

The devolution of the Natural Condition Immunity

This defense is common in cases of injury at parks and campgrounds; case law on this immunity is confused at best

By Jerry Clausen, Tim Tietjen & Dan Pleasant

Two children go camping at different public campgrounds. Each is injured when a diseased tree falls on the tent in which the child is sleeping. Each sues the responsible public entity. Each public entity moves for summary judgment, asserting the "natural condition" immunity, which immunizes a public entity against liability for injury caused by a natural condition of unimproved public property.

The judge in one child's case grants summary judgment while the judge in the other child's case denies it. Both rulings are upheld by the Court of Appeal. How can this be?

The answer is twofold. These seemingly inconsistent outcomes are the result of (1) a subtle difference in the facts between the two cases and (2) a sea change in the law construing the natural condition immunity that made this factual difference critical. The net effect is that the current state of the law concerning the natural condition immunity is more unsettled and confusing now than it has been in the 55 years since it was originally enacted.

Section 831.5: The Natural Condition Immunity

Generally, a public entity is liable for an injury caused by a dangerous condition of public property if it had notice of the condition and a sufficient opportunity to protect against it. (California Gov. Code § 835. Undesignated statutory references that follow are to the Government Code.) Under the natural condition immunity (§ 831.2), however, the public entity may be immune from such liability if the injury is caused by a natural condition of unimproved property. Section 831.2 provides: "Neither a public entity nor a public

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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 any lake, stream, bay, river or beach."

The purpose of section 831.2 is to encourage government agencies to keep public-owned wilderness areas open for public use by eliminating the burden and expense of making the property safe. (*Milligan v. City of Long Beach* (1983) 34 Cal.3d 829, 832-833.)

To establish this immunity, a public entity must prove that the plaintiff's injury was (1) caused by (2) a natural condition (3) of unimproved (4) public property. As a practical matter, section 831.2 usually presents issues only as to elements (2) and (3) – i.e., whether the condition is a "natural condition" and/or whether the property is "unimproved." (*Fuller v. State of California* (1975) 51 Cal.App.3d 926, 937; *County of San Mateo v. Superior Court* (*Rowe*) (2017) 13 Cal.App.5th 724, 731.)

The statute does not define the phrase "natural condition" or "unimproved public property." (*Rowe, supra*, 13 Cal.App.5th 724 at p. 731.) This article summarizes the development of the interpretation of those terms by the courts, focusing primarily on the unimproved public property element. As will be seen, the construction of this element has changed drastically in the last four or five years.

The "natural condition" element

The meaning of the term "natural condition" as used in section 831.2 has not been precisely defined. Under the common law, the phrase "natural condition of the land" indicates "'that the condition of land has not been changed by any act of a human being.'" (*Sprecher v. Adamson* (1981) 30 Cal.3d 358, 362, fn. 3, quoting Rest.2d Torts, § 363, com. b.) A similar interpretation has been given to the phrase "natural condition" as used in section 831.2. Thus, a condition that might otherwise be considered "natural" may not be natural under section 831.2 if artificial changes or human conduct make it more dangerous than it would be without those changes. (*City of Santa Cruz v. Superior Court* (1988) 198 Cal.App.3d 999, 1006-1007 ["the Legislature intended to preclude liability for unimproved natural conditions unless the public entity engaged in conduct which actively increased the degree of dangerousness of a natural condition"].)

In *Buchanan v. City of Newport Beach* (1975) 50 Cal.App.3d 221, the court held that whether alterations caused by wave action, tides, and human activity constituted unnatural conditions was a question of fact. (*Id.* at p. 227.) There, dredged sand was deposited on what had been submerged sand spits, raising the beach level by 27 feet and causing a steep slope from the shoreline into the water. (At p. 224.) The plaintiff was injured when a plunging wave thrust him down into the sand. (At p. 226.) He contended the man-made changes altered the wave action from a "spilling" type of wave to a "plunging" type. (*Ibid.*)

Reversing a nonsuit, the court held, "The alteration of the flow of the ocean, the wave action and the slope of the beach caused unnatural conditions. Whether, as claimed by defendant, these conditions by time and tide have become natural is a question of fact." (*Id.* at p. 227.)

Buchanan, however, has proven to be somewhat of a lone voice in the wilderness. In *Fuller v. State of California, supra*, 51 Cal.App.3d 926, decided at virtually the same time as *Buchanan*, the court held that the mere fact that human activity contributed to the formation of a condition did not necessarily preclude it from being a "natural" condition under section 831.2. Although acknowledging that "each case must be decided on its own facts," the *Fuller* court commented, "[T]he combined acts of men and of nature have caused substantial change to [California] coastline's condition. It cannot be said wherever such has occurred and an area of the coast is no longer in the pristine state which it was prior to the population of California, that the Legislature intended such an area to be excluded from the application of section 831.2.

