Department of Boating and Waterways
Memorandum

Subject : Marking Hazards in and near the Water

A recurring concern voiced by public entities relates to the possibility of legal liability for negligence should a public entity undertake to mark natural hazards in or near a river or other water body and inadvertently fail to mark one or more of the hazards with the result that a member of the public is injured. As a result of such concerns, some public entities refrain from undertaking a program to mark natural hazards at all, depriving the public of the information and protection that such a program could provide. Below is a discussion of recent case law showing the development of legal doctrine in this area. It is provided in order to clarify the low degree of legal risk in connection with undertaking a passive program of marking natural hazards on water bodies and to encourage public entities to consider undertaking such programs.

DISCUSSION:

A. Immunity under Government Code section 831.2

The liability of public entities in tort is governed by the California Tort Claims Act (Gov. Code secs. 810 et seq.). Generally, a public entity has a duty to warn of a dangerous condition of its property under Government Code sections 835 and 830. However, the absolute immunity created under Government Code section 831.2 is an exception to these general provisions and prevails over them.

Government Code section 831.2 provides as follows:

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

This provision was added by Chapter 1681 of the Statutes of 1963. The Senate Legislative Committee Comment explains the intent for the adoption of this section as follows:

> "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. But 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. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, 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 the benefits received.

1. *Gonzales v. City of San Diego*

In *Gonzales v. City of San Diego* (1982) 130 Cal.App.3d 882, the Forth District Court of Appeal considered a case in which the City of San Diego voluntarily provided lifeguard and police protection to a beach and surf area it owned and controlled. The complainant in the case alleged the decedent entered the surf on a summer afternoon believing the absence of posted warnings and any police or lifeguard patrols indicated the area was safe for public swimming. However, there was a riptide condition and she drowned.

The Appeals Court held the immunity in Government Code section 831.2 did not apply in this case because the death resulted from a "hybrid condition"—in addition to the natural condition of the land, the death resulted because the City had voluntarily provided a "protective service" and had done so negligently. In other words, the Court held, 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.

It is no doubt this decision which is causing the reluctance of many public entities to post hazard signs.

However, although this case was never directly overruled, it has been limited in subsequent decisions by both the Fourth District Court of Appeal and other Courts of Appeal to the "extremely narrow factual grounds" of that case. Furthermore, the Legislature abrogated even those narrow grounds by enacting section 831.21 in 1987.[1] In addition, the language of subsequent decisions makes it clear that the posting of warning signs alone is not the kind of "protective service" that would ever result in liability, even if done negligently, and the courts have encouraged such posting.

The development of the case law in this area is discussed below.

2. Decisions Since *Gonzales*

McCauley v. City of San Diego

In 1987, the Fourth District Court of Appeal had the opportunity to reconsider the policies it had enunciated in the *Gonzales* case. In *McCauley v. City of San Diego,*(1987) 190 Cal.App.3d 981, the Court considered a situation where a plaintiff was injured after falling from cliffs overhanging a city beach while using an unpaved trail.

[1] Gov. Code section 831.21 provides that "Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services or signs."

The plaintiff claimed the city had assumed risk management: of the unimproved property by posting signs indicating that the trail was slippery and dangerous and by attaching chains at the trailhead, but that the city's actions were inadequate, in part, because no sign was posted where the plaintiff actually fell. The Court of Appeal held that the trial court correctly found that the city was shielded by the absolute immunity of Government Code section 831.2. In doing so, the Court of Appeal said:

> The public policy considerations underlying the absolute immunity provided by section 831.2 support our conclusion the signage program is neither an improvement precluding immunity…nor a voluntary assumption of a protective service in face of a dangerous natural condition so as to moot the underlying intent of section 831.2 of freeing the public entity from the duty of performing the protective service in the first place…Mindful the City could have avoided any liability under section 831.2 by simply not posting any warning signs, we believe public policy is promoted by the minimally burdensome and passive intervention of sign placement so long as 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.

Public entities may continue to be concerned by the phrase, quoted above, "so long as the public entity's conduct does not amount to negligence in creating or exacerbating the degree of danger normally associated with a natural condition." However, *McCauley* makes it clear that this phrase should be understood only to refer to <u>active</u> negligence which actually creates or exacerbates the degree of danger—something more than merely <u>passively</u> failing to warn.

