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Fine Tuning California's Approach to Injured Participants in Active Sports

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FINE TUNING CALIFORNIA'S APPROACH TO INJURED PARTICIPANTS IN ACTIVE SPORTS

I. INTRODUCTION

Participation in active sports is reasonably safe,[1] but it occasionally exacts a heavy toll.[2] In 1992, the California Supreme Court struck a balance between protecting the public's interest in recreation and the claims of injured athletes. In *Knight v. Jewett*,[3] it held that "liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport" (the *Knight* rule).[4] This rule reflects the reasoning that "vigorous participation . . . would be chilled if legal liability were to be imposed on a participant on the basis of . . . ordinary careless conduct."[5]

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1. *See* Michael J. Stuart et al., *Injuries in Youth Football: A Prospective Observational Cohort Analysis Among Players Aged 9 to 13 Years*, 77 MAYO CLINIC PROC. 317 (showing that serious injuries are uncommon in youth football). Seven percent of football players under age fourteen studied over the course of one season received severe enough injuries to prevent them from participating for the rest of the season. *Id.* No serious head, neck, or back injuries occurred. *Id.* at 318.

2. Tamara C. Valovich et al., *Repeat Administration Elicits a Practice Effect with the Balance Error Scoring System but not with the Standardized Assessment of Concussion in High School Athletes*, 38 J. ATHLETIC TRAINING 51 (2003) ("The incidence of injury to the head, neck, and spine has been as high as 13.3% of reported injuries in high school football. . . . The rate of sport-related traumatic brain injuries . . . was [ten per 100,000] 15- to 24-year-old male subjects."); Bob Putnam, *The Deadliest Sport in America*, ST. PETERSBURG TIMES, Mar. 12, 2002, at 8C (stating that an average of one death occurs in pole vaulting each year out of approximately 25,000 active participants); Staff Report, *Stay Safe While Splashing*, OCEAN COUNTY OBSERVER, Aug. 7, 2003, at A4 (noting that, every year, thousands nationwide experience spinal cord and head injuries from diving into shallow water).

3. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal.Rptr. 2d 2 (1992).

4. *Id.* at 318.

5. *Id.*

In *Kahn v. East Side Union High School District*,[6] the court applied the *Knight* rule in the case of a public school swim coach who directed a fourteen-year old member of his team to perform a hazardous dive that terrified her, for which she was untrained, and during which she was unsupervised.[7] The court understood the issue in *Kahn* to be whether the defendants should have been liable for "push[ing the] plaintiff beyond her capabilities or [increasing] her risk in some other way."[8] It ruled that Kahn could not recover unless she proved her coach was at least reckless.[9]

In the 1938 case of *Bellman v. San Francisco High School District*,[10] the same court applied a negligence standard to very similar facts. The *Kahn* dissent would have ruled as the *Bellman* majority did,[11] and vice versa.[12] The court in *Bellman* compensated an athlete injured by a coach's ordinary negligence, while the *Kahn* court erected a protective shield for coaches by heightening the standard to recklessness. A decision under the *Bellman* rule could produce injustice to a sympathetic defendant, while a decision under *Kahn* could be unfair to a sympathetic plaintiff. The *Bellman* and *Kahn* opinions suggest that the court has been seeking a happy median somewhere between negligence[13] and recklessness[14] for at least sixty-five years.

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6. 31 Cal. 4th 990, 75 P.3d 30, 4 Cal. Rptr. 3d 103 (2003).

7. *Id.* at 995–96, 998. In her dissent, Justice Kennard wrote that in applying the *Knight* standard to the conduct of a professional coach for novice, teenage athletes, the majority did not take the difference between athlete participants and coaches into consideration. *Id.* at 1023 (Kennard, J., dissenting).

8. *Id.* at 1001 (internal quotations omitted).

9. *Id.* at 995–97.

10. 11 Cal. 2d 576, 81 P.2d 894 (1938).

11. *Kahn*, 31 Cal. 4th at 1021–25 (Kennard, J., dissenting).

12. *Bellman*, 11 Cal. 2d at 589–93 (Shenk, J., dissenting).

13. Generally, negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . ." BLACK'S LAW DICTIONARY 1056 (7th ed. 1999). It is constituted by unreasonably risky conduct that breaches a duty of care owed to another, and which proximately causes harm to that other. *See* DAN B. DOBBS, THE LAW OF TORTS 269 (2000).

14. In general, recklessness is conduct demonstrating a conscious disregard for safety. BLACK'S LAW DICTIONARY 1271 (7th ed. 1999) (reckless is "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk."). The defendant must be "conscious of the risk," or have "specific reason to know

While the *Knight* rule, which requires active sports plaintiffs to prove recklessness, is generally sensible, the facts of *Kahn* suggest that the rule should not be rigidly applied where certain factors are present in a sports injury case (the "*Kahn* factors").[15] In *Kahn*, the court should have lowered the protective shield of recklessness and tried the case based on ordinary negligence.

Part II of this Note provides an overview of California case law pertaining to injured active sports participants. Part III.A compares *Kahn* with *Bellman*. Part III.B presents the *Kahn* factors, which courts adjudicating disputes involving active sports injuries may find useful. Part III.C addresses policy concerns. The *Kahn* factors suggest that athlete safety and the public's interest in recreation need not be mutually exclusive.

II. OVERVIEW: *BELLMAN*, *KNIGHT*, *KAHN*

A. Protecting Athletes: Bellman, *1938*

In the fall of 1934, Belva Bellman, a seventeen year-old high school sophomore in San Francisco, was enrolled in a standard gym class.[16] When she attempted to re-enroll in the gym class in the spring, the teacher in charge of registration told her the ordinary classes were full, and instead placed her in a "Beginners' Tumbling Class."[17] Belva took the tumbling class under protest.[18] She told her tumbling instructor she did not want to take tumbling, but the teacher said if she did not, she would not receive her credits.[19]

To pass this class, the school required Belva to successfully perform at least ten of eighteen separate exercises.[20] The more exercises she performed, the higher her grade would be.[21] According to Belva, the physical education teacher gave her no direct

about it," and proceed anyway, "without concern for the safety of others." DAN B. DOBBS, THE LAW OF TORTS 351 (2000).

