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UCLA Journal of Environmental Law and Policy

Title

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Journal

UCLA Journal of Environmental Law and Policy, 8(1)

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Publication Date

1988

DOI

10.5070/L581018744

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Where the Wild Things Are: California Public Entity Liability for Wild Animal Attacks on Public Lands

I.

INTRODUCTION

On March 23, 1986, a sunny Sunday afternoon, three year-old Laura Small was out for a walk with her family. The Smalls had gone to enjoy the spring weather at Caspers Wilderness Park in San Juan Capistrano, approximately seventy miles southeast of Los Angeles. Laura had managed to get several yards ahead of her mother, hiking up a dry creekbed. Suddenly, a full-grown mountain lion sprang from the surrounding brush, sinking its fangs into Laura's skull, and dragging her by the head into some adjacent bushes.¹ Fortunately for the little girl, a nearby hiker came to her rescue, quite possibly saving her life. As a result of the attack, she was partially paralyzed and blinded in one eye.²

In October of 1986, Laura Small's parents filed a \$28 million lawsuit, naming Orange County and the State of California as defendants.³ The plaintiffs have alleged that public officials were aware of the danger posed by the presence of mountain lions in the park, and that these officials failed to warn the public about the danger. At the time of the attack upon Laura Small, visitors to Caspers Wilderness Park were warned that mountain lions might be present in the park, but that rattlesnakes and poison oak were the "most dangerous form[s] of wildlife found in the park."⁴ The lion attack on Laura Small was the first recorded on a human being in California in recent years.⁵

The issue of adequate warning again arose on October 18, 1986, when another child, Justin Mellon, was attacked by a mountain lion in the same park, about one-quarter mile away from the site of the previous attack.⁶ Justin suffered bite wounds to his head, arms,

1. Los Angeles Times, Mar. 24, 1986, Par 2, at 1, col. 4 (Orange County ed.).

2. *Id.* Jan. 12, 1987, Part 2, at 7.

3. *Id.* Oct. 14, 1986, Part 2, at 4, col. 4.

4. *Id.* Jan. 12, 1987, Part 2, at 1, col. 2.

5. *Id.*

6. *Id.* Nov. 8, 1986, Part 2, at 3, col. 1

legs, and stomach while his family looked on helplessly.⁷ He received over one hundred stitches as a result.⁸ This attack took place one day after visitors to the park had reported mountain lion sightings.⁹ The boy's parents filed a \$20.5 million lawsuit substantially similar to that filed by the parents of Laura Small,¹⁰ with Orange County and the State of California again named as defendants.¹¹

What may prove relevant to both these suits is that the lion population in California recently has increased dramatically. In 1971, the California legislature imposed a moratorium on the hunting and killing of mountain lions.¹² At that time, the lion population in the State numbered approximately six hundred,¹³ and the legislature was apparently concerned that the existence of the species was in jeopardy. After sixteen years of protected status, however, population estimates ranged as high as five thousand lions statewide.¹⁴

While the threat of attack by wild animals may not be immediately apparent to members of the public who visit parks and wilderness areas, it is a very real danger which is increasing in probability of occurrence.¹⁵ A number of factors contribute to the increased risk of mountain lion attacks. These factors include increased mountain lion population, decreased habitat, increasing human recreational use of wilderness areas, and public ignorance of the nature of mountain lions.

Lee Fitzhugh, a wildlife specialist at the University of California, Davis, contends that the interplay of these factors has allowed lions to become gradually accustomed to people as a natural element of their environment.¹⁶ As the human and mountain lion habitats continue to approach, and even overlap each other,¹⁷ "[i]t is possible under some circumstances some lions may be losing their historic fear of human beings," according to Brian J. Kahn, president of the California Fish and Game Commission.¹⁸

Compounding the problem of the increased boldness of the lions is the problem that most people are not even aware of the danger

7. *Id.*

8. *Id.* Oct. 21, 1986, Part 1, at 1, col. 5 (Los Angeles ed.).

9. *Id.* May 21, 1987, Part 2, at 5, col. 1.

10. The same attorney is serving as plaintiff's counsel in both actions.

11. *See supra* note 9.

12. Los Angeles Times, Oct. 2, 1986, Part 2, at 1, col. 1 (Orange County ed.).

13. *Id.*

14. *Id.*

15. *Id.* Oct. 24, 1986, Part 2, at 1, col. 1.

