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JUNIOR LIFEGUARD COMPETITION PARTICIPANT ASSUMES RISK OF INJURY

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In the case of *Lupash v. City of Seal Beach*, 75 Cal.App.4th 1428, 89 Cal.Rptr.2d 920 (Cal.App. Dist.4 1999), the specific issue before the court was whether the defendants had "increased the inherent risk of harm of ocean athletics." In this particular instance, plaintiff was seriously injured while entering the ocean during a junior lifeguard competition. The facts of the case were as follows:

> On July 15, 1988, David Lupash, then 13, tripped and fell in the ocean during the final event of a junior lifeguard competition on the beach at 55th Place in east Long Beach. The accident happened about five to ten seconds after Lupash ran down the beach and into the water. He stepped into "something like a hole," lost his balance, and fell face down. He is now a quadriplegic.
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> An accomplished swimmer and a distance freestyler, Lupash had swum competitively since he was eight. He swam nearly every day, participating in one or two meets a month. He had engaged in rough water swims in previous years.
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> Several weeks before the accident, Lupash began a summer junior lifeguard program offered by the City of Seal Beach. The program was designed to "to teach kids how to interact at the beach, in the water, do competitions while enjoying themselves, while being safe." It involved a commitment of 15 hours a week over a 6-week period. About half the time was spent in the ocean, the remainder in instruction on ocean safety.
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> Lupash participated in a drill on cervical spine injuries the day before the competition. He was repeatedly admonished not to dive into shallow water because "you could hit your head on the bottom and break your neck which would cause spinal cord injury or other types of injuries." Instead he was told to use a "dolphin" dive to protect his head. Dolphining involves high-stepping through the water until hip or waist- level high and then lunging forward with the arms and head straight up until the water is deep enough to swim. The head is kept up to prevent it from hitting anything. Lupash had learned how to perform the dolphin dive at a private swimming club well before he joined the junior lifeguards.
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> Lupash also was warned about such dangerous ocean conditions as undertows, undercurrents, rip tides, stingrays, and jellyfish. He could not recall being directed to make a "bottom check" to familiarize himself about the unevenness of the ocean bottom: "I vaguely - I remember, you know, [the instructor] discussing

many things, but I'm not quite certain exactly, so it's [a] vague, vague memory."

About 300 to 400 children from 3 cities (Long Beach, Seal Beach and Newport Beach) participated in the July 15 competition. The 55th Place beach was chosen because it offered a large sandy area, relatively isolated from the public, with "pretty tranquil, flat, nice calm water." Protected by a breakwater, it had minimal surf conditions, with "ankle slapper" waves (about a foot or so) breaking close to shore. There were no undertows, rip currents, or stingrays. Since the junior lifeguards began using the beach at 55th Place in 1977 for training and competitions (with hundreds of thousands of entries), there had never been any reported accidents or incidents.

Lupash arrived shortly before 9 a.m. and spent about 10 to 20 minutes in the water to warm-up. He walked slowly waist deep in the water for a distance about 45 feet parallel to the shore. He did not feel anything unusual about the ocean floor and did not notice any holes or drop-offs.

There were six competitive events, including three in the water. Lupash participated in four of them: a long distance (two-mile) run on the sand, a run-swim-run individual race, a capture-the-flag event, and, a run-swim-run relay race. Both run-swim-run events involved running down the beach and into the water and swimming around buoys before returning to shore. Lupash won many of these events, including the individual run-swim-run.

Lupash did not do as well during the capture-the-flag game. He became involved in a pushing and shoving match with another boy who had roughhoused him; Lupash was disqualified for poor sportsmanship after he uttered a profanity. Upset and crying, Lupash decided to quit early: "I was just exhausted mentally and physically, and I said, `That's it. I'm not going to swim this last race.'" He changed his mind after Mark Lees (the Seal Beach instructor who had disqualified him) said, "`Stop acting like a baby. You're going to go out there and swim.'" His twin brother and teammate, Daniel, also encouraged him "not to let the team down."

The last race started about 10 minutes later. Lupash's turn came 10 minutes after that, about 1:30 p.m. To the cheers of his friends, who were yelling "Go, go, go," Lupash sprinted down the sand. He ran into the knee-deep water "as fast as I could," and "I tripped. I stepped into something like a hole, I just lost my footing. . . . Then I lost my balance, and instinctively I tried to bring my arms out, and the next thing I knew, I was just face down in the water."

