F@#%K Pads: The Assumption of Risk Doctrine, Liability-Limiting Statutes, and Skateboarding

by

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> Some people sincerely wish to engage in high risk pursuits, but the operation of the tort system substantially interferes with that choice. The tort system authorizes courts and juries, which are potentially unsympathetic to the value of risk choice, to determine the "social undesirability" of activities... Such interference with risk choice will not be based on any determination that could be considered legitimate under an autonomy-respecting principle.

Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 Emory L.J. 1, 43. (1993).

I. Introduction

Professor Judges' critique of the tort system's handling of hazardous recreational activity rang truer in 1993 than it does in 2003. Over the last decade courts throughout the country established common law doctrine that limit the ability of plaintiffs to recover for injuries sustained during risk-taking recreational activities. The California Supreme Court led this movement with their decision in *Knight v. Jewett*, 3 Cal.4th 296, 834 P.2d 696, 11 Cal.Rptr.2d 2 (1992). Courts in a number of other jurisdictions have adopted the reasoning of *Knight*.[1] Negligence claims for sports injuries have consequently been limited substantially.

[1] *Knight* has been cited to support limits on tort liability in sports in a number of jurisdictions outside of California. *See* Cahill v. Carella, 648 A.2d 169, 172 (Conn. Super. Ct. 1994) (softball injury); Foronda v. Haw. Int'l Boxing Club, 25 P.3d 826, 839 (Haw. Ct. App. 2001) (boxing death); Pfister v. Shusta, 657 N.E.2d 1013, 1016 (Ill. 1995) (informal can kicking game); Mark v. Moser, 746 N.E.2d 410, 416-18 (Ind. Ct. App. 2001) (bike injury during a triathalon injury); Hoke v. Cullinan, 914 S.W.2d 335, 338 (Ky. 1995) (tennis); Ritchie Gamester v. City of Berkley, 597 N.W.2d 517, 521 (Mich. 1999) (ice skating); Martin v. Buzan, 857 S.W.2d 366, 368 (Mo. Ct. App. 1993)

Yet the public perception has not caught up with the judicial reality. Most people view liability as an ever-present threat in risk taking recreational activities. The fear of liability has prevented private and public entities from encouraging or allowing risky recreational activities. To assuage these fears, legislatures have passed liability-limiting statutes.[2] The decisions passed down by the courts over the last ten years have made these statutes redundant at best. At worst, these statutes offend the preferences of the individual and the autonomy of the sport, and possibly allow a cause of action that could not stand under the common law. Further, such statutes cause instability in the courts at a time when favorable common law is developing. This article examines these issues in the one "high-risk" sport with which I am intimately familiar – skateboarding. The California liability limiting statute applied to skateboarding is unnecessary, as the common law assumption of risk doctrine protects defendants from liability for skateboard injuries. In fact, the statutory law may curtail the defenses available under common law. Further, the statute impinges on the autonomy of the individual skater and furthers the process by which skateboarding is criminalized.

Section II. provides relevant background information on skateboarding, and the California statute that limits liability for injuries sustained in skateboard parks.

(co-ed softball game); Schick v. Ferolito, 767 A.2d 962, 964 (N.J. 2001) (golf); Reddell v. Johnson, 942 P.2d 200, 205 (Okla. 1997) (BB gun "war"); Phi Delta Theta Co. v. Moore, 10 S.W.3d 658, 661 (Tex. 1999) (Enoch, J., dissenting) (paint ball injury). See also Swenson v. Sunday River Skiway Corp., 79 F.3d 204, 206 (1st Cir. 1996) (applying Maine law and noting that moguls present an inherent risk in skiing).

[2] For example, a Florida statute limiting liability for injuries occurring from skateboarding, inline skating or freestyle biking states, "The purpose of this section is to encourage governmental owners or lessees of property to make land available to the public for skateboarding, inline skating, and freestyle bicycling. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability…" Fla. Stat. §316.0085(1) (2002).

Section III. discusses the common law assumption of risk doctrine, and its application to skateboarding.