16. *Id.* Oct. 21, 1986, Part 2, at 1, col. 1 (Orange County ed.).

17. *Id.* at 3, col. 1.

18. *Id.* at 1, col. 1 (Los Angeles).

from lions. John Dennis, an associate senior scientist with the National Park Service, states that "[t]he real problem we see as a nation is so many grow up in the cities and have no idea of the nature of animals. People think milk comes from milk cartons, they have no idea how it got there. . . . They have no idea how to act in wild country."¹⁹

If, as a spokesman for the California Department of Fish and Game has stated, more attacks such as those in Caspers Wilderness Park are inevitable,²⁰ it follows that additional litigation might occur which will raise new questions about government responsibility for wild animal attacks. Given the size of the awards being sought in the cases already described, the state and other public entities face potentially large liability.

No statute or case law clearly mandates public liability for wild animal attacks occurring on public land. In order to establish the liability of a public entity, a plaintiff must prove that the public entity breached a duty of care established by the California Government Code sections relevant to dangerous conditions of public property. In deciding cases in this area, the courts will have to reason by analogy from the case law interpreting the California Government Code of similar statutes. The courts will need to consider several countervailing policy concerns, including: species preservation, the rights of people to be safe when using public lands, the difficulty in defining reasonable methods of warning the public about the dangers of wild animals, and the adverse impact a finding of liability would have upon the ability of public entities to keep parks and wilderness lands open to the public.

This comment will examine the courts' treatment of public entity liability in the cases most clearly analogous to the animal attack cases currently in litigation. It will suggest that under the case law, an animal attack victim could prevail in California in certain factual situations. However, this comment will also suggest strong policy reasons for adopting public entity immunity in this area.

II.

DEFINING PUBLIC ENTITY DUTIES

The State of California has a custodial responsibility to preserve its wildlife resources. Wildlife is publicly owned, and it is the state's

19. *Id.* Jan 12, 1987. Part 2, at 1, col. 2 (Orange County ed.)

20. *Id.*

policy to conserve and maintain wildlife.²¹ Section 2052 of the State Fish and Game Code states that it is state policy to conserve and protect endangered and threatened species and habitat. Pursuant to these objectives, the legislature imposed the 1971 moratorium on the killing of mountain lions. The legislation's purpose was to allow the Department of Fish and Game time to "prepare a plan which will insure survival of mountain lions."²² Under the moratorium and the Fish and Game program, mountain lions have flourished²³ to the point that another policy objective of the state—the safety of its citizens—may be threatened.

The California State Constitution provides that citizens are entitled to be safe and secure in their persons,²⁴ and that government and governmental employees are obligated to exercise their power for the protection of the people.²⁵ Towards that end, the Department of Fish and Game's statutorily mandated policy is to alleviate economic losses or public health and safety problems caused by wildlife.²⁶ The means to be used to effect this policy include the capture and dispatch of any animal which poses a threat to public safety and welfare.²⁷

In the case of wild animal attacks, these lines of policy may conflict. The state or other public entity cannot simply exterminate all wildlife which might pose a threat to public safety. Nor can it fail to take any measures in the face of potential attacks. In determining whether a public entity's actions have been reasonable, the courts must find that such actions have embraced both competing strands of public policy.

III.

CALIFORNIA GOVERNMENT CODE—ESTABLISHING PUBLIC ENTITY LIABILITY

In the state of California, all governmental tort liability is statutorily determined.²⁸ All causes of action against a public entity must allege a violation of the State Government Code. If liability cannot

21. *Betchart v. State Dep't of Fish and Game*, 158 Cal. App. 3d 1104, 1106, 205 Cal. Rptr. 135, 136 (1984).

22. *See* 1971 Cal. Stat. 3209.

23. *See supra* note 12.

24. CAL. CONST. art. I, § 1.

25. *Id.* art. II, § 1.

26. CAL. FISH & GAME CODE § 1801(g) (West 1984).

27. CAL. PUB. RES. CODE § 5008.2 (West 1984).

28. *Susman v. City of Los Angeles*, 269 Cal. App. 2d 803, 808, 75 Cal. Rptr. 240, 243 (1969).

be established under one statute, it may still be established under another.²⁹ Thus, a plaintiff may attempt to establish liability for wild animal attacks under a number of statutes.