In his complaint, Lupash alleged that the defendant cities were negligent in designating 55th Place for the junior lifeguard competition. Specifically, Lupash contended that the following

evidence proved "the site posed an undue risk of harm."

> [T]here was a soft-bottomed trough or trench that was inshore not far out and that it was a constant recurring phenomenon at that place that its dimensions were variously six to nine inches or more deep and that it had a width that was variously described as a foot or more in width.

In addition, Lupash claimed Seal Beach was at fault "for negligently telling him to run into the water 'as fast as he could' without doing a bottom check." Further, Lupash alleged the Seal Beach was negligent for "telling him to compete in the last race even though he was 'tired and mentally exhausted, emotionally exhausted'." Under the circumstances of this case, the trial court found no basis for imposing liability for negligence and dismissed Lupash's lawsuit. Lupash appealed.

NO DUTY FOR NATURAL DANGERS

Citing a public policy which "promotes coastal access," the appeals court noted that "the government does not become a guarantor of public safety by providing certain services on unimproved property in its natural condition":

> California's magnificent coastline contains a variety of conditions: soaring cliffs, craggy coves, fog-shrouded inlets, sheltered bays, crashing waves. With natural beauty come natural dangers as well, including the hazards caused by churned-out depressions, inshore trenches, and sandbars.
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> Despite these risks, since 1987, California courts have consistently held that public entities do not owe a general duty of care to the public to provide safe beaches or to warn against concealed dangers caused by natural conditions of the ocean, regardless of whether lifeguard services have been provided.

On appeal, however, Lupash had argued as follows that the defendants owed him a legal duty of care because "he was more than a simple recreational user of the beach":

> Here, Long Beach selected 55th Place as the site for a junior lifeguard competition to which Seal Beach sent a team. The cities thereby stepped outside their usual role as landowner or provider of general public services. Additional obligations may be expected of them for evoking a false sense of security or because some special relationship exists between the government and the injured party.

The appeals court rejected this argument. In the opinion of the appeals court, owed no legal duty of care in this particular instance because there was "no substantial evidence that either Long Beach or Seal Beach created an undue risk of harm to Lupash and his fellow competitors."

> [T]he evidence shows that 55th Place did not pose any unusual or extraordinary risks of harm different from other Southern California beaches, many of which are also south-facing. Thanks to the breakwater, the water was calm and there was minimal wave activity... [S]andbars and uneven ocean bottoms are endemic to such local beaches as Venice, Newport Beach and Santa Monica...
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> Beaches can have high points, low points, riptides, rip currents, swirls, splashing waves, drowning water, sand crabs, driftwood, broken glass, seashells, all kinds of dangers, and assuming they are all just part of the landscape, that everybody must as a matter of law anticipate.
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> A contrary rule would dissuade municipalities from sponsoring recreational events on public beaches because of the ease with which ordinary ocean conditions could be construed as dangerous in the hindsight of an accident...
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> We do not expect our public entities, King Canute-like, to hold back the power of the sea. They are not responsible for natural hazards and owe no duty to warn beachgoers, or even children in city-sponsored junior lifeguard programs, against breaking waves and an uneven ocean floor.

Moreover, the appeals court found it significant that "there never had been any other incident or accident... in the decades of intensive use by the public and by junior lifeguards (including previous competitions and hundreds of thousands of entries)." According to the court, such evidence "was properly considered by the court in evaluating the dangerousness of this particular beach and the notice to defendants":

> Safety-history, including the presence or absence of prior accidents under similar use, is evidence which may make these ultimate facts more probable or less probable than they would be without the evidence.

Accordingly, under these circumstances of this case, the appeals court found "[s]ubstantial evidence does not support the inference that 55th Place should not have been selected."

NEGLIGENT INSTRUCTION?

On appeal, Lupash had also argued that "Seal Beach incurred additional legal responsibilities because its employees negligently instructed him in the junior lifeguard program in the areas of safe water entry and in failing to teach him to do a bottom check each time he entered the water." As described by the appeals court, Lupash's lawyer had asserted the following at trial:

> We are contending that instructing the child to run as fast as he can down the

> beach itself is negligence because it presents the problem of tripping, and it causes his forward momentum to be such that it enhances the problem of losing his balance in shallow water and that high stepping also does the same. In other words, Your Honor, it's one thing for a trained lifeguard at the age of twenty something to be told to do these things. It's quite another to tell a twelve-year-old boy to do these things.