Section IV. analyzes the effect of liability limiting statutes on the common law assumption of risk doctrine; specifically, whether a statutory violation abrogates the assumption of risk doctrine.

In conclusion, this article suggests that legislatures, as well as courts, respect the autonomy of sports and the individual. If liability limiting statutes are thought necessary to encourage growth of a sport such as skateboarding, such legislation should be narrowly drafted. Narrow draftsmanship better preserves the autonomy of the sport while more fully shielding cities that build skateparks from liability.

II. Background

Skateboarders have always skated in the streets, schools, and backyard pools. But in the mid–90's the number of skaters grew dramatically. Skating in these areas became increasingly off limits. Cities passed ordinances banning skateboarding on public streets and sidewalks. Property owners begin kicking skaters off their property, often by hiring private security or calling in the police. The resulting confrontations between frustrated skaters and the angry security guards or police officers were often ugly, sometimes violent. The need for hassle-free, public places to skateboard was apparent. Public skateparks were the obvious solution, but only a handful of public skateparks existed during the nineties. Cities were hesitant to build skateparks, largely because of liability concerns. The skateboard industry sought to address these concerns by urging the California Legislature to pass a law barring recovery for skateboard injuries occurring at a public skatepark.

That bill, A.B. 1296, passed and became Health & Safety Code §115800 in 1998. §115800 states in part:

> (d)(1) Skateboarding at any facility or park owned or operated by a public entity as a public skateboard park, as provided in paragraph (3), shall be deemed a hazardous recreational activity within the meaning of § 831.7 of the Government Code...

§ 831.7 of the Government code provides in relevant part:

> Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

The law served its purpose. It demonstrated that skateboarding enjoyed enough support to get the state legislatures attention. Cities begin building skateparks. These parks were wildly popular, with an estimated 50-100 users on any given day. As cities saw the popularity of skateparks at neighboring cities, they came to recognize the need for skateparks and rushed to meet these needs. §115800 was the catalyst that started this chain reaction.

That law had other provisions as well. Health & Safety Code §115800(a) forces cities with skateparks to adopt ordinances requiring all skaters to wear kneepads, elbow pads and helmets in the skatepark. "No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and knee pads." Health & Safety Code §115800(a). If the skatepark is not supervised on a regular basis, the city may meet its duty by "adopting an ordinance requiring any person

riding a skateboard at the facility to wear a helmet, elbow pads, and knee pads" and by posting a sign giving notice of the ordinance. Health & Safety Code §115800(b)(1)(2).

The law also had a "sunset" clause, and was to automatically expire on January 1, 2003, unless the legislature voted to renew the bill.[3] Health & Safety Code §115800(e). Jim Fitzpatrick, President of the International Association of Skateboard Companies (IASC), sent a series of emails to members of the skateboard industry urging them to contact their representatives and express their support for the law. Fitzpatrick's emails threatened that all the skateparks in California could close if the law was not renewed. He argued that the future of skateboarding was at risk. As a part owner of a small skateboard magazine, I received these emails. I emailed a reply, agreeing that the future of skateboarding was at risk, but was at risk precisely because of the law. I urged owners of skateboard companies to withdraw their support from the bill that would renew the law.

The reason I opposed the bill was the provision in the law forcing cities with skateparks to adopt ordinances requiring the use of safety gear. Serious skateboard related injuries are rare. The U.S. Consumer Product Safety Commission (CPSC) recently surveyed fifty skateparks. The CPSC survey found that soccer players are almost twice as likely to be injured as skateboarders, while basketball players and baseball players are 3 and 4 times, respectively, more likely to be injured.[4] *Product-*

[3] The legislature renewed §115800 when it enacted S.B. 994 in 2002. The current version of §115800 is set to sunset on January 1, 2008. Cal Health & Safety Code §115800(e).