15. *See infra* Part III.B.
16. *Bellman*, 11 Cal. 2d at 580.
17. *Id.* at 580–81.
18. *Id.* at 583.
19. *Id.*
20. *Id.* at 580.
21. *Id.*

instruction.[22] Instead, advanced students in the class showed her how to perform the tumbling exercises.[23]

One of the exercises was called the "roll over two."[24] This exercise involved the tumbler "tak[ing] a short run and div[ing] over two persons who are on the floor on their hands and knees, alight[ing] on outstretched arms, and with the head curled under in order to complete a forward roll, com[ing] to a standing position."[25] Performing the roll over two, Belva fell "many times . . . on top of the girls on the floor."[26] During one such attempt, Belva struck her head and was injured.[27]

The school district disputed the facts and claimed that Belva was contributorily negligent.[28] However, the California Supreme Court invoked the existing School Code and upheld a jury verdict finding the district liable for ordinary negligence.[29] The court held that Belva had produced sufficient evidence to support a verdict for the plaintiff:

> either upon the theory that the 'roll over two' [was] not an exercise suitable for senior high school girls or that appellant's employees knew or should have known that because of the respondent's mental or physical condition she was not a proper subject for such instruction, or that the class teacher did not properly instruct and supervise her.[30]

The evidence also showed that the exercise could result in injury if not performed properly.[31]

The dissent protested that "courses in physical education [would] be curtailed or eliminated, depending on the degree of 'guess' indulged by the school authorities on what a jury would say about it."[32] Citing authority that is still valid, the dissenting justice stated that "the law does not make the school districts insurers of the

22. *Id.* at 583.
23. *Id.*
24. *Id.* at 580.
25. *Id.*
26. *Id.* at 583.
27. *Id.* at 580, 586–87.
28. *Id.* at 580–81.
29. *Id.* at 580–81, 583.
30. *Id.* at 583.
31. *Id.*
32. *Id.* at 589 (Shenk, J., dissenting).

safety of the pupils."[33] The tumbling course, it argued, was no different from tumbling classes in thousands of schools.[34] The school district had done nothing more than operate in accordance with "universal practice."[35] In other words, the *Bellman* decision infringed upon a public interest in recreation.

B. Protecting Recreation: Knight, *1992*

Query how the court's decision in *Bellman* might have differed if, at the same time that Belva lunged flawlessly to perform a "roll over two," one of the two girls on the floor suddenly rose, and Belva collided with her. This is the nature of the scenario with which the court was confronted in *Knight* in 1992, where it established the general rule that active sports participants must prove at least recklessness to recover for their injuries.[36]

On Super Bowl Sunday in 1987, Kendra Knight and Michael Jewett were enjoying a party at a friend's residence.[37] At half time, the revelers decided to go outside for a game of touch football.[38] During the game, Jewett ran into Knight.[39] "[Don't] play so rough or I['ll] stop playing[!]" she told him.[40] On the next play, however, Jewett stepped on Knight's hand, causing an injury that resulted in the amputation of one of her fingers.[41]

The court reasoned that "a participant's normal energetic conduct often includes accidentally careless behavior."[42] Jewett argued that "by participating in the game in question, [Knight] impliedly . . . agreed to reduce the duty of care, owed to her by defendant, to only a duty to avoid reckless or intentionally harmful

33. *Id.* (Shenk, J., dissenting) (citing Goodman v. Pasadena City High Sch. Dist., 4 Cal. App. 2d 65 (1935)); *see, e.g.*, Rodrigues v. San Jose Unified Sch. Dist., 157 Cal. App. 2d 842, 845 (1958); Woodsmall v. Mt. Diablo Unified Sch. Dist., 188 Cal. App. 2d 262 (1961); Lilley v. Elk Grove Unified Sch. Dist., 68 Cal. App. 4th 939 (1998).
34. *Bellman*, 11 Cal. 2d at 589.
35. *Id.* at 591 (Shenk, J., dissenting).
36. Knight v. Jewett, 3 Cal. 4th 296, 318 (1992).
37. *Id.* at 300.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 300–01.
42. *Id.* at 318.

conduct."[43] The court was persuaded.[44] It stated that liability did not depend on whether Jewett's conduct was reasonable, but "on the nature of the activity or sport in which the defendant [was] engaged and the relationship of the defendant and the plaintiff to that activity or sport."[45] The court held that defendants did not have a duty to eliminate risks inherent in a sport, but that they did have "a duty to use due care not to increase the risks to a participant over and above those inherent in the sport."[46] The court expressly stated that this rule could apply to coaches.[47]

"[V]igorous participation[,]" the court held, "likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct."[48] The *Knight* decision

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43. *Id.* at 302.

44. *Id.* at 318.

45. *Id.* at 309.

46. *Id.* at 316. In *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), the California Supreme Court held that, in general, every person owes a duty to use due care to avoid injuring others. *Id.* The *Rowland* court also held that subject to certain factors, it is possible to fashion exceptions to this rule. *Id.* at 112–113. The set of factors is not finite or exclusive, however, the court provided eight "major factors" (the "*Rowland* factors") for evaluating such possible exceptions. *Id.*

It is unclear whether the *Knight* court considered the *Rowland* factors. The court in *Knight* does not specifically discuss them. It mentions *Rowland* once, immediately before stating that "the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant." *Knight*, 3 Cal. 4th at 315. This could mean that the nature of a sport (i.e., whether it is active) is a "minor factor" under *Rowland*, or it could mean the *Knight* court did not consider the *Rowland* factors at all.

