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CONSENT IN SPORTS & RECREATIONAL ACTIVITIES: USING CONTRACT LAW TERMINOLOGY TO CLARIFY TORT PRINCIPLES

*Russ VerSteeg**

I. INTRODUCTION

Today, the sports world is more aware of the importance of safety than ever before. For millennia, humans have engaged in athletic and recreational activities that have involved serious physical risks.¹ The risks are not even confined to participant risk; officials, spectators, and bystanders commonly suffer injuries as a result of athletics.² When injuries occur, there is a broad range of potential consequences. Depending on the circumstances, an injured individual may require medical attention for both physical and mental rehabilitation. Families and friends of those injured may suffer emotional, financial,

* Professor, New England Law | Boston. I would like to thank Barry Stearns and Brian Flaherty, Research Librarians at New England Law | Boston for their outstanding contributions. Thanks also to Lauren M. Oliva for her excellent research assistance.

¹ See e.g., H.A. HARRIS, *SPORT IN GREECE AND ROME* 22–26 (1972) (describing, in particular, ancient Greek boxing and also an exceptionally brutal contest, the pankration, in which “[t]he only tactics which we know to have been banned were gouging – poking a thumb or finger into an opponent’s eye – and biting...”); *id.* at 151–243 (extensive discussions of Greek, Roman, and Byzantine chariot racing). See also NIGEL SPIVEY, *THE ANCIENT OLYMPICS: A HISTORY* 105–111 (2004) (describing the pankration and its brutality).

² See e.g., *Allred v. Capital Area Soccer League, Inc.*, 669 S.E.2d 777 (N.C. App. 2008) (spectator who attended professional women’s soccer match brought negligence action against soccer league and county, injuries sustained when she was struck in the head by a soccer ball); *Nemarnik v. Los Angeles Kings Hockey Club, L.P.*, 127 Cal. Rptr. 2d 10 (Cal. App. 2d Dist. 2002) (spectator at a Los Angeles Kings game was injured when a puck during pregame warm-ups left the playing area); *Gallagher v. Cleveland Browns Football Co.*, 659 N.E.2d 1232 (Ohio 1996) (videographer sued the Cleveland Browns for negligence due to injuries received when two football players collided into him while he was taping a football game); *Friedman v. Houston Sports Ass’n*, 731 S.W.2d 572 (Tex. App. 1987), *writ refused* NRE (Sept. 16, 1987) (eleven-year-old baseball spectator and her father brought action against owner of stadium for injuries sustained when spectator was struck by foul ball); *Thurston Metals & Supply Co., Inc. v. Taylor*, 339 S.E.2d 538 (Va. 1986) (liability to one struck by golf club); *Baker v. Mid Maine Med. Center*, 499 A.2d 464 (Me. 1985) (liability to one struck by golf ball); *Fish v. Los Angeles Dodgers Baseball Club*, 128 Cal. Rptr. 807 (Cal. App. 1976) (liability to spectator hit by ball at baseball game); *Pierce v. Murnick*, 145 S.E.2d 11 (N.C. 1965) (action for personal injuries sustained by spectator when wrestler fell upon him from ring); *Aaser v. City of Charlotte*, 144 S.E.2d 610 (N.C. 1965) (spectator at hockey game was injured when struck in the ankle by a hockey puck being played with by a group of boys); *Ulrich v. Minneapolis Boxing & Wrestling Club, Inc.*, 129 N.W.2d 288 (Minn. 1964) (spectator at wrestling match sustained injuries when he fell after being struck by referee); *Toone v. Adams*, 137 S.E.2d 132 (N.C. 1964) (action by baseball umpire against baseball club, manager, and baseball fan for injuries sustained while umpire was proceeding); *McFtridge v. Harlem Globe Trotters*, 365 P.2d 918 (N.M. 1961) (plaintiff struck by basketball thrown by player).

and other losses as well. Yet, even in the face of such dangers, we persist in subjecting ourselves to such risks. Presumably, whether we do so consciously or not, we all engage in a kind of risk-reward or cost-benefit analysis. Those who participate in marathon running, skiing, snowboarding, surfing, horseback riding, football, hockey, soccer, lacrosse, baseball, basketball, climbing, white water rafting, golf, car racing, and hundreds of other sports and recreational activities are apparently willing to risk a great deal of negative consequences in return for the prospect of positive consequences (e.g., the psychological thrill of participation and/or competition,³ satisfaction of accomplishment, improved physical and mental health, money – for some – and numerous other benefits that society recognizes as deriving from sports and recreational activities).⁴

The legal system has struggled with how to deal with such injuries. Today, the news and social media report scores of lawsuits brought by those who have been injured against other participants, coaches, officials, venue operators, and the institutions that organize and provide sports and/or recreational activities (e.g., NFL, NHL).⁵ Techni-

³ See Angela Grippo and Brad Sagarin, *The Biological Basis for the 'Thrill of Victory,'* Psychology Today (Jan. 25, 2013), <https://www.psychologytoday.com/blog/the-wide-wide-world-of-psychology/201301/the-biological-basis-the-thrill-victory>; Joachim Vogt Isaksen, *The Psychology of Extreme Sports: Addicts, not Loonies*, Popular Social Science (Nov. 5, 2012), <http://www.popularsocialscience.com/2012/11/05/the-psychology-of-extreme-sports-addicts-not-loonies/>; Lindsey Konkel, *Extreme Psychology; There may be more to high-risk sports than a "no fear" mantra*, Science Line (July 13, 2009), <http://scienceline.org/2009/07/health-konkel-extreme-sports-risk-psychology/>.

⁴ See e.g., Dryden, *supra* note 4, at 267 (“If someone asks us why we play, we’re not sure any longer. We might speak ritually of ‘loving the game’; then, embarrassed, skip on to winning, money, and the rest. And everyone understands.”).

⁵ See Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. REV. 213, 271–74 (1987) (discussing “Injuries in Sporting Events”). See e.g., Tom Worgo, *The NHL Gets Nets but Can It Stop Lawsuits?*, 31 HOCKEY DIGEST 12 (Nov. 2002) at <http://connection.ebscohost.com/c/articles/7444096/nhl-gets-nets-but-can-stop-lawsuits>; Associated Press, *Teenage Girl Dies After Getting Hit in the Head*, ESPN (March 20, 2002), <http://sports.espn.go.com/nhl/news/story?id=1354060>; Ben Rohrbach, *More bad news, Rams fans: Reggie Bush sues St. Louis over injury*, Yahoo! Sports (Jan. 8, 2016), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/more-bad-news--rams-fans--reggie-bush-sues-st--louis-over-injury-153559370.html> (San Francisco 49ers running back Reggie Bush officially files a lawsuit against the St. Louis Convention and Visitors Commission after suffering a season-ending ACL injury after slipping on concrete surrounding the field at Edward Jones Stadium); Michael A. Orr, *Eddie Johnson Files \$9.9 Million Lawsuit Against Portland Timbers*, Stumptown Footy (Feb. 6, 2014), <http://www.stumptownfooty.com/portland-timbers/2014/2/6/5387998/eddie-johnson-files-9-9-million-lawsuit-against-portland-timbers> (Portland Timbers striker Eddie Johnson has filed suit against the club's parent company, Peregrine Sports, alleging the team and affiliated doctors and training staff allowed him to practice while still suffering the effects of a concussion); Terry Frei, *Trial for Todd Bertuzzi attack on former Avalanche Steve Moore set for 2014*, THE DENVER POST (Oct. 26, 2013), http://www.denverpost.com/avalanche/ci_24391981/justice-moore-ice (Moore, then 25, suffered three fractured vertebrae, a concussion and brain damage. He hasn't played in the NHL since that night); Jared Clinton, *Report: Denna Laing, family to sue NHL, women's leagues after spinal cord injury*, THE

cally speaking, the legal questions actually involve two very large fields of law: Tort and Contract. To complicate matters further, there are several layers of analysis needed in order to resolve liability issues related to injuries sustained as a result of sports and recreational activities.

This Article focuses primarily on how legal analysis should address “consent” in the context of injuries sustained by those involved in sports and recreational activities.⁶ It is possible, and perhaps likely, that this analysis is also applicable to the doctrine of “consent” in non-sports and recreational activities. Part I of this Article explains the legal framework of the relationship between injuries and Tort law. This Part examines, for example, basic principles of negligence, assault, and battery. Part II discusses assumption of risk and consent, and explores their technical meanings. This Part also considers the way that Contract law intersects with Tort in the form of “waivers of liability.” Part III presents the central thesis of the Article. It explains how Contract Law principles provide an analysis superior to current Tort principles in evaluating “consent,” and recommends that Tort law abandon its unworkable, inferior terminology. This Part also briefly explores an exception to the law of consent, which helps to explain why the lawsuits brought by former NFL and NHL players have a great deal of merit. The Conclusion briefly summarizes the concepts explained in the body of the Article.

Basic Principles: Tort & Contract

A. Overview

Generally speaking, those injured as a result of sports and recreational activities – whether they are participants, officials, spectators, or bystanders – sustain their injuries as a result of: 1) negligence (*e.g.*, a spectator mindlessly walking into the path of a runner during a road race); 2) dangers inherent in the activity itself (*e.g.*, the incidental contact that occurs when two basketball or soccer players simultaneously attempt to gain possession of a loose ball); or, 3) intentional actions (*e.g.*, a hockey player deliberately checking another

HOCKEY NEWS (Jan. 14, 2016), <http://www.thehockeynews.com/blog/report-denna-laing-family-to-sue-nhl-womens-leagues-after-spinal-cord-injury/> (Boston Pride forward Denna Laing is reportedly planning to sue the NHL after suffering a severe spinal cord injury during the Outdoor Women’s Classic on Dec. 31).

⁶ Prosser says that consent is a topic that “is one of the most complex and difficult in the entire area of law.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18 Consent, at 112 (5th ed. 1984).

player or a football defender tackling a runner with the ball).⁷ The law of Torts has developed a specific vocabulary to refer to different kinds of conduct. For purposes of analyzing sports and recreational activity injuries, when carelessness (*i.e.*, a failure to act reasonably) causes injury, Tort law usually classifies that careless conduct as “negligence.”⁸ When an intentional act causes injury, Tort law typically refers to that intentional conduct either as “assault”⁹ or “battery.”¹⁰ Because those involved in sports and recreational activities willfully subject themselves to certain risks inherent in those sports and recreational activities, the legal system deals with their injuries differently than the ways that it deals with injuries sustained in everyday life (outside the scope of sports and recreational activities).¹¹ But before exploring the nuances of those differences, it is first use-

⁷ See *e.g.*, Dryden, *supra* note 4, at 160 (describing the numerous injuries that NHL players take for granted as being part of the game, including broken noses, a broken wrist, dislocated and separated shoulders, “an assortment of back sprains, knee sprains, hip pointers, groin pulls, cuts, bruised ribs and knees.... Then as things begin slowly to break down, it’s ice packs, heat packs, tape, pills, ointments, machines, the sports ethic, and us to keep us going.”). Of course, injuries might also result from a combination of any or all of these. In addition, a discussion of injuries caused by defective products used in sports and recreational activities is beyond the scope of this Article. For an introduction to some of those issues, see Russ VerSteeg, *Product Liability and Commercial Law Theories Relating to Concussions*, 10 J. BUS. & TECH. L. 73 (2015).

⁸ See Restatement (Second) of Torts § 282 (1965) (“[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregarding of an interest of others. Negligent conduct may consist either of an act, or an omission to act when there is a duty to do so.”); NEGLIGENCE, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances.”).

⁹ See RESTATEMENT (SECOND) OF TORTS § 21(1) (a)–(b) (1965) (“An actor is subject to liability to another for assault if he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and the other is thereby put in such imminent apprehension.”).

¹⁰ See *id.* § 13(a)–(b) (“An actor is subject to liability to another for battery if he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and a harmful contact with the person of the other directly or indirectly results.”); see generally Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1606 (2012) (“The action in battery originated in the early common law writ of trespass, which included not only battery, but also assault, false imprisonment, trespass to land, and trespass to chattels.”) (footnote omitted); *Id.* at 1607 (“Although conceived originally as covering force and violence, at some point early on it became clear that the writ of trespass covered many of what we would now view as offensive bodily contacts, such as ‘spitting upon a person; pushing another against him; throwing a squib or any missile or water upon him.’”) (footnotes omitted).

¹¹ See *e.g.*, *Murphy v. Steeplechase Amuse. Co.*, 166 N.E. 173 (N.Y. 1929) (“*Volenti non fit injuria*. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.”) (footnotes omitted).

ful to understand the basic doctrinal principles of negligence, assault, and battery that traditionally govern liability for injuries.

B. Negligence¹²

Hornbook law teaches that “negligence” occurs when one person owes a duty of reasonable care to another, he breaches that duty, and that breach proximately causes injury to the other.¹³ Whether one person owes another a duty of reasonable care is a question of law that a judge must decide.¹⁴ Typically, a duty arises because of some relationship between the parties. The relationship can be very obvious, such as a teacher owing a duty of reasonable care to his students. It can also be more attenuated, such as a therapist owing a duty of reasonable care to persons who may be endangered by his patient's conduct.¹⁵ A person breaches a duty of reasonable care when he fails to act as a reasonable person would have acted under similar circumstances.¹⁶ This is a question of fact, which, in a jury trial, is determined by the jury (*i.e.*, as opposed to the question of

¹² See Moore, *supra* note 10, at 1610 (“At some point courts began to distinguish between an action in negligence and an action in battery. Assault and battery came to be viewed as requiring something more than mere negligence on the part of the defendant, that is, a bad intent or willfulness. Even then, however, courts struggled to determine what a bad intent might be.”) (footnote omitted).