[4] *Product-Associated Visits To Hospital Rooms* report by the U.S. Consumer Products Safety Commission. 1997

Associated Visits To Hospital Rooms report by the U.S. Consumer Products Safety Commission, *available at* http://www.skateboarding.com/skate/skate_biz/article/0,12364,199931,00.html. Because there are so few skateboard injuries the costs to society from such injuries are negligible. There is no governmental interest in diminishing these already negligible costs. If there were such an interest, the same interest would be doubly present in soccer, and four times as compelling in baseball. As Albert Fierro, Risk Manager of Association of Bay Area Government's Pooled Liability Assurance states, "[Skateparks] are no more dangerous than swings and slides. Apparently if anyone falls, they go home for treatment. They're not suing if they get hurt." Memorandum from the Richmond Skatepark Supporters, to the Richmond City Counsel (Feb. 20, 2003)(on file with author).

In the absence of a valid government interest in safety, the individual participant's conduct should be determined by the norms of the sport and the preferences of the individual.[5] In the case of skateboarding, there is no valid interest in decreasing the sport's inherent dangers. Accordingly, each skater should decide for him or herself when and where he/she wears safety gear. Kneepads and helmets are normally worn on large halfpipes and in deep bowls. The speeds reached in these terrains are significant. If the skater has to abandon the trick, they are skating too fast to run it out, so they make use of the plastic surface on the pads and knee-slide out of the bailed trick. In contrast, safety gear is not normally worn on the street or on the small obstacles found in the majority of skateparks because safety gear does little to prevent likely injuries received on this type

[5] For an argument that society should place more value on the individual's decision to participate in high risk recreational activities, see Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 Emory L.J. 1, 43. (1993).

of terrain. The majority of these injuries that do occur are minor breaks, torn ligaments, etc, and would not be prevented by safety gear. Further, many skaters feel that safety gear adversely affects the feelings of freedom and risk taking inherent in the nature of skating.

A policy of respecting skateboarding's autonomy was one of the reasons I opposed Health & Safety Code §115800; another reason was because I oppose the process by which skateboarding is criminalized under §115800. Skaters who choose not to wear safety gear may be ticketed and even arrested under the ordinances that §115800 require cities to adopt. Yet the majority of skaters follows the norms of the sport and chooses not to wear pads. Those norms are established based on skateboarder's collective experience. In that experience, safety gear does little to prevent most injuries. For this reason the requirement of safety gear is viewed as an illegitimate imposition on skaters. Because there is no legitimate basis for the law, skaters do not respect or accept the law. Skaters choose to risk the chance of a ticket rather than conform to its requirements. Or they simply don't use the skateparks where safety gear is enforced, choosing to skate in the streets instead, which is what caused the problem in the first.

Had the law never been renewed, there would be no state mandate requiring cities to adopt safety gear ordinances. Cities that wished to pass such an ordinance could do so, and some undoubtedly would. But some would not, as demonstrated by the fact that some cities do not enforce the safety gear ordinance in place. Skateboarding would be one step further away from being criminalized. Additionally, without §115800, the common law would control. This is the ideal scenario, as the common law primary assumption of risk doctrine provides the individual skater with the autonomy to decide

when and where to use safety gear, while giving cities greater protection against liability for skateboard injuries then §115800.

III. Common Law Assumption of Risk Doctrine

A general rule of tort law is that each person has a duty to use ordinary care and "is liable for injuries caused by his [or her] failure to exercise reasonable care in the circumstances…." *Rowland v. Christian*, 69 Cal.2d 108, 112, 443 P.2d 561, 70 Cal.Rptr.97. This duty of care may be limited by the assumption of risk doctrine. The Restatement of Torts (Second) § 496A defines the doctrine as follows: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." The Comments to the Restatement identifies four contexts in which courts use assumption or risk. Relevant here is Comment c(2), which states that the assumption of risk applies when the plaintiff has voluntarily entered into some activity that she knows to involve some risk, and thereby has impliedly agreed to take her own chances and to relieve the defendant of any duty.

