Tackling the Competitive Sports Doctrine: A New Proposal for Sports Injuries in Texas

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TACKLING THE COMPETITIVE SPORTS DOCTRINE:
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INTRODUCTION

A. Texas tort law cannot handle a surge of sports-related litigation

The Texas tort system cannot cope with an inevitable surge of litigation arising out of participation in sports and recreational activities. Texas appellate courts have forged their own means of handling such cases through the use of the “competitive sports doctrine,” known elsewhere as the reckless-intentional standard. Although a recent feature of Texas law, the reckless-intentional standard is grounded in the old common law doctrine of assumption of the risk. The Texas Supreme Court abolished the affirmative defense of assumption of the risk in 1975, and has repeatedly criticized its rebirth as the competitive sports doctrine. On several occasions the Texas Supreme Court signaled its interest in considering other liability standards to be utilized in adjudication of cases involving sports injuries, but it has not yet so acted. In the event that it did choose to act, it is similarly unclear what its choice would be.

This article examines the foundation of the competitive sports doctrine, traces its slow growth, and documents pitfalls that will arise if the Texas Supreme Court does not act. This article further suggests an improved standard, currently used in a minority of states, and proposes a new test to ensure that courts apply the standard fairly and consistently.

B. The growth of sports in America

Americans love sports. Recent studies show that a large majority of the American population, a record high, participate in sports and related recreational activities.1 Whether in an organized or casual setting, indoors or outdoors, sports, recreation, and exercise activities fill the leisure time of many Americans. In addition, the past decade has also seen explosive growth among the so-called extreme sports—skateboarding, snowboarding,

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1 American Sports Data, Inc., A Comprehensive Study of Sports Injuries in the U.S., http://www.americansportsdata.com/sports_injury1.asp. According to the study, in the year 2001, 50.6 million people over the age of 6 were frequent exercisers who participated in a single activity such as running, cycling or treadmill exercise on at least 100 occasions. In addition, 39.9 million were frequent participants in a recreational sport such as basketball, tennis, softball, or skateboarding, having participated at least 25 times, in most cases. Another 15.3 million were outdoors enthusiasts, participating in an active outdoor pursuit such as hiking, mountain biking, or skiing, at least 15 times during the year.
and the like.2

The phenomenon crosses all age boundaries, from youth to baby-boomers to the elderly. Despite ongoing discussion of a childhood obesity epidemic, statistics show that childhood participation in sports is actually at an all-time high.3 Likewise, participation in recreational activities by the baby-boomers increased dramatically in the past decade.4 Studies also report an astounding increase in the number of people over the age of 55 participating in sports and fitness.5

A glance at the statistics reveals that the numbers of sports-related injuries are steadily increasing.6 The Center for Disease Control reports that one of every five emergency-room visits for an injury results from participation in sports or recreation.7 Some studies estimate that the number of sports injuries not requiring an emergency room visit may be five times that number.8 In 1999, the federal government reports that Americans made an estimated 1.5 million emergency room visits for injuries sustained while playing basketball, baseball, softball, football, or soccer.9 The numbers of sports-related injuries show no sign of decline.

It follows that with the increase in sports participation and the corresponding increase in sports injuries across the country, Texas can expect to witness further escalation of sports-related litigation. Unfortunately, those litigants will face a confusing situation. The liability standard that courts will apply to the conduct of the defendant may vary depending on the place of suit, the sport being played, and whether the defendant participated in the activity. In short, the Texas tort system is ill-equipped to deal with sports-related injuries.

C. A brief description of Texas tort law in the context of sports

When confronted with the issue of liability in the context of sports injuries, the majority — though not all — of Texas appellate courts have

2 Id.
3 While much has been written about the decline in childhood activity rates, the decrease is most likely attributed to the falling numbers of participants in the casual activities. In fact, the number of participants in most organized youth sports has stayed steady, while some youth sports such as soccer show phenomenal growth. Id.
4 For instance, from 1987 - 2001, health club membership among people aged 35-54 increased by 135%; after stripping out the effect of population growth, the incidence of membership could still claim a 60% rise. Id.
5 Id.
6 The U.S. Consumer Product Safety Commission estimates that between 1991 and 1998, golf and swimming injuries increased 110 percent; ice hockey and weightlifting injuries, 75 percent; soccer injuries, 55 percent; bicycling, 45 percent; volleyball, 44 percent; and football 43 percent. Science Daily, found at http://www.sciencedaily.com/releases/2001/01/010129064359.htm.
7 CDC Injury Research Agenda, found at http://www.cdc.gov/ncipc/pub-res/research_agenda/05_sports.htm.
8 American Sports Data, Inc., supra.
9 CDC Injury Research Agenda, supra.
adopted the “reckless or intentional” conduct liability standard. The reckless-intentional standard requires an injured plaintiff to prove that the defendant’s conduct was either reckless or intentionally injurious. To date the reckless-intentional standard applies only to participant-defendants; at this time, no Texas court has extended the doctrine to non-participants.

In fact, it may be somewhat of a misnomer to even refer to reckless-intentional as a “standard.” As this article discusses, Texas courts do not follow a uniform standard in the adjudication of cases arising out of sports or recreational activities. The case law regarding sports injuries has developed slowly in Texas since its first appearance in the early 1990s. Courts have used a number of names to refer to the reduced standard of care to be required of defendants in sports injury cases. The reduced standard was born as the “competitive contact sports doctrine,” then later revised as the “competitive sports doctrine.” Known generally as the reckless-intentional standard, this article will establish that the standard is insufficient on a number of levels.

D. Failures of the reckless-intentional standard

The reckless-intentional standard is confusing. The standard has its roots in the common law doctrine of assumption of the risk, a doctrine that the Texas Supreme Court abolished in Texas thirty years ago. To make matters more confusing, the assumption of the risk doctrine was not so much a doctrine as it was a collection of three overlapping theories of liability, discussed in greater depth within. Therefore, the continued existence of assumption of the risk in the guise of the competitive sports doctrine, or the reckless-intentional liability standard, only serves to confuse litigants, their attorneys, and the court system.

The reckless-intentional standard is costly. The standard requires both a thorough examination of the facts and a subjective evaluation of the mindset of the defendant. Use of the reckless-intentional standard prevents efficient resolution of cases at the summary judgment level.

The reckless-intentional standard is contrary to the wishes of the Texas Supreme Court. On three different occasions, the Texas Supreme Court has criticized the doctrine and proposed alternatives. Unfortunately, the case has not yet arisen that would allow the Texas Supreme Court to speak definitively and therefore the state limps along with a compromised, criticized standard.

E. A proposed solution

This article proposes that, in cases arising out of injuries suffered while

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10 Justice Frankfurter described the term “assumption of risk” as a classic example of a felicitous phrase, “undiscriminatingly used to express different and sometimes contradictory ideas,” and whose uncritical use “bedevils the law.” Tiller v. Atlantic Coast Line R. Co. (1943) 318 U.S. 54, 68 (conc. opn. of Frankfurter, J.).
engaged in sports or recreation, Texas courts use a modified version of the inherent risk standard. This standard states that both co-participant and nonparticipant defendants owe no duty to protect a participant from risks inherent in the sport or activity in which he has chosen to take part. It is essentially a no-duty standard, based not an assumption of the risk but instead grounded in public policy. Moreover, the Texas Supreme Court has previously signaled its approval of the inherent risk standard. Finally, because of the steep consequences associated with the determination of no-duty, this article provides a test to allow courts to accurately and fairly determine when the inherent-risk standard should apply.

AN EXPLANATION AND CRITIQUE OF THE CURRENT SYSTEM

A. A definition of the competitive sports doctrine

The majority of Texas courts of appeal have held that a participant in a competitive contact sport consents to and assumes the risks of the sport, but not the risk of deliberate injury or reckless conduct by another player.11 The doctrine, known generally as the competitive sports doctrine, encompasses the reckless-intentional standard.

“Reckless” has been characterized as “wanton or wilful.” It requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved or with knowledge of facts that would disclose this danger to any reasonable person. For example, under this standard, inadvertently shanking a golf ball so as to hit another golfer who was in front and to the right of the golfer hitting the ball may be incompetent or unskillful, but does not rise to the level of recklessness.12

B. A definition of assumption of the risk

The competitive sports doctrine has its roots in the affirmative defense of assumption of the risk. Before the adoption of comparative negligence in Texas, assumption of the risk acted as a complete bar to a plaintiff’s claim. Courts often referred to the assumption of the risk doctrine as volenti non fit injuria, meaning “one who consents cannot receive an injury.” The basis for this defense lies in the theory that the plaintiff voluntarily exposed himself or herself to the risk that caused the injury formed.13

Historically, the assumption of risk defense required proof that the plaintiff voluntarily and knowingly exposed himself or herself to a dangerous condition or activity. The trier of fact was asked to determine whether the plaintiff knew and appreciated the nature of the dangerous condition or activity, the risks of which he or she was expressly assuming. The defense required a subjective inquiry into the state of the plaintiff’s

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13 See Rosas v. Buddies Food Store, 518 S.W.2d 534, 538-539 (Tex. 1975).
mind--in contrast to ordinary negligence theory, which measures the actor’s conduct according to objective standards.\textsuperscript{14}

C. \textit{Texas lower courts have readopted assumption of the risk}

Unfortunately, over the years, “assumption of risk” gained a variety of meanings. Courts rarely used the phrase with precision and applied the doctrine sloppily, “in a number of very different factual settings involving analytically distinct legal concepts.”\textsuperscript{15}

Assumption of the risk essentially encompasses three separate yet overlapping concepts. The three separate doctrines certainly share a common background, and may often produce the same result, but differ in rationale, in foundation, and in execution. The three separate doctrines known as assumption of the risk are more specifically described as express, secondary, and primary assumption of the risk.