¹³ See DAN B. DOBBS ET AL., DOBBS’ LAW OF TORTS § 125 “The Elements: Meaning and Terminology” (2d ed. 2011) (“In the ordinary case, the defendant owes a duty of care. The only question about the duty in such cases is whether the care owed is some especially high kind of care or whether it is more modest. This phase of the duty issue is usually discussed in terms of the ‘standard of care.’ The duty or standard imposed in most cases is the duty of reasonable care under the circumstances, no more, no less.”).

¹⁴ See *id.* § 251 (“No defendant is liable for negligence unless he is under a legal duty to use care. If the defendant is under no duty to use care, he is in effect exempted from the ordinary rules of negligence law and avoids all accountability and responsibility for harm inflicted. Whether the defendant owes a duty or not is determined by judges, not juries.”).

¹⁵ See e.g., *Tarasoff v. Regents of U. of California*, 551 P.2d 334, 340 (Cal. 1976) (“When a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger.”).

¹⁶ See Dan B. Dobbs et al., *supra* note 13, § 127 (“The duty owed by all people generally—the standard of care—is the duty to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm to others... The reasonable and prudent person standard of care is often described as the standard of ordinary care, due care, or reasonable care... the terms are interchangeable, and they all refer to external conduct that would be dictated by ‘care’ or ‘prudence.’”); Restatement (Second) of Torts § 283 cmt. c. (1965) (“In dealing with this problem the law has made use of the standard of a hypothetical ‘reasonable man.’ Sometimes this person is called a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing. The actor is required to do what this ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard.”).

whether a duty exists, a question of law which the judge – not the jury – decides).¹⁷ In theory, in most instances, jurors are capable of evaluating whether someone has or has not acted in a manner appropriate for a reasonable person under the circumstances. If a person has breached a duty of reasonable care, then a jury must also determine whether that breach proximately caused the plaintiff's injury.¹⁸

Like breach of duty, the question of "proximate cause" is a question of fact for the jury.¹⁹ Proximate cause is complicated. In order to analyze proximate cause, generally, a jury must answer two questions in the affirmative: 1) was the defendant's conduct the actual/but-for cause of the plaintiff's injury; 2) was the general type of injury sustained, by the plaintiff, a foreseeable consequence of the defendant's conduct.²⁰ Typically, in order for a defendant's conduct to constitute an actual/but-for cause of a plaintiff's injury, we must find a cause-and-effect relationship between the two. Cause-and-effect relationships tend to be grounded in three scientific disciplines (or combinations of them): 1) Physics (*e.g.*, Newtonian Laws, such as "for every action there is an opposite and equal reaction," or other physical laws relating to things such as matter, energy (including temperature), friction, and gravity); 2) Chemistry (*e.g.*, when certain substances contact one another they produce heat or combustion); or 3) Psychology (*e.g.*, a great deal of human and other animal behavior is caused by the way brain functions cause us to react to external stimuli of various kinds). But, in addition to determining whether there is an actual/but-for cause-and-effect relationship between a defendant's conduct and a plaintiff's injury, "proximate cause" requires that a jury also determine that there is a close enough relationship between a defendant's conduct and a plaintiff's injury that it is fair, or

¹⁷ See Dan B. Dobbs et al., *supra* note 13, § 251 ("Whether the defendant owes a duty or not is determined by judges, not juries. Judges also determine the scope of the duty owed. On the other hand, juries determine all the other elements of the negligence case unless the answer is so clear that reasonable people cannot differ.").

¹⁸ See *e.g.*, *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 721 N.E.2d 614, 620 (Ill. App. 1999) ("Proximate cause can be established only when there is a reasonable certainty that the defendant's act caused the injury, it cannot be predicated upon surmise or conjecture as to the cause of an injury.").

¹⁹ See Restatement (Second) of Torts § 434 cmt. c. (1965) ("The question of what actually occurred in any particular case is for the jury, unless this is agreed upon, admitted by the pleadings, or found by special verdict, or unless the testimony is so undisputed and uncontradictory that there is only one inference which reasonable men could draw from it. If this is the case, the court must determine whether the actor's conduct is a substantial factor in bringing about the plaintiff's harm, unless this question is itself open to reasonable difference of opinion, in which case it is for the jury.").

²⁰ See Dan B. Dobbs et al., *supra* note 13, § 125 ("In addition to proving causation in fact, the plaintiff must prove that the defendant's conduct was a 'proximate cause' of the plaintiff's harm, meaning that the harm was the general kind that was unreasonably risked by the defendant, the kind of harm the defendant should have been more careful to avoid.").

just, to hold the defendant responsible.

Although many judges and courts have formulated a number of analytical methods for assessing this issue, most use “foreseeability” as the determining factor.²¹ As a general rule, if a reasonable person should have anticipated a result, Tort law considers the result “foreseeable.”²² In simple terms, then, if a reasonable person, prior to and/or in the midst of performing some action should anticipate that his conduct will result in injury to another, Tort law treats that person’s conduct as a “proximate cause” of the injury if, in fact, injury does occur.²³

C. Assault

In Tort law, the word “assault” has a meaning that is quite different from what most laypersons typically assume. Laypersons, unfamiliar with Torts, usually think of harmful or offensive *physical contact* when they hear the term “assault.” This misconception is mostly due to its meaning in Criminal law. Laypersons ordinarily are familiar with the Criminal law definition of “assault” as a result of reading it or hearing it in the media, which frequently reports such instances. However, as any first year law student knows, in the law of Torts, “assault” has its own technical meaning. In Tort law, “assault” occurs when a person intentionally causes another to apprehend (*i.e.*, perceive) imminent harmful or offensive contact.²⁴ For example, when A sees B load a gun with live ammunition and watches B point it at him and fire it at close range, A apprehends/perceives imminent harmful contact. Assuming for the sake of argument that B’s conduct satisfies the definition of “intentional,”²⁵ B has probably committed the tort of “assault,” even if A suffers no physical contact (*e.g.*, if the

²¹ *See id.* § 205 (“[C]ourts usually reduce the tests of scope of liability or proximate cause, both in direct and in intervening cause cases, to a question of foreseeability... To some extent, the language of foreseeability is simply a shorthand expression intended to say that the scope of the defendant’s liability is determined by the scope of the risk he negligently created.”).

²² *See id.* § 206 (“The foreseeability or risk rule holds the defendant subject to liability if he could reasonably foresee the nature of the harm done, even if the total amount of harm turned out to be quite unforeseeably large.”); RESTATEMENT (SECOND) OF TORTS § 435 cmt. a “Foreseeability of Harm or Manner of Its Occurrence”(1965) (“However, the manner in which the harm occurs may involve the cooperation of other assisting factors so numerous and so important that the actor’s negligence cannot be regarded as a substantial factor in bringing about the harm.”).

²³ *See* Dan B. Dobbs et. al., *supra* note 13, § 125 (“A plaintiff cannot recover without showing actual harm resulting from the defendant’s conduct.”).

²⁴ RESTATEMENT (SECOND) OF TORTS § 22 cmt. a “Attempt Unknown to Other” (1965) (“It is, therefore, necessary not only that the act should be done with intention but that it should actually have put the plaintiff in apprehension of an immediate contact.”).

²⁵ For more on the meaning of “intent,” *see infra* Part III.

bullet misses him). The Tort of “assault” protects a person’s interest in mental tranquility.²⁶

Consider this rule as it might apply in baseball: If a pitcher intentionally throws a “brush-back” pitch, attempting only to pitch the ball close to a batter (even without actually trying to hit him), and the batter perceives imminent harmful or offensive contact, then the pitcher would be subject to liability for “assault.” But, because of several other rules, discussed below, pitchers are not liable for assault in such circumstances.²⁷ However, if a person were to throw a ball, in this manner, at a stranger in a non-baseball/non-sports setting, such conduct would ordinarily constitute assault.

D. Battery

For purposes of this Article, “battery” is probably the most important tort. “Battery” occurs when a person intentionally causes harmful or offensive contact with another.²⁸ Although there are nuances in the rule, the basic concept is simple enough:²⁹ When A intentionally strikes B with his fist, that conduct ordinarily constitutes the tort of “battery.” In an ordinary American football game, for example, in the absence of special rules applicable to the sport, there

²⁶ RESTATEMENT (SECOND) OF TORTS § 24 cmt. b. “What Constitutes Apprehension” (1965) (“It is not necessary that the other believe that the act done by the actor will be effective in inflicting the intended contact upon him. It is enough that he believes that the act is capable of immediately inflicting the contact upon him unless something further occurs.”).

²⁷ See *infra* Part II.

²⁸ See Moore, *supra* note 10, at 1588 (“[S]ome have argued that the essence of battery is not the intent to cause a *harmful or offensive* contact, but rather the intent to cause an *unpermitted* contact, thereby raising questions concerning the precise nature of the relationship between the defendant's intent and the plaintiff's lack of consent.”) (footnotes omitted, italics original); *id.* at 1597 (“[B]attery requires that the defendant perform: (1) an act, (2) with the intent ‘to cause a harmful or offensive [bodily] contact’ (or the imminent apprehension of such a contact), (3) that directly or indirectly causes, (4) a harmful or offensive bodily contact.”) (footnotes omitted); Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEGAL MED. 1, 4-5 (1996). “The modern tort of battery has been defined as an intentional wrong ‘which is committed by intentionally bringing about a harmful or offensive contact with the person of another.; This will happen when the direct offensive contact with the body of another had been desired (purposive) or known to be substantially certain to result. The tort is based on the principle that other persons do not have the right to interfere with the person of another unless he or she validly consents to such an interference. The law considers the tort of trespass to person as safeguarding not only the personal interest in one's physical integrity, but also as protecting the individual against any interference that is offensive to a reasonable sense of dignity and personal autonomy.” *Id.* (footnotes omitted).

²⁹ Although the basic principle is relatively simple, Professor Moore cautions that the doctrine, as a whole, is not. See Moore, *supra* note 10, at 1595 (“[N]either beginning law students nor experienced lawyers should be misled into thinking that modern intentional torts such as battery are relatively simple and straightforward or that the Second Restatement clearly articulates the doctrine as it has been applied by a majority of courts.”).

would be battery on nearly every play where one player intentionally blocks or tackles another, since these actions are typically intentional harmful contact that causes some degree of injury (even if the injury is a *de minimis* soft tissue inflammation). Indeed, most “contact sports” involve participant conduct that would be considered “battery” if that conduct were to occur in a non-sports context or setting. Intentional fouls in basketball, checking in ice hockey, and baseball players sliding into second base and making contact with the defender in an attempt to break up a double play, would all be considered “battery” in the absence of special rules governing the games.³⁰ Presumably many, but certainly not all, athletes who have suffered concussions while playing contact sports have suffered them as a result of conduct that would be considered “battery” in non-sports settings.

Assumption of Risk & Consent

A. Overview

“Assumption of risk” and “consent” are technical terms; they are words that have special meanings in the vocabulary of Tort law. As such, it is important to define these terms carefully and to use them correctly in order to be precise and clear when using them as “terms of art.” Assumption of risk is a term used to describe an affirmative defense to negligence.³¹ Consent is a term that relates to intentional torts, not negligence. Many have used the old Latin phrase, *volenti non fit injuria* (“no wrong accrues for one who is willing”) as a shorthand for both of these concepts.³²

³⁰ See e.g., Dryden, *supra* note 4, at 190 (explaining that his Montreal, Canadian coach, Scotty Bowman, exhorted his players to intentionally try to hit, and, presumably, hurt an opposing player: “Then more slowly again, his voice an angry baritone, ‘*Put that guy down.*’”) (italics in original); *id.* at 220 (“Delivered mid-ice with shoulder or hip, a body-check is the universal symbol of Canadian hockey. Hard, clean, elemental, a punishing man-to-man contest...”); *id.* at 243 (hypothesizing about the origins of body checking in the game of ice hockey, Dryden remarks, “But inadvertent or not, early players soon discovered that in a puck carrier’s game, collisions were effective deterrents.”); *id.* at 250 (“Hockey was a rough game, and had been very nearly from its start. Its speed, its confined, congested playing area, had almost guaranteed it, and made body-checking accepted defense strategy.”).

³¹ RESTATEMENT (SECOND) OF TORTS § 496A “Assumption of Risk: General Principal” (1965) (“A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.”).

