During recent months, the "NRPA Law Review" has presented decisions from various jurisdictions which discussed the applicability of recreational use statutes to public entities. Under these statutes, an owner or occupier who opens the land free of charge for recreational use owes no duty of care to guard, warn, or make the premises reasonably safe for the recreational user. Further, to establish liability, an injured recreational user must show willful or wanton misconduct on the part of the landowner which caused the injury.

Limited landowner immunity under a recreational use statute is just one of several statutory mechanisms which may be available to public park and recreation agencies under the law of a particular jurisdiction. This month's column presents the most recent reported appellate decision involving unimproved public land immunity in California. In part, because unimproved public land immunity was available under the state tort claims act, the state supreme court found that the recreational use statute was not applicable to public entities in California.

As illustrated by the McCauley decision described herein, governmental liability in California is based, in part, upon the existence of a dangerous condition. On the other hand, there is no liability for natural conditions on unimproved public land which cause injury. In McCauley, the principal issue was whether unimproved public land immunity is still available when the public entity arguably provides a less than adequate warning of a dangerous natural condition, rather than no warning at all.

BIRTHDAY BASH

In the case of McCauley v. City of San Diego, 235 Cal.Rptr. 732 (Cal.App. 4 Dist. 1987), plaintiff Michael McCauley was injured in a fall on property owned and maintained by the defendant City of San Diego. The facts of the case were as follows:

On February 4, 1980, McCauley celebrated his 21st birthday with a group of friends and consumed a substantial quantity of alcohol during the day and evening hours. The group continued drinking at the cliffs overhanging Black's Beach in the Torrey Pines Recreational Area, where their car was parked near the end of the paved road entering the dark recreational area. Soon, the apparently intoxicated McCauley stumbled away. Several hours later, he was found lying in Flying Dutchman Gulch, approximately 200 feet down the cliff immediately above the beach. The approximate area which McCauley fell was located about 400 yards from where he and his friends parked. McCauley gained access to the cliff on the western portion of the recreational area by use of an unpaved trail and apparently fell from an area known as Goat Trail. His blood alcohol level at 7:15 a.m. was .06% [Expert testimony indicated that, at the time of the
accident, "McCaulley had significant impairment, presumably both mentally as to
comprehension and physically as to coordinated motor behavior, as a result of his
intoxication, intoxication."] As a result of his fall McCaulley was in a coma for over 3 1/2
months and suffered substantial physical injuries, including traumatic amnesia which
prevented him from supplying any specific details regarding the accident or events
before it.

The trial court found that the cliffs at Torrey Pines Recreational Area constituted a "dangerous
condition" within the meaning of state tort claims act. Specifically, Government Code section 835
provided for governmental liability under the following circumstances:

Except as provided by statute, a public entity is liable for injury caused by a dangerous
condition of its property if the plaintiff establishes that the property was in a dangerous
condition at the time of the injury, that the injury was proximately caused by the
dangerous condition, that the dangerous condition created a reasonably foreseeable risk
of the kind of injury which was incurred, and that either: (a) A negligent or wrongful act
or omission of the public entity within the scope of his employment created the
dangerous condition; or (b) the public entity had actual or constructive knowledge of the
dangerous condition ... a sufficient time prior to the injury to have taken measures to
protect against the dangerous condition.

In the opinion of the trial court, Government Code section 831.2 was a statutory exception to
governmental liability for dangerous conditions under section 835. Section 831.2 provided as follows:

Neither a public entity nor a public employee is liable for an injury caused by a natural
condition injury unimproved public property, including but not limited to any natural
condition of any lake, stream, bay, river or beach.

The trial court had found the site of the accident was "unimproved public property" within the meaning
of section 831.2. As a result, the trial court concluded that the City of San Diego was immune from
liability under the circumstances of this case. The trial court, therefore, entered judgment in favor of
defendant City of San Diego. McCaulley appealed.

On appeal, McCaulley argued that "the trial court had erred in concluding the City was statutorily
immune from liability for his injuries caused by a dangerous natural condition located on unimproved
public property." Specifically, McCaulley alleged that "the City has assumed 'risk management' of the
unimproved property by posting warning signs which proved to be inadequate." The issue before the
appeals court was, therefore, whether the City owed an independent duty to warn McCaulley of a
known dangerous natural condition on its unimproved property, despite immunity under section 831.2.

According to the appeals court, "section 831.2 codifies an absolute immunity for public entities and their
employees for injuries caused by natural conditions of any unimproved public property."
The provision was enacted to relieve public entities of the burden and expense of putting natural unimproved property in a safe condition and defending claims for injuries flowing from their use, thus guaranteeing public access and use of such unimproved, publicly held property. Thus, the section is designed to address the problem of limited availability of recreational facilities where the public demand is greater than the finite supply of such natural recreational resources.

As noted by the appeals court, the scope of governmental immunity under section 831.2 had been addressed earlier in the case of *Gonzales v. City of San Diego*, 130 Cal.App.3d 882, 182 Cal.Rpt. 73 (1982). In this particular instance, the defendant city had voluntarily decided to provide lifeguard services for a surf area it owned and controlled. The state court of appeals found Gonzales drowned when the defendant city negligently failed to warn her of a known dangerous natural condition, i.e. a riptide. In this case, the court held that "once a public entity voluntarily provides a protective service for certain members of the public, inducing their reliance on the non-negligent performance of that service, the public entity will not be shielded from potential liability by section 831.2 where the dangerous character of the natural condition is compounded by the public entity's negligent performance of the voluntarily assumed protective service."

