

AVILA V. CITRUS COMMUNITY COLLEGE DISTRICT: SHAPING THE CONTOURS OF IMMUNITY AND PRIMARY ASSUMPTION OF THE RISK

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I. INTRODUCTION

Jose Avila, a student-athlete, played on Rio Hondo Community College's baseball team, the Roadrunners.¹ In January 2001, the Roadrunners played a preseason game at Citrus Community College.² During the game, a Roadrunners' pitcher hit a Citrus College player. When Avila came to bat the following inning, he was struck in the head by a pitch thrown by Citrus College's pitcher.³ The impact cracked Avila's batting helmet.⁴ Even though Avila felt dizzy and was in pain, Rio Hondo's manager instructed him to go to first base.⁵ After Avila complained to him, Rio Hondo's first base coach instructed Avila to stay in the game.⁶ Avila felt pain and numbness after he took second base.⁷ After a player on the opposing team yelled from the dugout that Rio Hondo needed a pinch runner, Avila went to the dugout.⁸ No one attended to Avila's injuries. As a consequence, Avila suffered serious personal injuries.⁹

Although Avila sued several entities, only his claims against Citrus Community College District (the District) were before the California Supreme Court. Avila alleged the District acted negligently in failing to provide him with medical care, failing to effectively supervise the pitcher who threw the

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1. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 385 (Cal. 2006).

2. *Id.*

3. *Id.* at 385-86.

4. *Id.* at 386.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

ball that struck Avila, failing to supply Avila with equipment to protect him from a head injury, and failing to provide supervisory personnel to prevent reckless and retaliatory pitching.¹⁰ Avila also asserted the District negligently failed to train and supervise personnel to provide medical care to injured players and conducted an illegal game in violation of baseball rules intended to protect players like him.¹¹

In dismissing Avila's action against the District, the trial court sustained the District's demurrer that it was shielded from liability by virtue of a statute affording tort immunity to public entities and the absence of a duty of care to Avila.¹² A divided court of appeals reversed the lower court decision.¹³ The majority ruled that the statute on which the District relied should not be interpreted to extend tort immunity to protect institutions from claims predicated on an institution's negligent supervision of public school student-athletes.¹⁴

The California Supreme Court granted the District's petition for review in order to resolve a split in the California Courts of Appeal. The court was called upon to determine the contours of the duty of care that colleges owe to student-athletes. In addressing this issue, the court first had to determine whether a statute that grants immunity to public entities for "injuries sustained during 'hazardous recreational activities'" precluded recovery against the District.¹⁵ Assuming statutory immunity did not shield the District from liability, the court was also called upon to determine whether the District owed a duty of care to a visiting player.¹⁶ The court's analysis of the duty of care issue required that it also critically assess the extent to which assumption of the risk exculpates institutions from liability to student-athletes. This article examines the California Supreme Court's resolution of the foregoing issues.

II. STATUTORY TORT IMMUNITY

A. *Overview of Governmental Immunity*

The blanket immunity from tort liability for states and their agencies

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 385.

16. *Id.*

provided by sovereign immunity¹⁷ has been statutorily waived in almost all the states.¹⁸ In place of the absolute shield of sovereign immunity, tort claims acts and other statutes have been enacted that retain the state's immunity from tort liability for specified circumstances.¹⁹ Although these immunity statutes vary, they generally immunize governmental agencies from tort liability if the alleged negligent act occurred in a state agency's performance of a governmental function.²⁰

Governmental immunity has been extended to immunize public colleges and universities and their employees from liability for negligent acts. In providing immunity to public colleges and universities, many courts generally adhere to the proposition that the governmental agency has acted in the performance of a governmental rather than a proprietary function.²¹ One court explained that case law has established that an agency performs a governmental function when it engages in "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."²² In contrast, a proprietary function is an activity that is conducted "primarily for the purpose of producing a pecuniary profit . . . [and not] normally supported by taxes or fees."²³

As intimated above, courts afford qualified immunity from tort liability to government employees and officers for discretionary acts or functions – defined as acts or functions that involve the "exercise of discretion and judgment, or personal deliberation, decision, and judgment."²⁴ Immunity from tort liability is not available for an officer or employee's negligent

17. The policy behind the sovereign immunity doctrine is that "if the public is able to tie up the government with potential lawsuits, then the government could not function when its every action would be subject to litigation." Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7, 67 (1996).

18. DAN D. DOBBS, *THE LAW OF TORTS* 716 (2000).

19. *Morales v. Town of Johnston*, 895 A.2d 721, 727-28 (R.I. 2002) (noting that after sovereign immunity was abolished, legislation was enacted granting immunity in certain instances or by courts); DOBBS, *supra* note 18; STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *THE AMERICAN LAW OF TORTS* 49-50 (2003). Such statutes have been passed in each of the fifty states. *See id.*; Andrew F. Beach, *Dying to Play: School Liability and Immunity for Injuries that Occur as a Result of School-Sponsored Athletic Events*, 10 SPORTS LAW. J. 275, 279 (2003).

20. Beach, *supra* note 19. Governmental immunity is derived from the common law concept of sovereign immunity which bars suits against a state agency unless it has consented or waived its immunity. *Yanero v. Davis*, 65 S.W.3d 510, 517, 519 (Ky. 2002).

21. Beach, *supra* note 19.

22. *Harris v. Bd. of Regents*, 558 N.W.2d 225, 228 (Mich. Ct. App. 1996) (quoting M.C.L. § 691.1401 (f); M.S.A. § 3.996(101)(f)).

23. *Id.* at 230.

24. *Yanero*, 65 S.W.3d at 522; SPEISER, KRAUSE & GANS, *supra* note 19, at 75-76.

performance of a ministerial act. (i.e., an act that “requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts”).²⁵ In other words, the alleged act must involve policy making in order for immunity to be available as a defense.²⁶

Where a statute immunizes public colleges and universities from tort liability, the prevailing view is that a public college’s operation of its intercollegiate athletics program falls within the scope of such a statute.²⁷ In the contexts of both intercollegiate and interscholastic sports, statutes granting immunity to colleges and universities generally have been extended to immunize coaches and other athletic personnel from tort liability if the alleged negligence involved a discretionary function.²⁸ In a few instances, states have gone further and enacted legislation that provides specific immunity in the sports context. A Rhode Island statute grants immunity from negligence liability to persons who provide services as coaches in interscholastic and intramural sports programs organized or conducted pursuant to the rules and regulations of the Rhode Island interscholastic league.²⁹ Before immunity is extended, however, each of the above instances assumes the existence of an applicable immunity statute of some type.

As the foregoing discussion suggests, often the resolution of disputes regarding the availability of immunity as a defense turns on whether the

25. *Yanero*, 65 S.W.3d at 522; SPEISER, KRAUSE & GANS, *supra* note 19, at 77-78.

26. *McCaskey & Biedzynski*, *supra* note 17, at 74.