³² See e.g., *Fitzgerald v. Conn. River Paper Co.*, 29 N.E. 464, 465 (Mass. 1891) (“The rule of law, briefly stated, is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure.”); *Murphy v. Steeplechase Amuse. Co.*, 166 N.E. 173, 174 (N.Y. 1929). “*Volenti non fit injuria*. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.” *Id.* (footnotes omitted). See also

B. Assumption of Risk: Express & Implied

1. Express

Technically, there are several kinds of assumption of risk. First, a person might expressly assume a risk of injury by agreeing, either in writing or orally, to undertake an activity. When a person expressly acknowledges that he or she is willing to assume risks, we refer to that as “express assumption of risk.”³³ Today, many people expressly assume risks of injury by means of contracts. Those who provide horseback riding lessons, ski instruction, gymnastics instruction, skydiving opportunities, and the like, typically require participants to sign so-called waivers of liability.³⁴ Such waivers usually include language that states that the participant is aware of the many dangers presented by the activity in question and that, as partial consideration for the service provider’s willingness to provide facilities – and sometimes instruction – for that activity, the participant expressly assumes those risks, waives his/her right to sue the service provider, and agrees to hold the service provider harmless for any injuries.³⁵ Thus, in many instances, participants expressly assume risks.

2. Implied: Primary & Secondary

In addition to express assumption of risk, there are also circumstances in which Tort law deems persons to have assumed risks impliedly. This is implied assumption of risk. To complicate matters further, Tort law has developed two separate kinds of implied assumption of risk: primary and secondary.³⁶ “Primary assumption of

Simons, *supra* note 5, at 248–58 (discussing doctrinal similarities between assumption of risk and consent).

³³ See e.g., *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470 (7th Cir. 1991) (“Express assumption of risk demands an explicit agreement...”).

³⁴ See Simons, *supra* note 5, at 234 (“Would the reasonably prudent person ever try the experimental sport of hang gliding?”).

³⁵ See e.g., *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 35 P.3d 383 (Wash. Ct. App. 2001). See also Simons, *supra* note 5, at 224 (“Sometimes a plaintiff specifically agrees not to hold defendant liable for conduct that would otherwise be tortious. Such waivers will often be enforced, especially when they are in contractual form.”).

³⁶ See Dan B. Dobbs et al., *supra* note 13, § 238 (“[P]rimary assumption of risk’ is used to indicate the no-duty or no-breach conception and its attendant complete-bar effect; and the term ‘secondary assumption of risk’ is used to indicate the contributory negligence conception.”); RESTATEMENT (SECOND) OF TORTS § 496A cmt. c. “Assumption of Risk: General Principal” (1965). “Primary implied assumption of risk may be illustrated by the case in which a plaintiff has been injured as a natural incident of engaging in a contact sport. It may also be seen in the act of a spectator entering a baseball park, thereby consenting that the players proceed without taking precautions to protect her from being hit by the ball.” *Id.* See e.g., *Foronda ex rel. Est. of Foronda v. Haw. Intern. Boxing Club*, 25 P.3d 826, 835–36 (Haw. App.

the risk is the judicially created affirmative defense whereby a defendant owes no duty to protect a plaintiff against certain risks that are so inherent in an activity that they cannot be eliminated.”³⁷ As Catherine Hansen-Stamp has explained:

the application of the...[doctrine] requires a duty analysis: if the injury results from an inherent risk, the provider owes no legal duty, plaintiff's cause of action must fail.... If the injury does not result from an inherent risk, plaintiff may go on to prove that the provider's negligence caused his injuries.³⁸

The principal reason why primary implied assumption operates to negate liability is best explained as a matter of policy: The nature of the activity is what dictates whether the rule applies. Most activities – especially sports and recreational activities – present risks that, because of the very nature of the activity, cannot be eliminated.³⁹ For example, in his book, *The Game*, the former Montreal Canadiens goalie, Ken Dryden, described the knee ligament and shoulder injuries of a teammate, remarking, “For though only in his mid-twenties, he can see a clear, disquieting pattern emerging to his career, and he’s just beginning to know that from now until he retires, it won’t

2001). “Primary implied assumption of risk contemplates a plaintiff who reasonably chooses to bear a particular risk of harm. Conversely, the defendant owes no legal duty to protect the plaintiff from any harm that risk may entail... Secondary implied assumption of risk refers to a plaintiff's unreasonable decision to confront a risk of harm created by the defendant's negligence.”

Id. (quoting *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778 (D. Haw. 1993)). Foronda, 25 P.3d 826, 834 (Haw. App. 2001). “In its 'secondary' sense, implied assumption of risk focuses on a plaintiff's conduct, and describes a situation where plaintiff knows of the danger presented by a defendant's negligence and proceeds voluntarily and unreasonably to encounter it. A plaintiff's assumption of risk is unreasonable, and a form of contributory negligence, where the known risk of harm is great relative to the utility of plaintiff's conduct.” *Id.* (quoting *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959)). *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959). “[I]n area in which injury or damage was neither intended nor expressly contracted to be nonactionable, assumption of the risk has two distinct meanings, in one sense being an alternate expression for proposition that defendant was not negligent in that he either owed no duty or breached no duty owed and in a secondary sense as an affirmative defense to an established breach of duty and in which sense it is indistinguishable in its nature from contributory negligence.” *Id.*

³⁷ *Bundschu v. Naffah*, 768 N.E.2d 1215, 1221 (Ohio App. 2002). *See also* *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470, 477 (7th Cir. 1991) (“In primary implied assumption of risk, the plaintiff assumes risks inherent in the nature of the activity...”).

³⁸ Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming's Recreational Safety Act – An Update*, 33 LAND & WATER L. REV. 249, 260 (1998) (footnotes omitted).

³⁹ *See e.g.*, Dryden, *supra* note 4, at 133 (discussing the fear of being hit and hurt as simply being expected while playing goalie in the NHL); *id.* at 138 (“I should catch more, but years of concussion have left the bones in my hand and wrist often tender and sore, and learning to substitute a leg or a stick to save my hand, my catching glove reprogrammed and out of practice, often remains at my side.”).

change much.”⁴⁰ We might say that such risks are intrinsic or inherent, or that such risks exist due to the necessity of the structure of the activity itself. And given the intrinsic, inherent, or necessary nature of such risks, it would be unfair or unjust to hold persons liable when those risks produce injury.⁴¹ The rule of primary assumption of risk functions to hold those who participate in or provide activities liable for injury to others participating, *if and only if*, the injury is caused by reckless or intentional conduct, but *not* for mere negligence or even for what some describe as gross negligence.⁴²

The California Supreme Court’s explanation of the difference between primary and secondary assumption of risk in *Knight v. Jewett*⁴³ is helpful. In *Knight*, the plaintiff and defendant were on opposite sides in an informal game of touch football using a peewee football, and the plaintiff suffered a serious hand injury during the game, which resulted in three surgeries and, ultimately, amputation of a finger.⁴⁴ The court analyzed the assumption of risk and, in an extensive discussion, differentiated between primary assumption of risk and secondary assumption of risk within the context of comparative fault:⁴⁵

Primary assumption of risk is defined as a legal conclusion that there is no duty for the defendant to protect the plaintiff from a risk. Secondary assumption of risk, on the other hand, is defined as the defendant having a duty of care to the plaintiff, but the plaintiff knowingly encounters the risk caused by the breach of duty.⁴⁶

⁴⁰ *Id.* at 162.

⁴¹ See e.g., Simons, *supra* note 5, at 240. “[S]ometimes an activity is unavoidably dangerous: it cannot be made safer. In that event, the defendant cannot offer choice (3), i.e., she cannot offer the activity’s benefit without its costs. If the plaintiff has chosen to engage in such an activity, with knowledge of the risks, then he *has* consented or assumed the risk, in the full and not the limited sense. Perhaps he wishes that there were a safer way to engage in the activity, but there is not. His consent, therefore, should ordinarily be effective.” *Id.*; *id.* at 271–72. “The plaintiff is unlikely to recover for risks that ‘are almost inevitable from the conduct on the part of the other contestants to which he... gives his assent.’ Even violation of the rules of the sport might not lead to recovery. However, a plaintiff may recover for injuries suffered from certain acts, including but not limited to flagrant violations of the rules.” *Id.* (footnotes omitted).

⁴² See *infra* Parts II and III for more discussion about primary assumption of risk.

⁴³ 834 P.2d 696 (Cal. 1992).

⁴⁴ *Id.* at 696.

⁴⁵ *Id.* at 704–11.

⁴⁶ *Id.* at 704–05. See also *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470 (7th Cir. 1991) (“[I]n secondary implied assumption of risk, the plaintiff assumes risks that are created by the defendant’s negligence.”); TERENCE J. CENTNER, *AMERICA’S BLAME CULTURE: POINTING FINGERS AND SHUNNING RESTITUTION* 81 (2008). “Secondary assumption of risk generally involves a breach of a duty not to increase the risks encountered by plaintiffs beyond the level inherent in the sport. Secondary assumption of risk also involves a breach of a duty of care by a defendant and additional facts suggesting that

The *Knight* court explained the distinction between primary and secondary assumption of risk as follows: 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.⁴⁷

The Court further defined primary implied assumption of risk more clearly: In cases involving “primary assumption of risk”—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff's recovery.⁴⁸

C. Consent

Few ideas are more central to law than that of consent. The presence or absence of valid consent commonly helps determine the distribution of legal rights. We can hardly imagine the law of contracts, of property, or of crimes and torts – including battery, trespass, assumption of the risk, and informed medical consent – apart from the idea of consent.⁴⁹

According to Dobbs, “One who consents or apparently consents to acts that would otherwise count as an intentional tort cannot recover damages for those acts.”⁵⁰

Consent as a legal concept developed originally within the context of the law of trespass. Trespass is a generic

the plaintiff knew of the danger and decided to encounter the risk.” *Id.* (footnotes omitted). See also Simons, *supra* note 5, at 215. (“In cases of ‘primary’ assumption of risk, defendant is not negligent – either he owed no duty or he did not breach the duty owed. ‘Secondary’ assumption of risk is an affirmative defense to an established breach of duty, and exists only if plaintiff was contributorily negligent.”) (footnote omitted).

⁴⁷ *Knight v. Jewett*, 834 P.2d 696, 704 (Cal. 1992).

⁴⁸ *Id.* at 708.

⁴⁹ R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397 (1995) (footnote omitted).

⁵⁰ Dan B. Dobbs, et. al., *supra* note 13, § 95, 216 “Consent as a Bar.” *Id.* at 218 § 96 (“Either actual or apparent consent is effective to relieve the actor of responsibility for the acts addressed.”) (footnote omitted).

term that encompasses all kinds of wrongful direct and intentional interferences with persons, land, and chattels (goods). Trespass to person comprises three separate torts – battery, assault, and the tort of false (wrongful) imprisonment.⁵¹

As was mentioned, “consent” is a term used in the context of intentional torts, such as assault and battery, whereas “assumption of risk” is a term used in connection with negligence.⁵² It is best not to confuse or conflate the two terms.⁵³ To further complicate matters, unlike assumption of risk, which is an affirmative defense to negligence, lack of “consent,” technically, is a required element of a plaintiff’s *prima facie* case.⁵⁴ According to Prosser, “Consent ordi-

⁵¹ Mendelson, *supra* note 28, at 4 (footnote omitted).

⁵² See Dan B. Dobbs, et. al., *supra* note 13, § 95, 217 “Consent as a Bar” (“An analogous rule applies in some but not all negligence cases under the name of assumed risk.”); W. Page Keeton et al., *supra* note 6, § 18, 112 (“A similar but different question relates to the questionable defense of voluntary assumption of the risk to otherwise actionable, accidental invasions giving rise to negligence, or even some kind of strict liability.”) (footnote omitted). One might wonder, if “assumption of risk” and “consent” are really analogous, why the legal community does not use the same terminology to refer to the same concepts. In order to avoid confusion and increase the likelihood of consistency, perhaps we should use the same terminology; perhaps we should not use different terminology for “consent” and “assumption of risk.”

⁵³ See Simons, *supra* note 5, at 214–15 (“Consent is an accepted defense to an intentional tort; why then are we uncertain about the status of assumption of risk, which is often equated with consent?”). Curiously, however, Professor Simons, himself, on occasion, conflates the two terms. See *e.g.*, *id.* at 249 (“[I]f an athlete is deemed to assume the risk of some intentional contacts during a sporting event, he has agreed to an uncertain risk of an intentional tort.”) (footnote omitted); *id.* at 251 (“Consent and assumption of risk doctrine are directly analogous in significant ways. Both traditionally operate as complete defenses. Both essentially rely on the plaintiff’s subjective preferences or desires. But there are some subtle contrasts, as well.”) (footnote omitted).

⁵⁴ See *e.g.*, Moore, *supra* note 10, at 1591–92. (“The casebooks diverge, however, on whether a plaintiff’s actual or apparent consent is an affirmative defense or whether lack of consent is a part of the plaintiff’s *prima facie* case. Many of the casebooks present consent as an affirmative defense that must be pleaded and proved by the defendant. Other casebooks observe that some courts treat consent as an affirmative defense, while others treat the absence of consent as an element of the plaintiff’s *prima facie* case.”) (footnotes omitted). *Id.* at 1603 (“In some cases, courts have brought into the definition of a battery the requirement that the plaintiff prove the absence of consent, sometimes substituting lack of consent for the intent to commit a harmful or offensive contact.”) (footnote omitted); *id.* at 1612. (“[W]ith respect to the required intent, apparently originated the phrase ‘intention of bringing about a harmful or offensive contact’ as a substitute for the prior emphasis by courts and commentators on ‘unlawful,’ ‘wrongful,’ or ‘constructive’ intent. The First Restatement recognized that absence of consent was an essential aspect of battery...” (footnotes omitted).