Given the holding in *Gonzales*, McCauley argued that the City of San Diego, under the circumstances of this case, had similarly assumed a protective service (i.e. signage) and negligently provided this service. Further, McCauley contended that his reliance on signage provided for his protection had resulted in his injuries. As described by the appeals court, the City of San Diego had established a signage program which included the following warnings regarding dangerous conditions.

1. a sign reading "Warning, Hazardous Cliffs, Trails, Rip Currents," approximately 23"x 46" in overall dimensions with "Warning" written in 6" letters and the remaining words in 4" letters, unlit and unreflectorized, located approximately 400 yards from the edge of the cliffs, just beyond the end of Torrey Pines Scenic Drive; (2) a series of posts with signs reading, "Danger, False Trail," depicting in red the picture of a person falling with debris, approximately 12"x 24,"unlit and located on the rim of the cliffs running north/south facing east; and, (3) a sign reading "Caution, Slippery Trail," approximately 12" x 24" with "Caution" written in 4" letters and "Slippery Trail" in 5" letters, located on the most southerly post of three posts connected by a chain, approximately six feet apart situated at the beginning of Goat Trail on the cliff rim.

According to McCauley's expert witness, "the first warning sign was located too far back from Torrey Pines Scenic Drive in the park area to be seen, was neither illuminated nor reflectorized, and was too far from the cliffs to provide an effective warning." This expert witness also noted the following alleged deficiencies in the signage located at the site of the accident.

[O]nly a few of the false trails were marked with signs, perhaps creating a false belief they were the only false trails; the false trail signs were neither artificially lit nor reflectorized; the false trail signs simply do not adequately warn of the dangers present
within the area; some of the false trail signs were improperly placed making it difficult to know to which trail the sign referred; and the three posts and chain, especially at night, would tend to direct a person away from Goat Trail and onto the false trail to the Flying Dutchman Gully.

In the opinion of McCauley's expert witness, "the City could have pursued [the following] four courses of conduct which would have been effective in protecting the public from dangerous conditions of the cliff:

1. placement of a barricade fence or railing in the area of the cliff edge; (2) the use of signs prepared according to recognized safety standards, employing international symbols and using the actual language prohibiting pedestrian traffic on the false trail; (3) posting Goat Trail as the only recognized access along the cliff face down to the beach and warning it should be used only by experienced climbers; and (4) simply fencing the entrance and closing the park at night.

Based upon this testimony, McCauley maintained that "the City's signage warning of false and slippery trails along the cliffs constituted an ineffective and unprofessional attempt to warn the public of the dangerous nature of the cliffs." Having attempted to provide a warning, McCauley concluded that "the City should be held responsible for its negligence in failing to warn properly."

In Gonzales, the City had assumed the responsibility for warning the general public of unsafe surf conditions by voluntarily providing lifeguard protection and posting warnings of unsafe areas. However, the extent and nature of this protection proved insufficient to warn or protect the public from the dangerous conditions of the riptide which drowned Gonzales. Similarly, McCauley claimed "the City, as in Gonzales, assumed the responsibility for risk management in the Torrey Pines recreational area by its signage program, the extent and nature of which was insufficient to warn or protect the public from the dangerous conditions of the eroding cliffs."

The appeal court rejected this argument. According to the appeals court, "Gonzales only stands for the proposition section 831.2 - it will not cloak a public entity with immunity when its own conduct is partially responsible for inducing a person to be victimized by a dangerous condition of the nature hidden trap." In the opinion of the court, "the facts underlying Gonzales are clearly distinguishable from those we confront here."

The protective services voluntarily assumed by the City in Gonzales were active and ongoing and of the character to induce reasonable public reliance. In comparison here, the passive nature of a series of warning signs is designed simply to warn the people to take care if they assume the risk in using the unimproved public property in its natural condition. In Gonzales, once the city voluntarily assumed the duty of providing lifeguard services, it induced public reliance upon the expertise of those who provided the lifeguard service in detecting and warning of the existence of dangerous rip currents, latent in character to the majority of the unknowing, swimming public. However, here
are not hidden dangerous conditions, but rather an undisguised cliff openly dangerous to all. Granted, McCauley can argue the condition became hidden and latent in the fog and darkness of the evening in question. However, where the City cannot be liable for failing to post warnings on specific, unimproved realty, we cannot imagine how the City would have to waive its right to immunity at night when its signage is not visible.

Further, the appeals court found that "public policy considerations" dictate that "the signage program is neither an improvement precluding [unimproved public land] immunity [under section 831.2], nor a voluntary assumption of a protective service in face of a dangerous natural condition" as in Gonzales.

Mindful the City could have avoided any liability under section 831.2 by simply not posting my warning signs, we believe public policy is promoted by the minimally burdensome and passive intervention of sign placement so long the public entity's conduct does not amount to negligence in creating (or exacerbating the degree of danger normally associated with a natural condition. Consequently, we believe it fosters the legislative purpose of section 831.2 to allow public entities to post warnings of purely natural dangerous conditions on unimproved public property, without jeopardizing their section 831.2 immunity. A warning-signage program which does not contribute to the dangerousness of a natural condition constitutes a reasonable middle approach for a public entity to pursue, guaranteeing the retention of the cloak of immunity while promoting public safety by encouraging the governmental entity to warn the using public of the existence of known dangerous natural conditions. The record here does not justify the conclusion the City had voluntarily assumed the responsibility for reasonable risk management within the unimproved area.

The appeal court, therefore, found that "the trial court correctly concluded the City was shielded by the absolute immunity of section 831.2." As a result, the appeals court affirmed the judgment of the trial court in favor of defendant City of San Diego.