of the team illegally used false handicap placards); ASSOCIATED PRESS, *USC Football Recruit Maurice Simmons Arrested for Robbery*, Mar. 7, 2008, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/03/07/sports/s085324S06.DTL (regarding arrest of USC recruit Maurice Simmons); ASSOCIATED PRESS, *Two Syracuse Players Arrested*, Mar. 6, 2008, http://collegefootball.rivals.com/content.asp?CID=782834 (two Syracuse football players arrested). But, note that many football players are upstanding citizens. *See, e.g.*, Bill Pennington, et al., *Ex-NFL Player Is Killed in Combat*, N.Y. TIMES, Apr. 24, 2004, at D1 (reporting the combat death of Pat Tillman, "whose decision to give up a lucrative NFL career to join the Army Rangers made him one of the most public examples of patriotism in the aftermath of the attacks of Sept. 11, 2001").

298. *See, e.g.*, *Knight*, 834 P.2d at 711 (citing Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520 (10th Cir. 1979)).

299. *See, e.g.*, Lazaroff, *supra* note 13, at 318 (using the term "reckless" in a non-legal sense).

would cause players to alter their performance so as to avoid liability.[300] The end result, according to *Knight*, would chill the player's vigorous participation.[301]

In football, the nature of the game would change if a linebacker's actions were more restrained. This alteration would begin with the linebacker's change in mindset. Rather than focusing on the game, the linebacker would be concerned about liability. The linebacker's new concern—liability—would ultimately change their athletic movements during the play. For one, linebackers would tone down their speed of pursuit, which in turn, would reduce the force in which linebackers hit the quarterbacks. In this sense, the linebacker has become a *lethargic* participant.

As *Knight* explained, the linebacker's lack of vigorous participation will cause a fundamental change in the way football is played.[302] Now that the linebacker has reduced the intensity of the blitz, it is less likely that he will achieve the original purpose of the play—sacking or hurrying the quarterback. The blitz has now become ineffective. Furthermore, the linebacker is unlikely to get close enough to the quarterback in time to compensate for the lack of defensive coverage.[303] The quarterback, now unhindered by any blitzing linebacker, will have an easier time passing to an open receiver. Given the ineffectiveness of the blitz, it is unlikely this play will ever be used. With the removal of this longstanding and effective defensive tactic from the playbook, the fundamental balance between offense and defense will tilt in the offense's favor. As such, the fundamental nature of the game has changed.

Knight avoided this problem by barring recovery for merely negligent conduct in certain active sports.[304] In this hypothetical, the linebacker's late hit on the quarterback was arguably careless. A person of reasonable prudence would not slam into a defenseless player in this fashion. Indeed, the application of the Hand Formula[305] supports this argument. The risk of

300. For those inclined to argue that the linebacker would be dissuaded from engaging in this conduct due to the existence of rules that would penalize such conduct, it is submitted here that the rules of the game are not sufficient to eliminate this conduct. One need only watch even an hour's worth of NFL to see a player engage in dangerous conduct that results in a penalty. While such repercussions generally deter such conduct, they do not have the same effect that the imposition of liability would have upon that defender in the event that the quarterback is injured.

301. *Knight*, 834 P.2d at 710.

302. *Id.*

303. Whenever a linebacker blitzes, one more offensive player is left "open" to receive a pass. Thus, a blitz is most effective if it allows the linebacker to quickly disrupt the quarterback.

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

305. *See supra* notes 224 and 252 and accompanying text.

harm to the quarterback, while slim, still outweighs the utility generated by the linebacker's actions. Other than a five- to fifteen-yard penalty assessed against their team, linebackers have nothing to gain in the play by hitting the quarterback once the ball has been released.[306]

Although the linebacker's actions would be careless, it is less likely that they would be deemed reckless. As mentioned above, the line between recklessness and carelessness often centers upon the degree of the risk caused by the conduct in light of the circumstances involved in the sport.[307] In tackle football, the linebacker's rush at the quarterback is often frustrated by huge offensive linemen, whose blocking serves to impede the linebacker's path. Furthermore, even a linebacker who tackles a quarterback without obstruction is unlikely to cause the quarterback death or substantial physical harm—the type of harm contemplated by the Restatement. Consequently, the linebacker in this hypothetical would be viewed as careless, but not reckless.