See also RESTATEMENT (SECOND) OF TORTS § 13 cmt. d. (1965) (“[T]he absence of consent is a matter essential to the cause of action, and it is uniformly held that it must be proved by the plaintiff as a necessary part of his case”). See also, *Ford v. Ford*, 10 N.E. 474, 475 (Mass. 1887) (“The absence of lawful consent is part of the definition of an assault...”); RESTATEMENT (SECOND) OF TORTS § 10 cmt. c. “Privilege” (1965). (“There is an important difference between those privileges which are based on the consent of the person affected by the actor’s conduct and those which are created by law irrespective of

narily bars recovery for intentional interferences with person or property. It is not, strictly speaking, a privilege, or even a defense, but goes to negative the existence of any tort in the first instance.”⁵⁵ He explains further that “[c]onsent avoids recovery simply because it destroys the wrongfulness of the conduct as between consenting parties....”⁵⁶ Professor Dobbs’s treatise expresses the same principle:

In many cases, consent is not a true defense but instead marks a deficiency in the plaintiff’s prima facie case. For example, the defendant does not intend an offensive battery when he touches the plaintiff in a consented-to way. The plaintiff’s consent in such case negates any tortious intent, so the plaintiff fails in one element of her proof.⁵⁷

“Under the Second Restatement, as well as in the vast majority of jurisdictions, the absence of consent is part of the plaintiff’s prima facie case....”⁵⁸ In the specialized field of medical treatment, the Tort doctrine has imposed an additional requirement that consent be “informed.”⁵⁹

the other’s consent. The latter type of privilege must always be pleaded and proved by one who seeks thereby to destroy the seemingly tortious character of his conduct, and so protect himself from being subject to liability. On the other hand, where the privilege is based upon the consent of the other affected by the actor’s conduct, there is a distinction between consent to invasions of the interests of personality, in which the burden is upon the plaintiff to prove absence of consent, and consent to all other legally protected interests, including the possessory and proprietary interest in land and chattels, in which the burden of proving the consent is upon the defendant.”)

⁵⁵ W. Page Keeton et al., *supra* note 6, § 18, 112. See also Mendelson, *supra* note 28, at 5–6. (“The courts regard the role of consent in trespass as generally having the effect of transforming what would otherwise be unlawful contact into accepted, and acceptable, conduct. Therefore, consensual contact does not, ordinarily, amount to battery.”) (footnote omitted).

⁵⁶ W. Page Keeton et al., *supra* note 6 § 18, 113.

⁵⁷ Dan B. Dobbs, et. al., *supra* note 13, at 218. See also W. Page Keeton et al., *supra* note 6, at 113 (“Consent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties, however harmful it may be to the interest of others, and even though it is perhaps both immoral and criminal.”). See also Mendelson, *supra* note 28, at 3. (“The law of trespass to person...focuses on the patient’s right to be free of any unwanted bodily contacts and the right to decide whether or not such contacts should occur. Therefore, the ultimate issue of the physician’s liability in trespass to person has to be determined by reference to the presence or absence of valid consent.”)

⁵⁸ Moore, *supra* note 10, at 1635 (footnote omitted). See also *id.* at 1654–55 (“[T]he ALI should decide whether to include absence of consent as an element of the plaintiff’s prima facie case, or alternatively, to specify that consent (either actual or apparent) is an affirmative privilege or defense.”) (“I believe the better position is to make consent an affirmative defense, just like self-defense, defense of others, and defense of property. It is unclear to me why consent functions differently, given that it is not limited to actual consent but includes apparent consent, which is very much like the reasonableness tests of other, clearly affirmative defenses.”) *Id.* at n. 391.

⁵⁹ Mendelson, *supra* note 28, at 24. (“In the United Kingdom, Australia, and Canada, the law considers consent to medical treatment as ‘real’ or ‘valid’ for the purposes of battery if it is given by a competent person who has made the decision voluntarily upon being informed in broad terms of the nature of the

*Categories/Labels & Analysis of Assumption of Risk, Consent, and
Contracts: Changes Suggested*

A. Overview

One of the most important things that legal analysis requires is clarity of definitions. In order to resolve any legal dispute, we must ascertain, as best as we can, what the facts are and be clear about what legal labels, or terms, we use to characterize those facts. If we fail either to ascertain true facts or to characterize those facts appropriately, using accurate terms and definitions of those terms, we run the risk of making mistakes in decision-making. We have noted that there are three sub-categories of “assumption of risk”: 1) “Express Assumption of Risk,” which occurs when a person overtly communicates a willingness to subject herself to the risk of negligence (*e.g.*, a written waiver of liability); 2) “Secondary Implied Assumption of Risk,” which occurs when a person subjectively understands the nature and scope of risks involved in any given activity, but, nevertheless, participates in that activity and is cognizant of those risks;⁶⁰ and 3) “Primary Implied Assumption of Risk,” which occurs when a person participates in an activity, which has certain risks that are intrinsic, inherent, or necessary (perhaps some might even say that such risks are “open” or “obvious”) as part of the nature of the activity (*e.g.*, when on a golf course one ordinarily assumes the risk of being hit by an errant shot struck by another golfer).

The American legal system also recognizes three sub-categories for “consent”: 1) “Actual Consent” (or “Consent in Fact”), which occurs when a person truly, subjectively agrees to conduct by another which, absent consent, would be an intentional Tort (*e.g.*, such as assault or battery);⁶¹ 2) “Apparent Consent,” which occurs when a per-

procedure that is to be performed.” (footnote omitted). This article does not address the specialized issues that the area of medical consent may present. *See also* Mendelson, *supra* note 28, at 31 (“[U]nless the circumstances of emergency apply, a medical or surgical procedure that goes beyond the scope of a patient’s express consent should be regarded as trespass, even when there was no evidence of an express prohibition.”) (footnote omitted).

⁶⁰ Some treat secondary implied assumption of risk as a kind of comparative fault. *See* 57B AM. JUR. 2D NEGLIGENCE § 9 § 764 “Secondary Assumption of Risk” (2d ed. 1962) (“In some jurisdictions, the affirmative defense of assumption of risk merges into the general scheme of liability assessment in which the conduct of the parties must be compared based on evidence of negligence and contributory negligence, as established by reasonable and prudent person standards.”). *See e.g.*, *Perez v. McConkey*, 872 S.W.2d 897, 900 (Tenn. 1994) (“When plaintiff’s decision to take risk is unreasonable, secondary assumption of risk is indistinguishable from contributory negligence, and should only reduce, not preclude, recovery under comparative fault analysis.”).

⁶¹ Dan B. Dobbs, et. al., *supra* note 13, at 218 (“Actual consent to an act is a subjective willingness for the act to occur.”).

son's actions or conduct manifest a willingness to subject themselves to conduct by another, which, absent consent, would be an intentional Tort (*e.g.*, such as assault or battery),⁶² and 3) "Implied Consent," which occurs in certain circumstances, such as an emergency (*e.g.*, "a physician...has implied consent to deliver medical services, including surgical procedures, to a patient in an emergency"⁶³).

At this juncture, it is important to note that Contract law also recognizes three basic types of contracts: 1) "Express Contracts," which occur when the parties manifest their intent to be bound by an agreement by words, either written or verbal;⁶⁴ 2) "Implied in Fact Contracts," which occur when the parties manifest their intent to be bound by an agreement by conduct (*e.g.*, a seller shipping goods to a buyer or a buyer sending payment to a seller);⁶⁵ and 3) "Implied in Law Contracts," which occur when the circumstances are such that, for policy reasons, our legal system recognizes the existence of a contract in order to prevent unfairness and to promote justice (*e.g.*, instances where Contract law protects a party's restitutionary interest).⁶⁶

⁶² See *id.* ("Apparent consent is conduct, including words, that are reasonably understood by another as a reflection of consent.") (footnote to RESTATEMENT (SECOND) OF TORTS § 892); Moore, *supra* note 10, at 1627–28 ("[T]he apparent consent doctrine is necessary for the defendant to avoid liability in situations where the defendant mistakenly, but reasonably, believes that the plaintiff has consented.") (footnote omitted); Simons, *supra* note 5, at 217 ("Doctrinally, the question is whether the plaintiff has actually or apparently consented to the harm.") (footnote omitted).

⁶³ W. Page Keeton et al., *supra* note 6, at 117 (footnote omitted). See also Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 34 (2010). Professor Bell uses the terms "express, implied, and hypothetical." Unfortunately, he uses the word "implied" to refer to what traditionally has been called "apparent" and he uses the word "hypothetical" to refer to what has traditionally been called "implied." But he does not explain to the reader that he has consciously changed the labels. Nevertheless, functionally, Professor Bell's "implied" category is the same as what this Article calls "implied in fact" and his "hypothetical" category corresponds to what this Article calls "implied in law."

⁶⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a. "How a Promise is Made" (1981); 1 WILLISTON ON CONTRACTS § 1:5 "Express contracts including contracts inferred or implied in fact" (4th ed.); 17A AM. JUR. 2D CONTRACTS § 12 "Generally" (2d ed. 1962). See *e.g.*, *Alexander v. O'Neil*, 267 P.2d 730, 734 (Ariz. 1954) ("An express contract is ordinarily thought of as an actual agreement reached by the parties who have openly uttered or declared terms thereof at the time of making it, either orally or in writing.").

⁶⁵ See 1 WILLISTON ON CONTRACTS § 1:5 "Express contracts including contracts inferred or implied in fact" (4th ed.) ("Although no words of promise or agreement are used, such transactions are true contracts and may properly be called "inferred contracts" or "contracts implied in fact.""). See *e.g.*, *Baltimore & O.R. Co. v. U.S.*, 261 U.S. 592, 598 (1923) ("An agreement will not be implied in fact, unless there was a meeting of the minds of the parties, indicated by some intelligible conduct, act, or sign.").

⁶⁶ See Bell, *supra* note 63, at 46 ("Contract law...places the three main types of consent – express, implied, and hypothetical – into an ordered ranking, ranging from most consent rich to the least.").

B. Zooming Out to Focus on Goals

It is useful first to zoom out, assess, and comprehend the big picture of what these legal doctrines are meant to achieve. In other words, we need to articulate the goal or goals in order to determine whether our legal rules are designed in such a way that we actually are likely to accomplish that goal or those goals. The bottom-line goal of the doctrines of assumption of risk, consent, and assessing parties' intent to be bound by contractual obligations is to determine whether, between two persons, one is liable to the other for payment when later it turns out that the former (the plaintiff) has suffered some type of injury – whether physical, emotional, or economic – as a result of conduct by the latter (defendant). As a rule, if the latter (the defendant) has acted within the range of conduct that the community accepts as reasonable under the circumstances, then she (*i.e.*, the latter/defendant) ought not be held liable. Ideally, these doctrines should protect and balance two interests: 1) the desires of plaintiffs, and 2) the actions of defendants, who have acted reasonably in response to their perceptions of the desires communicated to them by the plaintiffs. Both are legitimate interests that warrant efforts to protect them.

Ordinarily, when a plaintiff successfully communicates his desires to a defendant, our legal system is capable of determining whether a defendant ought to be held liable. For example, when a person purchases a ticket to a baseball game, expressly telling the ticket salesperson (*i.e.*, an agent of the venue operator) that he wants to buy a ticket close to first base because he likes to sit close to the action and close to an area where foul balls are likely to be hit, the venue operator ought not be liable if that spectator is injured when struck by a foul ball during that game while sitting in his desired seat. On the other hand, presumably the converse is true. Assume the spectator expressly told the ticket salesperson that he wanted to purchase a ticket for a seat that was further away from the playing field, shielded by protective netting, because he was fearful of being struck and injured by a foul ball. Assume also that the ticket salesperson, in contravention of the express desires of the spectator, sells to that spectator a ticket for a seat in the first row, close to first base, with no protective netting or screening of any kind. And also assume that this spectator makes his way to his seat (following the directions of the seat number printed on the ticket and instructions by an usher), but that, just as he is about to sit and before he has become aware of the location of the seat and its proximity to the playing field (and before a reasonable person in his situation would have become aware),

a foul ball strikes and injures him. In this scenario, a reasonable person in the position of the ticket salesperson would not have sold a ticket to the spectator for that seat. This is because the spectator expressly communicated his unwillingness to assume/undertake the risks of sitting in a vulnerable location. Because the salesperson's conduct was unreasonable, the venue operator (*i.e.*, the employer of the ticket salesperson) should be liable for the injuries caused when the foul ball struck the plaintiff.⁶⁷

Simply stated, and it bears repeating, when a plaintiff successfully communicates his desires in a manner that a reasonable person ought to comprehend (*i.e.*, whether a willingness or unwillingness to undertake the risks of the potential negligence of others, the risks of potential, intentional assault and/or battery, or the risks that flow from agreeing to contract obligations), our legal doctrines have little or no difficulty determining whether to impose liability. The problems arise when there is a lack of correlation, or disconnect, between a plaintiff's desires (*i.e.*, inner, subjective thoughts) and the perceptions of those desires by a reasonable person in the position of a defendant.⁶⁸

These doctrines start from the premise that, when a plaintiff understands the nature and scope of the risks involved in a situation, but willingly decides to take his chances – and effectively communicates that willingness in a manner that a reasonable person would comprehend that willingness – by undertaking the risks of participation (*e.g.*, playing a game, watching a game, agreeing to terms, conditions, and obligations in a contract), then a defendant, who is also involved in the activity along with the plaintiff (*e.g.*, a co-participant, official, the other contracting party) ought not be liable to the plaintiff when the plaintiff's injury is caused by a risk within the nature and scope of risks comprehended by the plaintiff.

