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Back to nature: Beware of immunity traps

A discussion of case law surrounding the natural condition immunity

When filing a case against a public entity for dangerous condition of public property, one of the first considerations is "what, if any, immunities may apply?" The big one that usually comes to mind is design immunity for an approved plan (Gov. Code, § 830.6). However, one important but often overlooked immunity lurking in the cauldron of government affirmative defenses – and the subject of this article – is the "natural condition" immunity embodied in Government Code section 831.2. If your dangerous-condition case occurs anywhere near a lake, stream, bay, river, beach, path, or just simply *anywhere* in nature, you will want to at least consider the possible impact of this immunity. (All further undesignated section references refer to the California Government Code.)

Section 831.2 provides, "Neither a public entity nor a public employee is liable for an injury caused by a *natural condition* of an *unimproved* public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." (Gov. Code, § 831.2 (emphasis added).)

Thus, section 831.2 presents two distinct fact questions, (1) whether the area of the alleged dangerous condition is "natural"; and (2) whether the property constitutes "unimproved" public property. The Government Claims Act (Gov. Code, §§ 900, et seq.) does not provide any standards or definitions for these terms.

Determining whether public property is "unimproved" is not always an easy task. Case law suggests that in order to take public property outside the natural-condition immunity, the improvements must "change the physical nature or characteristics of the property at the location of the injury to the extent that it can no longer be considered in a natural condition." (*Mercer v. State of California* (1987) 197 Cal.App.3d 158, 242.) Yet, how much developmental activity is needed to take a property out of its natural state?

Areas where the immunity has been found applicable

- ***The beach cases***

The difficulty in determining how much developmental activity is needed to take a property out of its natural state is illustrated in the line of dangerous-condition cases involving beaches. In such cases, plaintiffs have been unsuccessful in arguing that the construction of lifeguard towers, restroom facilities and concrete fire rings converted unimproved beach areas into "improved" public property for purposes of section 831.2. (See *Rendak v. State of California* (1971) 18 Cal.App.3d 286; *Fuller v. State of California* (1975) 51 Cal.App.3d 926, 937.)

In *Rendak v. State of California*, the plaintiff alleged that the construction on the beach of restrooms and "fire rings" (circles of concrete set in the sand for building of fires) excluded the facts from application of section 831.2 immunity, particularly in the area where a portion of a cliff slipped into the sea, killing the plaintiff. The court held that such construction did not change the "natural condition" of the beach nor make it "improved" public property within the meaning of section 831.2. (*Rendak*, *supra*, 18 Cal.App.3d. at pp. 288-89.)

In *Fuller*, the plaintiff was injured after diving off a cliff into the ocean, where he hit a submerged sand bar. The sand bar was likely created by the construction of a jetty and pier 3,000 feet down the coast, which deposited sand that caused the water to be much shallower at the point where the plaintiff dove in. The *Fuller* court concluded:

> The construction of the yacht harbor and jetty and the rip rock work done on the river obviously was not the type of improvement to either the park, the Point or the beach that would take the area out of the immunity provision of section 831.2, nor did they in any way change its 'natural' condition. The cliff, except for paths worn by people using the area, and the beach, except for a small addition to sand, were still in a natural condition.

(*Fuller*, *supra*, 51 Cal.App.3d at p. 937.)

On the other hand, in *Buchanan v. City of Newport Beach* (1975) 50 Cal.App.3d 221, decided the same year as *Fuller*, the court held that a beach *will not* be considered to be in a "natural" and "unimproved" condition where the public entity alters its property by dredging a harbor and making sand deposits, thereby creating a condition dangerous to surfers. In *Buchanan*, the plaintiff was paralyzed as a result of a surfing accident. The evidence there showed that the property was "altered radically" by the nearby dredging of a harbor and resultant deposit of sand, which raised the beach level by 27 feet, thereby causing a steep slope from the shoreline to the water. As the court stated, "[this] man-made condition of the beach, plus the interaction of the ocean swells against the jetty, [caused] a condition described in the evidence as a 'refraction' of the waves, . . . [producing] a dangerous surfing condition." (*Id*. at p. 224.)