The California Supreme Court discussed the assumption of risk doctrine at length in *Knight v. Jewett*, 3 Cal.4th 296. *Knight* arose out of an informal touch football game between social acquaintances. *Knight*, 3 Cal.4th at 300. After a few minutes of play, defendant ran into plaintiff. Plaintiff warned the defendant that he was playing too rough. *Id.* at 300. On the very next play defendant collided with plaintiff, knocking her over and stepping on her hand. *Id.* at 300. Plaintiff suffered an injury, and after three unsuccessful operations, was forced to amputate her hand. *Id.* at 301. Plaintiff sued on a theory of negligence. *Id.* at 301. Defendant asserted that the implied assumption of risk doctrine barred plaintiff's claim. *Id.* at 301.

There was a question in California as to whether the doctrine was good law at the time *Knight* was decided. The California Supreme Court had adopted a comparative fault system in *Li v. Yellow Cab Co.,* 13 Cal.3d 804, 532 P2d 1226, 119 Cal.Rptr. 858. Unlike contributory fault systems, a comparative fault system allows plaintiffs to recover even if the plaintiff's own negligence contributed to the injury, although recovery is decreased to that extent. Scott Giesler, *The Uncertain Future of Assumption of Risk in California,* 28 Loy. L.A. L. Rev. 1495 (1995). Many commentators and courts believed that the shift to contributory fault negated the implied assumption of risk doctrine. Giesler, *Id*.

Knight clarified the role of the assumption of 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. *Knight*, 3 Cal.4th at 308. The court defined secondary assumption of risk, or implied 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." *Id.* at 308. Secondary assumption of risk merges with the comparative fault scheme. *Id.* at 315. The primary assumption of risk remains a complete bar to plaintiff's recovery. *Id.* at 315. Whether primary or secondary assumption of risk applies is an objective inquiry; the subjective knowledge of the plaintiff is irrelevant. *Id.* at 313. Instead the analysis focuses on the inherent nature of the activity and the parties' relationship to that activity. *Id.* at 313. As *Knight* recognized, danger, risk, and careless behavior are inherent in the nature of many active sports. *Id.* at 316. The court recognized the policy interest in

keeping litigation concerns from chilling participation in sport. *Id.* at 318. In order to give effect to this policy, the court reasoned that defendants have no legal duty to eliminate or decrease risks inherent in the sport. *Id.* at 316. The defendant's duty is limited to a duty not to increase the inherent risks of the sport. *Id.* at 316. The defendant in *Knight* was found not to have increased the risks inherent to touch football, and the court ruled that plaintiff's claim was barred by the implied assumption of risk. *Id.* at 321.

Calhoon v. Lewis, 81 Cal.App.4th 108, 96 Cal.Rptr.2d 394 (2000), held skateboarding an inherently dangerous activity of the type contemplated by *Knight*. Plaintiff, an experienced skateboarder, was practicing skateboard tricks in a driveway owned by the parents of a friend. *Calhoon*, 81 Cal.App.4th at 111. Plaintiff suffered serious injury when he fell backwards onto a planter and impaled himself on a hidden pole that stuck out of the planter. *Id.* at 111. Plaintiff sued his friend's parents, who had placed the planter in the driveway. *Id.* at 111. Defendant moved for summary judgment, arguing that skateboarding was an activity covered by the primary assumption of risk doctrine. The trial court granted summary judgment and the Fourth District affirmed.

> An activity falls within the doctrine if 'the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.' (Citation omitted). These factors certainly apply to skateboarding.

Id. at 116.

The court dismissed plaintiff's argument that their case fell within the exception to the assumption of risk doctrine. That exception states that defendants "do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." *Knight*, 3 Cal.4th at 316. Plaintiff argued that defendants breached this duty by

concealing a metal pipe in the planter, thereby increasing the risks inherent in skateboarding. The court disagreed because the metal pipe did not cause plaintiff's fall; the risk of falling is inherent to skateboarding. *Calhoon*, 81 Cal.App.4th at 116. The metal pipe increased the severity of the injury suffered, but the court explained that this was irrelevant to the assumption of risk doctrine. *Id.* at 116. The exception applies when defendant's conduct increases the risk of injury beyond that inherent in the sport, not when it increases the severity of the injury suffered. *Id.* at 116.