It is therefore an open question as to whether *Knight* overruled *Rowland* with respect to the *Rowland* factors. If it did, then precise guidance for determining what may constitute an exception to the reasonable care standard is not presently available. If it did not, then *Knight* must be consistent with *Rowland*.

There is no indication that in *Kahn*, the appellate or supreme courts considered the *Rowland* factors. Like other California courts, the *Kahn* courts simply applied the rule that dangers inherent in active sports constitute an exception to the standard of reasonable care established in *Rowland*. *See, e.g.*, Calhoon v. Lewis, 81 Cal. App. 4th 108, 116, 96 Cal. Rptr. 2d 394 (2000); Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990, 1003 (2003).

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

48. *Id.* at 318.

thus protected the public interest in recreation, as the dissent in *Bellman* would have done.[49]

C. Bellman *Redux:* Kahn, *2003*

Eleven years after *Knight*, Olivia Kahn was a fourteen year-old high school freshman in San Jose, California.[50] Although she did not have experience as a competitive swimmer, Olivia was competent and decided to try out for the junior varsity swim team.[51] She told the team coaches[52] she had a lifelong fear of diving into shallow water and suffering a head injury.[53] Coach Andrew McKay assured her she would not have to dive at meets, and that she could start inside the pool.[54] At the meets preceding her injury, McKay had Olivia start in the water.[55] However, minutes before a meet in October 1994, about a month after joining the team, McKay told Olivia she would have to dive.[56]

Olivia panicked and begged McKay to change his mind.[57] "I told him . . . I did not know how to do the dive and . . . had never

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49. Bellman v. San Francisco High Sch. Dist., 11 Cal. 2d 576, 589 (1938) (Shenk, J., dissenting).

50. *Kahn*, 31 Cal. 4th at 995; Howard Mintz, *School Coaches Watch S.J. Case*, SAN JOSE MERCURY NEWS, June 3, 2003, at 1A, *available at* http://nl.newsbank.com/nlsearch/we/Archives?p_action=doc&p_docid=0FB76BCD585E019B&.

51. *Kahn*, 31 Cal. 4th at 998; Kahn v. E. Side Union High Sch. Dist., 96 Cal. App. 4th 781, 786, 117 Cal. Rptr. 2d 356, 360 (2002) [hereinafter *Kahn Ct. App. Decision*].

52. Two coaches supervised the swimming program, Coach McKay and Coach Chiaramonte-Tracy. Both were district employees. *Kahn*, 31 Cal. 4th at 998.

53. *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 786; *Kahn*, 31 Cal. 4th at 998.

54. In relays, three out of four team members dove into the pool, while one started from inside the pool. *Kahn*, 31 Cal. 4th at 998. McKay did not concede that he promised Olivia would never have to dive. *Id.* at 1012.

55. *Id.* at 998.

56. *Id.*; *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 786. Because McKay reneged on his promise that Olivia would not have to dive at swim meets, she might have been able to base a claim upon promissory estoppel. *See* Kevin P. McJessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1804–07 (1995).

57. *Kahn*, 31 Cal. 4th at 998.

dove into the racing pool in my life."[58] McKay was unmoved. Olivia testified that he told her to "dive in off the blocks or [she was] not swimming."[59] The dive involved propelling herself from an eighteen-inch platform into three and a half feet of water, and dipping below the surface in a shallow arc rather than skimming it.[60] In the few minutes remaining before the start of the meet, Olivia thus began to practice this dive.[61] Doing so, she broke her neck and suffered permanent injuries.[62]

McKay asserted he had previously told Olivia and the other team members that they were not to practice diving without a coach's direct supervision.[63] He testified that he was unaware Olivia had begun practicing after he told her she would have to dive.[64] Thus, he argued, her decision to dive was a superseding cause of her injury, but the court was not persuaded.[65]

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58. Maura Dolan, *Putting the Hurt on Coaches*, L.A. TIMES, July 29, 2003, at A1.

59. *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 787; John Woolfolk, *Recalling Day Life Changed*, SAN JOSE MERCURY NEWS, Aug. 30, 2003, at 1B, *available at* http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=0FD46CDADF6FC5BE. McKay "denied informing [the] plaintiff that she would be off the team if she refused to dive on the day she was injured." *Kahn*, 31 Cal. 4th at 1012. He also asserted that he told Olivia she could dive from the pool deck if she wished. *Id.* at 999.

60. *Kahn*, 31 Cal. 4th at 997–98. The pool conformed to National Federation of State High School Association guidelines. *Id.* at 998. Competition swimmers dive in a shallow arc just beneath the surface because diving straight out would slow them down. Woolfolk, *supra* note 59, at 1B.

61. *Kahn*, 31 Cal. 4th at 995; Maura Dolan, *Justices Set Limits on Coach Lawsuits*, L.A. TIMES, Aug 29, 2003, at B1; John Woolfolk, *Ex-S.J. Swimmer Can Sue District*, SAN JOSE MERCURY NEWS, Aug. 29, 2003, at 1A.

62. *Kahn*, 31 Cal. 4th at 995; Dolan, *supra* note 61, at B1; Woolfolk, *supra* note 61, at 1A.

63. *Kahn*, 31 Cal. 4th at 999–1000.

64. *Id.* at 999.