A. *Government Code Section 815.6*

Government Code Section 815.6 provides that public entities can be held liable for failure to discharge mandatory duties.³⁰ The statute establishes a strong presumption of liability; immunity is the exception rather than the rule. However, courts have narrowly construed what constitutes a "mandatory duty." For example, in *Longfellow v. County of San Luis Obispo*,³¹ a personal injury action arising out of a fall on a sidewalk, the court held that the county was under no mandatory duty to make the sidewalks safe.³² Plaintiffs in this case were unable to designate a specific statute pointing to such a duty. Victims of wild animal attacks who attempt to base liability against public entities on the general policy provisions of the Fish and Game Code or the State Constitution may face similar reasoning.

B. *Government Code Section 835*

A plaintiff in a wild animal attack case must plead and prove each required element of Government Code Section 835, which concerns public entity liability for injuries caused by a dangerous condition of public property. Section 835 provides:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition³³ of its property³⁴ 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

29. CAL. GOV'T CODE § 815 legislative committee comment—Senate (West 1980).

30. Section 815.6 provides:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Id. § 815.6.

31. 144 Cal. App. 3d 379, 192 Cal. Rptr. 580 (1983).

32. *Id.* at 385, 192 Cal. Rptr. at 583.

33. Section 830(a) defines "dangerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." CAL. GOV'T CODE § 830(a) (West 1980).

34. Government Code Section 830(c) defines "public property" as "real or personal property owned or controlled by the public entity." *Id.* § 830(c).

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 an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2³⁵ a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.³⁶

Thus the public entity is statutorily required to provide adequate notice of a dangerous condition causing a foreseeable injury.

C. *Government Code Section 831.2*

In addition to satisfying the requirements of Section 835, plaintiffs might have to establish that the dangerous condition in question is an artificially created one. Government Code Section 831.2 counterbalances Section 835 by providing that public entities are not liable for injuries caused by natural conditions of unimproved public lands.³⁷ This section provides absolute immunity from liability for injuries occurring in areas such as state parks, where the only improvements are recreational access roads and hiking, riding, fishing and hunting trails.³⁸ The policy underlying this statute is one of keeping these areas open: the burden and expense of defending claims for injuries might cause many public entities to close such areas to public use. As the Legislative Committee Comment to Section 831.2 states, "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."³⁹

As a threshold requirement, therefore, plaintiffs seeking to recover for injuries received from wild animal attacks will have to establish that the presence of such animals is not a natural condition of land. The mere fact that a condition has been affected in

35. *Id.* § 835.2(a).

36. Section 830(b) defines the term "protect against" to include "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning against a dangerous condition." *Id.* § 830(b).

37. Section 831.2 provides:

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 any lake, stream, bay, river or beach.

Id. § 831.2.

38. *Id.* legislative committee comment—Senate.

39. *Id.*

some way by human activity will not suffice to take such condition out of the category of natural conditions.⁴⁰ For example, in *County of Sacramento v. Superior Court*,⁴¹ the court held that the presence of a dam fifteen miles upstream, which might possibly have affected the flow of the American River and thus caused the drowning of a rafter, did not constitute an artificial condition.⁴² Similarly, in *Fuller v. State* the plaintiff injured himself after diving from a cliff into shallow water, and the court held that the presence of a man-made jetty three thousand feet down the coastline also did not constitute an artificial condition.⁴³

By contrast, in *Buchanan v. City of Newport Beach*⁴⁴ the court rejected the trial court's judgment of "nonsuit" in favor of the city. Enough evidence supported the plaintiff's contention that the improvement of a harbor entrance had created a larger beach area, altered the flow of the ocean and the action of waves breaking onto the beach, and changed the slope of the beach, thereby creating an artificial condition.⁴⁵ Plaintiff's suit under Section 835 was thus allowed to go forward.