27. *See, e.g., Harris*, 558 N.W.2d at 228 (finding that because the operation of an intercollegiate athletics program involved a governmental activity, the state university was entitled to governmental immunity). *But see Brown v. Wichita State Univ.*, 540 P.2d 66, 88 (Kan. 1975) (holding that intercollegiate football is a commercial activity and as such constitutes a proprietary function).

28. *See, e.g., Prince v. Louisville Mun. Sch. Dist.*, 741 So. 2d 207, 211-12 (Miss. 1999) (holding that the football coach, carrying out discretionary functions, was entitled to immunity from tort liability for injuries sustained by a student-athlete during football practice); *Quinn v. Miss. State Univ.*, 720 So. 2d 843, 849 (Miss. 1998) (holding that instructor who hit plaintiff with baseball bat during a hitting demonstration at a baseball camp was entitled to qualified immunity since the act involved discretionary rather than ministerial function); *Lennon v. Petersen*, 624 So. 2d 171, 174 (Ala. 1993) (holding that the soccer coach and university trainer were entitled to qualified immunity from negligence liability where an athlete alleged they failed to recognize his injuries and provide adequate treatment; coach acted within his discretionary functions in determining extent of player's injuries).

29. *See Morales v. Town of Johnston*, 895 A.2d 721, 725 (R.I. 2002) (citing to General Laws 1956 § 9-1-48(b)). The Rhode Island statute does not extend immunity where the alleged tortious conduct was “committed in willful, wanton, or reckless disregard for the safety of the participants.” *Id.* Other illustrations granting immunity from negligence liability in sports include: MISS. CODE ANN. § 95-9-3 (volunteers and sports officials are afforded immunity from negligence liability); GA. CODE ANN. § 51-1-20 (a) (granting immunity to employees of nonprofit associations that conduct or sponsor sports programs).

negligent act occurred in an agency's performance of a governmental versus a proprietary function,³⁰ an official's exercise of a discretionary versus a ministerial function,³¹ or whether the facts of a particular case bring it within the parameters of one of the exceptions to the governmental immunity doctrine. Each of these scenarios presupposes, however, statutory authority to extend immunity to the agency or officer alleged to have committed the negligent act that injured the plaintiff.

B. Analysis of Avila

The issue of the availability of governmental immunity to the District in *Avila v. Citrus Community College District*³² invoked just such a question. The California Supreme Court was asked to determine whether a statute that granted immunity to owners of recreational land could be relied on by the District to exculpate it from alleged tort liability to Avila.³³ Like other courts asked to determine whether statutory authority existed to immunize state agencies and officials, the resolution of this question rested largely on statutory construction. Thus, the court was required to construe the relevant statute and determine whether the circumstances of the case sub judice brought the defendant's alleged negligent acts within the ambit of the statute's grant of immunity from tort liability.

The statute at issue, Section 831.7 of California Government Code (Section 831.7) entitled *Hazardous Recreational Activities*, immunizes public entities and employees from liability for injuries caused to persons engaged in the pursuit of hazardous recreational activities.³⁴ As to what constitutes a hazardous recreational activity, the statute states rather vaguely that "'hazardous recreational activity' means a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or spectator."³⁵

30. See, e.g., *Harris*, 558 N.W.2d at 228 (asked to determine whether acts of the university involved its governmental or proprietary function); *Brown*, 540 P.2d at 88 (asked to determine whether acts of the university involved its governmental or proprietary function).

31. See, e.g., *Prince*, 741 So. 2d at 211-212; *Quinn*, 720 So. 2d at 849 (court rules that instructor who hit plaintiff with baseball bat during a hitting demonstration at a baseball camp was entitled to qualified immunity since act involved discretionary rather than ministerial function); *Lennon*, 624 So. 2d at 174 (court holds soccer coach and university trainer entitled to qualified immunity from negligence liability where athlete alleged they failed to recognize his injuries and provide adequate treatment; coach acted within his discretionary functions in determining extent of player's injuries).

32. 131 P.3d 383, 385 (Cal. 2006).

33. See *id.*

34. CAL. GOV'T CODE § 831.7 (2006).

35. *Id.* § 831.7(b).

Thereafter, Section 831.7 enumerates certain activities as constituting hazardous recreational activities, but apart from the examples fails to further define what constitutes a “recreational activity.” It is this ambiguity that the California Supreme Court was asked to resolve.

The *Avila* court’s analysis of Section 831.7 was not the first occasion on which California courts had wrestled with determining what types of activities fall within the statute’s scope. Indeed, *Avila* provided the California Supreme Court with an opportunity to resolve a conflict among the California Courts of Appeals regarding what constitutes a recreational activity under Section 831.7. Specifically, California intermediate courts had reached disparate holdings on whether the term “recreational,” as used in the statute, was intended to include intercollegiate and interscholastic sports.

In *Acosta v. Los Angeles Unified School District*,³⁶ a gymnast suffered an injury during the off-season while practicing under the supervision of his high school’s assistant gymnastics coach.³⁷ The court of appeals ruled that Section 831.7 did not immunize the school district from negligence liability since the legislature did not intend to include school sponsored or supervised activities within the statute’s definition of recreational activities.³⁸ The court reasoned that including the activities at issue in the case before it within the parameters of Section 831.7 would immunize school districts from a range of extracurricular sports activities.³⁹ This, according to the court, would radically undermine a long established rule that imposes a duty on school districts to exercise reasonable care in supervising students in their charge.⁴⁰ The court reasoned it was unwilling to make such a “major revision of California law with respect to school district tort liability”⁴¹ unless the legislature clearly expressed its intention to do so.

Similarly, in *Iverson v. Muroc Unified School District*,⁴² where a soccer player was injured during a physical education class soccer game, the court refused to extend Section 831.7 as a defense to the plaintiff’s negligence claim since the student’s injury did not occur from participation in a recreational activity.⁴³ Like the *Acosta* court, the *Iverson* court was influenced by

36. 31 Cal. App. 4th 471 (Cal. Ct. App. 1995).

37. *See id.*

38. *Id.* at 479.

39. *Id.* at 476.

40. *Id.* at 477.

41. *Id.*

42. 32 Cal. App. 4th 218 (Cal. Ct. App. 1995).