Unfortunately, in the 37 years since the *Buchanan* court was willing to acknowledge how human activities in one area can create a dangerous "natural" condition nearby, the case has been repeatedly distinguished. Indeed, almost all appellate decisions since 1975 have only *broadened* the scope of the natural-condition immunity, especially with respect to injuries from hidden sandbars. (See, e.g., *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188 (immunity under section 831.2 exists even

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where public entity's nearby improvements, together with natural forces, add to the build-up of sand on a public beach); see also *Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 (sandbar that was a human-altered condition existing for some years, but which merely duplicated a model common to nature, was a "natural condition" as a matter of law for the purposes of section 831.2).) Notably, the diving activity in *Tessier* was also held to be subject to the "hazardous recreational activity" immunity embodied in section 831.7, subdivision (b)(2). (*Tessier*, *supra*, 219 Cal.App.3d at p. 316.)

Like the beach cases, cases involving rivers have similarly held that the natural-condition immunity applied even where human activity contributed to the injury-causing condition. For example, in *County of Sacramento v. Superior Court* (*Kuhn*) (1979) 89 Cal.App.3d 215, the construction of Folsom Dam did not make the flow of water in portions of the American River downstream of the dam "unnatural" for purposes of section 831.2 immunity. The court reasoned it would be absurd to take the hypothesis to its extreme logical conclusion: "Indeed if Folsom Dam were to make the downstream American River unnatural for purposes of section 831.2, so would it make the Sacramento River as well, into which the American flows and whose flow it thereby necessarily affects." (*Id.* at p. 219.)

• ***Man-made lakes***

One court has held that a man-made public lake is considered "unimproved" public property. (*Osgood v. County of Shasta* (1975) 50 Cal.App.3d 586.) In *Osgood*, the decedent was struck and killed by a motor boat while water-skiing. The plaintiff argued the shoreline of Shasta Lake was an extremely dangerous and hazardous condition due to the physical configuration of the lake; the hundreds of coves, inlets, arms and legs that limited the visibility of motor-boat operators; and water-skiers throughout the over-365 miles of shoreline. The plaintiff thus argued that section 831.2 only applied to natural lakes, and, since Shasta is man-made and not natural, the immunity did not apply. (*Id*. at pp. 587-88.) The *Osgood* court disagreed, reasoning: "The Legislature rejected a limited immunity inapplicable to artificial lakes in favor of an unconditional immunity applicable to all public lakes, including Shasta Lake. And it goes without saying that the shoreline of the lake is a natural condition thereof within the meaning of [section 831.2]." (*Id*. at p. 590.) The court in *Eben v. State of California* (1982) 130 Cal.App.3d 416 reached the same result where a man-made lake was at issue. (*Id.* at pp. 422-423.)

Likewise, human-altered conditions that merely duplicate models common to nature are still "natural conditions" as a matter of law. (See *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 928-29 (beach altered to prevent its destruction by erosion was not materially different from beach as it existed before onset of erosion).)

• ***Wild animal attacks***

A "natural condition" under section 831.2 is not limited to physical conditions of the land. Thus, a claim based on an injury caused by a wild animal, such as a mountain lion, is subject to immunity under this provision. (See *Arroyo v. State of California* (1995) 34 Cal.App.4th 755, 762.) Similarly, imposing a moratorium on hunting a notoriously dangerous animal in order to increase that particular animal's population does not create an artificial condition sufficient to remove the injury from a claim of immunity under section 831.2. (*Id.* at pp. 764-65.)

• ***Urban areas***

Section 831.2 governs injuries on unimproved public property in urban as well as rural areas, such as when a person is injured in a cave located in a city-owned, urban greenbelt. (See *Winterburn v. City of Pomona* (1986) 186 Cal.App.3d 878, 881.)

• ***"Partially" improved land***

The fact that certain areas of public land are improved does not make a public entity liable for injuries in unimproved parts of the area. In *Eben v. State of California*, a public entity placed warning buoys and signs at a location on a public lake that was some distance from where plaintiff was injured in a water-skiing accident. The court held that the entity was immune from liability because the buoys were far from the accident site and because there was no evidence that the buoys had anything to do with the accident. (*Eben*, *supra*, 130 Cal.App.3d at pp. 423-24.)