65. *Id.* at 1016–17. The court referred to *Dailey v. Los Angeles Unified Sch. Dist.*, 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970), which determined that an unsupervised student's misconduct is not necessarily a superseding cause of an injury, where the misconduct was something that could be expected of adolescents who are not adequately supervised. *Kahn*, 31 Cal. 4th at 1017 (citing *Dailey*, 2 Cal.3d at 750–751). Olivia stated that the coaches did not instruct the team to refrain from practicing without direct coach supervision. *Id.* at 998. Coach Chiaramonte-Tracy did not recall McKay giving such an instruction. *Id.* at 1000. Moreover, Coach

Olivia dove under protest. Moreover, she said she received no training from her coaches or teammates in shallow-water racing diving between the start of the swim season and the accident.[66] Instead, McKay directed other team members to help her practice diving off the deck of the diving pool into the deep water.[67] When she had done so, she had come in too deeply.[68]

While McKay sat nearby completing paperwork, two teammates offered to show Olivia how to perform the racing dive in the minutes she had left.[69] One of them simulated the starting gun with a clap.[70] At the first clap, Olivia froze and stared at the water.[71] At the second and third claps, she dove, and came in dangerously deep.[72] "I really can't do this," she thought, "but I . . . [have] to . . . help my teammates."[73] She could see McKay from the corner of her eye.[74] She dove, this time striking the bottom, and her body curled reflexively into a fetal position.[75]

McKay disputed the facts, but the court concluded that there was sufficient evidence to preclude summary judgment.[76] Olivia based her claim on ordinary negligence.[77] The trial court, however, understood the case in terms of "primary assumption of the risk."[78]

Chiaramonte-Tracy testified that she did not give or hear McKay give instructions about the danger of improper diving into shallow water. *Id.*

66. *Kahn*, 31 Cal. 4th at 1015. McKay disputed this assertion. *Id.* at 1012.

67. *Id.* at 998.

68. *Id.* The team's other coach, Coach Chiaramonte-Tracy, noted that Kahn's entry level dive was "a little too deep," as did Kahn's teammates. *Id.* at 998, 1000.

69. *Id.* at 998.

70. Woolfolk, *supra* note 59, at 1B.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Kahn*, 31 Cal. 4th at 998.

75. Woolfolk, *supra* note 59, at 1B.

76. *Kahn*, 31 Cal. 4th at 996.

77. *Id.* at 997.

78. *Kahn Ct. App. Decision*, 96 Cal. App. 4th 781, 785–86. Where the doctrine of primary assumption of the risk applies, the plaintiff is unable to prove a prima facie case because the law provides that the defendant had no duty of care with respect to the conduct that caused the plaintiff's injury. DAN B. DOBBS, THE LAW OF TORTS, 537 (2000). For example:

> courts often hold that landowners are free to leave dangerous conditions on their land, so long as those conditions are not hidden. If someone is injured by a dangerous but obvious condition on the land,

The defendants argued that Olivia's decisions to join the team and to dive at the swim meet were voluntary, and that she had assumed the risks inherent in the sport of competitive swimming.[79] In a split decision, the California Court of Appeal for the Sixth Appellate District accepted the defendants' argument and granted summary judgment.[80] "To instruct is to challenge," the court reasoned, "and the very nature of challenge is that it will not always be met."[81] Citing *Bushnell v. Japanese-American Religious & Cultural Center*,[82] the Court of Appeal also stated that courts should not impose liability upon an instructor for asking a student to "take action beyond what, with hindsight, is found to have been the student's abilities."[83]

The California Supreme Court, however, pointed to the fact that primary assumption of the risk does not turn on whether conduct is voluntary.[84] Unlike in *Bellman*, where it required only proof of ordinary negligence, the court in *Kahn* held that to recover, Olivia would have to convince a trier of fact that McKay had been at least

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the landowner is frequently not liable because he is under no duty of care with respect to conditions on his own land.

Id. In the *Kahn* trial, the appellate and supreme courts all discussed primary assumption of the risk. *Kahn*, 31 Cal. 4th at 995; *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 785. However, all three courts recognized that under *Knight*, the law did not state that coaches owe athletes absolutely no duty of care; they recognized *Knight* simply holds coaches to a duty not to be reckless, rather than negligent. *Kahn*, 31 Cal. 4th at 995–96; *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 790–92. Therefore, *Knight* did not in fact hold that cases related to sports injuries involve primary assumption of the risk. It merely elevated the duty of care owed from negligence to recklessness.

79. *Kahn*, 31 Cal. 4th at 997.

80. *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 797.

81. *Id.* at 795 (quoting Bushnell v. Japanese-Am. Religious & Cultural Ctr., 43 Cal. App. 4th 525, 50 Cal. Rptr. 2d 671 (1996)).

82. 43 Cal. App. 4th 525, 50 Cal. Rptr. 2d 671 (1996).

83. *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 795 (quoting *Bushnell*, 43 Cal. App. 4th at 532).

84. "[P]rimary assumption of risk . . . does not turn on plaintiff's . . . decision to encounter [a risk] voluntarily, but on . . . whether defendants owed her a duty of care." *Kahn*, 31 Cal. 4th at 1016. If the court had applied the traditional rule of assumed risk as consent, DAN B. DOBBS, THE LAW OF TORTS 535 (2000), and held that Kahn voluntarily assumed the risk of diving, would it also be true that McKay voluntarily assumed the risk of training minors to perform hazardous activities?

reckless—something it felt a jury could legitimately determine.[85] "[T]he object . . . is to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity."[86]

Unlike the *Bellman* court, the *Kahn* majority did not consider whether diving from a platform into shallow water is "an exercise suitable for . . . high school [students.]"[87] In *Bellman*, the court considered the plaintiff's mental or physical condition to be a legitimate factor in finding the district liable.[88] However, the *Kahn* court stressed that coaches must be able to "'push[]' a student to attempt new or more difficult feats . . . ."[89] Like *Bellman*, however, the *Kahn* court stated that failure to instruct could be a factor in finding the district liable.[90] Olivia's evidence also convinced the court that the dive she attempted was "ultra-hazardous" in the absence of adequate training.[91]

Meanwhile, the dissent in *Kahn* would have followed *Bellman*, applying a standard of ordinary negligence.[92] Whereas the California Supreme Court, in accord with the Court of Appeal, agreed that "coaches who merely challenge their students to move beyond their current level of performance have not breached a duty of care,"[93] the dissent protested that "any teacher, no matter what the subject matter,

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85. *Kahn*, 31 Cal. 4th at 1013.