1. \textbf{Express assumption of the risk}

We turn first to express, or contractual, assumption of the risk. Courts face this situation in those cases in which the plaintiff has expressly agreed to the risk of injury while participating in the subject activity. The consent is usually written, through the execution of a release or waiver of liability, either standing on its own or incorporated into a contract containing other terms. The Texas Supreme Court’s decision in \textit{Farley} acknowledged that its decision did not affect express assumption of the risk, holding that it would continue as a valid defense.

The express assumption of the risk defense arises not out of tort law but instead out of contract. The defense holds that a party contractually assumed the risk of harm by expressly agreeing to the dangerous activity. In \textit{Willis v. Willoughby},\textsuperscript{16} the Amarillo court of appeals held that assumption of the risk based on a signed document stating that the party is aware of the risks and has consented to such risks “remains live and well.”

The \textit{Willoughby} court confronted express assumption of the risk in the context of a sports-injury case. In that case, the plaintiff enrolled in a self-defense martial arts course. The court considered the issue of a pre-injury “Waiver/Release of Liability Form” executed by the plaintiff. In her waiver, the plaintiff represented that:

“I understand that self-defense training is inherently dangerous and I knowingly and willingly assume all risk of injury or other damage associated

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with such training. I release all teachers, students, and other parties from any claim of any and all liability that may result from any injury received, and I hereby waive all claims that I, or anyone else on my behalf, may make with respect to such injury or damages. I agree for myself and my successors that . . . should I or my successors assert any claim in contravention to this agreement, I and my successors shall be liable for the expenses including . . . legal fees incurred by the other party or parties in defending unless the party or parties are adjudged finally liable on such claim for willful and wanton negligence . . . .”

The court found that the plaintiff expressly acknowledged the inherent danger involved in self-defense training. Moreover, the plaintiff knowingly and willingly assumed all risk of injury or other damage associated with such training. As such, the court found no alternative but to conclude that the contractual doctrine of assumed risk applied. Having assumed “all risk of injury . . . associated with such training,” the plaintiff effectively relieved the owner of the studio of the duty to protect her from foreseeable injury while instructing her in self-defense.

Although one might posit that enforcement of a contractual clause limiting liability in advance might violate public policy, the Willoughby court noted that there is no evidence that the Texas Supreme Court has ever supported such a notion. Similarly, other states have recognized that so long as an express assumption of risk agreement does not violate public policy, the agreement operates to relieve the defendant of a legal duty to the plaintiff with respect to the risks encompassed by the agreement and, where applicable, to bar completely the plaintiff’s cause of action.

In summary, contractual assumption of the risk of an injury that is foreseeable and contemplated in an agreement remains a valid defense in Texas.

2. Secondary assumption of the risk

Secondary assumption of the risk refers to those situations in which a plaintiff may conceivably assume a risk created by the defendant’s breach of a duty toward him, if the plaintiff deliberately chooses to encounter that risk. Secondary assumption of risk encompasses those instances in which the defendant owes a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty. It applies when a defendant has created a hazard that is known, appreciated,
and voluntarily encountered by the plaintiff, but the defendant is not relieved of his duty of care with respect to the hazard.23

In Texas, secondary assumption of the risk has been subsumed into comparative negligence. Although Texas courts did not use the phrase ‘secondary assumption of the risk,’ the doctrine is essentially the same as the Texas ‘no-duty’ rule.24

In the case of *Parker v. Highland Park, Inc.*,25 a few years after *Farley*, the Texas Supreme Court confronted the ‘no-duty’ rule in conjunction with the case of a plaintiff injured at an apartment complex. The Court expressly abolished the no-duty rule and instead applied ordinary negligence and contributory negligence principles to the case.26

In *Parker*, the court noted that “[n]o-duty, as thus explained, was said to defeat a plaintiff’s action because a plaintiff’s knowledge and appreciation of a danger cut off his action before reaching the issue about a defendant’s negligence. As has been noticed before, the plaintiff’s knowledge and appreciation are two elements which duplicate, overlap, and are segments of the voluntary assumption of risk doctrines which we abandoned in *Farley v. M M Cattle Company*, 529 S.W.2d 751 (Tex.1975).”27

The *Parker* court provided a number of reasons for the final elimination of the no-duty rule. Among the reasons for its decision, the court enumerated the following: 1) the addition of ‘no-duty’ to a plaintiff’s burden has confused the issue; 2) the Supreme Court had itself undermined the cases on which the no-duty cases were relying; 3) the legislature’s adoption of the comparative negligence scheme indicated its desire to replace “the harsh system of absolute victory or total defeat of an action by such doctrines as contributory negligence, voluntary assumption of risk, and also the included doctrine known as no-duty; 4) the vagueness and impreciseness of no-duty rendered precedent as virtually useless; 5) the no-

23 Id.
24 ‘No duty’ is a misnomer. Secondary assumption of the risk is actually a ‘limited duty’ doctrine, a constraint of the duty that certain defendants owe to injured plaintiffs.
25 565 S.W.2d 512 (Tex. 1978)
26 The “no duty” doctrine is defined as follows: the occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees. This includes a duty of the occupier to inspect and to discover dangerous conditions. *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853 (1950); *Genell, Inc. v. Flynn*, 163 Tex. 632, 358 S.W.2d 543 (1962). His duty is to protect his invitees from dangers of which he, the occupier, knows, or (because of his duty to inspect) of which he should know in the exercise of ordinary care. If there are dangers which are not open and obvious, he is under a duty to take such precautions as a reasonably prudent person would take to protect his invitees therefrom or to warn them thereof. But if there are open and obvious dangers of which the invitees know, or of which they are charged with knowledge, then the occupier owes them “no duty” to warn or to protect the invitees. This is so, the cases say, because there is “no duty” to warn a person of things he already knows, or of dangerous conditions or activities which are so open and obvious that as a matter of law he will be charged with knowledge and appreciation thereof.
27 *Parker*, 565 S.W.2d at 516.
duty role interferes with an objective general duty rule by imposing the plaintiff’s subjective knowledge of a condition; 6) the condemnation of the no-duty doctrine by scholars was virtually universal; and 7) a number of Texas cases establishing that premises cases are “more easily tried under ordinary negligence or contributory negligence principles.”

In other states addressing secondary assumption of the risk following the advent of comparative negligence schemes, the doctrine does not act as a complete bar to a plaintiff’s recovery. Instead, the relative fault of the plaintiff and defendant is apportioned under the comparative negligence statute. Incorporation of the doctrine into comparative negligence comports with the order of the Texas Supreme Court in Farley.

3. Primary assumption of the risk

Primary assumption of the risk is a true no-duty doctrine. Historically, primary assumption of risk applied in cases where the court found that there is “no duty” on the part of the defendant to protect the plaintiff from a particular risk. The policy underlying primary aspect of the doctrine is that the plaintiff’s assumption of risk is the counterbalance to the defendant’s lack of duty to protect the plaintiff from that risk. The doctrine bars plaintiff’s recovery for his injury, even though he acted reasonably in encountering the risk. Primary assumption of risk, though technically ended by the Texas Supreme Court in the Farley decision, has been reborn as the reckless-intentional standard or the competitive sports doctrine.

THE DEATH AND REBIRTH OF ASSUMPTION OF THE RISK IN TEXAS

A. The Texas Supreme Court abolishes assumption of the risk

The competitive sports doctrine holds that a participant has assumed the risks of sport, other than those caused by reckless or intentional conduct and thus rests on the affirmative defense of assumption of the risk.

1. “Voluntary assumption of the risk will no longer be treated as an issue”

In 1975, the Texas Supreme Court abolished the assumption of the risk doctrine in ordinary negligence cases: “[F]or this trial, and henceforth in the trial of all actions based on negligence, volenti non fit injuria -- he who consents cannot receive an injury -- or, as generally known, voluntary assumption of risk, will no longer be treated as an issue.” The court’s decision made it clear that that, in light of the state’s recent adoption of the comparative responsibility liability apportionment scheme, the assumption

28 Parker, 565 S.W.2d at 519.
31 Farley v. MM Cattle Company, 529 S.W.2d 751, 758 (Tex. 1975).
of the risk doctrine was at odds with the legislative will.

Assumption of the risk had outlived its usefulness. In contrast to the sleek new comparative fault doctrine, assumption of the risk was an anachronism, a clumsy artifact of the past. The court was aware that, because assumption of the risk acted as a complete bar to a plaintiff’s case, the doctrine could not coexist with apportionment of negligence. The Farley decision, coming so quickly on the heels of the legislature’s adoption of the comparative negligence scheme, represented a true break with the past and a significant step toward modernization of the Texas judicial system.

Unfortunately, despite the clear and unequivocal language of the opinion, the significant step forward did not last. In fact, in less than twenty years, the Texas courts of appeal would resurrect the doctrine of assumption of the risk and introduce it once again into the state’s jurisprudence.

Now clothed in the guise of the “competitive sports doctrine,” the doctrine is known technically as primary implied assumption of the risk. While Texas appellate courts have been careful to note the abolition of assumption of the risk in Texas, they have been carving out a large exception to the Farley case and have essentially recreated the affirmative defense of assumption of the risk.

2. The Farley decision

The Farley case arose out of a horseback riding accident. Plaintiff Benny Farley was a cowboy at the time of his injury, working for defendant MM Cattle Company. One day, while rounding up stray cattle during the course of his employment with MM Cattle, Farley narrowly avoided a collision with another employee of the ranch. In doing so, Farley fell from his horse and suffered severe injuries.