Subsequent cases have tended to follow *Fuller* – to the point that the rule now appears to be that "conditions that occur in nature but happen to be produced by a combination of human and natural forces are natural conditions *as a matter of law*." (*Schooler v. State of California* (2000) 85 Cal.App4th 1004, 1009, italics added; *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 194; *Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 ["It is now generally settled that human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of Government Code section 831.2"]; *Goddard v. Department of Fish and Wildlife* (2015) 243 Cal.App.4th 350, 361 ["section 831.2 has been broadly construed to provide immunity even where a natural condition has been affected in some manner by human activity or nearby improvements"].)

The courts in *Tessier* and *Morin*, for example, held that sandbars were natural conditions under section 831.2 even though the sandbars formed due to a combination of wave action, tides, and human activity. (*Tessier*, at p. 314; *Morin*, at p. 194.) The human activity consisted of dredging and the construction of jetties, piers, and the like, which the plaintiffs contended caused the sandbar formation at the site of the injury even though those activities occurred some distance away. The *Tessier* and *Morin* courts reasoned that, because sandbars occur in nature even in the absence of human activity, any contributing human activity does not alter the natural character of the condition. (*Tessier*, at p. 314; *Morin*, at pp. 190-191.)

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The "unimproved" property element

The early cases: the "risk management" test

The first case to construe section 831.2 was *Rendak v. State of California* (1971) 18 Cal.App.3d 286. In *Rendak*, the plaintiffs' decedent was walking along a beach in a county park when he was struck by rocks that fell from a cliff above. The closest improvement was a bathroom some 900 feet away. The court rejected the public entity's contention that the only actionable injury could be "one directly caused by a defect in some man-made improvement." (*Id.* at p. 288.) At the same time, however, it also rejected the plaintiffs' contention that the bathroom rendered the *entire park* improved, holding instead that the improvement of a portion of a park does not remove its unimproved areas from the immunity. (*Ibid.*) It held that, in the case before it, the immunity applied because the evidence showed as a matter of law that the location of the injury was "separate, distinct and remote" from the improvements. (*Rendak, supra*, 18 Cal.App.3d at p. 289.)

In 1982, two cases decided within a month of each other refined the *Rendak* analysis into a rule requiring that, to establish that public property in its natural state is no longer "unimproved," a plaintiff must show some form of *physical change* at the *location of injury* that justifies the conclusion that the public entity is responsible for "reasonable risk management" in that area. (*Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 888; *Eben v. State of California* (1982) 130 Cal.App.3d 416, 421.) Both courts drew this formulation from California Government Tort Liability Practice (Cont.Ed.Bar 1980) section 3.42, authored by Professor Van Alstyne, the drafter of the Government Claims Act.

Several other courts subsequently embraced this rule. (*Morin v. County of Los Angeles, supra*, 15 Cal.App.3d 184, 190; *Mercer v. State of California* (1987) 197 Cal.App.3d 158, 165; *Bartlett v. State of California* (1988) 199 Cal.App.3d 392, 400; *Rombalski v. City of Laguna Beach* (1989) 213 Cal.App.3d 842, 852; *Tessier v. City of Newport Beach, supra*, 219 Cal.App.3d 310, 315; *Valenzuela v. City of San Diego* (1991) 234 Cal.App.3d 258, 261.)

A number of these cases indicated that, while evidence of a physical change at the location of injury was a *necessary* requirement to establish that property was "improved," it was not by itself sufficient. There also had to be evidence "to link the improvements, causally or otherwise, with the accident." (*Eben v. State of California, supra*, 130 Cal.App.3d at p. 425 [no evidence buoys located some distance from waterskiing accident had anything to do with it]; *Mercer v. State of California, supra*, 197 Cal.App.3d at p. 165 [no evidence that fences or signs at sand dunes had any causal connection to plaintiff's off-roading accident]; *Rombalski v. City of Laguna Beach, supra*, 213 Cal.App.3d 842, 852-853 [no evidence stairway to beach or lifeguard station caused plaintiff to dive into ocean].)

Recent cases: the rejection of the risk management test

Recently, two cases rejected the risk management test. The first to do so was *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170. In that case, the plaintiff went to a county park to go boating. The plaintiff was injured while standing on a paved parking lot by limbs that fell from a tree located off the parking lot. (*Id.* at p. 174.) The plaintiff contended that, because the location where he was injured was improved, the immunity did not apply. (*Id.* at p. 178.)