86. *Id.* at 1011. The court suggested that applying negligence in the context of sports could have implications for public safety; it could discourage the training of skiers to rescue other skiers. *Id.* at 1010.

87. Bellman v. San Francisco High Sch. Dist., 11 Cal. 2d 576, 583 (1938).

88. *Kahn*, 31 Cal. 4th at 1006.

89. *Id.*

90. *Id.* at 1012.

91. *Id.* at 999. Kahn produced a Red Cross safety training manual for swim coaches which instructed that diving into water less than five feet deep is dangerous, and that 95 percent of swimming injuries occur in water five feet deep or less. *Id.* It instructed that, "[e]ven an experienced diver can be seriously injured by diving improperly . . . or diving from starting blocks without proper training and supervision." *Id.* McKay claimed he followed the manual by starting Olivia off with dives into the deep diving pool, but the court noted there were no starting blocks adjacent to the District's deep pool. *Id.* at 1012, 1015.

92. *Id.* at 1021 (Kennard, J., dissenting).

93. *Id.* at 1001 (referring to *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 795).

challenges students to perform with ever greater skill and to undertake progressively harder tasks."[94]

Applying a heightened standard, the *Knight* rule is logical as a general rule. However, it has a tendency toward harshness that seems ripe for tempering over time. According to the court in *Knight*, for example, "[e]ven where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing, the ski resort would not be liable for his or her injuries."[95] It seems unlikely that *Knight* can truly be a hard and fast rule given the permutations of such a scenario. Fine tuning seems inevitable.

III. ANALYSIS: FINE TUNING THE *KNIGHT* RULE

A. Comparing Kahn *with* Bellman

Either the reasoning of *Bellman* (ordinary negligence) or that of *Knight* (recklessness) could have controlled in *Kahn*. *Bellman* and *Kahn* both involved high school athletes who were ordered by teachers to perform dangerous maneuvers about which the students had misgivings. By relying upon *Knight*, the court raised the question as to how to distinguish *Bellman*.

The cases might be distinguishable on the basis that Bellman was forced into tumbling, whereas Kahn's swim team activities were voluntary. Yet the *Kahn* court clarified that the voluntary nature of Olivia's conduct was irrelevant to its decision.[96] It does not seem distinguishable that Bellman was engaged in a formal class while Kahn's activities were extracurricular, given that colleges today place great emphasis on participation in activities outside the classroom.

The distinction might be that while Bellman was an ordinary gym student, Kahn was a competitor. The *Kahn* court thought a potential chilling effect was especially undesirable at "a competitive level."[97] However, it is not clear what constitutes a competitive level. Professional athletes perform at a competitive level, but it is less clear to what extent junior varsity swimmers do. Some might

94. *Id.* at 1024 (Kennard, J., dissenting).
95. Knight v. Jewett, 3 Cal. 4th 296, 316 (1992).
96. *Kahn*, 31 Cal. 4th at 1016.
97. *Id.* at 1007.

say that junior varsity swim meets are competitive, while others may counter that the "real athletes" are on the varsity teams.

It is even less clear whether Bellman was performing at a competitive level. She was, after all, not in an ordinary gym class, but rather a specialized class for tumblers. Either way, given the court's more recent reasoning in *Knight* and *Kahn*, it seems unlikely that the court would find Bellman's tumbling coach liable today. There does not appear to be a meaningful distinction between the two cases. The question is whether *Bellman* is still good law.

Notwithstanding the court's 6-1 decision to apply the *Knight* rule in *Kahn*, the court may have had some misgivings. A measure of indecision, for example, would explain why it felt compelled to point out that it believed a trier of fact could find McKay reckless. Recklessness is a question for an impartial jury, not a remanding court. Perhaps the court was gesturing to the plaintiff, improving the chances of a settlement in her favor.[98] If so, it had its cake and ate it too, maintaining the *Knight* rule intact while providing for a de facto exception under the facts of *Kahn*.[99]

Moreover, the court qualified its opinion to apply *Knight* by stating that courts should "keep[] in mind . . . that different facts are of significance in each setting."[100] It did not explain how the significance of different facts was related to its holding that the *Knight* standard should generally apply to sports instructors.[101] The court explained that it "recognizes that the relationship of a sports instructor or coach to a student or athlete is different from the relationship between co-participants in a sport," but it did not explain how, and its ruling did not reflect this view.[102]

The facts of *Bellman* provided no basis for that court to authorize finding the school district negligent on the rationale that the "roll over two" was "not an exercise suitable for senior high

98. After the court ruled in *Kahn*, the plaintiff's attorney expected the case to settle. Dolan, *supra* note 61, at B1.

99. With reference to the *Kahn* decision, University of Berkeley Emeritus Law Professor Stephen Barnett stated that "[b]y letting this case go to the jury, the court indicates that recklessness doesn't have to be all that reckless." Dolan, *supra* note 61, at B1.

100. *Kahn*, 31 Cal. 4th at 1011.

101. *See id.* at 996.

102. *Id.*

school girls."[103] On the other hand, school sports programs did not simply vanish during the period between *Bellman* and *Knight*, when the rule in cases involving school sports-related injuries was ordinary negligence. Both the *Bellman* and *Kahn* courts could have gone farther to balance the various interests at play in cases involving injured active sports participants.