43. *Id.* at 225. Based on the court’s analysis of the statute, including its legislative history, it found no indication that the Legislature intended to include school sponsored activities within the term recreational and thus within the ambit of the statute. *Id.*

established legal principle imposing a general duty on school districts to supervise children on school grounds. The court of appeals explained that constructing Section 831.7 to include injuries sustained on school grounds during a physical education class would contradict this well established rule of law. Quoting *Acosta*, the court reiterated that such a construction of Section 831.7 would amount to a “major revision of California law with respect to school district tort liability.”⁴⁴ Turning to the statute’s legislative history, the *Iverson* court explained that Section 831.7’s history evinced a desire by the legislature to immunize public entities which desired to keep public lands open to recreational users but wanted some protection against users of public property engaged in hazardous activities such as hang gliding and rock climbing.⁴⁵

In *Ochoa v. California State University, Sacramento*,⁴⁶ however, a California intermediate court construed Section 831.7 to immunize a public university from negligence liability to a student-athlete injured during an intramural soccer game. Distinguishing *Acosta* and *Iverson*, the *Ochoa* court emphasized the absence of a duty of care on the part of the university to supervise the intramural soccer game, since plaintiff was an adult taking part in a voluntary activity.⁴⁷ Based on this distinction, the court concluded that plaintiff’s participation in an intramural soccer game constituted a hazardous recreational activity under Section 831.7.⁴⁸

Against this backdrop, the *Avila* court considered whether Section 831.7 immunized the District from liability for plaintiff’s injuries. It looked to the statute’s legislative history, precedent interpreting Section 831.7, and cases involving the liability of intercollegiate and interscholastic institutions to their students for assistance in resolving what it characterized as ambiguous statutory language.⁴⁹ Turning first to the legislative history, the California Supreme Court found that the California Legislature enacted Section 831.7 to resolve uncertainty as to whether a premises liability statute that granted qualified immunity to landowners against negligence claims by recreational users of their lands extended to public entities. The court explained that Section 831.7’s legislative history revealed that when the then proposed statute was introduced, its supporters were concerned that public entities should be afforded qualified immunity because it was virtually impossible to prevent

44. *Id.* at 227 (quoting *Acosta*, 31 Cal. App. 4th at 477).

45. *Id.* at 223-24.

46. 72 Cal. App. 4th 1300 (Cal. Ct. App. 1999).

47. *Id.* at 1308.

48. *Id.*

49. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 386, 389 (Cal. 2006).

users from coming onto public lands and engaging in hazardous activities.⁵⁰ As a part of its historical analysis of Section 831.7, the court looked to a Senate Committee's analysis of the then proposed bill which revealed its focus was on recreational users who might injure themselves during hazardous unsupervised activities and attempt to attribute their injuries to conditions of public property. The primary purpose of [the bill] is to prevent the hang glider or rock climber from suing a public entity when that person injured himself in the course of the activity.⁵¹

Based on its review of Section 831.7's legislative history, the court concluded that "[n]othing in the history of the measure indicates the statute was intended to limit a public entity's liability arising from other duties, such as any duty owed to supervise participation in particular activities."⁵²

The court's review of precedent interpreting Section 831.7 also supported its conclusion that the statute was not intended to bring supervised activities at colleges and high schools within the scope of recreational activities. The court explained that consistent with the legislative history of the statute, courts applying it had limited its applicability to circumstances involving injuries sustained during "voluntary, unsupervised, unsponsored activities."⁵³

Finally, the *Avila* court turned its attention to the body of law that establishes certain duties that public high schools and universities owe to their students, and found it supported a more limited construction of Section 831.7. Like the courts of appeals in *Iverson* and *Acosta*, the California Supreme Court acknowledged the existence of a body of law that imposes certain duties upon colleges and universities when their student-athletes are engaged in practice and games.⁵⁴ Thus, a tension exists between the immunity language of Section 831.7 and the well-established body of law regarding the obligations institutions owe to their student-athletes.⁵⁵ The court avoided expressly addressing this tension by concluding that the tension could be resolved by "acknowledging that school-sponsored and supervised sports activities are not 'recreational' in the sense intended by the statute, and thus Section 831.7 does not apply to immunize public educational entities from liability to students for injuries sustained during participation in such activities."⁵⁶

Turning again to the legislative history of Section 831.7, the court

50. *Id.* at 388.

51. *Id.* at 389.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 390.

56. *Id.*

concluded that the legislature intended to bring voluntary play within the definition of recreational activity rather than the types of supervised athletic events at issue in the case before it.⁵⁷ The court added that given that sports in the school context are an integral part of public education and thus a part of the educational mission of schools, they should not be characterized as recreational in the sense intended by the statute.⁵⁸ Based on the foregoing reasoning, the court concluded that “school sports in general, and organized intercollegiate games in particular, are not ‘recreational’ within the meaning of the statute.”⁵⁹

The court’s decision in refusing to extend Section 831.7 is sound. First, its construction of the statute is supported by the legislative history. In this regard, the ruling restricts the application of the recreational use statute to those activities and persons for which the legislation was enacted. A similar construction of a recreational use statute was recently reached by the Rhode Island Supreme Court. In *Morales v. Town of Johnston*,⁶⁰ the defendant town sought to use a recreational use statute to shield it from liability for injuries to a student-athlete suffered during a soccer game on a city owned field.⁶¹ In refusing to grant immunity to the defendant pursuant to Rhode Island’s recreational use statute, the court concluded that the “clear intent of the recreational use statute is to shield landowners against liability to those who come upon the owner’s land for recreation; a student athlete participating in an organized sport on a designated athletic field does not fall within its provisions.”⁶²

The *Avila* court’s ruling also avoids undermining a body of law that imposes duties on colleges and universities to their student-athletes. Like the *Avila* court, the Rhode Island Supreme Court in *Morales* reasoned that to extend immunity under these circumstances would derogate the duties that towns and school districts owe to their student-athletes.⁶³ Finally, the approach in *Avila* conforms to the tendency of courts generally, to strictly construe, against a governmental entity, statutes granting immunity from tort liability.⁶⁴

57. *Id.*

58. *Id.*

59. *Id.*

60. 895 A.2d 721 (R.I. 2006).

61. *Id.*

62. *Id.* at 730.

63. *Id.* at 730-31.

64. SPEISER, KRAUSE & GANS, *supra* note 19, at 33 (where common law immunity has been abolished and then restored in a more limited fashion, courts construe the legislation against the entity claiming immunity).

III. DUTY OF CARE AND ASSUMPTION OF THE RISK

A. Overview of Assumption of the Risk

The District based its demurrer on the additional ground that it owed no duty of care to Avila.⁶⁵ Given its ruling that the recreational use statute did not immunize the District from tort liability, it was incumbent upon the *Avila* court to assess this alternate ground for dismissal of plaintiff's complaint. The court began its analysis of the District's no-duty defense by pointing out that any assessment of duty in the sports context necessarily involved exploration of assumption of the risk since it is intertwined with the question of duty of care.⁶⁶ The relationship between duty and assumption of the risk is an appropriate point of departure for exploring the California Supreme Court's holding that the District breached no duty of care to Avila.