Together, *Knight* and *Calhoon* provide broad common law protection against liability for skateboard injuries. *Calhoon* explicitly states that the primary assumption of risk applies to skateboarding. In order to prevail, a plaintiff would have to show that a city increased the risks of skateboarding above and beyond those inherent in the sport. In other sports, plaintiffs have met this burden by showing that the defendant acted in a way that violated the rules of the game and the norms of the sport. In skateboarding, there literally are no rules of the game, thus, no way to violate them.

A plaintiff could try to show that the obstacles found in a skatepark increased the risk inherent in the sport, but the primary assumption of risk would bar this argument. The obstacles found in a skatepark are analogous to the obstacles found on a ski run. And the *Knight* court indicated that such obstacles do not increase the risks inherent in the sport. "Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them." *Knight*, 3 Cal.4th at 315. Like skiing, use of obstacles in skateparks is an inherent part of the sport, and adds to the thrill.

In addition to providing broad protection from liability, the primary assumption of risk doctrine also preserves the autonomy of the sport. Defendants have a duty not to increase the risks of the sport, but as *Calhoon* demonstrates, there is no duty to minimize the severity of injury resulting from the risks. Under the common law a city might have the duty to ensure that a skatepark is well built and maintained so as to not cause skaters to fall. But it has no duty to minimize the severity of the fall by enforcing the use of safety gear. In passing into law Health & Safety Code §115800 the legislature may have imposed such a duty on cities, and in doing so, opened a door for plaintiffs that was closed under the common law.

IV. The Effect of Statutory Law on The Assumption of Risk Doctrine.

§115800 imposes a duty on cities and public employees not found at common law. This additional duty is the duty to enforce the wearing of kneepads, elbow pads and a helmet by skateboarders in the skatepark. No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and knee pads. §115800(a). If the skatepark is not supervised on a regular basis, the city may meet its duty by adopting an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and knee pads and by posting a sign giving notice of the ordinance. §115800(b)(1)(2).

The city could fail to meet its duty under §115800 in a number of ways. If an operator of a skatepark fails to enforce the pad requirement, he or she would have not lived up to their statutory duty. If a city fails to adopt an ordinance requiring pads at the skatepark, or fails to post sufficient signs giving notice of that ordinance, the city would violate its statutory duty. The city may also violate its statutory duty if it fails to enforce

the ordinance. It should be noted that such failures are common. In Northern California, local pad ordinances are enforced at roughly half of the skateparks. In Southern California public employees are often hired as skatepark operators. Helmet use is usually enforced at these skateparks, but use of kneepads and elbow pads is rarely enforced.[6] If an injury results in such a scenario, the city would not only be precluded from invoking the statutory protection of §115800, it may be barred from a defense based on the assumption of risk doctrine. Whether it is in fact so barred is an open question in California.

California Evidence Code § 669(a) is the codification of the common law rule presuming a breach of the duty of care when a person violates a rule of law, and an injury results. In California there is conflicting case law as to the effect that this presumption has on the assumption of risk defense. The California Supreme Court attempted without success to clarify this issue in *Cheong v. Antablin*, 16 Cal.4th 1063, 946 P.2d 817, 68 Cal. Rptr. 2d 859 (1997).

Cheong involved a collision between two skiers. *Cheong*, 16 Cal.4th at 1066. Plaintiff sued for general negligence. *Id.* at 1066. The trial court granted defendant's motion for summary judgment, finding that plaintiff's claim was barred by the assumption of risk doctrine because a collision is an inherent risk of downhill skiing. *Id.* at 1066. Plaintiff appealed. Plaintiff pointed to a local ordinance that placed a duty on skiers "to ski in a safe and reasonable manner." *Id.* at 1067. Plaintiff argued that defendant had violated this ordinance when he caused the collision. Plaintiff argued that Evidence Code § 669 transformed the ordinance "into a legal duty of care, thus

[6] These conclusions are based on a sample of skateboard parks throughout California made in conjunction with work done by the author for Concussion Magazine.

abrogating the assumption of the risk defense." *Id.* at 1070. The Supreme Court "granted plaintiff's petition to review the issue of the ordinance's effect." But the court never resolved the issue. Four separate concurring opinions were written, and the case was dismissed on the narrowest of grounds. The court decided that plaintiff had not proven that he was of the class that the ordinance was designed to protect -- a necessary element of § 669.