Farley sued his employer, alleging negligence on the part of MM Cattle Company in four respects: (1) in furnishing him a horse that was unsafe for the work which was to be done; (2) in instructing him to use the horse for rounding up cattle under such circumstances as to pose an unreasonable risk of harm to him; (3) in failing to properly supervise the operation; and (4) in failing to furnish him a horse that was suitable for the purpose for which the animal was intended to be used. In its answer, MM Cattle Company pleaded, among other things, voluntary assumption of the risk.

MM Cattle Company contended that Farley assumed the risk of riding horses, and any injuries suffered as a matter of law. As such, according to MM, Farley would be barred from recovery.32 MM Cattle Company thus raised the issue known as volenti non fit injuria, the Latin phrase used to

32 MM relied on Texas cases, Robert E. McKee, General Contractor v. Patterson, 153 Tex. 517, 271 S.W.2d 391 (1954) and Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952).
express voluntary assumption of risk.

Farley’s cause of action arose shortly before the advent of the comparative negligence scheme in Texas. At the trial level, the trial court directed judgment in favor of MM Cattle Company, without citing the reason for its decision. The appeals court affirmed, finding that even if there was negligence shown on the part of MM Cattle Company, no evidence established that such negligence proximately caused Farley’s injuries. The plaintiff appealed the case to the Texas Supreme Court.

The Supreme Court seized on the Farley case as an opportunity to address the defense of assumption of the risk. The court was ready, for it had previously indicated its intent to face the issue. In Rosas v. Buddies Food Store, the opinion provided numerous reasons supporting the abolishment of the defense of assumption of the risk in negligence cases. Nevertheless, because the Rosas case was ultimately decided on other grounds, the court did not abolish assumption of the risk at that time.

In reaching its decision in Farley, the court noted that it considered the reasoning expressed in Rosas and found it persuasive. The court found it particularly compelling that, in its adoption of the comparative negligence scheme, the Legislature provided evidence that it supported the apportionment of negligence and that a plaintiff’s negligence should not completely bar recovery. “Assumption of the risk is incompatible with this rationale since that defense operates as a complete bar to recovery.”

One cannot blame the resurgence of the assumption of the risk doctrine on any ambiguity in the Farley opinion. The court stated directly:

“We therefore hold that for this trial, and henceforth in the trial of all actions based on negligence, volenti non fit injuria -- he who consents cannot receive an injury -- or, as generally known, voluntary assumption of risk, will no longer be treated as an issue. Rather, the reasonableness of an actor’s conduct in confronting a risk will be determined under principles of contributory negligence. Unaffected will be the current status of the defense in strict liability cases and cases in which there is a knowing and express oral or written consent to the dangerous activity or condition. The reasons expressed for abolishing the defense in negligence cases do not obtain as to these situations.”

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33 518 S.W.2d 534, 538-539 (Tex. 1975)
34 In a concurring opinion Justice Walker, in conjunction with others on the court, pointed out that Rosas did not directly involve assumption of risk. The concurring opinion recites: “While I do not disagree with all that is said by Mr. Justice Steakley concerning the doctrine of volenti non fit injuria, it is my opinion that we should consider and deal with the doctrine in the context of a case involving that defense.”
35 Farley, 529 S.W.2d at 758.
36 Id.
37 Id.
B. Texas appellate courts create the competitive sports doctrine

1. Assumption of the risk in the sports context

To trace the rebirth of the assumption of the risk doctrine in Texas as the tool to address sports injuries, we might look back to the seminal case involving a plaintiff alleged to have assumed the risk in the context of recreation activities. In Murphy v. Steeplechase Amusement Co., Inc., Judge Cardozo provided the definitive description of the assumption of the risk doctrine in a sports context in 1929:

Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.

In Murphy, the plaintiff brought suit based on injuries sustained at an amusement park. The plaintiff had watched previous park patrons ride “the Flopper.” After watching for a while, the plaintiff also chose to ride. In finding no duty on the part of the defendant, the court’s language sounds much the same as can be found in opinions written seventy-five years later.

He made his choice to join them. He took the chance of a like fate, with whatever damages to his body might ensue from such a fall. The timorous may stay at home.39

Thus, in the sports-injury context, assumption of the risk could best be defined as an affirmative defense to any claim brought by an individual who voluntarily participated in the injury-causing activity. The theory of the doctrine rests on the belief that the injured party assessed the risks before participation in the sport and placed himself in harm’s way. In the Second Restatement of Torts, the drafters recognized implied assumption of risk as a separate defense:

[A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant’s conduct or by the condition of the defendant’s land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.40

2. A summary of Texas appellate court opinions creating the competitive sports doctrine.

In the first decade and a half following the Farley decision, Texas courts did not revisit assumption of the risk. Assumption of the risk as an affirmative defense was effectively dead.41 That changed in the early 1990s.

38 166 N.E. 173, 174 (N.Y. 1929)
39 Id.
40 Restatement (Second) of Torts 496 C (1965).
41 Assumption of the risk seemed to have joined the “special ameliorative doctrines” of last clear chance, mitigation of damages, and avoidable consequences as outmoded and no
In the case of *Connell v. Payne*, the Dallas court faced, ironically enough, a negligence case based on injuries suffered while on horseback. It differed from the *Farley* case in that the injury occurred not in a work-related accident but while the parties played polo. As such, the *Connell* court reached a very different decision.

But it is not fair to say that the *Connell* court ignored the *Farley* case and its decisive language ending the application of the assumption of the risk doctrine in Texas. The court recited the *Farley* court’s admonishment not to rely on the plaintiff’s implied assumption of the risk. But rather than following the directions of the *Farley* decision, the Dallas court based its decision instead on the reasoning of the Ohio Supreme Court in *Marchetti v. Kalish*.

The *Connell* court refused to recognize the similarity to the *Farley* case, calling its fact pattern, a case in which (just as in *Farley*) a rider on horseback injured another rider on horseback, “a case of first impression.” It is true that in *Connell*, the plaintiff suffered injuries when the defendant swung a polo mallet and struck him in the eye during a polo match. The *Connell* court noted that polo is a dangerous game, carrying a high degree of risk. The appellate court noted, “no Texas court has addressed the issue of the legal duty owed by one participant to another participant in a competitive contact sport.”

The trial court submitted jury questions as to whether the defendant intentionally or recklessly caused Connell’s injury. The court also submitted jury questions that asked whether the polo club or the plaintiff himself was negligent. The jury answered each of these questions “no.” Based on these answers, the trial court entered a take-nothing judgment against Connell.

On appeal, the plaintiff argued that the court should have used ordinary negligence as the proper standard, contending that recklessness standard held him to an unreasonably high burden of proof. The court disagreed.

“By participating in a dangerous contact sport such as polo, a person assumes a risk of injury. The risk involved in competing in contact sports is the basis for the historical reluctance of courts to allow players to recover damages for injuries received while participating in a competitive contact sport unless one participant deliberately injures another. See *Kuehner v. Green*, 436 So. 2d 78, 81 (Fla. 1983) (Boyd, J., concurring).”

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These doctrines, which are “designed to avoid the harsh effects of contributory negligence as an absolute bar” to recovery are deemed no longer appropriate because under comparative responsibility a plaintiff’s neglect only reduces the amount of recovery.

*814 S.W.2d 486 (Tex.App.--Dallas 1991, writ denied).*

*53 Ohio St. 3d 95, 559 N.E.2d 699 (1990).*

*Connell*, 814 S.W.2d at 486.

*Id.*
One might think that the phrase “assumes a risk of injury” might raise an alarm, but the Connell court dismissed the Farley decision fairly quickly. The court acknowledged that assumption of the risk had been abolished, and acknowledged further the legislature’s intention to apportion negligence through its adoption of the comparative negligence scheme. But the Connell court then distinguished Farley by seizing on the Texas Supreme Court’s retention of the doctrine as a defense in strict liability and express consent cases.46 In essence, the Dallas court asserted that voluntary participation in competitive contact sports was akin to express consent.

The Connell court placed extra emphasis on the recreational nature of the injury-causing activity. Rather than looking at the clear directive of the Texas Supreme Court regarding assumption of the risk, the court chose to follow the Ohio Supreme Court’s lead in Marchetti v. Kalish.47 The Ohio Supreme Court in Marchetti analyzed the question of the proper duty owed by participants to other participants in a sport or recreational activity and found that a mere showing of negligence is not enough to allow recovery.48

The Dallas court expressly joined the authorities cited in Marchetti, holding that “[a] participant in a competitive contact sport expressly consents to and assumes the risk of the dangerous activity by voluntarily participating in the sport.”49 The Connell court held that for a plaintiff to prevail in a cause of action for injuries sustained while participating in a competitive contact sport, the plaintiff must prove the defendant acted “recklessly or “intentionally as the Restatement of Torts defines those terms.”50

The competitive sports doctrine had been born. But not every appellate court was so eager to cast aside the Farley holding. In Bangert v. Shaffner,51 the plaintiff suffered injuries in a parasailing accident. He sued the owner of the parasail, arguing that the owner was negligent in failing to instruct or supervise the operators of the parasail. The jury returned a verdict in favor of the plaintiff. At the appellate level, the defendant argued that because parasailing was a recreational activity, the plaintiff should have been required to show that the defendant was not merely negligent but that he acted with reckless disregard for the plaintiff’s well-being.