B. Kahn *Factors*

The court's statement that "the standard set forth in *Knight* . . . should generally apply to sports instructors, keeping in mind, of course, that different facts are of significance in each setting," implies that there may be exceptions.[104] Perhaps the court was not ready to announce one in *Kahn*. The court stressed the need to protect the public's interest in recreation, perhaps wary of unintended consequences. In the wake of the announcement that the court would hear *Kahn*, Little League Baseball and the American Youth Soccer Organization expressed fears that a ruling for the plaintiff could cause them to be "buried in lawsuits."[105] Cities complained that "[the] entire aquatic pool budget [of a small city] would probably be insufficient to cover the cost of [a single] trial,"[106] and the California Ski Industry Association presented written and oral arguments on behalf of the defendant school district.[107]

Though the court applied the heightened *Knight* standard of recklessness, the seeds of an exception are present in the *Kahn* opinion. The facts of the case suggest mitigating factors that might merit an exception to the *Knight* standard in future cases, should fairness so dictate. These factors are: 1) the probability of serious injury; 2) the sufficiency of training and supervision; 3) the existence

103. Bellman v. San Francisco High Sch. Dist., 11 Cal. 2d 576, 583 (1938).

104. *Kahn*, 31 Cal. 4th at 1011.

105. Woolfolk, *supra* note 61, at 1A.

106. Brief of City of San Luis Obispo, et al. as Amicus Curiae at 15, Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990 (2003) (requesting an extension of time to file and presenting arguments in support of defendant E. Side Union High Sch. Dist.), *available at* http://www.cacities.org/userfiles/godoc/6487.Kahn%20v.%20East%20Side%20UHSD%20-%20Amicus%20Brief.htm (Nov. 5, 2002). Presumably, even small cities could afford insurance to provide for such contingencies.

107. Maura Dolan, *Putting the Hurt on Coaches*, L.A. TIMES, July 29, 2003, at A1.

of a well-known alternative to the challenged conduct; 4) the plaintiff's skill level; 5) the defendant's status with respect to the sport; 6) the extent to which the plaintiff's injury is related to pressuring on the part of the defendant; 7) the age disparity between the plaintiff and the defendant; 8) the defendant's relationship to the plaintiff; and 9) the existence of a deeply seated fear.

1. The probability of serious injury

Unlike *Knight*, *Kahn* was not about a game of touch football among friends. The court recognized that Olivia's dive entailed a serious risk of injury.[108] In deference to an interest in recreation, the probability of serious injury should hardly be decisive in isolation. Yet, combined with factors such as the plaintiff's age and skill level, it might be important.

For example, where the matter concerns a novice who is a minor, it should be relevant that an activity could foreseeably produce a neck, brain or spinal injury. Kahn's expert testified that the dive was "ultra-hazardous," while a Red Cross manual stated that diving from a racing platform was the principal danger faced by persons learning to compete.[109] The court recognized that most injuries resulted from diving into shallow water.[110]

It is possible to be paralyzed while returning a volley in tennis, but paralysis is far more likely in pole vaulting.[111] Where the probability of serious injury is high, the court should consider whether or not *Knight* automatically applies.

2. The sufficiency of training and supervision

This factor should carry little weight in an informal setting, such as where a neighborhood "dad" shows local kids how to catch fly balls. It will have no relevance where training is not an issue, such as where swim team members organize a soccer match on their own. The factor might become significant, however, when combined with a probability of serious injury and a coach who is a state employee.

108. *Kahn*, 31 Cal. 4th at 1015.
109. *Id.* at 999, 1011.
110. *Id.* at 1015.
111. *See* Putnam, *supra* note 2, at 8C.

McKay should have done more than merely ask Olivia's teammates to instruct the novices.[112]

3. The existence of a well-known alternative to the challenged conduct

In active sports, people need to weigh alternatives, and juries should not second-guess decisions made under pressure by people of varying experience. Yet, this factor might carry weight where there is a gross disparity between the safety of the well-known alternative and that of the challenged conduct. For example, the court in *Kahn* found that a specific sequence of training was necessary to perform the dive safely;[113] this contrasts starkly with McKay's last-minute order to "dive or else."

4. The plaintiff's skill level

The fact that Olivia conveyed to McKay that she felt unprepared to dive was not significant in itself.[114] Nor was the fact that she repeatedly made dives that came in too low. Her skill level might have been important, however, in light of the facts that the activity was "ultra-hazardous" and that McKay was Olivia's public school teacher.

5. The defendant's status with respect to the sport

Arnold Schwarzenegger could be guilty of negligence for merely shaking the hand of a constituent, if in so doing he happened to break the constituent's hand. This is because courts recognize that a weightlifter has "[s]uperior or specialized knowledge or skill"[115] that is a relevant factor in adjudicating whether a person can be liable for negligently shaking hands. Analogously, the fact that a defendant receives most or all of her compensation from sports-related activities, or that she is licensed for her sports-related activities by a respected authority, might be relevant. Perhaps she is a retired professional athlete, or referees for professional games in her spare time.

112. *Kahn*, 31 Cal. 4th at 1017 n.5.
113. *Id.* at 1017.
114. *Id.* at 1017 n.5.
115. *See* DAN B. DOBBS, THE LAW OF TORTS 290 (2000).

Of course, just because someone excels in a sport does not mean that person should not enjoy the protection of *Knight*; that would defeat the rule. However, it is true that McKay's specialized knowledge placed him in a superior position to gauge whether it made sense for Kahn to dive at the meet.[116] McKay's superior specialized knowledge and skill might have been considered a factor in combination with other factors, such as the probability that Olivia would suffer a serious injury, and the sufficiency of the training and supervision she received.

6. The extent to which the plaintiff's injury is related to pressuring on the part of the defendant

If McKay's demand had not come at the last minute at a competitive meet and been accompanied by a threat to remove Olivia from competition, she might have been able to reflect and to decide not to dive. Naturally, active sports entail decision making under pressure, and the simple fact that a defendant pressured a plaintiff into a decision cannot hold weight. However, it may be a factor if the case involves a novice, an authority figure, and a particularly hazardous activity.

7. The age disparity between the plaintiff and the defendant

It would hardly be fair to automatically consider age as a factor wherever a differential existed between a plaintiff and a defendant. However, age may be relevant to determining how or if peer pressure, a lack of maturity, or deference to authority was related to the plaintiff's injury. The court might thus accord some weight in a case where the claimant was a minor novice, while the defendant was an experienced adult who failed to provide training.