Although the *Meddock* court plainly rejected this contention, it's rationale for doing so was a bit opaque. The court did not base its conclusion on an analysis of the unimproved property element – it assumed, but did not decide, that the tree was located on unimproved property. (*Meddock, supra*, at p. 177; see *Rowe, supra*, 13 Cal.App.5th 724, 732.) Instead, the court focused on the element of *causation*; it stated:

> The statutory immunity extends to "an injury *caused* by a natural condition of any unimproved public property[.]" (§ 831.2, emphasis added.) The use of the term "caused" is significant. Here, although the injury *occurred* on improved property, that is, the paved parking lot, it was *caused* by the trees … located near – and perhaps super-adjacent to – the improved parking lot, but themselves on unimproved property.

(*Meddock, supra*, 220 Cal.App.4th at p. 177.)

In rejecting the plaintiff's contention that the condition of the location of the injury was determinative, the court said, "We cannot plausibly read 'caused by' out of the statute, as [plaintiff] impliedly asks us to do." (*Meddock, supra*, at p. 178.) Although acknowledging the risk management test (as articulated in *Eben, supra*), the *Meddock* court commented, "Contrary to [plaintiff's] view, this passage does not substitute into the statute a spatial analysis for a causal one …." (*Ibid.*)

The court concluded, "[T]he *location of the occurrence* is not material to the statute." (*Meddock, supra*, at p. 179, original italics.)

Three years later, in *Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, Division Three of the First District reached the same result as *Meddock* on similar facts. The *Alana M.* court, however, based its decision squarely on the unimproved property element of section 831.2, not on the causation element.

In *Alana M.*, a three-year-old child was injured when a tanoak tree with a cavity and identifiable rot fell on her as she lay sleeping in a tent in Campsite 41 at Portola Redwoods State Park. The campsite had been graded and equipped with a fire pit, a picnic table, and a small wooden footlocker. (245 Cal.App.4th at p. 1485.) The 86-foot tree was located 60 feet from Campsite 41, 24 feet from Campsite 42, and 30 feet from the nearest man-made object (a picnic table). (*Alana M., supra*, 245 Cal.App.4th at p. 1485.)

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The defendant moved for summary judgment based on section 831.2. The plaintiff argued that, under the risk management test, the evidence raised a triable issue of fact as to whether the immunity applied. She contended that the leveling of the ground at Campsite 41 and the addition of amenities constituted a physical change at the location where the appellant was injured. She further contended there was a causal nexus between the improvement and the accident because the existence of the campsite exacerbated the danger posed by the tree by increasing the likelihood humans would be present within the area of risk (i.e., the campsite) when a diseased tree capable of striking the campsite failed. (*Alana M., supra*, 245 Cal.App.4th at pp. 1491-1492.) She argued, in essence, that the entire area – including the location of the tree – was within the area of "reasonable risk management" and hence should be considered improved property. (*Id.* at pp. 1487, 1492.)

The Court of Appeal rejected the plaintiff's arguments. In affirming summary judgment, it acknowledged that prior cases "have required at least some form of [artificial] physical change in the condition of the property at the location of the injury. [Citations.]" (245 Cal.App.4th at p. 1489, brackets in *Alana M.*, cits. & internal quotation marks omitted.) It nonetheless held that it is the character of the property at the location of the *natural condition* – not the character of the property at the location of the injury – that is relevant under section 831.2:

> [B]ecause the phrase "of unimproved public property" in section 831.2 modifies the "natural condition" that caused the injury, the relevant issue for determining whether the immunity applies is the character (improved or unimproved) of the property at the location of the natural condition, not at the location of the injury.

(*Id.*, at p. 1489.)

The court ruled that the evidence failed to raise a triable issue of fact "as to whether … there was a physical change in the condition of the property where the tree grew." (*Alana M., supra*, 245 Cal.App.4th at p. 1493.)

The court further held that proof of a causal nexus is still required to establish that public property is improved:

> In addition, in order to avoid the natural condition immunity, there must be a "causal nexus between the dangerous condition and either human conduct or an artificial improvement." The immunity applies unless an improvement or human conduct created, contributed to, or exacerbated the degree of, the danger associated with a natural condition.

(245 Cal.App.4th at p. 1489, cits. omitted.)

The court ruled the plaintiff had failed to establish this requirement: "Nor is there any evidence suggesting artificial improvements or human conduct contributed to the danger of the tree. There is no evidence, for example, that leveling the area of the campsites weakened the tree and made it more likely to fall." (*Alana M., supra*, 245 Cal.App.4th at p. 1489.)

