Requiring a School District to Protect Students in the Wake of a Tragedy

By Robert Glassman and Rahul Ravipudi

In California, drowning is a leading cause of injury-related deaths among children. And according to the Centers for Disease Control and Prevention, from 2005-2014, there were an average of 3,536 fatal unintentional drownings annually in the United States — about 10 deaths per day. Tragically, about one in five people who die from drowning are children 14 and younger. Accordingly, when we were asked to represent the parents of 13-year-old Alex Pierce who drowned in a Murrieta Valley Unified School District ("MVUSD") swimming pool at an after school band party, we knew the case was touching on a topic of widespread public safety and concern. And indeed it had. After a hard fought wrongful death litigation against the school district and its head lifeguard and swimming coach, the *Pierce* case settled and has been the catalyst for the development of proposed state legislation in Alex Pierce's name that would establish water safety and rescue guidelines in schools throughout California as well as significant changes to Murrieta Valley Unified School District policies and procedures in regards to the safety of its students. These include providing mandatory CPR training to all MVUSD faculty and obtaining a safety check of the District's pool facilities by an independent third party. All training and pool safety compliance inspections must be completed by May 2020, with findings made publicly available on the MVUSD website.

The tragic story begins on June 3, 2016. In the early evening hours of that day, 13-year-old Alex Pierce slowly and in clear sight drowned to death while the school's head lifeguard coach and a number of student lifeguards he trained and selected to work at a Murrieta Valley Unified School District ("MVUSD") pool party sat idly by and did nothing. What makes Alex's drowning even more tragic is that the only reason the coach, who is a certified lifeguard and lifeguard instructor and the school's head swim and dive coach, failed to aid in the rescue of Alex was because of his own perceived delusional misconception that he was not "on the clock" and that his insurance would not cover him getting involved. The evidence in the case, however, completely contradicted the coach's self-serving proclamations and litigation tactics, including multiple MVUSD staff members and students who stated the coach was on duty at the pool when Alex drowned.

Shocking video taken from surveillance footage highlights the countless missed opportunities by the coach and his lifeguards to bring Alex out of the pool without harm. Rather than pulling Alex out of the pool and saving his life, the lifeguards kept Alex floating on the surface of the pool and failed to perform life-saving measures, including CPR. Alex was without oxygen for approximately nine minutes before the paramedics arrived on scene and started rescue breathing immediately.

When the coach was later questioned by the authorities about how this tragedy happened, he gave evasive answers and acknowledged that he made no efforts at all to rescue Alex. A detective from the Murrieta Police Department testified that he believed the coach was not being honest about his involvement in the incident and was misrepresenting the truth and facts surrounding Alex's drowning. And when another police officer asked the coach if he was in charge of the lifeguards, the coach callously responded: "This was a district function, I don't want to be sued."

As a result of the incident, Alex was taken to a nearby hospital and, due to the severity of his injuries, he was airlifted to Naval Medical Center in San Diego where he was placed on life support and remained in a coma until July 7, 2016, when his family said their final goodbyes after he was declared brain dead following a final

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see also *Patterson v. Sacramento City Unified School Dist.* (2010 or 2007?) 155 Cal.App.4th 821

test by doctors.

Alex's parents subsequently filed a wrongful death lawsuit against MVUSD and the head lifeguard coach alleging negligence and negligent hiring, retention, supervision and training. During the litigation, rather than take responsibility or show remorse for the drowning death of young Alex, the defendants argued that they had no duty to rescue Alex and that the plaintiffs' claim for negligent hiring, retention, supervision and training lacked merit.

As will be discussed in more detail below, we prevailed on these defenses because the primary assumption of risk doctrine does not apply to children's recreational swimming parties, the lifeguard owed Alex a duty of care based on the special relationship he had with Alex as a school district employee at a school district event and the lifeguard was not immune from liability.

Defendants owed a duty of care to Alex

In California, each person has a general duty to use ordinary care to avoid injury to others, and is liable for injuries caused by his failure to exercise reasonable care in the circumstances. (*Capri v. L.A. Fitness Intern., LLC* (2006) 136 Cal.App.4th 1078, 1087.)

This general duty of care indisputably applied to the lifeguard and his overseeing of the end of year pool party at Vista Murrieta High School. The lifeguard erroneously contended he owed Alex no duty of care because his tragic death was an inherent risk in the swimming party. The lifeguard's contention failed because: (1) the primary assumption of risk doctrine does not apply to recreational swimming activities; and (2) even if the primary assumption of risk doctrine was applicable to the instant case, there were genuine questions of material fact as to whether the lifeguard increased any risks inherent in recreational swimming activities.

The primary assumption of risk doctrine does not apply to a children's recreational swimming party

The lifeguard erroneously contended that drowning is an inherent risk associated with end of year pool parties and thus under the doctrine of primary assumption of risk he had no duty of general care to prevent Alex Pierce's tragic drowning and death. The primary assumption of risk doctrine refuses to impose a duty to mitigate or eliminate inherent dangers of a sport or activity when doing so could discourage vigorous participation or threaten the activity's very existence and nature. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1161.)