8. The defendant's relationship to the plaintiff

The dissent in the *Kahn* Court of Appeal decision pointed out that the risk of harm may vary with the authority of the defendant.[117] In combination with factors such as the extent to which the defendant pressured a novice in relation to a hazardous activity, it could be

116. *See Kahn*, 31 Cal. 4th at 1023 (Kennard, J., dissenting).

117. *Kahn Ct. App. Decision*, 96 Cal. App. 4th, 781, 803 (2002) (O'Farrell, J., dissenting).

relevant whether the defendant controls a plaintiff's grade, her ability to compete, or her access to special opportunities.

9. The existence of a deeply seated fear

A distinction should be drawn between the natural anxiety of straining toward the next level in a sport, and mortal fear of a known hazard.[118] Olivia was not merely nervous about the competition; she had visions of her blood all over the pool.[119] People are idiosyncratic, of course, and the mere existence of such a fear should not be sufficient to lower the "shield" of *Knight*. However, it does not serve the public interest in recreation to "push" an athlete to the extent Olivia was pushed in *Kahn*. McKay did not push Olivia forward; he pushed her over a cliff. Where a defendant with authority directs a plaintiff to perform a hazardous activity of which she has expressed a mortal fear, it does not seem patently unreasonable to hold that the defendant owes her the duty of care of a reasonable coach under the same or similar circumstances.

10. Summary

The above factors are not intended for the trier of fact; that would make a jury's task too complicated. Instead, they are offered to assist courts in determining under what standards specific cases involving injuries to active sports participants should be tried. They provide for flexibility in cases involving gross disparities in knowledge, training, experience, and responsibilities between plaintiffs and defendants.[120]

118. *Kahn*, 31 Cal. 4th at 1011–12.

119. *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 798.

120. *Kahn*, 31 Cal. 4th at 1019–20 (Werdegar, J., concurring). These disparities are analogous to the "gross inequality of bargaining power" associated with unconscionable contracts, which negates a "meaningful choice on the part of one of the parties" and gives courts reason to pause when deciding whether to enforce disputed agreements. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 5.15 (rev. ed. by Joseph M. Perillo, West Pub. Co. 1995).

C. Policy Interests

It was reasonable for the *Kahn* court to place great weight upon a public interest in recreation.[121] The court may have considered additional policy interests, including: 1) trust; 2) education; and 3) the value of active sports.

1. Trust

The dissenting justice in *Kahn* wrote that minors think of coaches as mentors and role models.[122] Minors "trust the coach not to carelessly and needlessly expose them to injury."[123] Given the inherent risks of active sports, it is certainly important to provide coaches with latitude in performing their duties. There is also an interest in ensuring that where serious risks to safety are involved, coaches do in fact perform those duties.[124] Parents entrust teachers with their children's safety. McKay's conduct violated that trust.

The dissenting appellate court justice in *Kahn* stressed that rather than chilling competition, recognizing a duty to adequately train might produce the opposite effect.[125] This is because it would build trust in the reasonable safety of competition.

2. Education

Bellman is relevant to *Kahn* because the events of Kahn did not take place exclusively within the context of active sports. It involved a high school student and a teacher on state property, in a state facility, and under a program that the state funded and regulated. School sports are not just about recreation. Novices take up sports "not only to compete, but also to learn."[126] Even if learning

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121. In *Rowland v. Christian*, 69 Cal. 2d 108 (1968), the California Supreme Court stated that in the absence of a statute to the contrary, there should be no exception to the standard of reasonable care unless it is "clearly supported by public policy". *Id.* at 112.

122. *Kahn*, 31 Cal. 4th at 1023 (Kennard, J., dissenting).

123. *Id.* (Kennard, J., dissenting).

124. As far as Kahn's attorney was concerned, this was the crux of the case. "It's a situation of a coach not doing his job," he said. Mintz, *supra* note 50, at 1A.

125. *Kahn Ct. App. Decision*, 96 Cal. App. 4th 781, 804 92002) (O'Farrell, J., dissenting).

126. *Id.* (O'Farrell, J., dissenting).

sometimes unavoidably entails risks, there is a community interest in providing a reasonably safe learning environment.[127]

Schools are full of perils. As the dissent in *Kahn* points out, the court applies a standard of ordinary negligence in cases involving shop instructors[128] and chemistry teachers,[129] notwithstanding the risk of chilling enthusiasm for carpentry, or halting the march of scientific progress.

Acknowledging that public school teachers, in particular, owe students a duty of supervision, the *Kahn* court cited to a statute and to *Dailey v. Los Angeles Unified School District.*[130] The *Dailey* court stated that in California, school authorities are duty bound to supervise the conduct of children on school grounds and to enforce regulations necessary to protect them.[131] Under *Dailey*, the standard of care imposed when school personnel breach the duty to supervise is ordinary negligence.[132] *Dailey* cites *Taylor v. Oakland Scavenger Co.*[133] as authority for this rule—and *Taylor*, in turn, cites *Bellman.*[134] Thus, although the *Kahn* court never mentioned

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127. *See Kahn*, 31 Cal. 4th at 1011. Relying on prior appellate court decisions, the appeals court in *Kahn* decided that "a school district's duty to supervise its students does not 'trump' the doctrine of primary assumption of the risk." *Kahn Ct. App. Decision*, 96 Cal. App. 4th at 791.

128. *Kahn*, 31 Cal. 4th at 1024 (Kennard, J., dissenting); *see, e.g.*, Ahern v. Livermore Union High Sch. Dist., 208 Cal. 770, 284 P. 1105 (1930) (fourteen year-old student not instructed on the use of guards on a power saw); Calandri v. Ione Unified Sch. Dist., 219 Cal. App. 2d 542, 33 Cal. Rptr. 333 (1963) (judgment for school district and shop teacher reversed in student's negligence action).