The Court stated that: "*Gonzales* only stands for the proposition that section 831.2 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 of a hidden trap."* Furthermore, in a footnote explaining this statement, the Court makes it clear the public entity's content must be <u>active</u> in order to abrogate the immunity; passive conduct is not sufficient.[2]

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[2] Footnote 7 reads as follows:

> We note that section 831.2, as originally proposed by the California Law Revision Committee [*sic*], limited the breadth of this immunity by subjecting a public entity to liability for injury proximately caused by a dangerous condition which would not be reasonably apparent to and anticipated by an individual using the property with due care and the public entity or its employee had actual knowledge of the condition a sufficient time before injury to have taken protective measures against the dangerous condition (4 Cal. Law Revision Com. Rep. (1963) p. 852.) As evident from the language of enacted section 831.2, this exception was expressly rejected. Consequently, the Commission would have permitted liability if natural conditions on unimproved

Geffen v. County of Los Angeles

If *Gonzales* was severely curtailed by the Appellate District which produced it, it has been even more roundly criticized by other Appellate Districts. For example, in 1987, in *Geffen v. County of Los Angeles,*197 Cal.App.3d 188, the Second District Court of Appeal rejected it outright, concluding, at page 192, that it represented "an unwarranted curtailment of the rule of governmental tort immunity," and saying, at page 194, that the *Gonzales* "hybrid condition" rationale is "directly inconsistent with the plain meaning of the absolute immunity language embodied in section 831.2," and that it represented "an unwarranted restriction of sovereign immunity and should not be followed."

Mercer v. The State of California

The language in *McCauley* encouraging the posting of warning signs was also quoted with approval by the Second District Court of Appeal in *Mercer v.The State of California* (1987) 197 Cal.App.3d 158. In *Mercer*, the driver of an all-terrain vehicle was injured while driving on the sand dunes of a state recreational area when he drove his vehicle up the gradually sloping side of a dune and fell off the steep, "drop-off" side. There were no signs posted warning of the danger of the naturally-occurring contour of sand dunes, only speed-limit and other signs outside the dune area, but there was a state publication recommending the area for use by recreational vehicles. The Second District Court of Appeal held that the state publication, together with the provision of ranger services and the restriction of park uses did not amount to a "voluntary assumption of protective services" so as to result in loss of immunity under Government Code section 831.2.

The Court held:

> …we hold that the failure to warn issue involves the same basic policy consideration which led to the enactment of section 831.2. Therefore, liability for failure to warn is inconsonant with the immunity the statue provides. The immunity applies whether or not the dangerous condition amounted to a hidden trap and whether or not the public entity had knowledge of it.

Furthermore, the Court brushed aside the contention that the affirmative act of publishing a pamphlet recommending the area for use by recreational vehicles exacerbated the degree of danger associated with the natural condition. Stated the Court: "We see nothing irregular in encouraging the public's use of public property. Such use was, after all, the legislative motive behind the enactment of section 831.2."

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property amounted to a hidden trap known to the public entity. However, by rejecting that qualification, the Legislature was not declaring that a governmental entity would be cloaked with the immunity set forth in section 831.2 where it voluntarily assumes a protective service inducing public reliance and through negligent performance of that protective service concurrently causes a member of the public to be victimized by a dangerous, latent, and natural condition, as in *Gonzales.* Rather, where a public entity's conduct actively increases the degree of dangerousness of a natural condition, section 831.2 immunity is not available. [Emphasis added.]

Finally, the Court encouraged the public entity to erect signs in the dune area despite the entity's contention that an inspection system or warning signs on particular dunes would be impractical due to the continually shifting nature of the dunes. In other words, the public entity feared that, because the winds changed the dunes, the warning signs, over time, might not accurately reflect the hazards. The Court said:

> Public policy would support signs erected by respondent warning of the natural condition of the dunes at Pismo State Beach which would constitute neither an improvement nor a voluntary assumption of a public protection service removing immunity. We highly approve of the…language in *McCauley* [quoted above]… .

Morin v. County of Los Angeles

Two years later, in 1989, the Second District Court of Appeals considered the case of a swimmer who suffered injuries when he dove headfirst into a hidden sandbar in shallow water at a public beach. In this case, *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, the accident occurred about 300 feet from a pier on which the swimmer had previously observed posted signs prohibiting swimming within 200 feet of the pier. Once again, the Court specifically declined to follow the "hybrid condition" rationale of *Gonzales.*

In doing so, the Second District referred to a decision of Division Three of the Fourth District Court of Appeal, *Rombalski v. City of Laguna Beach* (1989) 213 Cal.App.3d 842. The Second District quoted with approval the following language of Justice Crosby in *Rombalski:*

> [T]he hybrid theory of *Gonzales* is both unsound and unnecessary. Where liability is grounded on active negligence or a special relationship, the character of the property as public or private is immaterial. When liability derives from the government's role as an owner of property, services offered on that property are only marginally relevant with respect to the determination of whether it remains unimproved for purposes of section 831.2. The alchemy of *Gonzales* was to create liability gold out of the mixture of two base elements: passive negligence and a dangerous condition on unimproved property. Neither could support a judgment alone. Nor can they together: Nothing added to nothing equals nothing."

The Court in *Morin* then concluded:

> Similarly in this case, we conclude defendant, by placing a sign on the pier warning against swimming within 200 feet thereof, did not improve or voluntarily assume the responsibility for reasonable risk management within the unimproved beach area where plaintiff entered the water.