The linebacker blitz illustration demonstrates why a limited standard of care is necessary in certain sports. By comparison, a regular standard of care would not cause the same problems in golf.[308] To begin, the initial premise in *Knight*—that careless conduct is inherent in certain sports[309]—would not apply to golf. In *Knight*, the court explained that such carelessness arises from "normal energetic conduct." [310] In golf, the opportunity to make a prudent choice does not occur during the performance of an athletic movement, and hence, does not occur during normal energetic conduct. Because *Knight*'s initial premise—that some sports involve inherent carelessness[311]—does not exist in golf, the policy concerns expressed in *Knight* will also not apply.

As discussed in Part III, there are two predominant ways in which a golfer may carelessly injure other players: by hitting a ball when another is in the ball's intended path, or by failing to yell "fore" when a ball is heading towards another player.[312] The carelessness present in these two examples is not a natural part of golf the way a linebacker's late hit is in football. Carelessness in football nearly always arises during an athletic

306. The linebacker could argue that the utility does not necessarily come from the contact, but the threat of such contact. This argument will be discussed below insofar as a quarterback who is not faced with such pressure will find that the offensive game is suddenly easier.

307. *Knight*, 834 P.2d at 712.

308. *See* Lazaroff, *supra* note 13, at 333 (stating "there would be no 'chilling effect' on golfers by applying negligence principles").

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

310. *Id.*

311. *Id.*

312. *See supra* Part III.

movement. When the linebacker hits the quarterback after the quarterback has released the ball, the linebacker does so mid-sprint. The same is true when a baseball player releases the bat with unnecessary force after hitting a ball,[313] or when a soccer player collides with the opposing goalie just inside the penalty box during a dash for the ball.[314] In each example, the injury occurred while the athlete was performing a physical movement in furtherance of the competitive objective.

But unlike players in football, baseball, or soccer, a golfer's athletic motion is not involved in either one of the two common forms of misconduct. For instance, when the golfer carelessly hits the ball while another participant is within range of the shot, the opportunity to take care occurred before the golfer's athletic movement began.[315] The golfer's carelessness occurred when the choice was made to swing—a moment of contemplation, not an athletic movement.[316] In contrast, the linebacker was sprinting and avoiding offensive linemen when he hit the quarterback.

Nor does a golfer's failure to shout "fore" occur during an athletic movement. Rather, golfers have already engaged in an athletic motion in their swing and follow-through. The opportunity to take care would arise at the instant a reasonable person would see that another player in the ball's flight path would be adequately warned by shouting "fore." Because the golfer's follow-through has already occurred, the choice at this moment does not occur during any athletic motion. Thus, unlike in basketball, where the elbowing player acts carelessly while jumping in the air, the golfer "acts" carelessly while gazing into the sky. As such, golfers cannot blame the unwise conduct on carelessness brought about by the heat of competition.

Consequently, because the two common forms of carelessness in golf do not occur during the athlete's physical motion, carelessness is not inherent in golf in the way originally understood by *Knight*.[317] Unfortunately, cases like *Schick* and *Dilger* missed this point, and instead equated a golfer's awareness of the possibility of being struck by a carelessly hit ball to *Knight*'s meaning of an inherent risk.[318] However, the *Knight* court's reasoning stemmed from the presumption that certain sports

313. *See, e.g.*, Gaspard v. Grain Dealers Mut. Ins. Co., 131 So.2d 831 (La. Ct. App. 1961).

314. *See* Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975).

315. Lazaroff, *supra* note 13, at 332.

316. *See id.* at 330 (stating that "the ball is stationary when hit, as is the player").

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

318. *See* Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 593–94 (Cal. Ct. App. 1997); Schick v. Ferolito, 767 A.2d 962, 968 (N.J. 2001).

involved inherent carelessness.[319] Since this presumption has been shown not to exist in the context of golf,[320] the negative outcomes that the *Knight* court sought to avoid would not arise in golf.