• ***Warning signs***

In *McCauley v. City of San Diego* (1987) 190 Cal.App.3d 981, plaintiff fell from cliffs overhanging a city beach, and section 831.2 applied even though the city had placed signs warning of slippery cliff trails. The court held that the warning signs did not constitute an "improvement." Nor had the city voluntarily assumed the responsibility for reasonable risk-management of the area, despite the fact that it had posted chains and warning signs regarding the trail that plaintiff used to gain access to the cliffs. The court held that the signs did not contribute to the dangerousness of the natural condition, and thus did not create a duty by the city to warn of the cliffs' natural dangers. (*Id*. at pp. 992-93.)

Nor does a failure-to-warn theory circumvent section 831.2. For example, the immunity was applicable in an action against the State by the driver of an all-terrain vehicle who was injured in the sand dunes of a state vehicular-recreation area, notwithstanding that the driver alleged in his complaint that the cause of injury was not the natural condition of the dunes, but the state's failure to warn. The court held that the driver's contention that he was entitled as a user of the park to rely on a safe recreational area was exactly the type of complaint section 831.2 was designed to protect public entities against. (*Mercer*, *supra*, 197 Cal.App.3d at p. 242.)

• ***User is lured into a hidden trap***

Where a public entity's conduct is responsible for inducing a person to be victimized by a dangerous condition in the nature of a hidden trap, section 831.2 will not apply. (*Gonzales v. City of San Diego* (1982) 130 Cal.App.3d 882.) In *Gonzales*, the plaintiffs sued for the wrongful death of their mother, who drowned while swimming in a beach and surf area for which the defendant city provided lifeguard and police protection.

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The complaint alleged that by providing these services, defendant assumed the obligation to post warnings of unsafe conditions, such as the dangerous riptide that resulted in the death of the decedent. The court held that, based on the allegations that the city assumed the duty to protect the public, section 831.2 *did not* provide the city with immunity as a matter of law. (*Id.* at pp. 885-86.)

Reliance on legislative history

In determining whether public property is covered by section 831.2, many courts look to the legislative intent in drafting section 831.2 and the public policy supporting the immunity statute. (See *Fuller*, *supra*, 51 Cal.App.3d at p. 938; *Arroyo v. State of California* (1995) 34 Cal.App.4th 755, 761-62; and *Mercer*, *supra*, 197 Cal.App.3d at p. 164.) In *Mercer*, the court characterized the intent of section 831.2 as "designed to ensure that public agencies will not, because of financial expense, prohibit public access to and use of the State's *natural recreational resources*." (*Mercer*, *supra*, 197 Cal.App.3d at p. 164 (emphasis added).) In *Arroyo*, the court noted that the Senate Legislative Committee Comment to Section 831.2 provides, "It is desirable to permit the members of the public to use public property in its natural condition and *to provide trails for hikers and riders and roads for campers into the primitive regions of the State*. [Citation.]" (*Arroyo*, *supra*, 34 Cal.App.4th at p. 761 (emphasis added).) The comment explains that the burden and expense of putting such property in a safe condition, and the expense of defending claims for injuries, would probably cause many public entities to close such areas to public use. Thus, to allow people to enjoy the pristine areas of California and protect the State from liability, the Legislature noted that "it is not unreasonable to expect persons who voluntarily use *unimproved public property in its natural condition* to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received. [Citation.]" (*Id.* at pp. 761-62 (emphasis added).)

However, because the policy on which the immunity is based is not applicable to injuries occurring on land adjacent to unimproved public property, the immunity has not been held to be applicable to injuries occurring on land *adjacent to* public property. For example, the natural-condition immunity did not preclude municipal liability for injuries sustained by a private landowner from falling limbs of trees located on adjacent government property. (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829.)

Successful approaches to natural condition cases

When deciding whether public property is unimproved, courts have also considered the remoteness of the improvements to the point of injury, and whether the improvements proximately caused the injury. (*Eben*, *supra,* 130 Cal.App.3d at p. 420.) As such, the focus of any summary-judgment opposition should be on the nexus between the "improvements" to the public property and how those improvements proximately caused plaintiff's injuries.

In sum, if your client was injured by anything even remotely resembling a natural condition, while on public property, it is time to think about the natural-condition immunity embodied in section 831.2. It is enough to make you want to run for the hills; but, unfortunately, even those hills may fall under the immunity.

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