PARMA - 2014
HAZARDOUS RECREATIONAL ACTIVITIES-THE CALIFORNIA EXPERIENCE
Taking the Risk Out of Recreation

Presented by:
David Clovis – California Joint Powers Risk Management Authority
Mark Hazelwood, Esq. – Allen, Glaessner, Hazelwood & Werth, LLP
Joe Kriskovich – City of Manteca

Moderator:
Melissa McDonald – Bickmore Risk Services
Park & Recreation
“Hot Topic” Issues

Here I go, off to camp taking along only the necessities of life...

...rain gear, flashlight, first aid kit, compass...

And my attorney...
Hazardous Recreational Activities

* Identifying Exposures
* Case Law/Immunities
* Programs
* Lessons Learned
* Questions
Identifying Exposures

* Aquatics
  * Open Water
  * Pools
  * Water slides
* Sports
  * Fields
  * Facilities
  * Shared-facilities
* Trails
  * Paved
  * Un-paved
  * Skate Parks
  * BMX Parks
  * Golf Courses
  * Playgrounds
Analyzing Exposures

- Humanitarian Exposures
- Financial/Legal Concerns
- Political Concerns
- Public Impression
Skate Parks/BMX Parks
Manteca BMX Bicycle Track

This BMX bicycle park is covered by the California Government Code Sec. 831.7, which states that bicycle racing is a hazardous activity and persons who participate voluntarily accept the risk and/or injury. The City of Manteca is not liable for injuries resulting from use of this park.

- BMX bike riding can be a dangerous activity. Ride at your own risk. The City of Manteca does not assume any responsibility for injuries.
- Track is restricted to use by ONLY BMX style bicycles. NO motorized vehicles, RC cars or other wheeled equipment other than bicycles are allowed.
- Experienced riders shall give less experienced riders a fair chance to use the BMX track.
- Do Not Use the BMX track if a hazardous condition exists. Report any damage or hazardous condition to the Parks & Recreation Department at 239-8470.
- This is a drug, alcohol and tobacco free facility. (MMC 12.12.100 & 110)
- Help keep your BMX Park clean. Use the track receptacle.
- For your safety, BMX users must wear: helmets, elbow and knee pads. (MMC 12.12.115)
- The BMX Track is designed for one-way use only.
- Spectators are not permitted within fenced area of track.

BMX Track Hours
BMX Track opens at 8 am and Closes at Sunset (MMC 12.12.120)
Aquatics
Facilities
Recreation Events

* Multi use facilities
  (School District)
* Indoor Events
* Drop In Programs
* Sports Leagues
* After School Activities
* Special Events
Playgrounds
Trails

* Users
* Location
* Signage
* Maintenance
Case Law/Immunities
Plaintiff must prove the following elements:

* Public property was in a dangerous condition at the time of the injury
* The injury was proximately caused by the dangerous condition
* The dangerous condition created a reasonably foreseeable risk of the kind of injury which occurred; and
* Either:
  * The dangerous condition was created by a public employee’s negligent or wrongful act or omission within the scope of his/her employment OR
  * The public entity had actual or constructive notice of the condition a sufficient time before the injury occurred to have taken reasonable measures to protect against the injury
Statutory definition: “A condition of property that creates a substantial (as distinguished from 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.”

Can include public improvement which has become changed, flawed, damaged or has deteriorated to a state that is potentially dangerous to reasonably foreseeable users.
Trivial Risks Excluded
Govt. Code § 830(a)

* Public entity is only liable when it creates a **substantial risk of injury** as opposed to minor, trivial, or insignificant risk
* Whether a defect is too trivial can be decided as a matter of law
  

* A full assessment of all surrounding circumstances is necessary to determine whether the risk is substantial or trivial
  
  *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734;
Case Examples of Dangerous Conditions of Public Property

* Submerged pipe near surface of recreational waters
  
  * Waters v. City of Los Angeles (1975) 13 Cal.3d 297

* Inadequately maintained road that had crumbled away

  * Elias v. San Bernardino County Flood Control Dist. (1977) 68 Cal.App.3d 70

* Mud hole in an improved parking strip

  * Low v. City of Sacramento (1970) 7 Cal.App.3d 826

* Boat launching ramp with a missing plank

  * Strongman v. County of Kern (1967) 255 Cal.App.2d 308
Cases Involving Non-Obvious Hidden Danger

* Non-defective highway overpass rendered dangerous by a negligently issued oversize load permit that routed truck through the overpass
  
  * Hill v. People ex rel. Dept. of Transportation (1979) 91 Cal.App.3d 426

* Sharp curve incorporated into a highway improvement without posted warning signs of need to reduce speed
  

* Children’s sandbox located close to a baseball diamond
  
  * Bauman v. City & County of San Francisco (1940) 42 Cal.App.2d 144
A public entity is not liable for a dangerous condition of public property based on third party conduct alone.