Let us remember that, whether we are talking about Torts or Contracts, there are essentially two related, relevant factual issues. We are trying to determine what subjective thoughts the injured party entertained and also what thoughts a reasonable person in the position of the party who inflicted the injury ought to have entertained. Both are relevant to determine liability, whether in Tort or Contract. Nevertheless, in close cases, arguably the thoughts entertained by a reasonable person in the position of an injurer are more important than

⁶⁷ See Simons, *supra* note 5, at 279 (discussing the limited duty rule applicable to situations where a spectator is injured by a foul ball at a baseball park).

⁶⁸ See Simons, *supra* note 5, at 251–52 (“Is plaintiff barred if a reasonable defendant would believe that plaintiff assumed the risk, even if plaintiff did not actually consent?”) (footnote omitted). Unfortunately, Professor Simons, himself, conflates “assumption of risk” and “consent” terminology.

the thoughts of an injured party. And it should be stressed that the subjective thoughts of the parties are not as important as the thoughts that a reasonable person in their positions ought to have entertained, based on the words and conduct of the other persons involved, coupled with the circumstances. Because humans are not mind readers, our legal system requires only that we act in accordance with the way that a reasonable person under similar circumstances would respond. As Professor Wright has observed, “there are persuasive arguments that legal doctrines should not invariably or uncritically serve a person’s subjective desires.”⁶⁹

External stimuli bombard our senses with information. We process information only through our five senses: sight, hearing, touch, taste, and smell. Thus, as a rule, in order to assess whether a person’s actions are reasonable, we must first determine what stimuli he perceived. What did that person see, hear, smell, taste, or feel? Only when we know those things can we then assess whether their actions were reasonable in light of their situation. Only then can we determine whether that person’s conduct was within the range of acceptable conduct that would have been taken by a hypothetical, reasonable person under those, or similar, circumstances.

To be sure, a person’s subjective thoughts may, and often do, influence the perceptions of others. Some people are able to “hide their feelings” better than others. But there is not always a direct, positive correlation between a person’s inner thoughts and their words, facial expressions, body language, or otherwise. There are times when a reasonable person misinterprets or misperceives the intentions of others. And, as a rule, when a reasonable person would misinterpret or misperceive the intentions of another, our legal system refuses to impose liability on a person who has acted in accordance with that reasonable misinterpretation or misperception. Why? Because, again, as a rule, our legal system takes the position that we only expect people to act reasonably, not as super-humans with mind reading capabilities.⁷⁰ So jurors are left to judge whether parties have acted reasonably in light of the information (*i.e.*, external stimuli) available to their (*i.e.*, the parties’) senses at the time of their actions.

To a large degree, as has been mentioned, both Contract and Tort litigation requires decision makers to determine whether defendants must pay plaintiffs money. Also to a large degree, that decision de-

⁶⁹ Wright, *supra* note 49, at 1398. See also Simons, *supra* note 5, at 253 (“[A]pparent consent and apparent assumption of risk are equally sound doctrines.”).

⁷⁰ See Bell, *supra* note 63, at 24 (“[E]ven the most powerful prosecutor can make no pretense of reading minds, but instead must rely on the observable, external manifestations of mental states.”).

pends on how decision makers interpret the meaning and content of communications that occurred at some time in the past between or among the plaintiffs and defendants. For the sake of example, let us consider how these factual inquiries might play out in a putative contract offer-and-acceptance. In order to be bound by a contract, both offeror and offeree must manifest their intent to be bound.⁷¹ When an offeror communicates an offer, it is the act of communication that manifests her intention to be bound, or not, to a contract. And when an offeree communicates either acceptance or rejection of the offeror's offer, it is that act of communication that manifests her intention to be bound to a contract. Whether the parties have manifested an intent to be bound depends on their verbal and non-verbal conduct, and also the surrounding circumstances (*e.g.*, prior conduct and interactions of the parties and industry customs). As a rule, neither putative offeror nor putative offeree can be liable for breach of contract if she did not manifest an intent to be bound.⁷²

In the law of Torts, a defendant is liable for damages for the intentional tort of battery when he intentionally causes harmful or offensive contact with a plaintiff.⁷³ However, if a plaintiff has consented to the harmful or offensive contact, a defendant is not liable for a plaintiff's injuries caused by the harmful or offensive contact.⁷⁴ For example, as a rule, when a boxer hits his opponent in the ring, he is not liable for his opponent's injury caused by the blow. Boxers con-

⁷¹ See 1 WILLISTON ON CONTRACTS § 3:2 "Requirements for informal contracts" (4th ed.). See *e.g.*, *Cox Broad. Corp. v. Natl. Collegiate Athletic Ass'n*, 297 S.E.2d 733, 737 (Ga. 1982) ("In determining if parties had the mutual assent or meeting of the minds necessary to reach agreement, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his manifestations of assent.") (footnotes omitted).

⁷² See 1 WILLISTON ON CONTRACTS § 1:3 "Agreement" (4th ed.) ("As is true with respect to promises, the nature of agreement requires a manifestation of mutual assent, and the concept of manifestation generally requires an objective indicium of mutual assent."). See *e.g.*, *Situation Mgt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699, 703 (Mass. 2000) ("It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement.").

⁷³ See RESTATEMENT (SECOND) OF TORTS § 13 "Battery: Harmful Contact" (1965); RESTATEMENT (SECOND) OF TORTS § 18 "Battery: Offensive Contact" (1965).

⁷⁴ See *id.* ("Plaintiff's consent to the contact with his person will prevent the liability."); RESTATEMENT (SECOND) OF TORTS § 892, cmt. b. "Meaning of Consent" (1979) ("Consent means that the person concerned is in fact willing for the conduct of another to occur. Normally this willingness is manifested directly to the other by words or acts that are intended to indicate that it exists. It need not, however, be so manifested by words or by affirmative action. It may equally be manifested by silence or inaction, if the circumstances or other evidence indicate that the silence or inaction is intended to give consent. Even without a manifestation, consent may be proved by any competent evidence to exist in fact, and when so proved it is as effective as if manifested.")

sent to subject themselves to blows from their opponents.⁷⁵ Boxers may communicate their consent by verbal conduct, non-verbal conduct, or consent may be inferred by industry custom.⁷⁶ Prosser's treatise illustrates this principle by specifically mentioning sports: "One who enters into a sport, game or contest may be taken to consent to the physical contacts consistent with the understood rules of the game."⁷⁷ Thus, like Contract offeror and offeree, liability for an intentional Tort such as battery may depend on whether a plaintiff has communicated consent.

Communication, by definition, is a two-way street. Communication involves an act or acts by one party coupled with a perception of that act or those acts by another. Most legal rules relating to communicative acts are based on the presumption that the meanings that we attach to communicative acts ought to be the meanings that a reasonable person under similar circumstances ought to have attached to such communicative acts. Thus, when a putative offeror says to an offeree: "I offer to buy your cow for \$500," whether a reasonable person in the position of the offeree would interpret the offeror's statement as a manifestation of assent to be bound by that offer depends on a number of factors. For example, the offeror's tone of voice, facial expressions, body language, hand motions, and other surrounding circumstances affect whether a reasonable person in the position of the offeree ought to interpret the offeror's offer as a genuine manifestation of his intent to be bound. Thus, suppose that a putative offeror is secretly, subjectively thinking to himself "I don't want to buy this guy's cow; I wouldn't buy this cow even for \$10." But if that putative offeror says: "I offer to buy your cow for \$500," and if he says that in a conversational, earnest tone of voice, with a look of genuine honesty in his eyes and hands calmly folded, absent other contradictory evidence (*e.g.*, perhaps such as a previous course of dishonest dealings between the parties), a reasonable person in the position of the putative offeree would interpret the putative offer as a genuine offer to buy, notwithstanding the putative offeror's secret,

⁷⁵ See *e.g.*, W. Page Keeton et. al., *supra* note 6, at 113 ("This manifestation of willingness can exist even when the plaintiff hopes to avoid the invasion, such as some harmful invasion in a sporting contest or a fist fight, and certainly does not want or desire any such invasion."). See also Moore, *supra* note 10, at 1617 ("[A] defendant who engages in a boxing match under the mistaken impression that the plaintiff consented has the requisite intent to harm when he punches the plaintiff in the jaw, desiring to knock him to the floor. The defendant will be liable if he is mistaken as to his opponent's consent, and his mistake is an unreasonable one.") (footnote omitted).

⁷⁶ W. Page Keeton et. al., *supra* note 6, at 113 ("The defendant is sometimes at liberty to infer consent as a matter of usage or custom and to proceed upon the assumption that it is given.").

⁷⁷ *Id.* at 114.

subjective thoughts to the contrary.⁷⁸

Absent persuasive, contradictory evidence, reasonable people presume that the outward manifestations of a person's words and conduct correspond to his subjective thoughts.⁷⁹ The same analysis governs whether a putative offeree's words or conduct legally operate as an acceptance. If a reasonable person in the position of the offeror would interpret the offeree's words and/or conduct as manifesting an intent to accept the offeror's offer, then, as a rule, our legal system treats those words and/or conduct as creating an obligation by the offeree to sell (*i.e.*, as an acceptance of the offeror's offer). The offeree's words and/or conduct may create such an obligation even if the offeree secretly, subjectively is thinking "No I wouldn't sell my cow for less than \$1,000."

C. Isolating the Questions & Trouble with Terminology of Categories

1. Overview

Thus far, this Article has suggested that three analogous, legal situations involve the same three questions. The three analogous, legal situations are: 1) whether a person (*i.e.*, plaintiff) has assumed the risks of another's (*i.e.*, defendant) negligence; 2) whether a person (*i.e.*, plaintiff) has consented to the risks that flow from another's (*i.e.*, defendant) intentional tort (*i.e.*, in particular assault and battery); and, 3) whether a person (*i.e.*, plaintiff) has assented to be bound in a contractual obligation with another (*i.e.*, defendant). The three questions that a fact finder must determine to assess a defendant's liability *vel non* in these situations are: 1) what the plaintiff's subjective desires were at the time of engaging in an activity; 2) what a reasonable person in the position of the defendant would have perceived the plaintiff's desires to be; and 3) whether the defendant's

⁷⁸ See *e.g.*, E. ALLAN FARNSWORTH, *CONTRACTS* § 3.10 "What is an Offer" at 137 (2d ed. 1990) ("Under the objective theory the issue then becomes whether the one to whom the proposal was made had reason to believe that it was intended as an offer.") (footnote omitted). See also Mendelson, *supra* note 28, at 24 ("Originally, the law emphasized the consensus of mind by the contracting parties as an indication of true consent. This approach was known as the 'subjective theory' of contract. Today the preferred doctrine is the 'objective theory,' whereby the law is less concerned with the true intentions of the parties and more with outward manifestations of those intentions. Eventually, the nature of consent within the physician-patient relationship would come to be examined in the light of this modern theory.") (footnote omitted).

⁷⁹ But Professor Wright warns: "[M]ore often than the law recognizes, apparent consent really does not reflect the degree of knowledge and freedom necessary to validate a transaction." Wright, *supra* note 49, at 1413.

conduct was reasonable in light of the perceptions of a reasonable person regarding the desires of the plaintiff. Now consider again the traditional categories that Tort and Contract law have established to analyze these three situations.

Assumption of risk has been sub-categorized into: 1) Express; 2) Secondary Implied; and 3) Primary Implied. A plaintiff *expressly assumes risks* when his communicative acts – presumably written, verbal, or otherwise – indicate his desire to undertake an activity even though he knows that the activity may pose certain risks of injury. A plaintiff assumes risks via *secondary implied assumption of risk* when he comprehends the general nature and scope of risks posed by an activity but, nevertheless, engages in that activity, knowing those risks.⁸⁰ A person assumes the risks inherent in an activity by means of *primary implied assumption of risk*, whether the person subjectively is aware of those risks or not.

Consent has been sub-categorized into: 1) Actual Consent; 2) Apparent Consent; and 3) Implied Consent. A person consents to battery⁸¹ through so-called *actual consent* when he subjectively desires to subject himself to another's harmful or offensive contact. According to Dobbs, "[a]ctual consent to an act is a subjective willingness for the act to occur."⁸² And Prosser notes: "Actual willingness, established by competent evidence, will prevent liability...."⁸³ "Apparent consent is conduct, including words, that are reasonably understood by another as a reflection of consent."⁸⁴ Professor Moore explains: "[T]he doctrine of apparent consent would also exonerate defendants who make reasonable mistakes but not those whose mistakes are unreasonable."⁸⁵ Consent is deemed *implied* when, for policy reasons, the circumstances (*e.g.*, an emergency situation where the plaintiff was rendered unconscious and cannot communicate) dictate that a defendant (*e.g.*, such as a physician rendering emergency medical

⁸⁰ See W. Page Keeton et al., *supra* note 6, § 68, 484–92 (Assumption of Risk).