Justice Chin wrote both the majority opinion and a concurring opinion in *Cheong* in order to emphasize his view that a statutory violation does not abrogate the assumption of risk. *Id.* at 1078. Justice Chin's concurring opinion reasoned that a statutory violation that triggers Evidence Code §669 creates a presumption of negligence per se. It does not create an independent cause of action for negligence. *Id.* at 1078. Nor does it establish a presumption of gross negligence. Under *Knight,* gross negligence is necessary to maintain the suit; mere negligence is insufficient, and §669 does not affect the assumption of risk doctrine. *Id.* at 1079.

Justice Chin's opinions have yet to crystallize into law, and no clear rule has emerged since *Cheong*. Given the California Supreme Court's own indecisiveness as to the effect of a statute or ordinance on the primary assumption of risk, it is not surprising that lower courts have similarly struggled.

Distefano v. Forester, 85 Cal. App. 4th 1249, 102 Cal. Rptr. 2d 813 (2001), found that ordinances of the California Vehicle Code had no effect on the duty of the participants engaged in the sport of off-roading. Both plaintiff and defendant were engaged in the sport of off-roading on an unnamed dirt road in the desert. *Distefano,* 85 Cal. App. 4th at 1250. Plaintiff was riding his motorcycle up a steep hill and had nearly

reached the top when he collided with defendant who had launched his dune buggy off the other side of the hill. *Id.* at 1253. Plaintiff suffered serious injury as a result and sued defendant for negligence. *Id.* at 1253.

Defendant moved for summary judgment on the grounds that collisions are a risk inherent to the sport of off-roading. *Id.* at 1253. Plaintiff argued that defendant had increased the inherent risk of collisions and had violated the statutory duty of care as set forth in California Vehicle Code §§38305 and 38316. *Id.* at 1256. §38305 proscribes the driving of off-highway motor vehicles at a speed that is greater than is reasonable or prudent. §38361 proscribes the driving of off-highway motor vehicles with a willful and wanton disregard for the safety of other persons or property. Plaintiff argued that these statutes determined the duty of care owed by defendant, that defendant had violated these statutes, that this violation along with Evidence Code §669 negated the primary assumption of risk doctrine. The trial court disagreed. In determining the duty of care, the court looked to the sport itself, which it found could "readily be characterized by the phrase: 'Thrills, chills, and spills.'" *Id.* at 1258. The trial court applied the primary assumption of risk doctrine and granted summary judgment. *Id.* at 1258.

The Fourth Appellate District affirmed, reasoning that the statutory violations did not affect the primary assumption of risk defense. The court found that the defendant's conduct did not violate the statute, but that even if it had, the statutes "did not establish an independent duty, the breach of which would expose Forester to tort liability…." *Id.* at 1274. The court recognized that the legislature can abrogate the assumption of risk doctrine, but the statutes in question demonstrated no clear intent to do so. *Id.* at 1273. Further, the court found that a violation of a statute should not trigger the presumption

created by Evidence Code §669. *Id.* at 1273. In so finding, the court expressly adopted the reasoning of Justice Chin's concurring opinion in *Cheong*. *Id.* at 1263. Finally, applying the *Knight* test, the court found that defendant's conduct was not "so reckless as to be totally outside the range of the ordinary activity involved in the sport." *Id.* at 1254.