Like sovereign immunity, the assumption of risk defense has evolved since its inception in the nineteenth century.⁶⁷ Although assumption of the risk defies easy characterization due to the confusion surrounding its use by courts and commentators, the traditional concept stands for the proposition that a "plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."⁶⁸ As the assumption of the risk defense evolved, it became connected to contributory negligence.⁶⁹ The demise of contributory negligence and the ascendancy of comparative negligence provided an important impetus for the continued evolution of the doctrine. Indeed, as noted by the South Carolina Supreme Court, "an overwhelming majority of jurisdictions that have adopted some form of comparative negligence have essentially abolished assumption of the risk as an absolute bar to recovery."⁷⁰

The evolution of assumption of the risk has not necessarily lessened the

65. *Avila*, 131 P.3d at 391.

66. *Id.*

67. Kenneth W. Simons, *Reflections on Assumption of the Risk*, 50 UCLA L. REV. 481, 485 (2002).

68. SPEISER, KRAUSE & GANS, *supra* note 19, at 636-37 (2003).

69. Simons, *supra* note 67, at 486. According to the Restatement (Second) of Torts, "the same conduct on the part of the plaintiff may thus amount to both assumption of the risk and contributory negligence, and may subject him to both defenses. . . . The great majority of the cases involving assumption of the risk have been of this type, where the defense overlaps that of contributory negligence. The same kind of conduct frequently is given either name, or both." RESTATEMENT (SECOND) OF TORTS § 496A cmt. (d) (1965)

70. *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 508 S.E.2d 565, 569 (S.C. 1998).

confusion surrounding the concept.⁷¹ One source of confusion relates to the terminology used by courts as they attempt to convey modern conceptualizations of the doctrine and harmonize it with comparative negligence. With the advent of comparative negligence, some courts have abandoned the terminology of assumption of the risk. In its place, courts substitute the terminology of no-duty or limited duty.⁷² Even when such is the case, however, the differences between assumption of the risk and the no-duty approach should not be overstated since assumption of the risk invariably remains an integral component of the no-duty analysis.⁷³ Other courts have eschewed the terminology of no-duty and assumption of the risk, and completely merged assumption of the risk into comparative negligence.⁷⁴ Some of these jurisdictions focus on the defendant's conduct and the "reasonableness of [the] risk the plaintiff chose to encounter."⁷⁵ As elaborated upon immediately below, yet other jurisdictions which categorize assumption of the risk into various component parts have merged only certain components of the doctrine into comparative negligence.⁷⁶

As noted by the California Supreme Court in *Knight v. Jewett*,⁷⁷ legislative and judicial adoption of comparative negligence made it "essential to differentiate between the distinct categories of cases that traditionally had been lumped together under the rubric of assumption of [the] risk."⁷⁸ An approach frequently used by some courts that recognize assumption of the risk, notwithstanding their recognition of comparative negligence, divides the defense into two broad categories: express and implied assumption of the risk.⁷⁹ Express assumption of the risk refers to circumstances where a

71. See Simons, *supra* note 67, at 495-96.

72. See, e.g., *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 225 n.9 (Mich. Ct. App. 2001) (stating that even though assumption of the risk has been abrogated in Michigan, it survives in the form of primary assumption of the risk); *Davenport*, 508 S.E.2d at 573-74 (recognizing the abolition of traditional assumption of the risk as an absolute bar but also recognizing primary assumption of the risk which focuses on duty).

73. Simons, *supra* note 67, at 499 (arguing the substantive differences between assumption of the risk and no duty seem slight).

74. See SPEISER, KRAUSE & GANS, *supra* note 19, at 652.

75. See generally Lura Hess, Note, *Sports and the Assumption of the Risk Doctrine in New York*, 76 ST. JOHN'S L. REV. 457, 469 (2002) (describing the approach taken by Arizona courts and discussing the varying approaches jurisdictions have taken to assumption of the risk including those states that have abolished it).

76. See, e.g., *Knight v. Jewett*, 834 P.2d 696, 703 (Cal. 1992) (merging secondary implied assumption of the risk into comparative negligence, but not primary assumption of the risk).

77. 834 P.2d 696.

78. *Id.* at 700.

79. See *Davenport*, 508 S.E.2d at 565 (providing thorough discussion of evolution of assumption of the risk, including the categories of the doctrine); SPEISER, KRAUSE & GANS, *supra* note 19, at

plaintiff, typically by contract, expressly agrees to accept the risk of harm associated with a defendant's conduct.⁸⁰ Implied assumption of the risk arises when a plaintiff "impliedly assumes those risks that are *inherent* in a particular activity."⁸¹

Courts will generally subdivide implied assumption of the risk into two categories: primary and secondary assumption of the risk. Primary assumption of the risk focuses not on whether the plaintiff voluntarily assumed a known risk, but on the question of duty.⁸² Did the defendant possess a duty to protect the plaintiff from the risk of harm resulting in injury?⁸³ This, in turn, requires an examination of the inherent characteristics of the activity involved.⁸⁴ Specifically, did the plaintiff implicitly assume those risks that are an inherent part of the activity allegedly resulting in plaintiff's injury?⁸⁵ If the risk causing the injury is an inherent part of the activity, the defendant owed no duty to the plaintiff, and therefore is not liable in negligence.⁸⁶ Where such a conclusion can appropriately be reached, primary assumption of the risk operates as a "complete defense."⁸⁷ As discussed below, what risks are considered an inherent part of the activity in question is critically important in determining the effect given to primary assumption of the risk in the sports context.

The affirmative defense of secondary assumption of the risk has a different focus. Assuming that a defendant owed a duty of care to the plaintiff, would a reasonably prudent person, "in the exercise of due care . . . have incurred the known risk and if he would, whether such a person in light

637-38.

80. See SPEISER, KRAUSE & GANS, *supra* note 19, at 637.

81. *Davenport*, 508 S.E.2d at 570. See also SPEISER, KRAUSE & GANS, *supra* note 19, at 637-38.

82. *Davenport*, 508 S.E.2d at 570 (primary assumption of the risk focuses on "the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff"); *Perez v. McConkey*, 872 S.W.2d 897, 902 (Tenn. 1994) (holding the same); *Knight*, 834 P.2d at 703 (also holding the same)

83. *Id.* See generally *Rees v. Cleveland Indians Baseball, Co., Inc.*, 2004 WL 2610531 at *2 (Ohio Ct. App. 2004) (finding that primary assumption of the risk is a principle that focuses on duty); *Davenport*, 508 S.E.2d at 565 (discussing the categories of assumption of the risk and concluding primary assumption of is another way of asking whether the defendant owed a duty to plaintiff).

84. See *Knight*, 834 P.2d at 704 (In describing the basis for primary assumption of the risk, the court states "the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.").

85. Timothy B. Fitzgerald, *The "Inherent Risk" Doctrine, Amateur Coaching Negligence, and the Goal of Loss Avoidance*, 99 NW. U.L. REV. 889, 902 (2005); Simons, *supra* note 67, at 487.