***County of San Mateo v. Superior Court* (*Rowe*)**

The most recent case to address the natural condition immunity is *Rowe, supra*, 13 Cal.App.5th 724, one of the few section 831.2 cases to rule in favor of the plaintiff. The facts in *Rowe* were similar to those in *Alana M.* In *Rowe*, a 12-year-old boy suffered catastrophic, polytraumatic injuries when a tanoak tree fell on him as he slept in a tent in campsite D-1 at San Mateo County Memorial Park. The 72-foot tree was afflicted with a fungus called *Armillaria*. The tree stood 20 feet from the plaintiff's tent, 22 feet from a paved access road, and 37 feet from a power line. It was surrounded by five campsites and stood within 126 feet of some 34 man-made improvements, including picnic tables, bear boxes, fire pits, and two bathrooms. (At p. 727.)

The facts in *Rowe*, however, differed from those in *Alana M.* in two important respects. First, unlike *Alana M.*, in *County of Mateo* there was evidence of physical changes at the location of the tree itself. An arborist testified that, in the area immediately surrounding the tree, the nutrient-rich natural mulch had been removed to bare dirt, the soil had been graded and compacted to construct the nearby roadways, parking areas, and campsites. (*Rowe, supra*, 13 Cal.App.5th at p. 729.) In addition, the incident report described the tree as "located *in* the north end of campsite D-1." (At p. 734, italics added.) The Court of Appeal held that this evidence raised a triable issue of fact as to the first requirement of *Alana M.* – whether there was an artificial physical change in the condition of the property at the location of the natural condition. (*Rowe*, at p. 735.)

Second, in *Rowe* there was also evidence of a causal link between the physical changes and the accident. Plaintiff's experts testified that the removal of mulch and compaction of the soil deprived the tree of nutrients and caused its roots to gradually die of oxygen starvation, predisposing the tree to becoming infected with *Armillaria*. (13 Cal.App.5th at pp. 728-729.) The court held this evidence raised a triable issue of fact as to the second requirement of *Alana M.* – whether there was a causal nexus between the dangerous condition and an artificial improvement or human conduct. (*Rowe, supra*, at p. 741.)

The path forward

Although in reaching its decision, the *Rowe* court applied the analysis set forth in *Alana M.*, the *Rowe* opinion can hardly be considered a full-throated rejection of the risk management test or an endorsement of the alternative *Alana M.* formulation. To the contrary, the *Rowe* court expressly left open a number of section 831.2 issues as to which the law is now unsettled. Indeed, going forward, the broader significance of *Rowe* may lie less in its disposition of the particular case before it and more in its identification of the existence and nature of the

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conflicts in the case law concerning section 831.2.

First, with respect to the location of the physical changes, the court noted that, both in the case before it and in *Meddock*, *Alana M.*, and *Rendak*, the natural condition constituted "a migratory danger; it began in one location but ended up, and caused injury, in another." (13 Cal.App.5th at p. 733.) However, it stated that, because the evidence raised triable issues of fact even under the *Meddock* and *Alana M.* analyses, "we do not need to decide whether and to what extent the location of the condition, or the location of injury, controls when dealing with a transitory hazard …." (*Id.* at p. 734.)

Second, with respect to proof of a causal link between physical changes and the accident, the court noted a "tension in the case law as to the legal significance of evidence that artificial, physical changes to the environment have contributed to or exacerbated a naturally occurring danger." (*Rowe, supra*, 13 Cal.App.5th at p. 738.) First, with respect to the *natural condition* element, the court observed that some cases have held such changes to be legally *in*sufficient to defeat immunity, while one (*Buchanan*) has held them legally sufficient. (*Rowe*, at pp. 738-739.) Second, with respect to the *unimproved property* element, the court noted that *Alana M.* held proof of a causal link between such changes and the dangerous condition to be legally *required*. (*Id.* at p. 739.)

The *Rowe* court, however, found it "unnecessary for us to examine these authorities at any length, or attempt to reconcile them." (13 Cal.App.5th at p. 739.) It assumed – without deciding – that proof of a causal link was not only a sufficient but necessary requirement to establish that the property was improved, and held that the evidence before it raised a triable issue of fact as to that requirement. (*Id.* at pp. 740-741.)

The California Supreme Court may ultimately have to resolve the unsettled legal issues arising out of section 831.2. In the meantime, plaintiffs' attorneys will face difficult problems in evaluating and prosecuting cases that implicate the natural condition immunity.



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