In the opinion of the appeals court, argument by plaintiff's attorney "misapprehends the duties of coaches and sports instructors." As cited by the appeals court, coaches and instructors owe the following legal duty of care to participants:

> [Coaches and sport instructors] owe students a duty not to increase the risks inherent in the learning process undertaken by the student. But this does not require them to fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether... Instead, by choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.

Applying these principles to the facts of the case, the appeals court noted there was "no dispute regarding Lupash's correct instruction on the dangers of performing a racing dive into shallow water," Moreover, the appeals court found "Lupash's objections to his training, if accepted, would fundamentally alter the nature of junior lifeguarding, which, as its name suggests, is designed to teach youngsters ocean safety skills and techniques used by lifeguards":

> While it might lessen the risk of accidents, we cannot imagine imposing a rule of care that would require junior lifeguards to walk (rather than run) down a beach before entering the water and to then carefully shuffle across the ocean floor to ascertain the bottom conditions before trying to swim. Being so ultra-cautious about their own personal safety, lifeguards so instructed would invariably jeopardize the safety and lives of others.

The appeals court, therefore, found no evidence of "anything done by his Seal Beach instructors to increase the risks of junior lifeguarding." In so doing, the appeals court rejected expert witness testimony offered by Lupash on lifeguarding which described "ways to decrease the risks of junior lifeguarding." According to the appeals court, "the defendant has a duty not to increase the risks inherent in the sport, not a duty to decrease the risks."

The appeals court also found no evidence that "further instruction (here regarding bottom checks) would have prevented the accident."

> Lupash, who was injured at 1:30 in the afternoon, had been in and out of the water since 9 that morning. He spent nearly a quarter of an hour walking around the

> shallow open water as part of his warm-up, and he ran from the beach into the same general ocean area during two previous competitions, including a run-swim-run event to the same buoy. Since he found nothing unusual in the bottom conditions during any of these previous entries, we cannot conclude that yet one more bottom check would have been any more fruitful.
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> A mere "possibility" of causation is not enough, and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law.

As a result, under the circumstances of this case, the appeals court found the trial court had properly dismissed Lupash's claims of negligent instruction.

NEGLIGENT CAJOLING?

Lupash had also contended on appeal that Seal Beach was negligent Beach for "cajoling him to continue competing despite his mental fatigue." After he was kicked out of the competition and refused to participate in the last race, Lupash cited the fact that "Mark Lees, one of his instructors, called him a 'baby' and told him to 'get back on the horse,' 'move on,' and 'put that behind him'." The appeals court, however, found the instructor's conduct "still does not suffice to create liability against Seal Beach":

> It is a virtually a matter of cliche in youth sports that setbacks should be viewed as opportunities and failure as an invitation to "try, try again." That is what character building, going the extra mile, and true grit is all about... To instruct is to challenge, and the very nature of challenge is that it will not always be met. It is not unreasonable to require a plaintiff who has chosen to be instructed in a particular activity to bear the risk that he or she will not be able to meet the challenges posed by the instructor, at least in the absence of intentional misconduct or recklessness on the part of the instructor. Any other rule would discourage instructors from asking their students to do anything more than they have done in the past, would therefore have a chilling effect on instruction, and thus would have a negative impact on the very purpose for seeking instruction: mastering the activity...There is nothing tortious [i.e., conduct triggering personal injury liability] about a coach who pushes student athletes to keep trying even when they are tired or upset...
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> We recognize there are limits to what a coach may do. Obviously, harassment, humiliation, and hazing are beyond the pale, as are directions to proceed in the face of a disabling injury... Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an

> instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities.

Applying these principles to the facts of the case, the appeals court found no evidence that the instructors had violated their legal duty "not to increase the risks over and above those inherent in the sport."

> There was no evidence Lupash suffered any physical infirmity. And far from seeking to humiliate him, the coaches, like his own brother, tried to make sure he remained a part of the team rather than being perceived as a quitter. By the time his turn came, more than 20 minutes had elapsed. Lupash put aside his tears and began the final race to the positive encouragement of his teammates.
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> We cannot fault Seal Beach for seeking to instill in its children "an understanding of the importance of teamwork, good sportsmanship, discipline, and respect for coaches, teammates and opposing players."

The appeals court, therefore, affirmed the judgment of the trial court dismissing Lupash's negligence claims against the defendants.