In plain sight

How one child's drowning changed pool safety laws in California

By Robert Glassman & Rahul Ravipudi

On October 8, 2021, Governor Newsom signed into law SB 722, also known as "Alex's Law." The law, which amended section 35179.6 of the Education Code, requires that an adult, certified in CPR, be present at events where children will be participating in or around a school swimming pool. The law was created as a result of a tragedy involving a 13-year-old boy, Alex Pierce, who drowned in a school swimming pool at an after-school band party.

Before the law was enacted, we represented Alex's family in a wrongful-death lawsuit against the school district. In this article, we will discuss key strategies we employed during discovery to obtain an eight-figure settlement for the family and how we then utilized evidence from the case to petition lawmakers to establish better water-safety and rescue laws in California.

Let's start with the statistics. Drowning is a leading cause of injury-related deaths among children in California. According to the Centers for Disease Control and Prevention, during 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. And on June 3, 2016, Alex Pierce became yet another casualty to child drowning.

Alex was attending an after-school party hosted by the band booster club. The party was held at the high school swimming pool. Shortly after the party started, Alex 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 the 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.

Before we discuss the specific evidence we ultimately uncovered that helped us prevail in the case, we think a brief overview of California law relating to drowning cases would be helpful. 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.

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.

Primary assumption of risk doctrine does not apply

The defendants 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, they 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 and 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 moot every provision in the Health and Safety Code designed to make pools safe, including those provisions intended to reduce the risk of drowning.

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-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 other their 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 741, 747.)

This duty has been reiterated since the adoption of the primary assumption of risk doctrine. (See *Jimenez*, *supra*, 247 Cal.App.4th at 603.)

The fact that 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. (*Ibid.*) 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. (*Ibid.*)

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. (*Ibid.*)

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) 155 Cal.App.4th 821 [As a matter of policy, we do not want truckdriver 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 unsupervised to engage in physical activities that can easily spiral into dangerous activities given the known proclivities of children to engage in horseplay. (*Jimenez*, *supra*, 247 Cal.App.4th at 605.)

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 to not increase the risks to a participant over and above those inherent in the sport. (*Knight*, *supra*, 3 Cal.4th at 315-16.) If a defendant breaches that duty, it is 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*, *supra*, 3 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*, *supra*, 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.

Negligent supervision and 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 the school district. 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 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 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.

Obtaining key evidence

The evidence in the case completely contradicted the coach's self-serving proclamations and defense litigation tactics, including multiple district staff members and students who stated the coach was on duty at the pool when Alex drowned.

The most damning evidence in the case against the school district was the surveillance video that captured Alex drowning. Recognizing the importance of such potential evidence, we took immediate steps to make sure any such video surveillance evidence was preserved. Accordingly, before even filing the lawsuit, we delivered a preservation of evidence letter to the school district's superintendent. In that letter, we introduced ourselves as the attorneys for the Pierce family and explained that we were sending the letter to them to ensure that any and all evidence related to Alex's drowning be preserved.

Here is an excerpt from the letter:

> You are hereby notified to preserve any and all evidence relating to this incident. Such evidence includes, but is not limited to, video surveillance footage from the day of the incident, photographs, schedules, reports, emails and hard copies of documents relating to the subject incident, the school-sponsored event Alex was at, the high school student lifeguards who were present at the time of the incident and any faculty volunteers. We believe that this evidence is currently in your custody, possession and control. These items are crucial evidence in a potential civil lawsuit.
>
> Accordingly, we hereby formally request that you preserve all such items in their original condition. Do not modify, alter or destroy any of the above-mentioned items, nor permit anyone to conduct any destructive or altering testing. As the California Supreme Court has stated: "Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8.
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> Accordingly, please advise us immediately of the status of the evidence and your intentions with respect to its preservation. If you will not agree to preserve the evidence, we are hereby offering to take possession of it and pay any related costs so that the evidence is preserved.
>
> Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is required by law.

Then, after filing the lawsuit and once discovery commenced, we served a formal written request for production to the district to provide to us any and all video surveillance footage showing the subject incident.