That a wild animal attack may have taken place in a park or other area which has facilities for public use will not necessarily resolve the natural versus artificial condition issue in favor of those attempting to establish liability. The presence of amenities such as restroom facilities and fire rings does not transform unimproved, natural conditions into artificial conditions which could give rise to liability.⁴⁶

Thus, victims of wild animal attacks who seek to hold public entities liable for their injuries will have to establish that the presence of such animals itself constitutes an artificial condition. Such a proposition may not be as untenable as it first appears. Following the reasoning in *Buchanan*, victims may argue that the presence of wild animals on the particular property where the attack occurred resulted from human activity. As human expansion into territory formerly only occupied by wild animals continues, through both increased residential development and increased recreational use of

40. *Fuller v. State*, 51 Cal. App. 3d 926, 938, 125 Cal. Rptr. 586, 593 (1975).

41. 89 Cal. App. 3d 215, 152 Cal. Rptr. 391 (1979).

42. *Id.* at 218, 152 Cal. Rptr. at 392-93.

43. 51 Cal. App. at 937, 125 Cal. Rptr. at 592 (1975). The jetty had contributed to a build-up of sand at the base of the cliff.

44. 50 Cal. App. 3d 221, 123 Cal. Rptr. 338 (1975).

45. *Id.* at 226-27, 123 Cal. Rptr. at 341 (the court held that the issue of "artificial conditions" is a question of fact, not law).

46. *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

wilderness areas,⁴⁷ the incidence of human-animal contact increases. Animals then become less fearful, as visitors to Yellowstone National Park who have encountered grizzly bears can readily confirm.⁴⁸ A plaintiff might then argue that the public entity improperly authorized expansion into wilderness areas, thus creating an artificial condition leading to an increased likelihood of attacks.

The 1971 California moratorium on the killing of mountain lions might also be interpreted as an artificial condition. The moratorium "artificially" protects the lions from their only predator, man, thereby creating a circumstance which has increased the risk of attacks. Of course, this argument's main weakness is that the public entity—whether the county, city, or other governmental body—has had no control over the legislature's rule.

D. *Liability Under Gonzales*

A public entity may voluntarily assume a duty of care by supervising the use of public property. In *Gonzales v. City of San Diego*,⁴⁹ the court held that by voluntarily providing lifeguard services on a public beach, the city assumed a duty of care which it breached after failing to warn swimmers about dangerous riptide conditions. The dangerous natural condition on public property combined with the negligent failure to warn created a "hybrid dangerous condition,"⁵⁰ which removed otherwise natural conditions from the immunity category provided by Section 831.2.

In cases of attack in public parks or other areas where public employees are present, the *Gonzales* rationale may apply. If the presence of such employees (for example, park rangers) is enough to reasonably induce public reliance upon the safety of public lands, a hybrid dangerous condition might be found to exist.

E. *Plaintiffs' Burden of Proof*

Having established that the presence of wild animals constitutes an artificial or hybrid-dangerous condition of public property, a victim must still establish the liability prerequisites of Section 835: 1) a dangerous condition at the time of the injury, 2) a foreseeable risk of the type of injury sustained and 3) either actual or constructive

47. Los Angeles Times, Oct. 21, 1986, Part 2, at 1, col. 1 (Orange County ed.).

48. This is referred to as the "Yogi Bear Syndrome" by several National Park employees the author has encountered. It affects such animals as bears, deer, squirrels, and in urban settings, the pest-like pigeon. *Id.* at 4, col. 2.

49. 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1982).

50. *Id.* at 885-87 182 Cal. Rptr. at 75-76.

dents, these accidents could be used as evidence that the property was in a dangerous condition at the time of the subsequent accident.⁵⁴ Plaintiff might, therefore, use the two mountain lion attacks in 1986 as evidence to establish the dangerous condition of the San Juan Capistrano park. However, these particular incidents will have questionable probative value if applied to incidents elsewhere in the state.

Liability for wild animal attacks will depend on a showing either that the presence of animals constitutes a condition of land, or that some other condition of the land allowed or caused the animals to be present. Unless some condition of the property, dangerous or not, contributed to the attack, no liability will exist.⁵⁵ Under this doctrine, the cases most analogous to wild animal attacks are those which involve attacks or other wrongdoings by third parties. In *Hayes v. State of California*,⁵⁶ for example, no liability was found against the state after criminal battery was committed upon two persons sleeping on a public beach. The *Hayes* court refused to characterize harmful third party conduct as a dangerous condition, absent some concurrent contributing defect in the property itself.⁵⁷