Campbell v. Derylo 75 Cal. App. 4th 823, 89 Cal. Rptr. 2d 519 (1999), looked to a relevant ordinance to determine if the defendant had increased the dangers inherent in the sport. Plaintiff was an eleven-year-old skier who stopped to rest on the slope. *Campbell,* 75 Cal. App. 4th at 825. Defendant was a seventeen-year-old snowboarder who had stopped to rest further up on the slope. *Id* at 825. Defendant removed his feet from the bindings, and the snowboard slid out of his control and down the slope, hitting plaintiff in the lower back. Defendant did not have a retention strap on his snowboard, even though one is required by an El Dorado County ordinance. *Id* at 825. Plaintiff sued, claiming that defendant had increased the risks above those inherent in the sport. *Id* at 828-29. The defendant asserted the assumption of risk defense, stating that runaway snowboards and skis are an inherent risk of the sport of skiing. The trial court held for defendant. *Id* at 826.

On appeal, the Third Appellate District reversed and remanded, holding that the ordinance could determine the standard of care required of snowboarders. "A jury could find that, by using a snowboard without the retention strap, in violation of… a county ordinance, defendant unnecessarily increased the danger [of the sport]." *Id* at 829. Although the court specifically declined to address the combined effect of Evidence Code § 669 and the county ordinance on the primary assumption of risk doctrine, the decision

makes clear that the county ordinance could determine the duty of care required of the defendant. *Id* at 829.

Campbell demonstrates how courts can circumvent Justice Chin's argument that a statutory violation has no effect on the assumption of risk. Under *Knight*, defendants have a duty not to increase the risks inherent in the sport. Conduct that does so is gross negligence, not protected by the assumption of risk. *Campbell* found that the ordinance defined the level of risk inherent in the sport, and defendant's violation of that ordinance showed that he had violated his duty not to increase the sport's risks. The violation of the ordinance amounted to gross negligence. Justice Chin's argument that a statutory violation leads to a cause of action based on mere negligence, barred under *Knight*, is undercut when the court has already determined that the violating conduct demonstrates gross negligence.

Liability limiting statutes such as § 115800 are especially prone to a *Campbell* type of interpretation. The ordinance in *Campbell* required use of a restraining strap on a snowboard. § 115800 requires use of safety gear in skateparks. As in *Campbell*, a court could find that § 115800 defines the risks inherent in the sport. As in *Campbell*, a court could find that by not enforcing the requirement of safety gear the city breached their duty not to increase the risks of skateboarding. Of course, the plaintiff would also bear some of the responsibility for their injury, as they were the party who ultimately decided not to wear safety gear. But in California where there is a comparative fault scheme, the plaintiff might still recover some portion of damages. As long as this possibility remains, the incentive to litigate remains.

V. Conclusion

Incentives to litigate sports injuries need to be removed if "high-risk" sports like skateboarding are to survive and thrive. A few plaintiffs should not be allowed to shut down skateparks. This is not to suggest that plaintiffs should be totally barred from recovery. Cities should have a minimal duty of care. For example, a plaintiff should be able to recover for injuries caused by dilapidated ramps, etc. The city should have a duty not to increase the risks of skating by allowing skateparks to fall into disrepair. Forcing cities to live up to such a minimal duty would not introduce such liability concerns as to fundamentally alter the nature of the sport. Imposing a duty on cities to force skaters to wear safety gear does. The fact that skaters consistently disobey the law demonstrates this point.

The legislature does have power to alter the nature of sports, but it should not do so absent a legitimate concern over safety. A policy favoring the individual's autonomy

and risk choice so dictates. Skateboarding's safety record demonstrates that there is no such legitimate concern. The legislature adopted §115800 without any reference to statistical facts about skateboarding and safety. The legislative history is void of such a discussion. Instead the legislature proceeded on the same presumptions about skateboarding that have constantly threatened its survival – namely that it is an unsafe sport. The common law makes no such assumptions.

The common law assumption of risk doctrine allows the individual and the sport to determine the type and degree of risks inherent to the sport. It continues to develop in a manner that protects the autonomy of the individual and his or her choice to participate in sports. The stabilizing effects of this trend should be encouraged. Legislatures in other states should refrain from adopting liability-limiting statutes such as §115800. If such statutes are deemed necessary, they should be drafted in a manner such that courts are unable to interpret them as creating a duty of care not present under the common law. This would require the legislature to respect the sport, and respect the choices of the individual participant, something already done in the common law.