The appellate court affirmed the trial court judgment in favor of the plaintiff. The defendant on appeal cited the Connell decision. The court

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46 Farley, 529 S.W.2d at 758.
47 53 Ohio St. 3d 95, 559 N.E.2d 699 (1990)
48 Id.
49 It is especially interesting that the Dallas court called its proposed doctrine the competitive contact sports doctrine, because the Ohio case on which it relied arose out of a golf match.
50 814 S.W.2d at 489.
51 848 S.W.2d 353 (Tex. App.--Austin 1993, writ denied)
acknowledged that, “traditionally, most courts have held as a matter of law that persons injured while participating in contact sports could not recover damages, on the theory that the risk of injury was inherent in the activity.”\textsuperscript{52} But the court distinguished \textit{Connell} by noting that the prior decision “clearly addressed the legal duty participants owe one another while engaging in a \textbf{competitive contact sport}.”\textsuperscript{53} Parasailing involved no contact at all, and thus was not subject to the \textit{Connell} precedent. The \textit{Bangert} court found that “\textit{Connell} likewise rested its holding upon the consent a polo competitor gives when he enters a match anticipating the possibility of collision and injury.”\textsuperscript{54}

Because it was undisputed that parasailing was not a contact sport, the \textit{Bangert} court declined “to adopt the reckless disregard standard for \textit{every} recreational activity or sport that might be considered dangerous.”\textsuperscript{55}

The \textit{Bangert} court distinguished its facts on the lack of contact, but other courts did not follow. In \textit{Hathaway v. Tascosa Country Club, Inc.},\textsuperscript{56} the plaintiff lost the vision in his right eye as a result of an errant golf shot. The \textit{Hathaway} court relied on the \textit{Connell} decision to find that for a plaintiff to prevail in a cause of action against a fellow golfer, the defendant must have acted recklessly or intentionally. The court noted “[w]hile the genteel game of golf can hardly be described as a “competitive contact sport,” we believe the reckless and intentional standard is every bit as appropriate to conduct on the links as it is to conduct on the polo field.”\textsuperscript{57}

In support, the \textit{Hathaway} court cited the case of \textit{Thompson v. McNeill}.\textsuperscript{58} In \textit{Thompson}, the issue before the Ohio Supreme Court was the degree of care owed between participants in the sport of golf. The court held that in sports such as golf, “only injuries caused by intentional conduct, or in some instances reckless misconduct, may give rise to a cause of action… [t]here is no liability for injuries caused by negligent conduct.”\textsuperscript{59} Acts that would be negligent if performed on a city street or in a backyard are not negligent in the context of a game where a risk of inadvertent harm is built into the sport. “A player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence because no duty is owed to protect the victim from that conduct.”\textsuperscript{60}

According to the \textit{Thompson} court, golfers familiar with the sport know

\begin{footnotes}
\item[52] Id. at 355.
\item[53] Id. at 355 (emphasis added).
\item[54] Id.
\item[55] Id. at 356 (Emphasis in original).
\item[56] 846 S.W.2d 614, 617 (Tex. App.--Amarillo 1993, no writ).
\item[57] Id. at 616.
\item[58] 53 Ohio St. 3d 102, 559 N.E.2d 705 (Ohio 1990).
\item[59] Id.
\item[60] Id. at 707.
\end{footnotes}
that “shanking the ball is a foreseeable and not uncommon occurrence...[t]he same is true of hooking, slicing, pushing, or pulling a golf shot.”61 The court concluded that, because of the great likelihood of these unintended and off-line shots, it can indeed be said that the risk of being inadvertently hit by a ball struck by another competitor is built into the game of golf. The court found that “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 whatever.”62

The Hathaway court held that for a plaintiff to prevail in a cause of action against a fellow golfer, the defendant must have acted recklessly or intentionally. Without evidence of such reckless or intentional conduct, the court held in favor of the defendant. At that point, the ‘contact’ portion of the competitive sports doctrine was effectively neutralized.

In Monk v. Phillips,63 yet another Texas court addressed the issue of the injured golfer. The plaintiff was struck by a shanked shot off the club of another member of his foursome. The parties acknowledged that the defendant did not intend to strike the ball in that manner.

Shortly thereafter, the Fort Worth court adopted the “reckless-intentional” standard as the proper standard to apply in sports cases. Furthermore, the court found that “[w]hile Phillips’s conduct may qualify as incompetence or unskillfulness, we find as a matter of law that it does not rise to the level of recklessness. Shanking the ball is a foreseeable and not uncommon occurrence in the game of golf that all golf players must accept.”

Another golf case appeared at the same time. In the case of Allen v. Donath,64 the court faced a situation similar to that faced in Hathaway. An errant tee shot struck the plaintiff in the head and thereby caused serious injuries. The court submitted the case to the jury, asking whether the reckless conduct of either party caused the occurrence in question. The jury did not find that reckless conduct caused the occurrence. On appeal, the plaintiff contended that the trial court incorrectly applied the “reckless conduct” standard rather than the “ordinary negligence” standard of care “in a non-contact sports case.”

The plaintiff in Allen argued that the appropriate standard of care for injuries in sports cases should be based on whether the sport at issue was a contact sport or a non-contact sport. Apparently, plaintiff was unable to cite the Bangert decision, in which the court of appeals refused to follow

61 Id. at 709.
62 Id.
63 983 S.W.2d 323 (Tex.App.—Fort Worth 1998, pet. den.).
64 875 S.W.2d 438 (Tex.App.—Waco 1994, writ den.)
Connell on those exact grounds.

Instead, the Allen court deferred to the Hathaway decision and found that “for a plaintiff to prevail in a cause of action against a fellow golfer, the defendant must have acted recklessly or intentionally.”\(^{65}\) The court refused to countenance the argument of plaintiff that his case was distinguishable from that of Hathaway. The golf shot that struck the plaintiff in Hathaway was a shanked shot, the blow in Allen came from a mulligan that the defendant allegedly failed to warn about. The court noted that the sole point of error was on the submission of the reckless conduct standard. The court found that the charge to the jury adequately submitted the question of whether Donath breached that duty by its definition of reckless conduct.

The case was not submitted on comparative responsibility terms, and thus the appellate court expressly offered no opinion “upon the issue of whether a plaintiff’s recovery for a sports tort should be reduced by either the reckless conduct or the negligence of the plaintiff.”\(^{66}\)

Another horseback riding case also presented itself. In Matthews v. Ingham,\(^{67}\) the court faced a lawsuit arising out of an injury in a steer-roping contest. The court noted that a number of cases have discussed whether a participant in a sport can hold another participant liable for negligent conduct that causes injury or whether the conduct causing injury must be reckless or intentional.\(^{68}\) The court first examined whether steer-roping is a sport within the Greer analysis. The court noted that it was not a head-to-head event but that it did involve “people competing” in an “organized fashion.”\(^{69}\) The court then examined whether “the injury resulted from an action that was foreseeable or expected in the course of the particular sporting event or was an abnormal or unforeseeable act.”\(^{70}\) In the case at bar, the defendant would be entitled to summary judgment only if he proved the act causing the injury was inherent and foreseeable as a matter of law.

3. The Supreme Court first criticizes the competitive sports doctrine

The Texas Supreme Court finally addressed the issue in 1996, but only in the briefest manner. In Davis v. Greer,\(^{71}\) in a brief opinion on the denial of application for writ of error, the supreme court spoke for the first time regarding sports injuries.

\(^{65}\) Id. at 440.
\(^{66}\) Id.
\(^{67}\) 1997 Tex. App. LEXIS 6479.
\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) 940 S.W.2d 582 (Tex.1996).
The underlying case involved a suit for damages arising out of injuries suffered during a softball game. The plaintiff contended that the defendant recklessly or intentionally injured him during the course of the game. The plaintiff, Kenneth Greer, was attempting to tag Davis on his way from third base, when Davis lowered his head and shoulders and deliberately collided with Greer in order to make Greer drop the ball, instead of attempting to slide into base or step aside to avoid the tag. The trial court granted summary judgment in favor of Davis. The court of appeals reversed.

Greer failed to properly raise the negligence question on appeal, and thus the appellate court did not reach the question of whether “during the normal course of a contact sports event, mere negligence on the part of the defendant is sufficient to impose liability.”

Nevertheless, though it could not reach the issue of the proper negligence standard to apply, the court did speak to the “assumption of the risk defense” raised by defendant. In the trial court, the defendant relied on the language in Connell stating that a person participating in a dangerous activity “assumes the risk of injury.” The Greer court stated that this language was mere dicta and was offered only in support of the language regarding the historical reluctance of courts to allow players to recover damages for injuries received while participating in competitive contact sports. The Greer court held that the Connell court did not recognize assumption of the risk and thus neither would it.

The Greer court then addressed the reckless or intentional standard in passing. The court stated that “The fact that a claimant must prove “intentional or reckless” conduct, rather than mere negligence, protects defendants such as Davis from suit for genuinely accidental injuries.”

In Davis v. Greer, the Texas Supreme Court issued its opinion on a denial of application for writ of error. In that brief opinion, Justice Gonzalez criticized the reckless-intentional standard as shaped by the lower courts. Gonzalez argued instead for a revised standard, one holding that a participant in a competitive sport should be deemed to have consented to and assumed risk of all harmful contacts and foreseeable injuries that are inherent to that particular sport.

The Texas Supreme Court accepted the result of the appellate court but criticized the reasoning of the underlying decision. “While [the reckless-intentional] standard may ultimately protect Davis from liability in this case, it did not protect him from suit for this foreseeable injury and does not

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72 Greer v. Davis, 921 S.W.2d 325, 328-29 (Tex. App.--Corpus Christi, writ denied).
73 Id. at 327.
74 921 S.W.2d. at 328-29.
75 940 S.W.2d 582 (Tex.1996).
76 Id.
allow him to obtain a summary disposition of this frivolous lawsuit.” 77 The
court agreed that agree that protecting defendants from suit for genuinely
accidental injuries that occur during the course of a sport or activity is a
worthy public policy goal.”