The court in *Slapin v. Los Angeles Int. Airport*⁵⁸ found such a contributing defect, and held that the defendant airport may have been liable for a third party assault which occurred in an inadequately lighted parking area. The court held that the unlighted condition of the parking area may have constituted a concurrent proximate cause of the plaintiff's injuries.⁵⁹ The court stated that "a defendant may not successfully defend that the plaintiff's injuries were caused by the wrongful criminal act of a third party, where the very basis upon which the defendant is claimed to be negligent is that the defendant created a reasonably foreseeable risk of such third party conduct."⁶⁰

2. Foreseeable Risk of the Type of Injury Sustained

The court in *Peterson v. San Francisco Community College Dis-*

54. *Barone v. City of San Jose*, 79 Cal. App. 3d 284, 291, 144 Cal. Rptr. 836, 839 (1978).

55. *Hayes v. State of California*, 11 Cal. 3rd 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974).

56. *Id.*

57. *Id.* at 472, 521 P.2d at 857, 113 Cal. Rptr. at 601.

58. 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (1976).

59. The court then remanded the case. *Id.* at 490-91, 135 Cal. Rptr. at 300.

60. *Id.* at 490, 135 Cal. Rptr. at 299.

notice of the condition. Plaintiffs must also prove proximate cause, an issue this comment examines throughout the discussion of each of the above three prerequisites.

1. Dangerous Condition at the Time of Injury

Public property is in a dangerous condition when it "involves an unreasonable risk of injury to the public."⁵¹ The reasonableness of the risk is determined by whether a reasonable person would conclude that using such property would lead to a substantial risk of injury.⁵² This presents an interesting issue of law: Would a reasonable person choose to use public lands while being aware that wild animals frequent the area? If the answer to that question is "yes," then the presence of wild animals does not by itself make the property dangerous. If the answer is "no," then any plaintiff who voluntarily entered such lands would be contributorily negligent *per se*. The judicial answer to the questions will probably be "maybe": the courts can be expected to at least sometimes determine that a victim-plaintiff could not have appreciated the full extent of the risk involved in using land.

A court might find public property to be in a dangerous condition even if the danger exists only by reason of a condition existing on adjacent property not owned by a public entity.⁵³ Thus, in areas such as Caspers Park, which is bordered on one side by Cleveland National Forest, and on another by the Audubon Society's Starr Ranch, the defendant public entity cannot exonerate itself by claiming that the dangerous condition is that of the adjacent property. A mountain lion roams at will; even if it spends the majority of its time on one owner's property, once the animal leaves it should be considered a condition of the property which it roams.

If a condition of public property has been the cause of prior acci-

51. *Teall v. City of Cudahy*, 60 Cal. 2d 431, 433-34, 386 P.2d 493, 494, 34 Cal. Rptr. 869, 870 (1963) (citing *Hawk v. City of Newport Beach*, 46 Cal. 2d 213, 217, 293 P.2d 48, 50 (1956)).

52. Government Code Section 830.2 provides:

A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.

CAL. GOV'T CODE § 830.2 (West 1980).

53. *Jordan v. City of Long Beach*, 17 Cal. App. 3d 878, 883, 95 Cal. Rptr. 246, 249 (1971).

*trict*⁶¹ also found that a condition of property created a reasonably foreseeable risk of wrongful acts by a third party. In that case, an assailant jumped from behind thick, untrimmed foliage adjoining a stairway, and attempted to rape the plaintiff. This modus operandi has been used in prior sexual assaults on the same stairway.⁶² The state Supreme Court held that the plaintiff stated a cause of action for harm occasioned by a dangerous condition of public property, and that the defendant owed plaintiff a duty of care to warn of the dangerous condition.⁶³

Similarly, in *Swaner v. City of Santa Monica*⁶⁴ the court held that liability may exist when a condition of property combined with foreseeable third party conduct results in the plaintiff's injuries. In *Swaner*, two people walking on a public beach were injured by a private vehicle.⁶⁵ The vehicle had gained access to the beach through an unfenced portion of an adjacent public parking lot.⁶⁶ The plaintiffs alleged that the city knew vehicles had entered the beach from the parking lot before, and that people on the beach had been injured. The court held that these allegations, if proved, might provide a "sufficient level of foreseeability so as to render the condition of the beach a proximate cause of appellant's injuries."⁶⁷ The *Swaner* court also held, however, that if the third party's conduct was unforeseeable, the chain of causation between the maintenance of a dangerous condition by a public entity and the plaintiff's injuries would be broken, thus eliminating any chance of liability.⁶⁸