86. Fitzgerald, *supra* note 85, at 902-03.

87. *Id.* at 902.

of all the surrounding circumstances including the appreciated risk . . . have conducted himself in the manner in which plaintiff acted.”⁸⁸ In other words, a plaintiff knowingly encounters a risk under circumstances where the defendant owes a duty of care to him or her.⁸⁹ It is a defense much more akin to traditional notions of assumption of the risk since it is asserted after a prima facie showing that defendant owes a duty of care to the plaintiff.⁹⁰ Moreover, it may involve either reasonable or unreasonable conduct by the plaintiff.⁹¹ Under secondary assumption of the risk, the defendant and the victim may both be held responsible for a plaintiff’s injury.⁹² These features of secondary assumption of the risk connect it to, or in some jurisdictions integrate it into, comparative negligence and allows courts to allocate fault proportionally.⁹³

B. Applying Assumption of the Risk in the Sports Context

i. Spectators

The circumstances under which primary or secondary implied assumption of the risk either partially or totally absolve a defendant of liability to a plaintiff in sports related matters have spawned considerable litigation. Certain general rules of law have arisen from judicial decisions addressing the defense in sports related cases. Primary assumption of the risk, whether or not so identified by courts,⁹⁴ has been relied on to shield owners of sports facilities from liability to injured spectators. Thus, the prevailing principle is that “there is no legal duty to protect or warn spectators about the ‘common, frequent, and expected’ inherent risks of observing a sporting event such as being struck by flying objects that go into the stands.”⁹⁵ With respect to the role of knowledge, generally “adult spectators of ordinary intelligence” who are familiar with the sports at issue will be presumed to possess an awareness of

88. SPEISER, KRAUSE & GANS, *supra* note 19, at 638.

89. *Davenport*, 508 S.E.2d at 571.

90. *Id.*

91. *Id.*

92. Fitzgerald, *supra* note 85, at 902.

93. *Id.* See, e.g., *Knight v. Jewett*, 834 P.2d 696, 702-03 (Cal. 1992) (distinguishing primary and secondary implied assumption of the risk and merging the latter into the comparative fault regime).

94. See, e.g., *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700 (N.J. 2005) (discussed *infra* note 104).

95. MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & ROBERT C. BERRY, SPORTS LAW AND REGULATION: CASES, MATERIALS AND PROBLEMS 867 (2005) (quoting *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 551 (Pa. 1978). Accord *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 574 S.E.2d 246, 250-51 (Va. 2003).

the normal risk of watching a sport, such as baseball.⁹⁶ Another general rule that can be derived from the spectator cases is that while an owner may not owe a duty of care to spectators for inherent risks, the owner or facility operator must do nothing to enhance the risks that are inherent to a particular sport.⁹⁷

In *Romeo v. Pittsburgh Associates*,⁹⁸ a spectator at a baseball game suffered injury after being struck by a foul ball.⁹⁹ The court noted that in Pennsylvania assumption of the risk has been abolished and recast as the “no-duty” rule which incorporates the notion of assumption of the risk. The court concluded the no-duty rule was applicable “because the risk of being struck by a foul ball while sitting in the bleachers is exactly the type of ‘common, frequent, and expected’ risk inherent in a baseball game.”¹⁰⁰ Although couched in terms of the “no-duty” rule, the court applied what other courts would characterize as primary assumption of the risk in absolving defendant of a duty to plaintiff.

Before the “no-duty or limited duty rule” applies, however, the risk giving rise to the injury must be deemed to constitute an inherent part of the game. As described by one commentator, “[w]hen risks are divisible from the underlying activity, courts are reluctant to find them ‘inherent.’”¹⁰¹ Thus in *Jones v. Three Rivers Management Corp.*,¹⁰² the Pennsylvania Supreme Court adopted the no-duty rule in baseball spectator cases, but refused to apply it where a spectator was hit by a foul ball in an interior walkway of a stadium.¹⁰³ According to the court, openings in the interior concourse were “not an inherent feature of the spectator sport of baseball.”¹⁰⁴

96. See, e.g., *Thurmond*, 574 S.E.2d at 250-51.

97. MITTEN, DAVIS, SMITH & BERRY, *supra* note 95, at 869.

98. 787 A.2d 1027 (Pa. Super. Ct. 2001).

99. *Id.*

100. *Id.* at 1031.

101. Fitzgerald, *supra* note 85, at 903.

102. 394 A.2d 546 (Pa. 1978).

103. *Id.*

104. *Id.* at 551. Although the court did employ the terminology of primary assumption of the risk, a recent New Jersey Supreme Court addressed the inherent risk limitation in a case involving a fan who was injured by after being struck by a foul ball. *Maisonave v. Newark Bears Profl Baseball Club, Inc.*, 881 A.2d 700, 700 (N.J. 2005). At the time the injury occurred, plaintiff was purchasing a beverage from a vending cart located in the concourse of a minor league baseball stadium. *Id.* at 702-03. Although some vending carts were located in protected areas, the vending cart at which plaintiff was standing was not. *Id.*

The New Jersey Supreme Court, in a case of first impression in New Jersey, reaffirmed the general rule regarding injuries suffered by fans while they are in the stands. “It would be unfair to hold owners and operators liable for injuries to spectators in the stands when the potential danger of

A rationale articulated for the limited or no-duty rule in sports spectator cases is the protection of consumer preference. Not imposing a duty on owners for risks inherent in the game promotes allowing owners to construct facilities that enhance consumer choice. Consumers may elect to sit in protected seats or find seats in unprotected areas where their view may be unobstructed and they can become more intimately involved in the particular game.¹⁰⁵ Another rationale articulated by courts has ties to assumption of the risk. Courts reason that owners should not be held liable for injuries to spectators resulting from risk inherent in the game of which spectators are aware when they attend a sporting event.¹⁰⁶

ii. Participants

The significant effect that assumption of the risk has had in sports spectator cases also manifests in sports cases involving participants. Courts that have adopted the primary assumption of the risk doctrine invoke standards in matters involving co-participants, similar to those endorsed by courts in sports spectator cases. These courts embrace the notion that the scope of the duty the defendant owes to the plaintiff depends to a considerable extent on the nature of the sport and the defendant's relationship to the sport.¹⁰⁷ In *Knight v. Jewett*,¹⁰⁸ the California Supreme Court summarized the rules regulating co-participant liability in sports and articulated rationales offered in support of these principles:

The overwhelming majority of the cases . . . have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport . . . and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.

In reaching this conclusion that a coparticipant's duty of care

fly balls is an inherent, expected, and even desired part of the baseball fan's experience." *Id.* at 706-07. The court declined, however, to extend the limited duty rule to areas other than stands since the risks of being struck by a ball are not inherent under those other circumstances. *Id.* at 709. The court held that the "proper standard of care for all other areas of the stadium is the business invitee rule, which provides that a landowner 'owe[s] a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered.'" *Id.*

105. *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 222 (Mich. Ct. App. 2001).