The court found, however, that the “reckless or intentional” standard
utilized by the court of appeals and adopted by a number of jurisdictions
throughout the nation “falls short of accomplishing this goal.” 78 The court
expressed the opinion that the Greer case demonstrated that the reckless or
intentional standard is not workable to ferret out unmeritorious claims. Fear
of litigation will alter the nature of the game if participants in athletic
contests are forced to endure the costly ordeal of a trial every time an injury
occurs on the playing field and the injured player makes an accusation of
reckless or intentional conduct.” 79

4. Texas appellate courts ignore the Greer decision

Amazingly enough, the next appellate court to face the question of a
sports-related injury ignored the Greer decision, choosing instead to rely on
the ‘reckless or intentional’ conduct standard outlined by the Connell case
and its progeny.

In Monk v. Phillips, 80 the court once again confronted what was rapidly
becoming the prototypical sports injury case in Texas — a golf related
injury. The defendant struck a golf ball that struck the plaintiff, blinding
him in one eye. The trial court applied the reckless or intentional standard,
and granted summary judgment, finding that as a matter of law the
plaintiff’s conduct was neither reckless or intentional. The appellate court
affirmed the decision.

The court recited the line of jurisprudence beginning with Connell, but
omitted any discussion of the Supreme Court’s language in the Greer
decision. The appellate court’s decision seemed to rest in large part on their
finding that no evidence supported the allegation that the defendant’s
conduct was reckless, as that word was defined in the Restatement. 81

Still, the court did not avoid touching on tangential elements, thereby

77 940 S.W.2d at 582.
78 Id. at 583.
79 Id.
80 983 S.W.2d 323 (Tex.App.—Fort Worth 1998, pet. den.)
81 The Restatement (Second) of Torts defines reckless disregard of safety as follows:
The actor’s conduct is in reckless disregard of the safety of another if he does
an act or intentionally fails to do an act which it is his duty to the other to do,
knowing or having reason to know of facts which would lead a reasonable man to
realize, not only that his conduct creates an unreasonable risk of physical harm to
another, but also that such risk is substantially greater than that which is necessary
to make his conduct negligent. RESTATEMENT (SECOND) OF TORTS §500
(1965).
blurring their analysis and rendering the precedential value of the decision much less valuable. The court touched on the inherent nature of the risk of being struck by a golf ball: “Because of the great likelihood of these unintended and offline shots, it can indeed be said that the risk of being inadvertently hit by a ball struck by another competitor is built into the game of golf.”82 And, once again, almost as if the court found it impossible to ignore the siren call of assumption of the risk: “Golfers playing to the right or left of that line will of course be endangered by such shots. This risk all golf players must accept.”83

C. The Texas Supreme Court criticizes the lower courts

1. The inherent risk standard enunciated

As noted above, the Texas Supreme Court first criticized the reckless-intentional standard in the Greer case. But the harshest criticism of the competitive sports doctrine, as well as the most eloquent case for the ‘inherent risk’ standard, was yet to come. In the case of Phi Delta Theta v. Moore,84 Justice Craig Enoch of the Texas Supreme Court dissented from the withdrawal of the grant of a petition for review. In doing so, Justice Enoch addressed the issue of “what tort liability rule should apply when a participant in a sports or recreational activity sues over an injury suffered during play.”85 Enoch stressed the importance of creating a firm rule because of the numerous situations that such a rule would address and criticized the unwillingness of the court to address it.86

Enoch recognized that, in suits by a participant against a co-participant, several Texas courts of appeals adopted a limited tort liability rule requiring a participant to prove reckless or intentionally injurious conduct, rather than merely negligent conduct. In the underlying case, the court of appeals held that the reckless-intentional standard did not apply in the case of a suit by a participant against a nonparticipant. Enoch wanted to propose a rule flexible enough to apply to both co-participants and non-participants.

In the underlying suit, the plaintiff was injured during the course of a fraternity sponsored paintball game. The fraternity moved for summary judgment, relying on Connell for the proposition that plaintiff, by his voluntary participation in the paintball game expressly assumed the risk of injury. Therefore, for the plaintiff to prevail, he must prove the fraternity’s acts were reckless or intentionally meant to cause the plaintiff’s injury. The

82 983 S.W.2d at 325.
83 Id. at 326.
84 10 S.W.3d 658 (Tex. 1999).
85 Id.
86 “Indeed, it is hard to imagine a sport or recreational activity whose participants, sponsors, coaches, and venue providers will not be affected by our treatment of this issue.” Id.
trial court granted summary judgment “on the basis that plaintiff assumed the risks of injury in the paint ball game.”

Plaintiff asserted on appeal that the trial court erred in granting summary judgment based on assumption of the risk, because of the abolition of that doctrine as a complete defense to tort liability in Farley. The court of appeals concluded that the trial court based its summary judgment on the proper application of the reckless-intentional standard. The court further noted that the reckless-intentional standard “is an extension of the express assumption of the risk doctrine retained in Farley.” But the court of appeals declined to apply the reckless-intentional standard, because no Texas court had applied the reckless-intentional standard in a suit against a nonparticipant, and reversed the trial court’s judgment.

Enoch criticized the foundation of the reckless-intentional standard—express assumption of the risk—as he reiterated that it is an “erroneous conclusion that mere participation in a risky sport amounts to express assumption of the risk.” Enoch’s dissent makes it clear that in the Farley decision, “we abolished the affirmative defense of implied assumption of the risk.” Enoch stated that the assumption of the risk defense should only be available in case where the defendant can prove that the plaintiff gave oral or written consent prior to facing the injury-causing risk. The remedy for a plaintiff encountering a known risk is to have the factfinder apportion negligence.

All of which brings Enoch back to the issue of a limited liability rule to apply in cases involving injuries arising out of sports or recreational activities. Enoch’s proposed rule was as follows: “a defendant does not owe a duty to protect a participant from risks inherent in the sport or activity in which the participant has chosen to take part.” The rule would be based on “normative policy decisions about what kind of conduct is acceptable in the context of sports and recreational activities.”

Every sport or recreational activity features risks that are inherent in that activity. Under Enoch’s proposed rule, a court would consider the nature of the activity to determine what conduct is accepted as part of the activity, and, consequently, the risks that flow from that conduct. “Thus, the duty determination in sports and recreational injury cases would focus on whether, from an objective standpoint, the risk that resulted in plaintiff’s

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87 Id.
88 976 S.W.2d at 741.
89 976 S.W.2d at 742.
90 10 S.W.3d 659.
91 Id. at 660.
92 Id.
93 Id. at 661.
94 Id.
injury was inherent in the nature of the sport or activity. If the injury-causing risk was inherent, the defendant owes the participant-plaintiff no duty and summary judgment is proper. If the injury-causing risk was not inherent, the case may proceed on an ordinary negligence theory.”

Enoch’s test focused on the risk that caused the injury, not the injury itself. Under his rule, there would be no inherent injuries, only inherent risks.

But of course Enoch recognized that inherent risks are not the cause of every injury occurring during a sporting event. His proposed standard would not erase liability for injuries resulting from risks that are not peculiar to the particular activity. For instance, ordinary principles of premises liability would protect participants encountering dangerous conditions caused by negligent upkeep or maintenance on a playing field.

2. The Texas Supreme Court speaks again

In 2002, the Texas Supreme Court again raised the issue of the proper standard to be applied in sports injury cases. In *Southwest Key Program v. Carlos Gil-Perez*, the court addressed the various proposed liability standards to be used in such cases.

Southwest Key owned and operated a residential home for youth in Brownsville, Texas. A Southwest employee took the plaintiff, Carlos Gil-Perez, and other residents to a local stadium to participate in athletic activities. At some point, a group of nonresident boys approached and the entire group agreed to an impromptu game of tackle football. Gil-Perez suffered an injured knee during the course of the game, and sued Southwest for negligently allowing him to play tackle football without protective gear.

The trial court refused to submit a reckless-intentional charge and chose instead to submit the case as one of ordinary negligence. The jury found Southwest 100% negligent. The defendant appealed, citing the trial court's refusal to submit a reckless-intentional instruction. The court of appeals affirmed the verdict, finding that the case was not a sports injury case, because the defendants were not participants in the game, nor could they properly be said to have "sponsored" the game. The court held, therefore, it need not address the issue of whether to apply the reckless-intentional standard. After concluding that there was sufficient evidence to support the jury's finding on negligent supervision, the court of appeals affirmed the trial court's judgment.

On appeal to the Texas Supreme Court, Southwest Key argued that the court should apply a heightened standard of tort liability and urged the court

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95 *Id.* at 662.
96 81 S.W.3d 269 (Tex. 2002).
97 79 S.W.3d 571, 576.
to adopt a uniform rule applicable in all cases in which a participant in a
sporting or recreational event suffers an injury during play. The Texas
Supreme Court noted that though it had not yet "spoken on the issue of
liability in the context of sports injuries, the lower courts of this state and
the high courts of many other states have."98 The court reviewed the various
competing liability standards and acknowledged the "valid public policy
reasons that have been articulated in support of each of the three approaches
to liability in sports-injury cases."99

Ultimately, though, the Supreme Court reversed the appellate court,
finding the evidence legally insufficient to support the finding of
negligence. Though it could not speak as to the proper standard to apply, the
express lack of endorsement of the reckless-intentional standard speaks
loudly.