Litigants will hotly contest the issue of foreseeability in any animal attack case. Whether a particular attack was foreseeable will be an issue of fact to be determined on a case-by-case basis. Prior to the attack upon Laura Small, the issue as applied to Caspers Wilderness Park would probably have been decided in favor of the defending public entity, given the lengthy period of time during which no prior attacks had been reported. The additional attack upon Justin Mellon complicates the issue. Factors which the courts will have to consider in deciding the issue of foreseeability include: the population density and number of reported sightings of wild an-

61. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

62. *Id.* at 805, 685 P.2d at 1195, 205 Cal. Rptr. at 844.

63. *Id.* at 814, 685 P.2d at 1201-02, 205 Cal. Rptr. at 850-51.

64. 150 Cal. App. 3d 789, 198 Cal. Rptr. 208 (1984).

65. *Id.* at 795, 198 Cal. Rptr. at 211.

66. *Id.* at 796, 198 Cal. Rptr. at 211.

67. *Id.* at 806, 198 Cal. Rptr. at 218.

68. *Id.* at 804, 198 Cal. Rptr. at 217.

imals in the surrounding area, the size of any adjacent habitat, and the aggressiveness of the offending species.

3. Actual or Constructive Notice

Government Code Section 835(b) provides that a public entity will be held liable for injuries caused by dangerous conditions of public property if it had actual or constructive notice of the defect.⁶⁹ Public entities cannot be held liable for failing to repair or warn of a dangerous condition unless the condition is known or should have been known in exercising reasonable care.⁷⁰ In *Ellis v. City of Los Angeles*, a sewer contractor was fatally injured by a pile-driver he was operating, after the street beneath him caved in.⁷¹ The court found that there was no evidence of a dangerous condition other than the occurrence of the accident.⁷² Based upon the lack of notice, the court held in favor of the defendant city, stating that "the liability statute cannot be given application that would render the municipality an insurer against accidents."⁷³

An exception to this rule applies where the defendant public entity has itself created the dangerous condition. For example, in *Pritchard v. Sully-Miller Contracting Co.*,⁷⁴ the City of Long Beach was held liable for injuries resulting from the dangerous condition created by its changing the timing on certain traffic signals.⁷⁵ When the dangerous condition in question has been created by the defendant public entity, the issue of notice becomes moot and no reasonable time is allowed for correction.⁷⁶ This exception will be useful to victims of mountain lion attacks, who may be able to establish that the presence of mountain lions is due to the protective custodial actions taken by the state on behalf of the lions.

Should a plaintiff not succeed in convincing the court that the defendant public entity created the dangerous condition, and if the public entity had no actual notice of the condition, the plaintiff must establish that the defendant had constructive notice. Government Code Section 835.2 declares that constructive notice is present when the condition has "existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of

69. CAL. GOV'T CODE § 835(b) (West 1980).

70. *Ellis v. City of Los Angeles*, 167 Cal. App. 2d 180, 187, 334 P.2d 37, 42 (1959).

71. *Id.* at 182, 334 P.2d at 39.

72. *Id.* at 187-188, 334 P.2d at 43.

73. *Id.* at 187, 334 P.2d at 42.

74. 178 Cal. App. 2d 246, 2 Cal. Rptr. 830 (1960).

75. *Id.* at 256-57, 2 Cal. Rptr. at 836.

76. *Id.* at 255-56, 2 Cal. Rptr. at 836.

due care, should have discovered the condition and its dangerous character."⁷⁷

Constructive notice may be imputed if a plaintiff can show that an obvious danger existed for an adequate period of time before the accident to allow public employees to discover and remedy the dangerous condition, had they been operating under a reasonable plan of inspection.⁷⁸ If the public entity can show that it has a reasonably adequate inspection system in place, and that it maintained and operated its inspection system with due care and did not discover the condition, constructive notice will not be imputed. The determination of what constitutes a reasonably adequate inspection system must take into account practicability and cost.⁷⁹ Thus, a public entity is not required to maintain an around-the-clock inspection of its highways in periods of emergency.⁸⁰

F. *Public Entity Defenses Under Government Code Section 835.4*

Government Code Section 835.4 provides a cost/benefit defense which can exonerate public entities even if the requirements for liability under other statutes are met.⁸¹ If the act or omission which created the dangerous condition (for example, allowing mountain lions to remain on public lands) was reasonable in light of the practicality and costs of available alternatives (extermination of the species, twenty-four-hour surveillance of parklands, continual

77. CAL. GOV'T CODE § 835.2 (West 1980).

78. *State v. Superior Court*, 263 Cal. App. 2d 396, 400, 69 Cal. Rptr. 683, 686 (1968).