106. *Id.*

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

108. *Id.*

should be limited in this fashion, the cases have explained that, in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct.¹⁰⁹

The approach adopted in *Knight*, and the majority of jurisdictions that apply primary assumption of the risk in co-participant cases, is often characterized as the intentional or reckless conduct rule. In contrast to jurisdictions which adhere to a negligence standard to determine the liability of one participant to another in a sports activity,¹¹⁰ these courts narrowly define when a duty arises between co-participants. As expressed by one court, "an action will lie in tort between co-participants in sports events 'when players step outside of their roles as fellow competitors' and recklessly or intentionally inflict harm on another."¹¹¹

Therefore, jurisdictions adopting *Knight's* articulation of the scope of a participant's liability to a co-participant focus on the inherent risks associated with a sport, or as is alternatively stated "[those] risks that are considered to be within the ordinary range of activity involved in the sport."¹¹² As expressed by one court, this determination will turn on whether "the injury-causing event was an inherent or reasonably foreseeable part of the game, such that the plaintiff is considered to have assumed the risk."¹¹³ In this regard, the majority of courts also generally find that injuries resulting from a co-participant's violation of the rules of a sport typically will not result in the imposition of a duty on the defendant participant since rules violations are inherent and anticipated aspects of sports contests.¹¹⁴ Finally, the majority of courts limit the scope of the no or limited duty rule in the context of co-participants by holding that while a defendant possesses no duty to protect plaintiffs from inherent risks in a sport, they possess a duty not to increase those risks.¹¹⁵

109. *Id.* at 710.

110. *See, e.g.,* *Estes v. Tripson*, 932 P.2d 1364, 1366 (Ariz. Ct. App. 1997); *Auckenthaler v. Grundmeyer*, 877 P.2d 1039, 1043 (Nev. 1994).

111. *Mark v. Moser*, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001). The court also identifies jurisdictions that have adopted the majority rule. *Id.* at 416.

112. *Id.* at 418.

113. *Id.* at 420.

114. *Id.*

115. *Lowe v. California League of Prof'l Baseball*, 65 Cal. Rptr. 2d 105, 109 (Cal App. 1997) (limited duty rule inapplicable where spectator injured after being distracted by a mascot which is not

As the court noted in *Knight*, the no-duty rule or intentional/reckless standard adopted by these courts is premised on the desire to encourage vigorous competition in sporting events.¹¹⁶ It is also premised on the belief that risk of injury is an inherent part of sports participation and the fear that recognition of a duty will lead to a flood of litigation.¹¹⁷

iii. Liability of Coaches and Trainers

Given their relevance to an analysis of the *Avila* decision, a brief discussion of certain standards governing the liability of defendants who are not co-participants, is warranted. As it relates to the liability of coaches to student-athletes,¹¹⁸ a critical issue is whether primary assumption of the risk applies to circumstances where the defendant is not a co-participant in a sports event. The applicability of primary assumption of the risk was considered in determining the liability of a high school coach in *Kahn v. East Side Union High School District*.¹¹⁹ There a fourteen-year-old student-athlete suffered injuries after she followed her coach's instructions and attempted a dive, which she had not previously practiced, during a swim competition.¹²⁰

The court recognized that the relationship between a student and his or her coach differs from the relationship between co-participants. Nevertheless, it applied the primary assumption of the risk doctrine it had previously enunciated in *Knight*. The court held that a

sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is "totally outside the range of the ordinary activity" involved in teaching or coaching the sport.¹²¹

The court reasoned that applying this standard seemed appropriate since a significant aspect of a coach's job is to push students to advance their skills,

integral to the sport of baseball); *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).

116. *Mark*, 746 N.E.2d at 419; *Knight*, 834 P.2d at 710.

117. *Mark*, 746 N.E.2d at 419 (stating these rules are based on the desire to avoid stymieing the vigorous participation of athletes in sporting events and to avoid the flood of litigation that would result from a rule that enhanced the likelihood that plaintiffs would prevail).

118. Coaches have been held liable for not adequately informing students of the need to wear protective equipment, requiring a high school athlete to continue play notwithstanding the coach's knowledge of an existing injury, and not providing prompt medical treatment to a high school athlete. MITTEN, DAVIS, SMITH & BERRY, *supra* note 95, at 903-04.

119. 75 P.3d 30 (Cal. 2003).

120. *Id.* at 34.

121. *Id.* at 32-33.

which requires encouraging them to attempt more difficult tasks.¹²² While the *Kahn* court recognized that coaches have a duty to their student-athletes not to increase the risks inherent in a sport, it also concluded that risks that are integral to learning a sport may constitute inherent risks.¹²³ Thus, the court concluded that “an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence.”¹²⁴ The court explained that imposing liability on coaches to mitigate inherent risks in learning would chill the learning and teaching of skills that must be acquired if a student is to develop athletically.¹²⁵

C. Analysis of Avila

The District asserted that it owed no duty of care to Avila.¹²⁶ The court began its analysis of the District’s defense by noting that when a sporting participant is injured, the question of duty is intertwined with the question of assumption of the risk.¹²⁷ Thereafter, the court reaffirmed the conceptualization it had adopted in *Knight*. After defining primary assumption of the risk, the court stated that in the sports context, primary assumption of the risk “precludes liability for injuries arising from those risks deemed inherent in a sport; as a matter of law, others have no legal duty to eliminate those risks or otherwise protect a sports participant from them.”¹²⁸ Reaffirming the objective approach articulated in *Knight*, the court further stated that with respect to the foregoing approach to duty, courts need not inquire into the plaintiff’s subjective knowledge of the risk. Rather, a court must “evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a

122. *Id.* at 32.

123. *Id.* at 40. See Keya Denner, *Taking One for the Team: The Role of Assumption of the Risk in Sports Cases*, 14 SETON HALL J. SPORTS & ENT. L. 209, 217 (2004) (observing that “although coaches, schools and athletic associations owe student athletes no duty to protect them from risks that are inherent in the sport, they do owe them a duty not to increase these risks”).

124. *Kahn*, 75 P.3d at 40.

125. *Id.* Other jurisdictions have extended primary assumption of the risk to conduct engaged in by coaches and trainers. See, e.g., *Kelly v. McCarrick*, 841 A.2d 869, 882 (Md. Ct. Spec. App. 2004) (endorsing the rule adopted in *Kahn* and stating inherent risk in sport is that training will not eliminate all risks associated with playing a sport); *Foronda v. Haw. Int’l Boxing Club*, 25 P.3d 826, 841 (Haw. Ct. App. 2001).

126. *Avila v. Citrus Cmty. College Dist.*, 131 P.3d 383, 391 (Cal. 2006).