Valenzuela v. City of San Diego

In 1991, the Fourth District Court of Appeal, the District that had originally handed down *Gonzales*, discussed in more detail the immunity accruing to public entities under Government Code section 831.2 in the context of warning signs. In *Valenzuela v. City*

of San Diego, 234 Cal.App3d. 258, the plaintiff, while diving from a rock, struck his head on the bottom and suffered severe injury. Although there were no warning signs regarding diving in the area where the plaintiff was injured, such signs were posted about a quarter of a mile south. The plaintiff contended the immunity in Government Code section 831.2 was inapplicable because the city placed appropriate warning signs only a quarter of a mile south of the accident and thus created a dangerous condition requiring warning signs directly in the areas of the accident.

The Court concluded:

> Of particular relevance here, the protective services voluntarily assumed by the city in *Gonzales* were active and reasonably induced public reliance. By contrast, signs are passive and are designed "simply to warn people to take care if they assume the risk in using the unimproved public property in its natural conditions" (quoting *McCauley*). …
>
> The same facts which distinguish *McCauley* from *Gonzales* are present here. The city never assumed an active role in risk management. It simply placed warning signs in an area where injuries had occurred. The mere placement of signs in a dangerous area does not reasonably induce the public to believe all other areas are safe.

Arroyo v. The State of California

In 1995, in *Arroyo v. The State of California,* 34 Cal.App.4th 755, the Second District Court of Appeal considered whether a public entity would lose its immunity under Government code section 831.2 if it warned of some dangers but not of others. In that case, the State posted signs warning of snakes and ticks, but had no signs warning of mountain lions. The plaintiff's child was attacked by a mountain lion while he was hiking on a marked trail in a state park. The court concluded that the trial court did not abuse its discretion in refusing leave to amend to allege that the State had placed signs in the park warning of snakes and ticks. The State need not warn of every possible danger.

The Court opined:

> Such signs do not create or exacerbate the degree of danger normally associated with hiking trails. Hiking trails normally are associated with the more primitive and remote areas of parks where one would expect to find diverse wildlife. Public entities are under no obligation to even provide signs warning of such dangers…The immunity of section 831.2 permits public entities to provide signs without incurring potential liability for failure to notify of every possible danger.

B. Immunity under Government Code Section 831.7

In the *Morin* case, discussed above, the Second Circuit Court of Appeal also analyzed whether liability would arise under Government code section 831.7, the Hazardous

Recreational Activities Immunity provision, and concluded that it would not. Section 831.7 grants immunity to public entities and employees for injuries that occur to any person who participates in a hazardous recreational activity.[3]

Subdivision (c)(1) of Section 837.1 provides:

> (c) Notwithstanding the provisions of subdivision (a), this section does not limit the liability which would otherwise exist for any of the following:
>
> (1) Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreation activity out of which the damage or injury arose. [Emphasis added.]

The *Morin* court concluded, however, that no duty would otherwise exist, and therefore no duty to warn would arise, because liability was precluded by the absolute immunity of Government Code section 831.2. Thus, the duty to warn that may sometimes arise in connection with hazardous activities under section 837.1 may never arise in cases where the injury is caused by natural conditions to which the immunity of Code section 831.2 attaches.

In 1991, the Fourth District Court of Appeal, the District which had first handed down the *Gonzales* decision, expressed agreement with the decision of the Second District Court of Appeal with respect to its analysis of the interaction between Government Code section 831.2 and 831.7. It concluded:

> In sum, both sections 831.2 and 831.7 protect the city from liability for Valenzuela's tragic accident. Public policy considerations support this conclusion. It is undisputed the city can avoid all liability by simply not posting any warning signs. The city should not be liable for voluntarily attempting to promote safety in circumstances where it has not increased the danger associated with the natural condition. … Pubic entities should be encouraged to warn of known dangerous conditions. To strip away immunity and encourage silence would indeed be counterproductive.

CONCLUSION:

Based on an analysis of the cases above, it is concluded a public entity would not be liable in tort if it undertook to post hazard signs to warn the public of hazardous natural conditions of a waterbody, inadvertently or negligently failed to post a particular hazard, and a member of the public was subsequently injured in a boating accident in connection with that hazard.

The reasons for this conclusion are as follows: 1) The entity has absolute immunity under Government Code section 831.2 for injuries sustained as the result of unimproved natural conditions; 2) Under that section, the entity has no duty to warn at

[3] Significantly, Section 831.7 defines "hazardous recreational activity" to include "boating."

all; 3) If the public entity does post warnings, it does not lose its immunity under Government Code section 831.2 because posting warnings is passive, not active, and therefore the entity has not “voluntarily assumed a protective service inducing public reliance” nor “actively increased the degree of dangerousness of a natural condition;” 4) If an entity does post warnings, it does not lose its immunity under Government Code section 831.2 if it posts warnings at some places but not others; 5) If an entity does post warnings, it does not lose its immunity if it warns of some dangers but not others; 6) Government Code section 831.2 also precludes the loss of immunity for failure to warn under Government Code section 831.7; 7) Public entities should be encouraged to warn of known dangerous conditions. To strip away immunity and encourage silence would be counterproductive and bad public policy;