79. CAL. GOV'T CODE § 835.2(b) (West 1980).

80. *Marino v. County of Tuolumne*, 118 Cal. App. 2d 675, 678, 258 P.2d 540, 542 (1953).

81. Section 835.4 provides:

(a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

CAL. GOV'T CODE § 835.4 (West 1980).

relocation of animals), then the public entity will not be held liable. Similarly, if the action taken by the public entity to protect against the dangerous condition (for example, posting warning signs at the entrance to public property without engaging in continual surveillance of the area) meets the same criteria of reasonableness, the public entity will not be held liable. Thus, in *Van Kempen v. Hayward Area Park*,⁸² the public entity was held not liable for injuries sustained by a child when a workbench set on end by unknown persons fell on him in a park. The court held that the park's efforts to make the bench safe—first, securing the bench by a header board fastened to its legs, and later chaining and padlocking it to a fence—were reasonable under the circumstances.⁸³

The defense of assumption of the risk is also available to public entities. A certain amount of common sense accompanies the assertion that any reasonable person who enters a wilderness area assumes the risk of being attacked by animals therein. Our ancestors might have found a contrary proposition ridiculous. "Assumption of the risk" has less intuitive appeal in this part of century, however. Urban dwellers, untrained in the ways of the wild, now easily travel to remote areas.

In order for a defendant to invoke the defense of assumption of the risk, it must show that the victim appreciated the specific risk confronting him.⁸⁴ The test is a subjective one; the plaintiff's reasonableness is analyzed in light of the knowledge he possesses. It remains to be seen how the courts will apply assumption of the risk in wild animal attack cases. The courts may find that urban dwellers have no reason to be aware of the existence of, or dangers posed by, wild animals on public lands. It may be that in other cases, involving experienced backpackers or other persons knowledgeable about the outdoors, the courts will find such persons to have reasonably assumed the risk of animal attacks.

IV.

CASE LAW FROM OTHER JURISDICTIONS

Since the first wild animal attack case to go to trial in California will be a case of first impression, the case law from other jurisdictions is instructive. Not surprisingly, only a handful of cases on point exist. Generally, courts have been unwilling to hold public

82. 23 Cal. App. 3d 822, 100 Cal. Rptr. 498 (1972).

83. *Id.* at 827, 100 Cal. Rptr. at 501.

84. *Chase v. Shasta Lake Union School Dist.*, 259 Cal. App. 2d 612, 66 Cal. Rptr. 517 (1968).

entities liable for wild animal attacks absent clear evidence of a negligent act or omission by a public employee.

In *Martin v. United States*,⁸⁵ a Ninth Circuit decision, an action was brought for the death of a camper killed by a grizzly bear in Yellowstone National Park. The court refused to hold the government liable, finding that the plaintiff's decedent had been contributorily negligent in entering the park without paying the entrance fee, intentionally failing to visit the ranger station, and camping in an unauthorized area. The decedent and his companion thus avoided receiving warnings which they otherwise would have received.⁸⁶ The court declared that it was not the intention of Congress in enacting the Federal Tort Claims Act to make the government an insurer of the safety of all park visitors.⁸⁷ The court also held that the warnings given to park visitors were adequate, stating that "to require the Park Service to post signs and warnings on every boardwalk, path or trail every few hundred feet throughout a park as extensive as Yellowstone would not only be prohibitive in cost but would destroy the park's beauty as well."⁸⁸

In *Ashley v. United States*,⁸⁹ the court dismissed a claim brought by Yellowstone visitor who was bitten by a bear after falling asleep with his arm protruding from his car window. The court held that a warning that bears were dangerous was sufficient; it was not necessary to warn visitors to roll up their windows when bears approach.⁹⁰