⁸¹ Although intentional torts, other than battery – such as assault or trespass to land – may also be negated by consent, for the sake of simplicity and clarity, from this point forward, the Article will use battery as the primary example.

⁸² Dan B. Dobbs et. al., *supra* note 13, at 218.

⁸³ W. Page Keeton et. al., *supra* note 6, at 113.

⁸⁴ Dan B. Dobbs et. al, *supra* note 13, at 218 (footnote to RESTATEMENT (SECOND) OF TORTS § 892) (*italics added*).

⁸⁵ Moore, *supra* note 10, at 1628 (footnote omitted). See also *id.* at 1650 ("Section 892 of the Second Restatement...provides that consent can be either actual or apparent and that apparent consent consists of 'words or conduct [that] are reasonably understood . . . to be intended as consent.'") (n. 376 quoting the Restatement: "Actors such as physicians are also privileged in emergency circumstances in which the actor has no reason to believe that the other person would, if asked, refuse to consent." RESTATEMENT (SECOND) OF TORTS § 892(2) (1979)).

treatment to an automobile accident victim) is excused or justified in what otherwise would be considered a harmful or offensive touching (*i.e.*, battery).⁸⁶ Professor Moore weighs in on this issue:

It is not clear that defendants should be required, in all cases, to determine consent solely on the basis of the plaintiff's own words or conduct. Perhaps defendants should be permitted to act when, under all of the circumstances, they reasonably believe that a plaintiff with the capacity to do so has consented to the contact.⁸⁷

Contracts also may be subcategorized into: 1) Express; 2) Implied in Fact; and, 3) Implied in Law. *Express* contracts are those where the offeror and offeree manifest an intent to be bound by their written or verbal communications. A contract is *implied in fact* when the non-verbal conduct of the parties implies that the offeror and offeree intend to be bound. "A contract, implied in fact, is an actual contract which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in light of the surrounding circumstances."⁸⁸ And a contract is *implied in law* when the words or conduct of the parties fail to indicate that the parties manifest an intent to be bound by an agreement, but other circumstances, for reasons of policy, make it unjust not to impose some degree of liability (*e.g.*, to prevent "unjust enrichment").

Thus, even though the goals of determining liability in all three legal situations are the same, Tort and Contract laws have evolved in such a way that we have created three different, and in some re-

⁸⁶ See *e.g.*, Mendelson, *supra* note 28, at 31 ("The legal justification for the emergency exception to the law of consent when applied to unconscious patients has changed from that of implied consent to the principle of necessity – the medical intervention must be shown to have been necessary 'for the protection of the plaintiff's health and possibly his life.'") (footnote omitted); Vincent R. Johnson and Alan Gunn, *Studies in American Tort Law* 139 (4th ed. 2009) ("In the absence of actual or apparent consent, special circumstances such as medical emergency may make it desirable for a person to engage in conduct that would otherwise be tortious. In such instances, the law holds that consent is implied because the interests to be furthered by the invasion (*e.g.*, preservation of life or limb) are more important than those which will be sacrificed (*e.g.*, bodily integrity and freedom from unconsented contact). *In such instances there is really no consent at all, actual or apparent, only a legal fiction called implied consent, which completely bars liability.*") (italics added).

⁸⁷ Moore, *supra* note 10, at 1652 (footnote omitted). See also Mendelson, *supra* note 28, at 30–31 ("[T]he law may imply consent in circumstances where a person is injured to the extent of being rendered unconscious and the injuries require prompt medical attention. Under these conditions, 'a physician . . . would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of the injured person's life or limb.'") (footnote omitted).

⁸⁸ *In re Home Prot. Bldg. & Loan Ass'n*, 17 A.2d 755, 756 (Pa. Super. Ct. 1941).

spects, inconsistent, vocabularies to articulate those modes of analysis. The balance of this Part of the Article suggests that Tort law will be better served if we borrow Contract law's terminology/vocabulary to analyze both assumption of risk and consent. Consistent legal vocabulary and a consistent analytical framework for evaluating analogous legal problems can provide significant advantages. Adopting a uniform vocabulary and analysis will reduce confusion, increase the likelihood of consistency, and increase the likelihood of achieving just results.⁸⁹

2. Express

The word "express" is a good word to use to characterize communication that uses language, expressed either verbally or in writing. Thus, when a putative plaintiff verbally or in writing communicates his desires in a manner that expresses a willingness to undertake an activity, despite the potential risks involved in that activity, it is best for the legal system to accept that communication as true. Fraud, misrepresentation, or coercion on the part of another may serve to cancel the validity of such an express communication, but arguably fraud, misrepresentation, or coercion are best treated as evidence that can rebut the presumption established by an express communication.⁹⁰ Hence, when a putative plaintiff uses verbal or written lan-

⁸⁹ See Simons, *supra* note 5, at 280 ("[I]t might be well to discard the nomenclature of 'assumption of risk,' with its multiple and mainly unacceptable meanings.").

⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 892B "Meaning of Consent" (1979) ("Consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it. If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm. Consent is not effective if it is given under duress."); RESTATEMENT (SECOND) OF TORTS § 892B, cmt. a. "Consent Under Mistake, Misrepresentation or Duress" (1979) ("This Section is concerned only with the effect of fraud, mistake or duress as invalidating the consent, rendering it ineffective and entitling the plaintiff to maintain any tort action that would be available to him if the consent had not been given. Thus if he is induced by the fraud, mistake or duress to consent to a harmful or offensive contact with his person, he may maintain an action for battery.") *Id.*; 13 Am. Jur. 2d Cancellation of Instruments § 13 (2d ed.) ("A party may seek judicial cancellation or rescission of an instrument based on the other party's misrepresentation or fraud. Whether a misrepresentation gives rise to a cause of action for rescission depends upon the materiality of representation in circumstances of the particular case. A misrepresentation in a contract is material if it would likely induce a reasonable person to manifest his or her assent to the contract.") (footnotes omitted). See *e.g.*, *Liborio v. King*, 564 S.E.2d 272, 275 (N.C. App. 2002) ("Proof of misrepresentation is rebuttal to presumption of validity of written consent to medical treatment, and does not outright invalidate consent as a matter of law."); *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 441 (Ariz. 2003) ("Allegations that patient on three separate occasions told nurse allegedly employed by medical imaging provider that patient would only accept an injection of one of two specified painkillers in connection with magnetic resonance imaging (MRI) examination, and that nurse told patient the medication had been

guage to communicate that he intends to assume the risks of negligence, consents to the risks of battery, or assents to the risks of contractual terms and obligations (*e.g.*, market price fluctuation), we can refer to these express communications respectively as: “express assumption of risk;” “express consent;”⁹¹ and, “express intent to be bound.”

Absent competent evidence that disproves the validity of such express communications – or other compelling public policy reasons – we ought to enforce the validity of desires expressed by competent individuals who have gone to the trouble of expressing themselves using the convention of language – either in writing or orally – to communicate those desires to others. Reasonable persons are entitled to perceive that others intend to communicate their thoughts and desires truthfully by means of language, expressed either in writing or orally. This contention derives from the logical premise that people earnestly communicate in good faith, and that there is a high, reliable correlation between a person’s thoughts (*e.g.*, desires) and their written or verbal expressions of those thoughts.

Express assumption of risk (*e.g.*, a standard waiver of liability of the sort signed by skiers), express consent (*e.g.*, a consent form signed by someone participating in an intramural boxing competition), and an express contract (*e.g.*, a written contract such as a real estate purchase-and-sale contract) constitute sound examples. Contract law has taught us that, as a rule, legal analysis is best served when we begin our inquiry regarding contract interpretation by carefully considering the specific language of the contract itself. That, for example, is why we have the parol evidence rule.⁹² The same general principle operates in statutory construction; we start our analysis with the language (*i.e.*, the words of the statute).⁹³ A legal

changed to one of those painkillers but proceeded to administer a different one, supported battery claim against provider on theory that provider obtained patient’s consent for injection by express misrepresentation.”)

⁹¹ See Bell, *supra* note 63, at 35–37. Interestingly, Professor Bell uses the term “express consent” but fails to acknowledge that traditional Tort law does not use that term. He cites the Second Restatement of Torts § 10A as the source for his definition. But the Restatement does not use that term; it merely defines “consent” not using the phrase “express consent.”

⁹² See 29A AM. JUR. 2D EVIDENCE § 1104 “Parol or Extrinsic Evidence Affecting Writings” (2d ed.) (“The parol-evidence rule generally precludes the use of extrinsic evidence to vary or contradict the terms of an unambiguous and integrated contract. Indeed, where a contract is integrated, no extrinsic evidence of prior or contemporaneous agreements will be admissible to change, alter, or contradict the contractual writing. In other words, where the parties have concluded a valid integrated agreement with respect to a particular subject matter, the parol-evidence rule precludes the enforcement of inconsistent prior or contemporaneous agreements. Thus, the parol-evidence rule generally prohibits the introduction of evidence that tends to alter an integrated written document.”) (footnotes omitted).

⁹³ See 73 AM. JUR. 2D STATUTES § 106 “Adherence to or Departure from Statute as Enacted” (2d ed.)

regime that adopts the concept of “express assumption of risk” would encompass situations where a putative plaintiff explicitly acknowledges and accepts the risks of negligence through written or oral language. There are, in fact, some jurisdictions that currently employ this terminology.⁹⁴ “Express consent,” in like manner, would arise when a consenting party expresses his willingness to incur another’s intentional harmful or offensive contact by means of written or oral communication.

3. Implied in Fact

Secondly, the Contract term “implied in fact” ought to be used to refer to situations where the conduct (*i.e.*, non-verbal actions or inactions) of the putative plaintiff indicate that he has assumed a risk, consented to battery, and/or agreed to the terms and conditions of a contract. As has been explained,⁹⁵ Contract law employs the term “implied in fact” in this manner. When the conduct of the parties is sufficient to prove mutual assent, the law embraces the implication of their conduct. The *Restatement (Second) of Contracts* provides that, “[a] promise ... may be inferred wholly or partly from conduct.”⁹⁶ Comment A to the *Restatement (Second)* states:

Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.⁹⁷

(“If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. In this regard, it has been stated that the legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from assertions of codifiers directly at odds with the clear statutory language. The courts may not speculate as to the probable intent of the legislature apart from the words in the applicable statutes.”) (footnotes omitted);

See e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is cardinal principle of statutory construction that statute should, upon the whole, be construed so that, if possible, no clause, sentence or word is rendered superfluous, void or insignificant.”).

⁹⁴ *See e.g.*, *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470 (7th Cir. 1991) (applying Illinois law, remarking: “Express assumption of risk demands an explicit agreement...”).

⁹⁵ *See supra* Part III, Section A.

⁹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 4 (1979).

⁹⁷ *Id.* § 4 cmt. a.

The venerable provision in the Uniform Commercial Code, § 2–207(3), provides an apt example, where the conduct of the parties is statutorily recognized as sufficient to establish the existence of a contract in situations where the express language of the parties has failed to do so.⁹⁸ The Uniform Commercial Code’s § 1–303 provides another illustration, where the course of dealing and course of performance (*i.e.*, prior conduct of the parties) is considered valid evidence of the parties’ intent.⁹⁹

Take a moment to consider how the term “implied in fact” might improve our analysis of assumption of risk. One difficulty in assessing secondary implied assumption of risk is that a fact finder is required to determine whether a plaintiff, in fact, knew, understood, and appreciated the nature and scope of risks involved in any given activity.¹⁰⁰ In the absence of an assumption of risk expressed through written or oral language, proving the subjective knowledge of a putative plaintiff’s understanding of risks is fraught with difficulty. Rather than trying to investigate the secret, inner thoughts of a participant, if Tort law were to recognize assumption of risk as “implied in fact” in circumstances where his conduct is indicative of his assumption of risk (*i.e.*, through circumstantial evidence based on a putative plaintiff’s conduct), a fact finder will have better tools to make such

⁹⁸ See U.C.C. § 2–207(3) (Additional Terms in Acceptance or Confirmation) (“Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.”).

⁹⁹ See U.C.C. § 1–303(d) (Course of Performance, Course of Dealing, and Usage of Trade) (“A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.”).

¹⁰⁰ See 30 Am. Jur. Proof of Facts 3d 161 § 1 (Introduction and Scope) (Originally published in 1995) (“Sports cases have tended to depart from the traditional definition containing the subjective element of plaintiff’s knowledge, favoring instead the legal issue of the defendant’s duty of care. This view eliminates the variable factors such as the plaintiff’s subjective knowledge and expectations, which the defendant would have no way of ascertaining.”); See *e.g.*, *Foronda ex rel. Est. of Foronda v. Hawaii Intern. Boxing Club*, 25 P.3d 826, 843 (Haw. App. 2001) (“The very concept of inherent risk implies indwelling risk independent of the participant’s subjective knowledge or perception of it. . . The inquiry is an objective one, and must be, for the vagaries of prior knowledge or perception of risk would undermine the doctrine’s underlying policy, that the law should not place unreasonable burdens on the free and vigorous participation in sports[.]”) (citing *Turcotte v. Fell*, 510 N.Y.S.2d 49, 502 N.E.2d at 968); *Turcotte v. Fell*, 502 N.E.2d 964, 969 (N.Y. 1986) (“Question of whether consent of participant in sporting event to risks of event was informed includes consideration of participant’s knowledge and experience in activity generally, with professional athlete being manifestly more aware of dangers of activity and presumably more willing to accept them in exchange for salary than amateur.”).

an evaluation.