For example, a golfer's vigorous participation would not be chilled due to the imposition of liability for careless conduct.[321] As used in *Knight* and its progeny, the term "vigorous" refers to the manner in which an athlete performs while engaging in competition.[322] In this sense, holding a golfer to a standard of reasonable care would not alter a golfer's vigorous participation.[323] A golfer performs by swinging a club.[324] Thus, requiring golfers to wait for others to vacate the area or shout "fore" after hitting the ball would not affect the manner of their performance.[325]

In contrast, a linebacker, whose effectiveness often depends on speed and power, would be chilled from vigorous participation because of liability concerns. A regular standard of care would affect both the speed and power of the linebacker's performance. Thus, unlike in golf, a regular standard of care does affect how a football player performs. A golfer, by contrast, can participate vigorously despite any potential liability for carelessness.

The second negative consequence expressed in *Knight* was that imposing liability could alter the fundamental nature of many sports.[326] Such alteration stems from the fact that when the participants play with less vigor, the game itself changes. However, as shown above, a golfer will continue to play in the same manner and with the same vigor even when subjected to a carelessness standard of conduct. A golfer will continue to eye the hole, focus on the ball, take a practice stroke, step forward, and take the real swing. As the United States Supreme Court recognized, the "essence of [golf is] shotmaking,"[327] and a carelessness standard would not fundamentally affect a golfer's shot. With the golfer's manner of performance remaining unchanged, nothing fundamental about the nature of the sport will change.

Because ordinary careless conduct is not part and parcel to golf, legal

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

320. Lazaroff, *supra* note 13, at 330–31.

321. *Id.* at 331.

322. *See Knight*, 834 P.2d at 710.

323. Lazaroff, *supra* note 13, at 331.

324. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001) (observing "[f]rom early on, the essence of the game has been shotmaking").

325. *See, e.g.*, Lazaroff, *supra* note 13, at 331 (discussing how golfers will not improve their game by acting with disregard towards the safety of others).

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

327. PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001).

liability for such conduct will not chill a golfer's vigorous participation and will not fundamentally change the game.[328] In fact, some argue that the golfing experience will improve under this regular standard of care.[329] By encouraging careful behavior, the standard would deter undesirable conduct, and players could play without fearing carelessly hit balls.[330] If remaining "cool" improves a golfer's game,[331] playing without the fear of a stray ball could prolong a golfer's relaxed state and further improve their game. In this sense, a regular standard of care would help a golfer's game.[332]

Relying on the rationale used in *Dilger*, the *Shin* court further discussed how holding participants liable for missed hits would "encourage lawsuits and deter players from enjoying the sport."[333] Yet, this is not necessarily true. For one, the argument is inaccurate—a negligence standard would not lead to liability for mere "missed" hits.[334] A golfer must *also* have carelessly "missed" the hit *and* proximately caused an injury.[335] Without these elements, liability will not result. The *Dilger* opinion supports this conclusion as it recognized that golf balls sometimes go awry, and that "[i]f every ball behaved as the golfer wished, there would be little 'sport' in the sport of golf." [336] This statement demonstrates that courts can distinguish between accidents caused without fault, and "mis-hits" which actually warrant the imposition of liability.

Secondly, even assuming that some players would be deterred from playing golf due to mis-hit liability, the *Dilger* analysis still comes up short. In concluding that potential mis-hit liability would cause fewer players to engage in the sport, [337] the court failed to consider the potential effects that a lower standard of care might have on the frequency of golf play. As some have argued, the lower standard will discourage careful play.[338] As a result, safety-conscious golfers may refrain from

328. *See* Lazaroff, *supra* note 13, at 331.

329. *See, e.g., id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Shin v. Ahn, 165 P.3d 581, 587 (Cal. 2007) (quoting Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 593 (Cal. Ct. App. 1997)).

334. *See* Lazaroff, *supra* note 13, at 332–33.

335. *Id.* at 331–32 (explaining that "any plaintiff would have to plead and prove that the defendant golfer causing the injury acted without reasonable care").

336. Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 593 (Cal. Ct. App. 1997).

337. *Id.* at 591.