PROBLEMS WITH THE CURRENT STANDARD

A. Public policy supports a unique standard for sports injuries

Why the need for a special standard to apply in sports injuries? Perhaps
a New Jersey Supreme Court opinion says it best: "One might well
conclude that something is terribly wrong with a society in which the most
commonly-accepted aspects of play--a traditional source of a community’s
conviviality and cohesion--spurs litigation."100 The debate remains open as
to whether it is public policy or public sentiment that so disfavors litigation
arising out of the sports arena. Nevertheless, it is certain that a special
standard “for sports injuries is rooted in the belief that law should not
unreasonably burden free and vigorous participation in sports and
recreational activities.”101

Additional reasons support the imposition of a special limited liability
rule. Athletic competitions often encourage behavior that would not be
accepted, much less encouraged, in other aspects of society. Exhibition of
the violent contact that we take for granted in contact sports outside of that
context would land a party in jail or in civil court. Fear that litigation could
chill the ardor in which athletes play drives much of the need for a special
rule. Numerous courts outside of Texas have commented on this.102

A special liability rule could protect nonparticipants as well.
“Participation in many sports and activities would be impossible absent the
efforts of nonparticipants like coaches, event sponsors, venue owners,

98 81 S.W.3d at 271.
99 Id.
102 See, e.g., Crawn, 643 A.2d at 604; Dotzler v. Tuttle, 234 Neb. 176, 449 N.W.2d 774, 778
sanctioning and rule-making bodies, and private sports clubs. Allowing nonparticipants to face the threat of civil liability for injuries resulting from risks inherent in their sport or activity leaves them with few options for reducing the potential for liability.\textsuperscript{103} Nonparticipants lack the requisite control over much of the action on the field. Sponsors, owners, and coaches do not have the ability to directly control participants. Their only certain means to avoid liability would be to avoid taking a role. Therefore, it makes sense that we reduce the risk of civil liability to encourage their continued involvement.

Notwithstanding these arguments, one can recognize that play in sports is not a license to maim. Thus, public policy must be shaped so as to create a balancing act—allowing the full freedom to participate, while at the same time restraining injurious acts. Tort rules should exist to ensure that “some of the restraints of civilization must accompany every athlete onto the playing field.”\textsuperscript{104} Participants must be allowed to enjoy their activities in relative safety.\textsuperscript{105}

\textbf{B. Alternate standards}

\textbf{1. The reckless-intentional standard as used elsewhere}

\textit{a. The significance of Knight v. Jewett}

If one accepts the argument that public policy supports a special standard for sports-related injuries, it is not initially clear what that standard should be. The reckless-intentional is the majority standard, it has existed in some form or fashion in Texas litigation for over 15 years—what then is the problem? Perhaps, the reckless-intentional standard as it presently exists in Texas is sufficient. Or, perhaps, the standard could be reformed to better match the similar standard used across the country.

The reckless-intentional standard is the majority standard used across the country. By far, the most influential case for the standard is the California case of \textit{Knight v. Jewett}.\textsuperscript{106} Courts across the country have adopted its reasoning.\textsuperscript{107} Although \textit{Knight} dealt primarily with the narrow

\begin{enumerate}
\item[103] Phi Delta Theta, 10 S.W.3d at 661.
\item[104] Nabozny, 334 N.E.2d at 260-61.
\item[105] Phi Delta Theta, at 661; Thompson v. McNeill, 53 Ohio St. 3d 102, 559 N.E.2d 705, 707 (Ohio 1990) (“We do not embrace the notion that a playing field is a free-fire zone.”).
\item[106] 834 P.2d 696 (Cal. 1992).
question of the tort liability of a sports participant to a co-participant, the
opinion provides important guidance regarding the role of assumption of
risk in a comparative fault regime and the difference between primary and
secondary assumption of risk.

The most obvious significance of Knight lies in its elimination of most
tort liability claims by sports participants predicated on a negligence theory.
It is not surprising that a decision by a respected state high court would
generate considerable influence both within and outside that jurisdiction. Of
greater significance is the effect Knight has had on general tort principles
outside the limited context of sports.

The Knight case arose out of a touch football game between friends.
After a few minutes of play, the defendant ran into plaintiff. Plaintiff
warned the defendant that he was playing too rough. On the following play,
the defendant collided with plaintiff, knocking her over and stepping on her
hand. Plaintiff suffered an injury, and after three unsuccessful operations,
doctors were forced to amputate her finger. Plaintiff sued alleging
negligence. The defendant asserted that the implied assumption of the risk
doctrine barred plaintiff’s claim.

The Knight court initially confronted the question as to whether the
doctrine was good law in California at the time of the decision. Around the
same time as the Farley court, the California Supreme Court adopted a
comparative fault system in Li v. Yellow Cab Co.108 Following the Li case,
California courts found themselves unsure whether implied assumption of
the risk survived the adoption of comparative negligence.109

Knight clarified the role of the assumption of the risk doctrine in light of
the shift to a comparative fault system by distinguishing between primary
assumption of risk and secondary assumption of risk. The court defined
primary assumption of risk as “those instances in which the assumption of
risk doctrine embodies a legal conclusion that there is “no duty’ on the part
of the defendant to protect the plaintiff.”110 The court defined secondary
assumption of risk as “instances in which the defendant does owe a duty of
care to the plaintiff but the plaintiff knowingly encounters a risk of injury
caused by the defendant’s breach of that duty.”111 Secondary assumption of
risk merges with the comparative fault scheme, while primary assumption
of risk remains a complete bar to plaintiff’s recovery.112

204, 206 (1st Cir. 1996) (applying Maine law and noting that moguls present an inherent
risk in skiing).
110 834 P.2d at 703.
111 Id.
112 See id. at 707-08.
The *Knight* court noted initially, “the assumption of risk doctrine has long caused confusion both in definition and application, because the phrase ‘assumption of risk’ traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts.”\(^{113}\) Prior to the adoption of comparative fault principles, there was often no need to distinguish between primary and secondary assumption of the risk because each would completely bar recovery by a plaintiff.\(^{114}\)

Nevertheless, the *Knight* court emphasized that, despite the adoption of comparative fault in California, a distinction remained between cases where no duty exists to protect a plaintiff from a particular risk (primary assumption of risk) and cases where a defendant owes a duty of reasonable care but the plaintiff “knowingly encounters a risk of injury caused by the defendant’s breach of that duty (secondary assumption of risk).”\(^{115}\) In the case of primary assumption of risk, comparative fault principles do not alter the result; that is, the defendant is not liable because there was no duty to protect in the first place. However, in the case of secondary assumption of risk, a plaintiff may proceed and recovery may be reduced but not completely barred.\(^{116}\)

Recognizing that other jurisdictions had found that ordinary negligence will not usually suffice to establish a valid claim for a sports co-participant, the court concluded that “a participant in an active sport breaches a legal duty of care to other participants -- i.e., engages in conduct that properly may subject him or her to financial liability -- only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport.”\(^{117}\) Applying that rule to the facts in *Knight*, the Supreme Court of California found that no legal duty of care to plaintiff had been breached and that the doctrine of primary assumption of risk barred the claim.\(^{118}\)

b. The reckless-intentional standard and nonparticipants

As noted above, Texas courts have not yet applied the reckless-intentional standard to nonparticipants. This is perhaps because the competitive sports doctrine was born out of assumption of the risk and it simply seems wrong to stretch assumption to nonparticipants. Adoption of a revised form of the reckless-intentional standard, along the lines of the *Knight* case, would enable application of the standard to nonparticipants.

Courts in other jurisdictions have applied the reckless-intentional

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\(^{113}\) *Id.* at 697.

\(^{114}\) *Id.*

\(^{115}\) *Id.*

\(^{116}\) *Id.*

\(^{117}\) cite

\(^{118}\) cite
standard to nonparticipants. In *Morgan v. State*,\(^{119}\) the court found that in assessing whether an owner or operator of an athletic facility has violated a duty of care toward voluntary participants injured on the premises, the applicable standard should include whether the conditions caused by the defendant’s negligence were unique and created a dangerous condition over and above the usual dangers inherent in the sport. Likewise, in *Kline v. OID Assocs.*,\(^{120}\) the court applied the reckless or intentional standard when an injured indoor soccer game participant sued the owner of the facility in which the game was played as well as the organizer of the soccer league.

One can find additional examples of courts in a number of other states that have adopted some form of limited tort liability for co-participant-defendants have applied the same rule to nonparticipant-defendants.\(^{121}\)

2. **Ordinary negligence standard**

   a. Other states’ use of the ordinary negligence standard

   Perhaps ordinary negligence may be the best way to address the question of sports-related injuries. A number of states seem to have not found any significant chilling effects through the use of the ordinary negligence standard in the sports and recreational activity context. In *Auckenthaler v. Grundmeyer*,\(^{122}\) the Nevada Supreme Court examined the issue of the standard of care for participants in recreational activities. The court recognized that even though it is based upon implied assumption of risk, it has survived in states where assumption of risk has been subsumed by statutory comparative negligence. The Nevada Supreme Court declined to follow the majority rule and held that “the negligence standard is a more attractive alternative,” stating: “Within the factual climate of recreational activities or even sporting events, the question posed is whether the defendant participated in a reasonable manner and within the rules of the game or in accordance with the ordinary scope of the activity.”\(^{123}\)

   The Wisconsin Supreme Court reached a similar conclusion. In *Lestina v. West Bend Mutual Insurance Co.*,\(^{124}\) a case that involved injuries arising out of an adult recreational soccer game, the Court recognized the majority rule, but as in Nevada, found that the simple negligence standard provides a

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\(^{120}\) 80 Ohio App. 3d 393, 609 N.E.2d 564, 565 (Ohio Ct. App. 1992).