127. *Id.*

128. *Id.*

duty to protect a plaintiff from the particular risk of harm.”¹²⁹

Unlike *Knight*, where the defendant was a co-participant, or *Kahn*, where the defendant was a coach, the court noted that the defendant school’s role was mixed. The District’s players were co-participants, its coaches were in a supervisory position in the conduct of the game, and other college personnel were responsible for the condition of the playing facility.¹³⁰ The court reaffirmed the standards governing liability of each of these actors. Co-participants possess a duty not to act recklessly. Coaches have a duty not to increase the risks inherent in participation in a sport. Those responsible for maintaining facilities must not increase inherent risk. Having set forth the governing legal regime, the court proceeded to apply the foregoing principles to the matter before it.

The California Supreme Court decided that in intercollegiate and interscholastic competition, similar rules should attach to the host school. Reasoning that a host school is not a disinterested third party given the benefits (e.g., enhanced recruitment of athletes, increased alumni support and revenue from broadcasting rights) that accrue when an opposing team visits, the *Avila* court held the host team should be included in the class of defendants with a connection to a sporting contest. Extending its precedent in *Knight* and *Kahn*, the court held that in “interscholastic and intercollegiate competition, the host school and its agents owe a duty to home and visiting players alike to, at a minimum, not increase the risk inherent in the sport.”¹³¹ In short, members of a visiting team are deemed co-participants for purposes of determining the applicability of primary assumption of the risk.

Having laid out the governing principles, the court next considered their applicability in regard to whether the District had enhanced the risk of injury to Avila. It analyzed this issue by addressing each of the four ways in which plaintiff alleged the District had breached a duty to him: “(1) conducting the game at all; (2) failing to control the Citrus College pitcher; (3) failing to provide umpires to supervise and control the game; and (4) failing to provide medical care.”¹³² Under a primary assumption of the risk analysis, a breach of duty would arise only if the alleged breaches were outside the inherent risks of baseball and within the duty the District owed to Avila.¹³³

129. *Id.* at 392.

130. *Id.*

131. *Id.*

132. *Id.* at 393.

133. *Id.*

i. Conducting the Game

Avila alleged that by hosting the game, the District violated community college rules prohibiting preseason games.¹³⁴ The court summarily rejected this argument noting that even assuming the District violated some unspecified rule, there was nothing to indicate that its having done so enhanced the ordinary risks of baseball.¹³⁵ The consequence of hosting the game, was the District's exposure of Avila to the ordinary risks inherent in baseball.

ii. Failing to Provide Umpires

The court also quickly dispensed with Avila's claim that the District breached a duty of care by failing to provide umpires. The gist of Avila's argument was that the presence of umpires would have made the game safer since an umpire would have been in a position to issue a warning after the first batter was struck by a pitch.¹³⁶ Relying on the basic proposition that the District's duty was restricted to not increasing the inherent risks of the game, the court concluded that the law imposes no duty to decrease inherent risk.¹³⁷ Consequently, even though the presence of an umpire might have reduced the risk of retaliation, there was no duty on the District to decrease the risk. As noted by the concurring and dissenting justices, baseball games are often played without umpires and there appears to be no basis on which to impose a duty on a college to provide umpires for games.¹³⁸

The court's ruling on this issue appears consistent with prevailing law in other jurisdictions as well as in California. Conduct or conditions that might be deemed impermissible because of the potential threat of harm occasioned thereby, are often viewed differently in sports. In another context a defendant might possess an affirmative obligation to take steps to avoid or to decrease the risk of harm. Under the inherent risk approach, courts are unlikely to impose an affirmative obligation on a defendant in order to decrease the risk of harm to the plaintiff.

iii. Failing to Provide Medical Treatment

Avila alleged that the District breached its duty by failing to provide

134. *Id.*

135. *Id.*

136. *Id.* at 395.

137. *Id.*

138. *Id.* at 398.

medical care after he was injured.¹³⁹ In addition to pointing out that California law did not support imposing this duty on the District, the court concluded that Avila's own coaches and trainers were present.¹⁴⁰ According to the court, Avila's coaches and trainers were vested with the exclusive authority to determine the medical care Avila required.¹⁴¹ Thus, even if the District caused Avila's injuries, its duty would have extended no further than ensuring that plaintiff's coaches and trainers were aware of his condition.¹⁴² Since the facts demonstrated Avila's coaches and trainers were aware of his injury, even assuming the District had a duty to notify Avila's trainers, the duty was satisfied.¹⁴³ Conveniently, the presence of the trainers for Avila's team also allowed the court to avoid considering the thorny issue of whether a college generally has a duty to provide medical care to injured student-athletes. There is a lack of uniformity among the few jurisdictions to have considered this issue thus far.¹⁴⁴

iv. Supervising the Citrus College Pitcher

The court's disposition of Avila's claim that the District breached a duty by failing to supervise and control the Citrus College pitcher is the most controversial aspect of the decision.¹⁴⁵ In rejecting Avila's assertion, the court first articulated the established principle that being hit by a pitch is an inherent risk of baseball, and the potential harm of being hit is apparent and well known.¹⁴⁶ The issue before the court, however, was whether to extend this rule to cover circumstances where a batter is intentionally hit by a baseball. It elected to do so and held that "[b]eing *intentionally* hit is likewise an inherent risk of the sport."¹⁴⁷

The court offered several justifications for including intentional conduct within the range of risks inherent in the sport of baseball. According to the court, a pitcher intentionally throwing at another batter is an established

139. *Id.* at 395.

140. *Id.* at 396.

141. *Id.*

142. *Id.* at 396.

143. *Id.*

144. MITTEN, DAVIS, SMITH & BERRY, *supra* note 95, at 929-30. For cases reaching different results on this issue see *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (imposing duty based on special relationship between student-athlete and university) and *Orr v. Brigham Young Univ.*, 960 F.Supp. 1522 (D. Utah 1994), *aff'd*, 108 F.3d 1388 (10th Cir. 1997) (refusing to impose duty on university).

145. *Avila*, 131 P.3d at 393.

146. *Id.*

147. *Id.*

baseball custom.¹⁴⁸ More than merely constituting a custom, the court determined that a pitcher throwing at a batter is an integral part of baseball strategy.¹⁴⁹ Since the strategic benefits derived from a pitcher intentionally throwing at a batter are not dependent on the participant's skills, the majority failed to find a reason to distinguish professional from college sports.¹⁵⁰ Consequently, it found primary assumption of the risk precluded a finding that the District owed a duty to Avila because the opposing batter intentionally threw at him.¹⁵¹

The majority in *Avila* also concluded that merely because baseball rules prohibit a pitcher from intentionally throwing at a batter is insufficient to establish a duty of care. In this regard, the court relied on its earlier precedent in *Knight* that rules violations alone will not necessarily give rise to a duty since "imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of a prescribed rule."¹⁵² The majority reasoned that since a pitcher throwing at a batter is an inherent risk of baseball and such activities "did not fall outside the range of ordinary activity," primary assumption of the risk barred Avila's negligence claim.¹⁵³ In reaching this result, the court extended the no-duty rule to circumstances where a pitcher intentionally throws at an opposing hitter.