338. *See* Lazaroff, *supra* note 13, at 331; *see also* Zurla v. Hydel, 651 N.E.2d 148, 152 (Ill. App. Ct. 1997) (explaining that requiring a reckless standard in golf would undermine

participating.[339] Mr. Parkinson's admonishment to avoid Andy Irons when on the golf course lends support for this theory.[340]

Finally, *Shin* erroneously relied on *Dilger* for the theory that a regular standard of care would encourage a burdensome amount of lawsuits.[341] This theory assumes there are enough golf-related injuries to create a burden on the courts to resolve them. While the actual number of golf-related injuries that occur every year in California remains unknown, the number likely falls far below the number of car accidents.[342] Yet, the court has not raised the burden for plaintiffs injured in car accidents. Furthermore, the "floodgates" theory is problematic since a higher standard of care would encourage people to take care. With more people being careful, the number of injuries would likely drop; consequently, there would be fewer tort suits plugging up the judicial system.[343]

V. CONCLUSION

In unintentional injury cases, the general rule imposing a duty to act reasonably has been long-established. [344] However, in states like California, courts are willing to depart from this general rule in an effort to promote certain policies. One common instance of departure occurs in the context of sports. In order to ensure that people continue to vigorously participate in sports, courts have assessed liability only for reckless

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"reasonable incentives" to take care); *see also Tort Law—Sports Torts—California Supreme Court Extends Assumption of Risk To Noncontact Sports—Shin v. Ahn, 165 P.3d 581 (Cal. 2007)*, 121 HARV. L. REV. 1253, 1259–60 (2008) (commenting that "it is unclear whether California's assumption of risk standard is more effective at avoiding the chilling effect that so concerned the majority [of the *Shin* court] than would the application of traditional negligence principles"); *see also* Jagger v. Mohawk Mt. Ski Area, Inc., 849 A.2d 813, 832 (Conn. 2004) (arguing that requiring skiers to act reasonably will promote and not deter vigorous participation).

339. *See* Lazaroff, *supra* note 13, at 334; *see also Tort Law—Sports Torts—California Supreme Court Extends Assumption of Risk To Noncontact Sports—Shin v. Ahn, 165 P.3d 581 (Cal. 2007)*, 121 HARV. L. REV. 1253, 1259–60 (2008) (stating "[a]lthough some recreational athletes may be emboldened by the tort protections they enjoy, others might shy away from vigorous participation in sports, out of fear of absorbing the burden of nonremediable, nonreckless injuries").

340. *See* SURFER MAGAZINE, *supra* note 213, at 121.

341. *Dilger*, 63 Cal. Rptr. 2d at 593.

342. CAR ACCIDENT LAWYER PROS, Statistics on Car Accidents in California, http://www.caraccidentlawyerpros.com/Statistics-on-Car-Accidents-in-California.html (last visited Oct. 12, 2008) (noting that California ranked number one in the United States in car accidents in 2006 with 4,236).

343. *See* Lazaroff, *supra* note 13, at 334 (explaining how golf injuries may be prevented by creating a greater incentive to behave carefully).

344. *See generally* Knight v. Jewett, 834 P.2d 696, 715–17 (Cal. 1992) (Kennard, J., dissenting).

conduct.[345] In so doing, courts have stated the purpose is to maintain the fundamental nature of the sport.[346]

While these considerations are valid in light of certain sports, golf does not raise such considerations. Indeed, golfers will not alter their athletic movement nor play with less skill out of fear of liability. The sport of golf will not change if the law requires golfers to wait patiently for other participants to move away. Nor would the sport change if its participants were charged with warning others of a misfired ball. Golfers would not suddenly chill their vigorous participation if they were required to be careful because golfers could continue to play in the same manner as they had before. The sport would not change in any fundamental way. As such, the specified policy reasons underlying the exception from the general rule do not apply.

Golf has always been a game of etiquette and sportsmanship. Applying a doctrine originally based on the idea that plaintiffs should be held liable for the risks they voluntarily encounter would misconstrue both the assumption of risk doctrine and the sport of golf. As Joel Parkinson asserted, even world famous Australian surfers do not anticipate injuries when they step onto a golf course.[347] In fact, when a golfer worries about being hit by an errant ball, they might even choose not to play. For the reasons expressed herein, the *Shin* court erred in applying the doctrine of primary assumption of risk to golf. However, as with golf, it is never too late for the court to admit its shank, take a mulligan, and try again. If not, perhaps the legislature should take a shot.

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345. *See* Schick v. Ferolito, 767 A.2d 962, 968 (N.J. 2001); Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989); Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975); Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

346. *Id.* at 710.

347. SURFER MAGAZINE, *supra* note 213, at 121.

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