\(^{122}\) 877 P.2d 1039 (Nev. 1994)

\(^{123}\) *Id.* at 1043.

\(^{124}\) 501 N.W.2d 28 (Wis. 1993).
sufficiently flexible and acceptable standard in personal injury actions resulting from sports activities. Addressing the public policy concerns underlying the intentional or reckless standard, that liability for negligence would discourage participation, the Court reasoned that the simple negligence standard, if properly applied, would not have such an undesired effect, and would accomplish the same objective as the reckless conduct standard in that it is adaptable to a variety of circumstances by definition, and only requires that a person exercise ordinary care under the circumstances.125

The Wisconsin court enumerated a number of factors that a court could use to determine whether a participant’s conduct constitutes simple negligence: the rules of the sport; the use of protective equipment; the customs of the sport; the inherent risks of the sport; age of the participants; the physical attributes of the participants; and the skill of the participants. The Court found that considering these factors would render the simple negligence standard substantially equal to the reckless conduct standard adopted by other jurisdictions.126

More recently, New Hampshire also rejected the reckless-intentional standard in favor of the ordinary negligence standard. In Allen v. Dover Co-Recreational Softball League,127 the court confronted a case in which a player in a coed slow-pitch recreational softball league was struck by a ball thrown by an opposing player. In its discussion of the standard of care, the Court reported that the standard of care against which a defendant’s conduct is measured ‘is essentially an objective one and is defined as how a reasonable man might act under the same circumstances.’128 The court concluded that “in ordinary negligence terms, a participant, sponsor or organizer who creates only risks that are normal or ordinary to the sport acts as a reasonable person of ordinary prudence under the circumstances.”129

In applying the ordinary negligence standard to the facts of that case, the court observed that participation in a softball game generally gives rise to the risk that a player may be struck by a ball that has been hit by a batter or

125 Id. at 33.
126 Id.
128 Id. at 1283.
129 Id.
thrown by a fielder. The court found that while a fielder has a duty to not act in a manner outside the range of the ordinary activity involved in playing softball, he does not have a duty to make only accurate throws, since reasonable fielders commonly make errant throws. In conclusion, the Court held: “The plaintiffs’ allegation describes a fielder whose conduct was within the ordinary range of activity involved in playing softball which, even if negligent, cannot as a matter of law constitute unreasonable conduct under the circumstances. Accordingly, the plaintiffs’ claim based upon the shortstop’s errant throw does not constitute a legal basis for relief.”

In yet another softball injury case, an Arizona appeals court applied the general negligence standard but remarked that there might be limits. In Estes v. Tripson, the court noted that this did not necessarily mean that the case must go to a jury. The courts retain authority to set “outer limits” as to questions of negligence or unreasonable risks. Stating that the defendant owed the plaintiff “the common duty to act reasonably in the light of foreseeable and unreasonable risks,” the court noted that “[n]ot every foreseeable risk is an unreasonable risk . . . [and] whether a risk is unreasonable depends substantially on the context.” Under the facts of that case, the court found that the defendant ran the bases in an ordinary and typical manner, and that there was no evidence that he did anything as a base runner to increase or exacerbate the inherent risks that the plaintiff faced as a catcher in a softball game. The Court concluded that the defendant “simply did not act negligently … did not breach a duty of reasonable care under the circumstances … [t]o hold otherwise would unreasonably chill participation in recreational sports.”

b. The Restatement’s use of the ordinary negligence standard

In a major development the Restatement of Torts 3d adopted the ordinary negligence standard as the proper standard to be used in the adjudication of sports injuries. This represented a major shift from the Restatement of Torts 2d, which specifically recognized implied assumption of the risk:

**Implied Assumption of Risk**

1. Except as stated in Subsection (2), a plaintiff who fully understands a risk of harm to himself or his things caused by the defendant’s conduct or by the condition of the defendant’s land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

2. The rule stated in Subsection (1) does not apply in any situation in

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130 *Id.*
132 *Id.* at 1366.
133 *Id.* at 1367.
which an express agreement to accept the risk would be invalid as contrary to public policy.

The Restatement 3d discards the implied assumption of the risk argument in favor of ordinary negligence. The revised Restatement still recognizes express assumption of risk: “Unless barred by the substantive law governing the claim or other independent body of law, a contract between the plaintiff and another person to absolve the person from liability for future harm bars the plaintiff’s recovery from that person for the harm.”

But comment i clearly rejects implied assumption of risk:

Implied assumption of risk distinguished. This section does not apply when a plaintiff’s conduct merely demonstrates that the plaintiff was aware of a risk and voluntarily confronted it. That type of conduct, which is usually called implied assumption of risk, does not otherwise constitute a defense unless it constitutes consent to an intentional tort. See Comment f. Thus, the rule stated in this section rejects and replaces Restatement Second, of Torts §§496C-G. A plaintiff’s conduct in the face of a known risk, however, might constitute plaintiff’s negligence and therefore result in a percentage reduction of the plaintiff’s recovery. See §3, Comment c.

Thus, a player’s entering a game might constitute negligence and thereby reduce the plaintiff’s recovery, but it does not constitute implied assumption of risk.

In the article A Symposium On Tort And Sport: Sports, Assumption of Risk, and the New Restatement,134 Professor William Powers addressed the question of assumption of the risk in the sports context and explained the rationale underlying the revised Restatement. Powers acknowledged the temptation to find that participants in sports voluntarily assumed the risk of harm. Nevertheless, in the views of the authors of the Restatement, the law has evolved in such a way that the old doctrine is no longer needed. Instead, the advent of comparative negligence permits the fact finder to incorporate the question of the plaintiff’s negligence into its decision. “Abandoning implied assumption of risk as an independent defense does not mean that a plaintiff’s actual knowledge or a voluntary decision is irrelevant. A plaintiff who acts unreasonably in the face of a known danger may be more culpable than a plaintiff who is only inadvertent.”135

According to Powers, the ordinary negligence standard, since the advent of comparative negligence, incorporates the plaintiff’s state of mind and his relative understanding of the risks involved in his pursuit of the activity. The jury should take into account the knowledge of a plaintiff who acts unreasonably when confronted with a risk that he knows to be dangerous and assign culpability accordingly.

134 38 Washburn L.J. 771 (1999)
135 Id. at 775.
c. The ordinary negligence system would not succeed in Texas.

One cannot doubt that the beauty of the ordinary negligence scheme lies in its purity. A court need not examine the activity in which the plaintiff was engaged at the time of his injury. Nor would it be required to undertake a separate examination of the state of mind of the defendant. Under the ordinary negligence standard, a plaintiff with full knowledge of the sport would presumably act differently than that of a plaintiff whose behavior in the same setting was less blame-worthy. The focus shifts from the activity to the act that caused the injury.

Similarly, the defendant’s behavior would be judged on the basis of what a defendant under the same or similar circumstances would have believed to be the situation. In the situation in which a defendant would reasonably expect a party to have the knowledge that other parties in that situation have, his comparative responsibility for the negligence would be lessened.

An example would be the person injured in a touch football game. The defendant in such an arena would be entitled to rely on the belief that parties playing touch football would still be exposed to occasional incidental contact. A defendant facing a lawsuit arising out of such incidental conduct would be entitled to rely on his subjective belief that players would understand that touch football involved touching.

Where then lies the problem with the ordinary negligence scheme? Wouldn’t the purity of the ordinary negligence be more attractive to the judicial mind than the rebirth of a doctrine that should have been buried thirty years ago?

Application of the ordinary negligence scheme in the sports context, in Texas, fails for two reasons, one technical and one emotional.

The first reason, the technical one, is that a pure system of ordinary negligence fails to discourage frivolous lawsuits. It undermines the possibility of adjudication at an early stage, in favor of a full-blown trial on the merits. The ordinary negligence standard attracts the plaintiff who believes that even the most non-negligent of defendants would prefer to settle at an early stage rather than engage in a trial on the merits. Even the availability of alternate dispute resolution or other such trial alternatives does not ameliorate the negatives. Why should a defendant be forced to endure the costs, both financial and emotional, of discovery, pleadings, and motions if in fact they have zero negligence?136

Another reason exists for the failure of the ordinary negligence scheme

136 Of course, the purist’s response to such an argument is that the problem lies not with the use of the ordinary negligence scheme in the sports context, but instead with a tort system that allows such abuse of the process. If in fact a special negligence standard is needed to address the sports injury context, then perhaps the tort system is broken.
in the sports context. One can easily find in the sports-injury cases a common thread: a psychological bar that courts and juries wrestle.

On the one hand, it is easy to say that the tort system should be allowed to do its work, that a jury will adequately assess the culpability of the defendant, and that the public can rely on the judicial system to eliminate the frivolous suits that sneak through the works.

But that sort of thinking faces stiff resistance in Texas. Recall the Farley and Connell decisions: strip away the context and one is left with two cases involving injuries on horseback. And yet, the court system provides two very different results. One plaintiff is entitled to recover for his injury, the other faces a complete bar to his suit. Now, reintroduce the context: work versus sport, pay versus play, cowboying versus polo.

Clearly, a plaintiff involved in what many would regard as a frivolous activity seems to offend many. It is the case of the unjust plaintiff, the guy who should have known what he was getting into. A person driving his car to work has to be aware that every year thousands and thousands of drivers are killed and injured in automobile accidents. His chances of injury are much, much more than the average golfer playing a Sunday morning round. But no court would be willing to say that the driver assumed the risk. Nor would any court find that the driver, solely through his use of the highway system, impliedly reduced the standard of care for his fellow drivers.