In *Rubenstein v. United States*,⁹¹ another Yellowstone bear attack case, the court rejected governmental liability because the plaintiff admitted that he had read and remembered certain government brochures containing warnings about wild animals.⁹² In *Wamswer v. City of St. Petersburg*,⁹³ a Florida appellate court sustained summary judgment for the city, which had been sued for injuries sustained in a shark attack off a municipal beach. The court found no evidence to indicate that the city had knowledge of the presence of sharks in nearby waters, and thus had no duty to warn.⁹⁴ The court

85. 546 F.2d 1355 (9th Cir. 1976), *cert. denied*, 432 U.S. 906 (1977).

86. *Id.* at 1360.

87. *Id.*

88. *Id.* at 1361.

89. 215 F. Supp. 39 (D. Neb. 1963).

90. *Id.* at 47.

91. 488 F.2d 1071 (9th Cir. 1973).

92. *Id.* at 1073.

93. 339 So. 2d 244 (Fla. Dist. Ct. App. 1976).

94. *Id.* at 246.

left open the question of what the city's duty would have been had it known of the presence of sharks.

The only case in which a public entity has been held liable for injuries sustained in a wild animal attack on public lands is *Claypool v. United States*.⁹⁵ In *Claypool*, liability was based upon the clearly negligent conduct of a park employee. The plaintiff, upon entering Yellowstone National Park, received a brochure explaining the dangers posed by wild animals within the park.⁹⁶ Prior to pitching his tent, the plaintiff asked a park ranger whether it was safe to sleep outside.⁹⁷ The park ranger, knowing that grizzly bears had injured several campers in an unprecedented, unprovoked raid on the same campground only two days before, nonetheless responded that hundreds of people slept out every night and that "they had never had anyone attacked without provocation."⁹⁸

V.

CONCLUSION

Although it appears that plaintiffs seeking to recover for injuries sustained in wild animal attacks may be able to establish liability against California public entities, there are strong policy reasons against allowing them to do so. These policy reasons are built into the state law, in Government Code Sections 831.2 and 835.4. Section 831.2 provides absolute immunity from liability for injuries sustained due to natural conditions on unimproved public property. Section 835.4 allows a public entity to avoid liability if it can demonstrate that its action or inaction in failing to discover, protect against, or warn about dangerous conditions of public property was reasonable in light of its limited available resources.

The policy behind these sections as applied to wilderness areas is well expressed in the Legislative Committee Comment to Section 831.2:

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

95. 98 F. Supp. 702 (S.D. Cal. 1951)

96. *Id.* at 703.

97. *Id.*

98. *Id.* at 703-04.

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 benefits received.⁹⁹

This public policy rationale should be extended to cases where the presence of wild animals has been determined to be an artificial condition of public property, as well as cases involving hybrid dangerous conditions. It should be the determinative factor in most, if not all, cases involving wild animal attacks occurring on public property. Liability should properly exist only in cases involving extreme levels of negligence, as in the *Claypool* case noted above. Otherwise, public entities will be forced to place such severe use restrictions upon public lands that any meaningful wilderness experience for members of the public will become impossible.

An example of such restrictions on use can presently be found at Caspers Park, where the attacks on Laura Small and Justin Mellon occurred. Since the Mellon attack, children are not allowed to go beyond the picnic area near the entrance to the park; adults wanting to go beyond the picnic area may do so only in groups of two or more, and families with children are not allowed to camp anywhere within the park.¹⁰⁰

Undeniably, residents of nearby communities have been deprived of the opportunity to fully experience the pleasures of this particular wilderness area. Eloquent testimony to this fact was recently provided by a resident of nearby San Juan Capistrano, whose family (including her young son, Jason) used to camp as many as thirty nights a year in the park. “[H]ow sad it is not to be able to camp overnight here anymore. We used to walk all along the creek and the trails where the little girl was attacked. Jason was always in my arms. It was beautiful.”¹⁰¹

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99. CAL. GOV'T CODE § 831.2 legislative committee comment—Senate (West 1980).

100. These rules are still in effect as of Apr. 7, 1989. Interview with Caspers Park employee (Apr. 7, 1989).

101. Los Angeles Times, Jan. 12, 1987, Part 2, at 7, col. 1 (Orange County ed.).

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