The traditional category of “apparent consent” appears to be analogous, at least partially, to the Contract concept of “implied in fact.” The time-honored case, *O’Brien v. Cunard S.S. Co.*¹⁰¹ states the rule simply:

If the plaintiff’s behavior was such as to indicate consent on her part, he [*i.e.*, the doctor who vaccinated the plaintiff] was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestation of her feelings.¹⁰²

Dobbs explains this principle:

Because the appearance of consent is effective if it leads the defendant reasonably to believe consent is actual, a plaintiff’s private and uncommunicated reservation does not subject the defendant to liability. The defendant is entitled to rely in good faith upon the reasonable appearance of consent created by the plaintiff.¹⁰³

¹⁰¹ 28 N.E. 266 (Mass. 1891).

¹⁰² *Id.* See also Dan B. Dobbs et. al., *supra* note 13, at 217 (“The plaintiff effectively consents if appearances created by her words or acts lead the defendant reasonably to believe she consented, even if the plaintiff did not subjectively intend to consent.”) (footnote omitted); *id.* at 218 (regarding the *O’Brien* case, “the court held that even if she did not subjectively consent, her conduct gave the appearance of consent and that the defendant was entitled to rely upon the appearance even if the plaintiff never subjectively meant to consent at all.”) (footnote to *O’Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891)). See also Simons, *supra* note 5, at 238–39 (“Consider the well-known consent case, *O’Brien v. Cunard Steamship Co.* The plaintiff, a passenger on a steamship, may have held out her arm to be vaccinated only out of terror and fear of quarantine. The court held that her *apparent* consent barred her battery claim. However, let us suppose defendant was aware of her unexpressed fears. Would that undermine the voluntariness of plaintiff’s consent? Not under the proposed model, because it was the government’s vaccine regulations, not the defendant, that restricted plaintiff’s choice. Traditional assumption of risk doctrine apparently takes the same position.”) (footnotes omitted).

¹⁰³ Dan B. Dobbs et. al., *supra* note 13, at 218. See also *id.* at 219 (“Effective consent can be manifested by nonverbal conduct of the plaintiff. It can be shown by actions, by a course of conduct, by social conventions applicable to the setting, or by a relationship between the parties.”) (footnotes omitted). Perhaps social conventions applicable to the setting could be either implied in fact or implied in law. See also W. Page Keeton et. al., *supra* note 6, at 113 (“[A] manifestation of consent, upon which the defendant may reasonably rely, will be equally effective even though there is no willingness in fact. In our society we must perforce rely upon the overt works and acts of others, rather than their undisclosed minds. Consent may therefore be manifested by words or by the kinds of actions which often speak louder than words. The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff’s conduct.”); Moore, *supra* note 10, at 1628, n. 245 (“[A] defendant may intend to harm even though he reasonably believes the plaintiff has consented.”).

4. Implied in Law

Contract law recognizes a contract “implied in law” in situations where, for policy reasons, we wish to avoid “unjust enrichment.”¹⁰⁴ It is common to refer to the underlying principle as one that provides restitution and one that employs the legal system to require a person to “disgorge a benefit.”¹⁰⁵ The *Restatement (Second) of Contracts* notes: “Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice.”¹⁰⁶ “A simple example is the claim for the return of money paid by mistake to one to whom it was not owed.”¹⁰⁷ Professor Farnsworth explains that claims for restitution based on contracts implied in law will not be enforced when the benefit was conferred “officiously,” “gratuitously,” or in a manner that is not “measurable.”¹⁰⁸ Primarily, then, it is a rule driven by equitable principles – principles that require courts to intervene in situations where public policy, “justice,” or “fairness” dictate intervention.¹⁰⁹

Primary implied assumption of risk operates using the same principle. And so does “implied consent,” when consent is implied in circumstances such as medical emergencies for reasons of justice/fairness. Prosser explains this principle, saying, “The justification is that no reasonable person would object if in a position to make a decision.”¹¹⁰ Fairness dictates that the legal system validate

¹⁰⁴ See E. ALLAN FARNSWORTH, *CONTRACTS* § 2.20 “Nature and Role of Restitution” at 102–03 (2d ed. 1990). See also Bell, *supra* note 63, at 39. Professor Bell identifies the same correlation between the Contract doctrine of “quasi-contract” and the Tort doctrine of “implied consent” in the context of medical emergencies. Bell uses the word “hypothetical” to refer to what this Article calls “implied in fact.” Again, part of the focus of this Article is to recommend a universal and consistent vocabulary for both Contract and Tort in the situations where the terms “express,” “implied in fact,” and “implied in law” will assist both lawyers and judges in their efforts to apply consistent methodology to the same underlying principles.

¹⁰⁵ See Farnsworth, *supra* note 104, at 102–03.

¹⁰⁶ Restatement (Second) of Contracts § 4 cmt. b (1997).

¹⁰⁷ Farnsworth, *supra* note 104, at 103.

¹⁰⁸ Farnsworth, *supra* note 104, at 104–10.

¹⁰⁹ See e.g., Wright, *supra* note 49, at 1413 (“[A]ll consumer knowledge is imperfect, and legal doctrines such as unconscionability can play an important role.”) (footnote omitted). The doctrine of “unconscionability,” like “implied in law,” allows a judge to apply principles of “fairness” to achieve what s/he deems to be an equitable result. See Uniform Commercial Code § 2–302.

¹¹⁰ W. Page Keeton et. al., *supra* note 6, at 118. See also *id.* at 119 (“It is of course possible that the situation may be one of unforeseen emergency, critical in its nature, which will justify the surgeon in proceeding on the assumption that the patient would consent if he were conscious and understood the situation.”) (footnotes omitted); See Bell, *supra* note 63, at 39 (“In tort law, physicians rendering emer-

(or, at the very least, exonerate and not punish) persons such as doctors who perform emergency surgeries, using their professional judgment and reason, when confronted by crises or emergency circumstances, which, by definition, do not provide time sufficient for reflection, debate, and/or extensive study and analysis. The mind-reading, second-guessing, and paternalism that may occasionally be necessary in medical emergencies where a conscious patient refuses treatment in a time of crisis may be the exception that proves the rule relating to objective manifestations of intent serving as the primary criteria for determining whether a person intends consent.¹¹¹

D. Application of Revised Terminology to Assumption of Risk & Consent

Using traditional Tort categories, professional athletes, who presently participate in contact sports probably assume risks in three ways. First they assume the risk of negligence by others by *express assumption of risk*. For example, they might do so by means of a written contract such as a standard player contract or collective bargaining agreement. Second, they might assume risks through *secondary implied assumption of risk*. For example, professional athletes, arguably, subjectively are well aware of the nature and scope of risks involved in their respective sports. And thirdly, they assume risks by application of the doctrine of *primary implied assumption of risk* (*i.e.*, because there are certain risks inherent in their respective sports, such as tackle football, ice hockey, and baseball).

Similarly, under the traditional Tort categories, professional athletes today probably consent to battery in three ways. First, they consent to battery by *actual consent*, because professional athletes will-

gency care on unconscious victims routinely win a defense against battery on grounds that the alleged victim *would have consented* to treatment *if he or she had been conscious.*) (footnote omitted) (italics original). See also Mendelson, *supra* note 28, at 19 (“Consent to medical treatment, as we understand this concept today, was not specifically articulated in the medical treatises, professional codes, and regulations of early modern England. Nevertheless, the notion of patient consent to treatment not only as a legal requirement but also as an ethical construct must have been appreciated, because its legal and ethical significance within the physician-patient relationship was discussed in the 1767 English case of *Slater v. Baker & Stapleton*. This case appears to be a first instance in which the court affirmed the principle that nonconsensual contact in the context of medical treatment ought to be regarded as a legal wrong.”) (footnotes omitted).

¹¹¹ See Mendelson, *supra* note 28, at 48 (“Medicine, and in particular psychiatry, recognizes that such factors as the patient’s personality, affective disorder, medications, external pressures and the setting, may impair clinical competency, leading to a refusal of treatment. Disease is frequently accompanied by stress and/or pain, productive of depression, that may impair the patient’s ability to function competently in processing and understanding medical information and making treatment decisions.”) (footnote omitted).

fully and consciously subject themselves to physical contact that is harmful or offensive. Also, they consent to battery through *apparent consent* because their participation and movements while engaged in their sports constitutes conduct that manifests a willingness to subject themselves to harmful or offensive contact. In addition, they consent with *implied consent* because the inherent nature of contact sports necessitates a certain degree of physical contact.¹¹²

Using the suggested, revised categories, discussed above (*i.e.*, express, implied in fact, and implied in law), we might also say that today's professional athletes participating in contact sports assume risks of unintentional contacts and consent to battery in three ways. First, modern professional athletes assume the risks of others' negligence and consent to harmful or offensive contacts by *express assumption of risk* and *express consent*. They do so, for example, by written player contracts or collective bargaining agreements. Secondly, such professional athletes' assumption of risk and consent may be *implied in fact* because the conduct of players manifests their willingness to subject themselves to the risk of negligence by others and also their willingness to subject themselves to intentional harmful or offensive physical contact by others.¹¹³ Lastly, their assumption of risks and consent may be considered *implied in law* because the inherent nature of contact sports at the professional level requires that participants play with a level of intensity that cannot necessarily prevent carelessness and also requires that participants intentionally strike co-participants in the course of engaging in such sports.¹¹⁴ But, presumably, players neither assume the risk of nor consent to violent contacts that are decidedly outside the scope of contact ordinarily contemplated by those who participate in such sports.

To be sure, this may present difficult issues in some sports such as professional ice hockey, where even fistfights are considered within the normally accepted range of player conduct.¹¹⁵ Even today in

¹¹² See *e.g.*, Dan B. Dobbs et. al., *supra* note 13, § 96, 219 (Manifestation of Consent, Implied Consent by Conduct) ("Perhaps most real-life consent is implied rather than expressed.") *Id.* ("We join a game of tag; we consent to being touched.") *Id.* ("Body language communicates many feelings or attitudes, including consents.") *Id.* ("Indeed your relationship with your partner might itself demonstrate a general consent to friendly touchings.") *Id.*

¹¹³ See Moore, *supra* note 10, at 1652–53 ("So long as the defendant's reliance is reasonable under the circumstances, there is no reason why the defendant should be liable in battery.")

¹¹⁴ See *id.* at 1653 ("If a defendant may act reasonably in self-defense, taking into account all of the attendant circumstances, then it is far from clear why consent should be limited to conduct manifested only by the words or conduct of the plaintiff.") (footnotes omitted); *id.* at 1654 ("[T]here has been little examination of the precise contours of the doctrine of consent, particularly the ability of a defendant to reasonably rely on circumstances other than the words or conduct of the plaintiff or someone authorized to give consent on the plaintiff's behalf.")

¹¹⁵ For reasoned discussion of issues related to violence in professional ice hockey, see *e.g.*, Dryden,

2016, NHL on-ice officials do not stop fights immediately. They watch as combatants drop their gloves and trade blows. Typically the on-ice officials intervene only when one player falls to the ice. Clearly, the tacit understanding is that fistfights between players are accepted as “part of the game” by NHL executives, coaches, officials, and players. Thus, players must legally be deemed to have consented to the injuries that result from such fights. Using traditional Tort vocabulary, we would say that they both actually consent and apparently consent. Using the vocabulary suggested in this Article, we would say that their consent is both implied in fact and implied in law.

E. Mistake or Fraud Invalidates Consent

It is well settled that mistake by a plaintiff or fraud by a defendant may vitiate a plaintiff’s consent.¹¹⁶ Prosser explains this principle:

supra note 4, at 214–17 (discussing the phenomenon of fighting in the NHL); *id.* at 216 (“The NHL is wrong. **** The NHL theory of violence is nothing more than original violence tolerated and accepted, in time turned into custom, into spectacle, into tactic, and finally into theory. For years the league has argued the wrong-headedness of its critics, and for years it has missed the point. Surely it matters little any more whether hockey fighting is violence or vaudeville, release or just good practice. What matters is that fighting degrades, turning sport into dubious spectacle, bringing into question hockey’s very legitimacy, confining it forever to the fringes of sports respectability.”); *id.* at 224 (commenting on the brutal tactics of the “Broadstreet Bullies” era of the Philadelphia Flyers in the mid-1970’s, and the NHL’s acquiescence to fighting and unprovoked violence, Dryden remarks: “Penalized more than anyone else but far less than they might be, with the league as unintended co-conspirator, they benefited hugely from the informal penalty ceiling and the league’s commitment not to appear to intervene in a game’s outcome. Some years later, the abuses of the Flyers largely gone, more subtle abuses increase. What the league never understood about the Flyers, what it doesn’t understand now, is that it cannot be the passive actor it wishes to be. That like any *laissez-faire*, non-interventionist approach, there are consequences predictable and certain that follow for which it is responsible, and by deciding not to intervene it is in fact intervening just as surely on behalf of those consequences, a league, through its referees, sends messages to the game, the players react, the game takes on its form. But what is the message, and what is the form? And what would it be like if the message was different?”); *id.* at 251 (“[I]t was in the late 1940s that a *pattern* of violence entered the game. For the first time, it became part of the regular play. And when it wasn’t removed, it only meant it would get worse. The nature of violence, the emerging style of play, guaranteed it.”); *id.* (explaining that violence escalated after the rules changed to allow forward passing, which, in turn, required defensemen to adapt their style of play: “It was from this simmering frustration that violence emerged. Brawling and stick-swinging became more frequent and vicious than before. **** The league intervened with fines and suspensions for the worst abuses, but it did nothing to penalize its insidious causes, in the end more damaging to the game.”); *id.* at 254 (“For adrenaline has its dark side. Fouled or resisted, it turns to anger, frustration, retaliation. And inside, a pattern of violence allowed many years before, it sends violence spiraling [sic] higher.”); *id.* at 260 (“And the league must deliver a message, clear and uncompromising: hooking, holding, and high-sticking will be penalized, so that the quick and skilled are not, so that open ice created will not be taken away.”).