Shocking video taken from the surveillance footage highlighted 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 we reviewed the video surveillance footage, we immediately knew that it was key evidence in the case showing that Alex's death was preventable had the lifeguards and staff responded differently. Around this same time, we decided to hire a neurologist to describe for us what happens to a child's body during drowning and how much time a child has without oxygen before there is irreversible brain damage. The neurologist opined that it takes about 15 seconds of anoxia for a patient to lose consciousness and about 3-5 minutes of anoxia to develop brain damage. And at about 5-7 minutes, there is irreversible brain damage and death.

Demonstrative evidence

We then hired a litigation visuals company to craft a visual aid to show Alex's anatomy as he drowned to complement the neurologist's opinions. The presentation began with a 3D model of Alex's likeness before showing surveillance footage of the pool party. The footage showed Alex unable to keep his head above the water's surface, flailing his arms for help as he drowned. Then, a model of Alex's respiratory system demonstrated how water entered his larynx, causing it to close involuntarily to prevent fluid and air from entering.

We superimposed a timer on the surveillance video that displayed the critical minutes passing as Alex sank to the bottom of the pool. Alex's loss of consciousness caused his larynx to open and water to fill his lungs. After being without oxygen for nearly two minutes, Alex's classmates pulled him to the surface. Next, the high school lifeguards jumped in and floated Alex around the pool for another seven minutes as his classmates watched in horror. Paramedics finally arrived and attempted to save Alex, but it was too late – Alex suffered a fatal anoxic brain injury.

The final video product toggling between the video surveillance footage with the timer and the visual aid of Alex's anatomy as he drowned was extremely compelling and effective. There is no doubt that the video helped us prove the district's negligence and also helped achieve a substantial settlement for the family.

The lifeguard declarations

Another effective discovery tool we utilized in the case was obtaining declarations of the student lifeguards. We typically do not like subpoenaing kids and teenagers for depositions because of their age. Instead, we will often first hire investigators to go and interview them with their parents about the case before we make contact with them. We have

found that is much less intimidating and disruptive for the families. And in a case like this one, since the students were all still enrolled at the district, we did not want them to be afraid to speak openly and freely about what had occurred if a lawyer or representative for the district was also in the room. If our investigator tells us that they are willing to cooperate, then we will initiate contact. That is what we did in this case. As a result, we ultimately obtained nearly a dozen signed declarations from students who were present at the pool party who all testified about the negligent handling of Alex's drowning by the school district.

Once we presented the district with the video we prepared and the student lifeguard declarations that we obtained, there was really no choice for the district but to accept responsibility for Alex's death.

Alex's Law

Shortly after the case settled, we wrote a letter to the state-elected assemblymember in Alex's family's district asking her to help us change the law so a tragedy like this never happens again. We started the letter by stating:

> We represent the family of Alex Pierce, a 7th grade student at Dorothy McElhinney Middle School in Murrieta who tragically drowned while participating in a year-end, school-sponsored swim party in June 2016. It is our mission to seek justice for our clients and to ensure proper safety measures and policies are in place so that no other family experiences the loss of a child. With this mission at the heart of our work, we, along with our clients, would like to meet with you to discuss introducing a bill on water safety and rescue training, in honor of Alex Pierce, to protect school-age children in California. Alex's mom, Sabrina Pierce, is on active shore duty in the Navy and his dad, Rodriquez Pierce, was honorably discharged from the Navy. They know how to fight for our country and they are now fighting for justice for their beloved son.

We continued:

> We know with your help we can create common-sense water safety and rescue-training legislation that protects our children and prevents this kind of tragedy from happening again.
>
> No parent should have to experience the devastating loss of a child. We look forward to speaking with you and hope that you will join us in our mission of honoring Alex Pierce while working to ensure that the safety measures and policies in place to protect our school-age children are implemented and enforced.

Along with the letter, we included the video we prepared in the case, as discussed above, along with the student lifeguard declarations illustrating to the assemblywoman how egregious the facts of the case were and how and why the tragedy was so preventable. She agreed to take a meeting with us and appreciated the evidence from the case that we shared with her. From that meeting, Alex's Law was born. We worked hand in hand with the assemblywoman and Alex's family to make sure the law made its way through the legislature and to Governor Newsom's desk for signature.

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