129. *See, e.g.*, Mastrangelo v. W. Side Union High Sch. Dist., 2 Cal. 2d 540, 42 P.2d 634 (1935) (evidence was sufficient that district was negligent where chemistry student was injured in an explosion); Damgaard v. Oakland High Sch. Dist., 212 Cal. 316, 298 P. 983 (1931) (chemistry teacher should have known the dangerous character of explosive gases); Reagh v. San Francisco. Unified Sch. Dist., 119 Cal. App. 2d 65, 259 P.2d 43 (1953) (defendant teacher had a duty to supervise where plaintiff student was unfamiliar with the use and characteristics of inherently dangerous and hazardous chemicals).

130. *Kahn*, 31 Cal. 4th at 1020 n.1. (citing CAL. EDUC. CODE § 44807 (West 1993)); Dailey v. Los Angeles Unified Sch. District, 2 Cal. 3d 741, 747, 470 P.2d 360, 87 Cal. Rptr. 376 (1970) (*cited in Kahn*, 31 Cal. 4th at 1020 n.1).

131. *Dailey*, 2 Cal. 3d at 747.

132. *Id.*

133. *Id.* (citing Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 109 P.2d 1044 (1941)).

134. *Taylor*, 17 Cal. 2d at 600.

Bellman, it upheld *Bellman* by affirming that the defendants' duty to supervise included the obligation to protect Olivia from her own lack of mature judgment.[135]

Recognizing a policy interest in education does not require removing danger from diving, or preclude the possibility of diving accidents. It simply protects the public's interest in recreation by setting a minimum threshold for safety where the dangers are great.

3. The value of active sports

There is a public interest in the values associated with active sports, including health, personal growth, teamwork, discipline, dedication, achievement, and fun. If the law recognizes the importance of recreation to decisions about sports-related injuries, it should also recognize that sports should enhance health, and not unreasonably jeopardize it. Where extreme hazards and inexperienced athletes are involved, courts should not place their stamps of approval upon machismo and winning at all costs. Teens are already prone to take inadvisable safety risks without encouragement from the state.[136] Where a decision is made based on an interest in recreation, that decision should be made with an eye toward the value of that recreation.

4. Summary

The above list is not exhaustive, of course. Many cases involving active sports injuries will involve a number of policy concerns that ought to be considered in determining what standard to apply. *Knight* will apply in the overwhelming majority of these

135. *Kahn*, 31 Cal. 4th at 1017. The *Kahn* concurrence considered legislative intent, citing statutes that grant qualified immunity to certain participants in and sponsors of socially useful enterprises. *Id.* at 1020 (Werdegar, J., concurring). The statutes cover diving, although dives from diving boards or diving platforms are expressly excluded. CAL. GOV'T CODE § 831.7(b)(2) (West 1995). Where these statutes are applicable, plaintiffs must prove gross negligence to recover; correspondingly, the concurrence would have applied a standard of gross negligence rather than recklessness. *Kahn*, 31 Cal. 4th at 1020–21 (Werdegar, J., concurring).

136. "Not wanting to disappoint her teammates, the shaken 14-year-old Kahn steeled herself and approached the pool to practice the dreaded dive with a friend." Woolfolk, *supra* note 59, at 1B.

cases, but the decision to apply the *Knight* rule should not be automatic.

IV. CONCLUSION

The *Knight* rule provides that active sports participants may be liable only for conduct that is at least reckless. However, the rule should not operate to excuse all negligent conduct simply because a dispute happens to involve an active sport. The majority opinion in *Bellman* recognizes that in certain cases involving active sports injuries, there are competing policy interests that should be factored into court decisions. The facts of *Kahn* suggest possible factors that might help a court to decide whether or not to apply *Knight* when presented with exceptional facts.

If the *Kahn* court had applied these factors, it might have concluded that where districts choose to include competitive diving in on-campus activities at their high schools, those districts and their coaches could be liable for ordinary negligence if they fail to provide adequate training and supervision. Such a conclusion would not infringe upon the ordinary citizen's privilege to sky dive, ride horses, or race automobiles.

Coaches of active sports reasonably direct athletes to engage in activities that can and do produce injuries.[137] Applying the *Knight* rule, the *Kahn* court concluded that a plaintiff in Kahn's situation could have no recourse unless the factfinder determined that the defendant was reckless or acted intentionally—even where the defendant was a knowledgeable, experienced adult who failed to provide an inexperienced, unskilled, minor plaintiff with any training or supervision at all.[138] Given the unusual facts of *Kahn*, the *Knight* rule requires the plaintiff to prove too much.[139] McKay's conduct

137. *See, e.g.*, Lupash v. City of Seal Beach, 75 Cal. App. 4th 1428, 89 Cal. Rptr. 2d 920 (1999).

138. Justice Kennard wrote that by the majority's view, McKay's alleged failure to train and supervise was "of no legal consequence," and a coach of teenage athletes "need have little concern for their physical safety." *Kahn*, 31 Cal. 4th at 1021 (Kennard, J., dissenting).

139. Based on this decision, ski industry attorney Joseph Collins commented, "Only in very rare situations will there be lawsuits by injured athletes against their coaches, and only when there's a viable allegation of recklessness." Woolfolk, *supra* note 61, at 1A. "At least good news from a

was callous and dangerous. Applying the *Kahn* factors proposed above would permit a court to use the law to discourage such bad conduct, in accordance with a primary goal of tort law.[140] The resolution of the issue of how best to approach questions related to injured participants in active sports will involve the recognition of a legitimate interest in the enjoyment of competition under reasonably safe conditions.

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defense standpoint is that the majority opinion set that bar relatively high," said East Side School District attorney Mark Davis. *Id.*

140. DAN B. DOBBS, THE LAW OF TORTS 3–4 (2000).

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