¹¹⁶ See *e.g.*, W. Page Keeton et al., *supra* note 6, at 119–21; Mendelson, *supra* note 28, at 36 (“In trespass, consent can be vitiated by duress, trickery, withholding of information in bad faith, or fraud...”) (footnote omitted).

A plaintiff cannot ordinarily be regarded as actually consenting to the defendant's conduct if the plaintiff assented to the conduct while mistaken about the nature and quality of the invasion intended by the defendant. Likewise, an overt manifestation of assent or willingness would not be effective apparent consent if the defendant knew, or probably if he ought to have known in the exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality of the invasion intended.¹¹⁷

Professor Moore adds: "Under current doctrine, however, consent will be ineffective only in situations where the defendant *knew* of the defect and failed to inform the plaintiff – i.e., when the defendant fraudulently obtained the plaintiff's consent."¹¹⁸ According to the *Restatement (Second) of Torts*, "If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm."¹¹⁹ Consider the effects of this doctrine as it relates to the current NHL and NFL litigation regarding concussions and the long-term effects of CTE on players.¹²⁰ One

¹¹⁷ W. Page Keeton et al., *supra* note 6, at 119 (footnote omitted). *See also id.* at 114 ("Consent...is ineffective, if...the consenting person was mistaken about the nature and quality of the invasion intended by the conduct.")

¹¹⁸ Moore, *supra* note 10, at 1634 (emphasis in original) (citing RESTATEMENT (SECOND) OF TORTS § 892B(2)).

¹¹⁹ RESTATEMENT (SECOND) OF TORTS § 892B(2).

¹²⁰ *See e.g.* In re Nat. Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 361 (E.D. Pa. 2015) ("On July 19, 2011, 73 former professional football players filed suit in the Superior Court of California, Los Angeles County, against the NFL Parties. They alleged that the NFL Parties failed to take reasonable actions to protect players from the chronic risks created by concussive and sub-concussive head injuries and fraudulently concealed those risks from players. In response, the Judicial Panel on Multidistrict Litigation consolidated these cases before this Court as a multidistrict litigation ("MDL"). Since consolidation, about 5,000 players ("MDL Plaintiffs") have filed over 300 substantially similar lawsuits against the NFL Parties... MDL Plaintiffs allege that head injuries lead to a host of debilitating conditions, including Alzheimer's disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, attention and reasoning, loss of memory, sleeplessness, mood swings, and personality changes. MDL Plaintiffs also allege that the repetitive head trauma sustained while playing football causes a gradual build-up of tau protein in the brain, resulting in Chronic Traumatic Encephalopathy ("CTE"). CTE allegedly causes an increased risk of suicide, and many symptoms often associated with Alzheimer's Disease and dementia, as well as with mood disorders such as depression and loss of emotional control."); In re Nat. Hockey League Players' Concussion Injury Litig., MDL 14-2551 SRN, 2015 WL 1334027, at *1 (D. Minn. Mar. 25, 2015) ("Litigation was initiated by former National Hockey League players who allege that Defendant National Hockey League (the "NHL") is responsible for 'the pathological and debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained ... during their professional careers... As defined in the Master Complaint, a "concussion" or "mild traumatic brain injury" ("MTBI"), "consists of trauma to the head and a resulting transient loss of normal brain function. According to Plaintiffs, repeated MTBI can trigger progres-

might initially surmise that professional hockey and football players have consented – and continue to consent – to the intentional physical contacts that are inherent as part of those games. But, if the leagues (*i.e.*, executives responsible for operating the leagues) did, in fact, know, as the plaintiffs in the litigation have alleged, the magnitude of those dangers, yet failed to disclose them to the players, then, as Prosser explained, there can be neither actual nor apparent consent using the traditional Tort terminology.

The revised terminology proposed above does not change this conclusion. Logically, although the external indicia of the players' consent may have been present, "[w]here there has been active misrepresentation, this has been held to invalidate the consent, so that there is battery...."¹²¹ Even in the face of "express consent" or "consent implied in fact," misrepresentation by the leagues ought to cancel either language (*e.g.*, express) or conduct (*e.g.*, implied in fact) that otherwise would ordinarily evince consent, because the act of misrepresentation effectively nullifies any reliance that the leagues might have placed on the ordinary meanings associated with the players' language or conduct.¹²² Again, Prosser remarks: "The decisions in this area have involved assent induced by fraud, in the sense that the defendant was either aware of the plaintiff's mistake or ignorance and failed to disclose the truth, or the defendant induced the mistake with representation which he knew was false."¹²³

II. CONCLUSION

Chances are that human beings will continue to engage in sports and recreational activities that pose significant risks of serious bodily harm. We have been doing so for millennia, and those participating in sports and recreational activities are likely to continue to assume the risks of negligence and consent to harmful and offensive physical contact willingly. As was mentioned, we willingly assume these risks and consent to these contacts for a variety of reasons. Money, re-

sive degeneration of brain tissue and can lead to Alzheimer's disease, dementia, and chronic traumatic encephalopathy ("CTE") (a disease caused by the accumulation of a toxic protein in the brain). In fact, Plaintiffs claim, 'scientific evidence has for decades linked head trauma to long-term neurological problems.'" *id.* at *2 ("Plaintiffs state that they relied on the NHL for information about health and safety, and that they were never informed of the negative long-term effects of sustaining concussions."); W. Page Keeton et al., *supra* note 6, at 120 (footnote omitted).

¹²² See *e.g.*, Wright, *supra* note 49, at 1414 ("[A] number of factors may prevent apparent consent from being genuine consent. Coercion, deficient or mistaken information, ideological distortion, impairment of capacity to consent, and weak relative bargaining position have all been thought capable of undermining the validity of consent.") (footnotes omitted).

¹²³ W. Page Keeton et al., *supra* note 6, at 120.

spect, peer pressure, the thrill of participation or competition,¹²⁴ the opportunity for achievement, pride, fame, glory, and a host of other incentives drive us to take the calculated risks and subject ourselves to certain intentional physical contacts that are part-and-parcel of such sports and recreational activities.

This Article has explained that there are important common threads that bind the legal doctrines and analyses relating to assumption of risk of negligence, consent to intentional Torts, and Contract formation. The first common thread is that, in each of those areas of law, we strive to use a reasonable person standard when imposing obligations and liability. Therefore, for example, when a reasonable person in the position of a defendant would interpret the plaintiff's language and/or conduct as communicating a willingness to subject himself (*i.e.*, the plaintiff) to the harmful physical contact of a body-check in an ice hockey game, the defendant is not liable for injuries caused by such a body-check. The second common thread is that we also try to respect the subjective thoughts and desires of the plaintiff. So if a football player subjectively thinks to himself, "yes, I'm willing to have opponents tackle me when I'm running in bounds, holding the football," he consents to the physical contact of the tackling opponent. But as was mentioned,¹²⁵ when the subjective thoughts of a plaintiff conflict with the reasonable perceptions of a defendant, the better policy is not to impose liability on the defendant who has acted reasonably, relying on the communicative message conveyed by the plaintiff's language and/or conduct.¹²⁶ Proving actual consent, or what we might call "subjective consent," is nearly impossible. In 1907, the Missouri Court of Appeals soberly explained the rationale for this rule:

The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real, but unexpressed state of his mind

¹²⁴ See *e.g.*, Simons, *supra* note 5, at 259 (noting that occasionally "the risk was an essential part of the pleasure that plaintiff derived from his choice.") (footnote omitted).

¹²⁵ See *supra* Part III, Section A.

¹²⁶ See *e.g.*, Dan B. Dobbs et. al., *supra* note 13, § 96, 218-19 (Manifestation of Consent, The Standard: Manifested or Objectively Determinable Consent) ("The question is whether the defendant reasonably believed that the plaintiff's words or conduct reflected a genuine consent.").

on the subject.¹²⁷

Therefore, as is the case with Contract law, Tort law ought to reject the validity of actual/subjective consent in situations where a reasonable person in the position of the defendant would have misperceived the plaintiff's subjective intent.¹²⁸ Instead, Tort law ought to adopt a wholly objective test for consent based on a reasonable person's perception of the plaintiff's outward manifestations that communicate consent – both verbal and non-verbal – coupled with circumstances that otherwise permit a defendant to rely on other factors, such as societal customs, that would lead a reasonable person to infer consent (*e.g.*, medical emergencies). In other words, Tort law ought to recognize the validity of consent only when it is expressed in language, implied in fact by conduct, or implied in law for reasons of justice (*e.g.*, such as in medical emergencies).¹²⁹

In essence, this Article contends that Tort law stands the best chance of achieving the goals of assumption of risk and consent when we use the objective, outward manifestations of a person's intent (*i.e.*, the external indicia of intent) rather than relying on self-serving testimony regarding a person's inner – but hidden/secret – thoughts.¹³⁰ Perhaps one potential exception is viable, but that is problematic. Prosser suggests that, “[a]ctual willingness, established by competent evidence, will prevent liability; and, if it can ever be proved, will no doubt do so even though the plaintiff has done nothing to manifest it to the defendant.”¹³¹ The principal problem with

¹²⁷ *Embry v. Hargadine-McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. App. 1907) (quoting 9 Cyc. 245).

¹²⁸ *Cf. Simons, supra* note 5, at 253 (“Defendant's reliance is critical to his apparent consent or apparent assumption of risk claim...[T]here is no good reason to protect a defendant's reasonable, but possibly mistaken, beliefs unless his beliefs affected his conduct.”) (footnote omitted). I disagree with Simons's claim. There is certainly good reason. If the legal system were to allow a lack of proof of a defendant's reliance to vitiate “apparent consent,” then we open the door for self-serving testimony and unhelpful “swearing-matches” between plaintiffs and defendants, who will undoubtedly say contradictory things about their subjective understandings regarding the defendant's subjective reliance.

¹²⁹ *See Bell, supra* note 63, at 24 (“The law of contracts and torts tends to regard consent objectively, as something established or negated by observable proofs, such as a party's manifestations.”) (footnote omitted).

¹³⁰ *See Simons, supra* note 5, at 235–36 (“Common sense will be a guide in significant categories of cases, such as injuries to spectators and participants in sporting events, to customers of amusement parks, or to employees working with dangerous machinery.”) (footnote omitted). Although common sense is certainly helpful to supplement the application of clear legal definitions and analysis, the starting point must be clear definitions and analysis.

¹³¹ *W. Page Keeton et al., supra* note 6, at 113. In his footnote, Prosser writes: “What if plaintiff writes in his secret diary, later produced in evidence, that he would be glad to have the defendant come upon his land and use his tennis court? There are no cases.” *See also Dan B. Dobbs et. al., supra* note 13, § 95, 217 (Consent as a Bar) (“The plaintiff likewise effectively consents if she actually or subjectively

exonerating a defendant, who had no reason to believe that the plaintiff has consented to an intentional tort, is that, in some cases, such a rule would excuse a person for conduct that would otherwise be tortious (*i.e.*, in the absence of subjective/actual consent) in circumstances where his conduct is unreasonable. A policy of sanctioning such conduct has the prospect of condoning intentionally tortious actions, encouraging protracted, unnecessary discovery (*e.g.*, defendant going on the proverbial “fishing expedition,” hoping to find some scintilla of evidence – such as Prosser’s hypothetical secret diary), and also encouraging false testimony.¹³²

A rule that renders actual subjective, but unmanifested consent as valid seems illogical. First, it is very unlikely that a defendant could prove it because private, unmanifested thoughts are generally only entertained inside the thoughts and mind of the plaintiff. Perhaps, on occasion, a defendant could find a third party to testify that the plaintiff had manifested consent to the third party as proof of subjective consent. Or, as has been suggested, a letter, diary, or a note could serve as evidence. But such proof seems far too susceptible to fabrication or forgery. It seems bad social policy to permit defendants to commit intentional torts in the absence of verbal or non-verbal consent, or at the very least, circumstances where policy encourages such conduct (*e.g.*, medical emergencies). Allowing evidence of subjective but unmanifested consent would encourage fraudulent testimony and the falsification through the fabrication of forged writings.

consents to the defendant’s conduct, even if that consent is not expressed or manifested.”) (footnote omitted).

¹³² Contract law takes the position that evidence of the subjective intent of parties is irrelevant and inadmissible. *See Embry v. Hargadine-McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. 1907) (“the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts...”).