The primary assumption of risk doctrine involves injury-causing conduct by a defendant who, because of the setting and the relationship of the parties, owes no legal duty to protect a plaintiff against ordinary negligence. (*Knight v. Jewett* (1992) 3 Cal.4th 296.) The question of whether a defendant owes a legal duty to protect a plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather the nature of the activity or sport and the relationship of the defendant and the plaintiff to that activity or sport. (*Id.* at 309.) In the context of active sport co-participants, for example, this means that a defendant generally has no duty to eliminate, or protect a plaintiff against, ordinary careless conduct considered to be part of the sport. (*Id.* at 315-16.) In the context of a coach/instructor there is no liability on a coach or instructor on the basis of ordinary negligence in urging students to go beyond their current level of competence. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1009.)

In evaluating applicability of the primary assumption of risk doctrine, courts look at the fundamental nature of the activity. Primary assumption of the risk generally applies to non-sports activities that are "done for enjoyment or thrill, requires physical exertion *as well as elements of skill*, and involves a challenge containing a potential risk of injury." (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1221, internal quotations omitted, emphasis added.) No California court or case law has applied the primary assumption of the risk doctrine to the recreational swimming of children. Application of the primary assumption of the risk doctrine in such a manner would make moot every provision in the California Health and Safety Code designed to make pools safe, including those provisions intended to reduce the risk of drowning.

The object to be served by the doctrine of primary assumption of risk is to avoid

recognizing a duty of care when to do so would alter the nature of an active sport or chill vigorous participation in the activity. (*Kahn*, 31 Cal.4th at 1011.) Imposing a duty on overseers of a children's pool party to keep a watchful eye on participants would not chill vigorous participation in recreational swimming parties.

During the case, the lifeguard relied on *Kahn v. East Side Union* and *Capri v. L.A. Fitness International* to support the assertion that drowning is one of the inherent risks in the "sport of swimming." The lifeguard's reliance on those cases is misplaced for several reasons. First in both cases the court found the doctrine did not apply to preclude liability. In *Kahn*, the court found a swim coach was negligent for forcing one of his athletes to dive in shallow water when she had not been properly trained to do so. The *Kahn* case is particularly distinguishable from the instant case because the plaintiff was part of a competitive swim team as opposed to participating in a recreational end of the year swimming party.

In *Capri*, the court refused to enforce an exculpatory provision of a release agreement when the pool had allowed algae to grow along the walking surface surrounding the pool. There is no dispute that neither Alex nor his parents executed a release of liability waiver in this case, as the plaintiff in the *Capri* case had. Neither the *Khan* nor the *Capri* courts refused to impose liability upon the defendants by applying the primary assumption of the risk doctrine and the doctrine should not be applied to these facts.

Furthermore, the court in both cases analyzed the inherent risks of the "sport of swimming" as opposed to risks inherent in "recreational swimming." The term swimming incorporates a wide variety of activity and the inherent risks associated with those activities are not universal. There are different inherent risks associated with deciding to swim the English Channel as opposed to swimming at a children's school party supervised by more than half-a-dozen lifeguards and a litany of other adults. While the former might include the possibility of drowning as an inherent risk, the fundamental nature of the latter should not include the possibility of drowning as an inherent risk.

By way of further example, California courts have recognized that unwanted contact with the floor is an inherent risk of any kind of dancing, but that does not mean every time a dancer contacts the floor, it is because of an inherent risk of dancing. (*Jimenez v. Roseville City School District* (2016) 247 Cal.App.4th 594, 610.) Similarly, while inhaling water may be an inherent risk of swimming not every drowning is the result of an inherent risk of swimming.

The bottom line is that inhaling water, drowning, and death should not be considered inherent risks of an end of the year children's swimming party.

Defendants owed a duty of supervision to Alex Pierce

The primary assumption of risk doctrine limits the duty of a coparticipant or instructor of a recreational activity towards a participant. The doctrine does not limit the duty of a school district, or its employees, to supervise students entrusted to their care. The California Supreme Court has analyzed the duty of school districts to supervise students, providing in pertinent part as follows:

> While school districts and their employees have never been considered insurers of the physical safety of students, California law has long imposed on school authorities a duty to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision.

(*Dailey v. Los Angeles Unified School Dist.* (1970) 2 Cal.3d at 747.) This duty has been reiterated since the adoption of the primary assumption of risk doctrine. (See, *Jimenez*, 27 Cal.App.4th at 603.)