Support for the *Avila* court's decision may be found in *Mark v. Moser*.¹⁵⁴ There, the court stated that a cognizable tort action arises between co-participants in sports activities when "players step outside of their roles as fellow competitors' and recklessly or intentionally inflict harm on another."¹⁵⁵ The court in *Mark* added that "liability will not lie where the injury causing action amounts to a tactical move that is an inherent or reasonably foreseeable

148. *Id.*

149. *Id.*

150. *Id.* at 394.

151. *Id.*

152. *Id.* (internal quotations omitted).

153. *Id.* The court restricted its holding to a pitcher who throws at a batter when the batter is at the plate. *Id.* This restriction was intended to avoid the situation that arose in *Molina v. Christensen*, where a pitcher intentionally hit a player in the on-deck circle. 44 P.3d 1274, 1276 (Kan. Ct. App. 2001). Although the court eventually dismissed the claim due to a procedural violation, the *Molina* court stated that the defendant's explanation that he was trying to keep players from crowding the plate was "unconscionable" since the defendant had no right to throw a baseball in the plaintiff's direction given the timing of the throw and the victim's position on the field. *Id.*

154. 746 N.E.2d 410.

155. *Id.* at 422.

part of the game and is undertaken to secure a competitive edge.”¹⁵⁶ Having articulated the foregoing standards, the *Mark* court opined that when a pitcher strategically throws the ball near a batter to prevent him from crowding home plate, even if the ball strikes the batter and injures him, “the pitcher’s conduct would not be actionable” since the risk of sustaining such injury is inherent in the game.¹⁵⁷ Another illustration offered by the court as to when the no-duty-rule would apply is where a football defensive player blitzes the quarterback and causes an injury.¹⁵⁸

Assuming the accuracy of the *Avila* court’s understanding of baseball custom, specifically the role of pitchers throwing at batters as within baseball custom, and the strategic aspects of pitchers hitting batters, the court’s extension of primary assumption of the risk and the resulting no-duty-sports-rule appears appropriate. If indeed a pitcher throwing at a batter is an integral part of the sport of baseball, the no-duty rule should apply. Moreover, because pitchers throwing at batters has strategic significance, rejection of the no-duty rule in this context would pose the potential to change the fundamental character of the game. These two considerations combined support the conclusion that a pitcher throwing at a batter would not seem to be *totally* outside the range of ordinary risks in the sport of baseball.

The *Avila* majority also responded to concerns of the dissent who argued that extending primary assumption of the risk to encompass intentional acts is an unwarranted intrusion into the law of intentional torts, and *Avila* should have been permitted to amend his complaint to properly allege battery.¹⁵⁹ The majority responded that allowing *Avila* to amend his claim would have been futile since the absence of consent is an element of battery. Given that *Avila* voluntarily participated in the baseball game, the court found his consent would have defeated any battery claim he might have asserted.¹⁶⁰

Whether or not one questions the wisdom of the rule articulated by the court, it is not necessarily inconsistent with tort law. In the context of sports, there is overlap between primary assumption of the risk and intentional torts. Historically, and even today, some courts adhere to a consent-based notion of assumption of the risk and impute plaintiff’s consent to all dangers inherent in

156. *Id.*

157. *Id.*

158. *Id.*

159. *Avila v. Citrus Cmty. College Dist.*, 131 P.3d 383, 395 (Cal. 2006). The dissent expressed concerns that determinations of whether a risk is inherent in a sport are too fact laden to be determined on a demurrer. *Id.* It also argued that the majority improperly took judicial notice of the fact that intentionally throwing at a batter’s head is an inherent part of intercollegiate sport, since this is not a fact that is “universally known.” *Id.* at 398-99.

160. *Id.* at 395.

a sports activity.¹⁶¹ Consent also provides the basis for defense to intentional tort actions in the sports context.¹⁶²

Interestingly, cases involving allegations of intentional torts, such as battery, in the sports context indirectly lend support to the majority's holding that a pitcher intentionally throwing at a batter should not give rise to negligence liability. Although defendants engaged in sporting events are not allowed to act recklessly and with wanton disregard of another participant's well being,¹⁶³ courts allow them considerable latitude.¹⁶⁴ If the alleged improper conduct is within the risks, which players impliedly agree to bear when they voluntarily elect to participate in a particular sport, liability for intentional tort will not follow.¹⁶⁵ Or, as summarized by one commentator, the

prevailing view is that although participation in an athletic contest involves manifestation of consent to those bodily contacts which are permitted by the rules of the game and foreseeable, an intentional act causing injury, which goes beyond what is ordinarily permissible in an unforeseeable way, is an assault and battery for which recovery may be had.¹⁶⁶

Thus, in determining whether a risk is within those assumed by an athlete, courts focus on whether the defendant's conduct is a part of the essence of the game.¹⁶⁷ As illustrated in *Avila*, a similar approach is adopted in cases not involving intentional torts.

IV. CONCLUSION

In *Avila*, the California Supreme Court reaffirmed its commitment to the prevailing no-duty rule between co-participants in sporting events. By extending primary assumption to include circumstances where a batter is intentionally hit by a pitcher, the court continued its movement toward narrowing the circumstances under which a defendant will be held liable for conduct that occurs in the sports context. The court's decision also highlights

161. See DOBBS, *supra* note 18, at 548.

162. *Hanson v. Kynast*, 526 N.E.2d 327, 333 (Ohio Ct. App. 1987).

163. *Thompson v. McNeill*, 559 N.E.2d 705, 707 (Ohio 1990) ("We do not embrace the notion that a playing field is a free-fire zone.").

164. See, e.g., *McKichan v. St. Louis Hockey Club*, 967 S.W.2d 209 (Mo. Ct. App. 1998).

165. Jeff Kessler, *Dollar Signs on the Muscle . . . And the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes*, 3 VA. J. SPORTS & L. 80, 101 (2001).

166. Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable?*, 5 SETON HALL J. SPORT L. 253, 256 (1995).

167. *Id.*

the significance of determining whether particular conduct is an inherent risk or integral part of a sport. By taking an expansive view of risks inherent in a sport to include some intentional conduct that carry a not insubstantial risk of injury, the court created an even higher hurdle which plaintiffs must overcome in establishing the liability of co-participants in sports. The court reached this conclusion having concluded that the risk of changing a fundamental aspect of the game of baseball outweighed the potential risk posed by a pitcher intentionally throwing at a batter. Thus, maintaining baseball custom and strategy trumped safety concerns. More importantly, however, the court's ruling reflects a perspective that liability between co-participants should be restricted to instances involving extreme conduct that falls squarely outside of the customs or ordinary conduct that can be expected in a particular sport. Thus, whether one agrees with the court's conclusion and the policies that underlie it, the decision serves to clarify the often blurry line between conduct that falls within and outside the parameters of risks inherent in a sport.