It is the recreational aspect of the activity that drives the result, not the plaintiff’s ‘awareness’ of risk. It is folly to ignore this important psychological barrier. For this reason, jurors are simply unlikely to accept the pure negligence standard, despite its many attractive features.

C. The reckless-intentional standard is not an appropriate standard for Texas

The reckless-intentional standard fails in three respects: it is confusing, it is costly, and it is contrary to the wishes of the Texas Supreme Court.

1. The reckless-intentional standard is confusing

One should now realize that assumption of the risk carries with it multiple and varied meanings. Therefore, building yet another doctrine on top of assumption of the risk makes little sense. Therefore, the continued existence of assumption of the risk in the guise of the competitive sports doctrine, or the reckless-intentional liability standard, only serves to confuse litigants, their attorneys, and the court system. “One reason courts abandoned the implied assumption of risk is that it duplicates other doctrines, such as plaintiff’s negligence and the scope of a defendant’s duty. If the plaintiff’s conduct was reasonable, it makes little sense to penalize it under the doctrine of plaintiff’s negligence.”\footnote{Powers, 38 Washburn L.J. at 773.}
The concept is doubly confusing in Texas because, at the present time, the doctrine born as the ‘competitive contact sports doctrine’ seems to require neither contact nor competition. As seen above, at least one court has distinguished the Connell case on the basis of non-contact. Yet, one can easily see that there is just as much room for injury in ‘non-competitive’ sports as there is in the ‘competitive’ arena. Are courts really proposing that the risk of injury in such ‘non-competitive’ sports as skydiving or skateboarding are substantially less? Why would a participant in an activity that is not competitive but arguably riskier be entitled to maintain a cause of action?

Furthermore, continued use of the phrase assumption of the risk sounds too much like the contractual defense. One wonders if the defense is used in the manner. Is implied assumption of the risk just cover for asserting that there was some sort of implied agreement of waiver of a cause of action? Or is it being used to imply an express acknowledgment of the risks of engaging in the activity and the accompanying possibility of injury occurring during the incident activity?

The phrase is confusing because in actuality the competitive sports doctrine does not evaluate the plaintiff’s assumption of risky activity. The assumption of the risk doctrine assumes the active act of evaluating the risk, acknowledging the risk, and engaging in the activity. But under the present analysis, mere participation implies the plaintiff has taken each of those steps.

2. **The reckless-intentional standard is costly**

The reckless-intentional standard is costly. The standard requires both a thorough examination of the facts and a subjective evaluation of the mindset of the defendant. Use of the reckless-intentional standard prevents efficient resolution of cases at the summary judgment level because it requires a subjective determination of the mindset of the defendant.

Use of the reckless-intentional requires discovery and depositions. Expert witnesses may be required. Courts are less likely to issue summary judgment because of the ability to create a fact issue as to what is reckless and what is merely negligent.

3. **The reckless-intentional standard is contrary to the wishes of the Texas Supreme Court**

The reckless-intentional standard is contrary to the wishes of the Texas Supreme Court. On three different occasions, the Texas Supreme Court has criticized the doctrine and proposed alternatives. Unfortunately, the case has not yet arisen that would allow the Texas Supreme Court to speak definitively and therefore the state limps along with a compromised, criticized standard.
One must admit that the reckless-intentional standard, known in Texas as the competitive sports doctrine, is in fact simply assumption of the risk under another guise. The philosophical basis for placing the burden of establishing reckless or intentional conduct on the part of the defendant is grounded in the belief that the plaintiff’s participation in the activity amounted to a consent to waive any standard of care on the part of the defendant, other than not to injure him recklessly or intentionally. That consent is implied because of the presumed willingness of the plaintiff to engage in a dangerous activity, in which he is aware of the likelihood of injury.

The Texas Supreme Court stated in *Farley* that assumption of the risk defense should not be used in any context where the plaintiff has not expressly waived his right to recover. Continued use of the reckless-intentional standard ignores this decision.

**A PROPOSED SOLUTION**

A. A proposed standard

This article proposes the use of the inherent risk standard. Stated simply, the inherent risk standard states that both co-participant and nonparticipant defendants owe no duty to protect a participant from risks inherent in the sport or activity in which he has chosen to take part.138

B. A proposed test

In the interest of maintaining consistency and encouraging adoption, I propose a modified form of the “inherent risk” standard. I would change the statement of the standard as follows. I would have the court ask: “Did the injury-causing risk fall within the ambit of risks for that particular sport or recreational activity?” The defendant does not owe a duty to protect the plaintiff from any of the risks that fall within that scope.

Every sport carries with it a certain risk of injury. Whether the sport or recreational activity involves contact or not, whether it is conducted in a league setting or informally between friends, the sport will carry with it a certain amount of risk. Indeed for some activities, the joy of participation in the sport is based in large part on the risk involved. The sport or activity will encompass a certain range of conduct engaged in by those parties involved in the activity.

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138 In *West v. Sundown Little League of Stockton, Inc.*, 96 Cal. App. 4th 351, 116 Cal.Rptr.2d 849, 854-55 (Cal. Ct. App. 2002), the court applied the inherent risk standard in a suit by an injured little league player against local and national little league organization and coaches. In *Scott v. Pac. W. Mountain Resort*, 119 Wash. 2d 484, 834 P.2d 6, 13-14 (Wash. 1992), the court stated quite plainly, “a defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.”
The purpose of the proposed test is to determine whether defendant owed the plaintiff a duty. The preface of the revised standard is that for every sport or recreational activity there is an ambit of risks involved in participation. The ambit of risks varies depending on the sport. Obviously golf would encompass certain risks while football would carry other risks. Any golf game carries with it the danger of being struck by an errant golf shot. Every football game carries with it the risk of a turned ankle or broken arm.

At the same time, there are a world of risks that lie outside the ambit of risks. The risk that a sinkhole will open up beneath the football players at issue falls outside the ambit of risk that surrounds participation in a football game. For these risks, the ordinary negligence standard would apply.

The court may determine the proper liability standard — no duty or ordinary negligence — by answering the question of whether the injury-causing risk fell within the ambit of risks for that activity. The test places upon the trial judge, rather than the jury, the burden of determining whether the ambit of risks associated with the activity encompassed the particular risk that caused the particular harm to the particular plaintiff.

Determination of that question is a matter of law. In doing so, the court may take into account considerations such as the nature of the sport, the history of the sport, deterrence of future harm, moral blame, and any other policy issues at stake that recognition of a duty might create.

The parties can rely on a threshold determination by the judge without the need to engage in lengthy and expensive discovery. If the court determines that the risk fell within the ambit of risks, then the court is to apply the no-duty standard. If, however, the injury-causing risk falls outside the ambit or risk associated with that particular activity, then the ordinary negligence standard will apply.

The analysis proposed herein focuses on the scope of the legal obligation owed by defendant to plaintiff. The proposed test requires that the fundamental scope-of-liability issue to be resolved is whether under all the circumstances a defendant should or should not owe a duty to to the plaintiff. The test places upon the trial judge, rather than the jury, the burden of determining whether the scope of the legal duty owed by defendant to the plaintiff encompassed the particular risk that caused the particular harm to the particular plaintiff.

Under the proposed test, the court may take into account considerations such as the deterrence of future harm, moral blame, and any practical (administrative or otherwise) difficulties recognition of a duty might create. Foreseeability of harm would be relevant but not the beginning and end of the inquiry. If the judge finds that the harm-producing risk fell within the scope of the risks associated with, or inherent to, that sport, then his
analysis is complete. If instead the court finds that the risk that caused plaintiff’s injury fell outside the ambit of risks associated with the sport, then the court should consider the case subject to ordinary negligence rules.

C. Conclusion

The inherent risk standard carries with it three distinct advantages. First, it removes any trace of the primary implied assumption of the risk doctrine. For too long the doctrine has far outlived it usefulness and struggles on in a different guise. The doctrine should have been abandoned long ago; no excuse exists for its continued use. Second, the ambit of risk standard provides an objective test. It removes the subjective element of the reckless-intentional standard. By removing the subjective test, the new standard provides for a speedy resolution of cases arising out of injuries in the sports or recreational activity test. No inquiry need by made into the mindset of the defendant. The court may instead make an early determination, based only on a recitation of the facts at the summary judgment level, as to whether the case should proceed. The parties will be spared the heightened costs of protracted litigation. The judicial system will not be burdened with cases that could be resolved quickly.

The inherent risk standard provides consistency. Courts will no longer be required to determine whether a certain sport or activity is competitive or not, or whether it involves contact. These distinctions are false and fail to adequately distinguish between activities that may carry a similar amount of risk but which occur in different arenas. The court system need no longer make determinations of whether golf is like polo is like parasailing.

The inherent risk standard provides simplicity. The threshold question for any court faced with a negligence claim is the establishment of a duty. The duty question is a matter of law. The ambit of risk test is easily incorporated into standard duty analysis. Such duty analysis in a sports or recreational activity case would begin with the question of whether the injury-causing risk fell within the ambit of risk of that activity. If so, there is no duty and the court may end its analysis.

Finally, as discussed above, adoption of the inherent risk standard reflects the will of the Texas Supreme Court. The court has criticized the reckless-intentional standard at least three times. The reckless-intentional standard, as spread across the appellate court system is not applied evenly or for the same reasons. It carries with it various names, various rationales, and various applications. For this reason, above all else, the Texas Supreme Court should act to resolve this matter.