The fact that the Alex's injuries and death were sustained as a result of behavior engaged in by him and/or a fellow student does not preclude a finding of negligence. (*Id.,* at 603-04.) Supervision is required, in part, so that discipline may be maintained and student conduct regulated. (*Id.,* at 604.) Such regulation is necessary precisely because of the commonly known tendency of children to engage in impulsive behavior, which exposes them and their peers to the risk of serious physical harm. (*Id.*) The court stated that even adolescent high school students are not adults and should not be expected to exhibit the discretion, judgment, and concern for the safety of themselves and other which is associated with full maturity. (*Id*.) The duty to supervise should be even more stringent for younger adolescents, like Alex. A principal task of supervisors is to anticipate and curb rash student behavior to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student, and failure to do so constitutes negligence. (*Id.*)

This duty analysis regarding negligent supervision has survived the changes in the law of assumption of the risk. (See, *Lucas v. Fresno Unified School Dist.* (1993) 14 Cal.App.4th 866 [a 10-year-old student joined with other students in throwing dirt clods at one another, although he knew he was not supposed to, the court found a duty of supervision was breached]; see also *Patterson v. Sacramento City Unified School Dist.* (2010 or 2007?) 155 Cal.App.4th 821 [As a matter of policy, we do not want truck driver training instructors to send inexperienced students out to load flatbed trailers without instruction and supervision.]) "We do not want schools to allow children … to congregate in unsupervised classrooms to engage in physical activities that can easily spiral into dangerous activities, given the known proclivities of children to engage in horseplay." (*Jimenez,* at 605.)

The primary assumption of risk doctrine cannot be construed to eliminate the general duty of supervision in all cases involving children when it is that duty that provides a basis for liability.

Defendants increased risks inherent in recreational swimming activities

It is well established that operators, sponsors, and instructors in recreational

activities generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. (*Knight,* at 315-16.) If a defendant breaches that duty, it was negligent. (*Luna v. Vela* (2008) 169 Cal.App.4th 102.) The question of duty depends not only on the nature of the sport, but also on the role of the defendant whose conduct is at issue in a given case. (*Knight,* 2 Cal.4th at 318.) A coach or instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student. (*Kahn,* 31 Cal.4th at 1005-06.)

In our case, there were material disputes regarding the head lifeguard's involvement in assigning the lifeguards present at the pool party when Alex drowned. If the head lifeguard assigned lifeguards with no experience handling an emergency or who could not recognize the indications that a child was drowning, then he negligently increased the risk of a child drowning, like Alex did, at the pool party. Similarly, if the head lifeguard was supposed to assign the lifeguards and pawned that task off to someone less qualified than him, then a jury could reasonably find he was negligently responsible for increasing the risk of injury and, thus, ultimately liable in this case for Alex's tragic death.

Furthermore, the head lifeguard could have done more after he had become involved in the situation to save Alex. The Murrieta Police Department stated that Alex would have had a greater chance of surviving if he had been pulled out of the pool earlier and CPR had begun immediately. There were genuine disputes of material fact as to whether the head lifeguard had the opportunity to inform the student lifeguards to remove Alex from the pool so that CPR could be performed before it was futile.

Defendants' negligent supervision does not fall within the purview of the Good Samaritan rule

The "Good Samaritan" doctrine does not apply when there is a special relationship between plaintiff and defendant which gives rise to a duty to act. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.) The head lifeguard had a duty to supervise Alex during the end of year party, based on the special relationship between Alex, as a student at a school district event, and the lifeguard as an employee of MVUSD. The special relationship between Alex and the lifeguard imposed an affirmative duty to provide assistance. (*City of Santee v. County of San Diego* (1989) 211 Cal. App.3d 1006, 1011.) Here, the lifeguard had an affirmative duty to not only prevent the injury but also provide aid after the injury occurred. As such, the lifeguard's negligent supervision and failure to protect Alex do not fall within the purview of the Good Samaritan doctrine.

Similarly, the Good Samaritan doctrine does not apply to persons who created or increased the risk of peril. (*Id.,* at 1010-11.) Here, the lifeguard caused the peril and/or increased the risk of Alex's injury occurring, as detailed above. The Good Samaritan doctrine does not apply to the lifeguard's actions because he was responsible for creating/increasing the risk.

Moreover, "one who undertakes to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of such a harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 613.)

Here, the head lifeguard undertook the service of providing lifeguards for the end of year pool party. His failure to exercise reasonable care in providing lifeguard services caused and/or increased the risk of Alex's drowning. The students in attendance relied upon the lifeguards provided by him to prevent drowning and other injuries at the end of year pool party. Here, Alex's harm was suffered because of the reliance upon the head lifeguard to provide lifeguard services for the end of year pool party.

This was a hard-fought case until the very end. At the demand of the Pierce family, Alex's death has led to significant changes to Murrieta Valley Unified School District policies and procedures in regards to the safety of its students, which include providing mandatory CPR training to all MVUSD faculty and obtaining a safety check of the District's pool facilities by an independent third party. Through this case we were able to ensure that the safety measures and policies in place to protect our school-age children are implemented and enforced so this type of tragedy never happens again. ■