There must be some concurrent contributing defect in the property itself. *(Pakarek v. City of San Diego (1994) 30 Cal.App.4th 909.)*
History of similar accidents during the course of normal use of a property can support a finding of a dangerous condition

*Baldwin v. State* (1972) 6 Cal.3d 424

Absence of prior accidents tends to prove no substantial risk of injury

Elements of Use with Due Care

  * Facts: Eight year old injured when attempting to ride his bike down a steep, wet, grassy hill in a park
  * Holding: Court affirmed summary judgment in City’s favor because park’s condition was not a dangerous condition
  * Reasoning: No reasonable person would conclude the property created a substantial risk of harm to reasonably foreseeable child users who used the property with the due care expected of children
  * See also Chowdurry v. City of Los Angeles (1995) 38 Cal.App.4th 1187
Hazardous Recreational Activities
Govt. Code § 831.7(b)

* Immunity to dangerous condition of public property
* Definition: “A recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or spectator
* Govt. Code § 831.7(b)(3): List of the types of activities that are specifically included within the definition
  * Not an exhaustive list
* To determine whether an activity not included in the list is a hazardous recreational activity, courts looks to the listed activities and make analogies
Exceptions to Hazardous Recreational Activity Immunity – Govt. Code § 831.7

* Failure to warn of a known dangerous condition or other hazardous recreational activity that was not assumed by the participant as inherently part of the activity
* When the public pays a specific fee to the entity for participation in the hazardous activity
* Negligent failure to construct or maintain equipment, structures or improvements
* Gross negligence
Cases Interpreting Hazardous Recreational Activity

* Tree rope swimming deemed hazardous recreational activity

* Immunity applied when 14 year old boy drowned while swimming in lake

* College not immunized after baseball player intentionally beaned by a pitch
  Avila v. Citrus Community College Dist. (2006) 38 Cal.4th 148

* After hours basketball game in junior high school gym considered hazardous recreational activity

* Soccer match during P.E. class cannot constitute hazardous recreational activity

* University held responsible for injuries to ultimate frisbee participants who was injured when striking glass door in gym
  Eddy v. Syracuse University (1980) 433 N.Y.S.2d 923
Neither a public entity nor a public employee is liable for an injury caused by a natural condition of an unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river, or beach.

Policy reason: To permit members of the public to use public property in its natural condition without placing the burden on public entities to keep the property safe.
**Cases Interpreting Natural Condition of Unimproved Property**

- State immune from claim brought by parents of child attacked by mountain lion on marked trial in state park
  

- Action by bodysurfer who was gravely injured when wave action hurled him against hard sand bottom barred against City, County, and State
  
  *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918

- Claim by horseback rider on state park trail that park constituted a dangerous condition barred
  

- Immunity for unimproved public property does not extend to injuries occurring to nonusers on adjacent land
  
  *Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829
When Public Property Ceases to be Unimproved

- No precise standard when public property in its natural state ceases to be unimproved
- “Improved” – “must change the physical nature or characteristics of the property at the location of the injury to the extent it can no longer be considered a natural condition”

Court rejected theory that upstream dam made river unnatural

County of Sacramento v. Superior Court (1979) 89 Cal.App.3d 215

Immunity applied against plaintiff injured in bodysurfing accident, even though beach reconstructed by rock formation years earlier

Knight v. City of Capitola (1992) 4 Cal.App.4th 918

Unimproved public property does not become “improved” simply because warning signs are used

A public entity is not liable for injury caused by a condition of

- Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all other types of vehicular riding, water sports, recreational or scenic areas and which is not a street or highway;
- A trial used for the above purposes;
- Any paved trail, walkway, path or sidewalk on an easement of way which has been granted to public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirements shall not construed to be a standard of care for any unpaved pathways or roads.

**Exclusions:** Unpaved roads that are city streets; county, state, or federal highways; or public streets or highways maintained by a special district.
Cases Interpreting Trail Immunity

* County immune from claim brought by bicyclist for injury incurred on paved county trail
  
  Armenio v. County of San Mateo (1994) 28 Cal.App.4th 413

* Immunity given to county for claim brought by rollerblader injured by crack in bicycle path
  
  Carroll v. County of Los Angeles (1997) 60 Cal.App.4th 606

* Path within dog park deemed a trail for purposes of Govt. Code § 831.4
  

* Wrongful death action barred where trail used for recreational and maintenance purposes
  

* Immunity upheld where Plaintiff fell over protruding tree trunk on path
  
  Montenegro v. City of Bradbury (2nd District Court of Appeal 2013)
Primary v. Secondary Assumption of Risk

* Primary assumption of risk – Defendant owes no duty to Plaintiff and doctrine operates as a complete bar to recovery

* Secondary assumption of risk – Defendant owes a duty, but the Plaintiff proceeds to encounter a known risk imposed by the Defendant’s breach of duty
  * Part of comparative fault scheme where trier of fact considers the relative responsibility of the parties in apportioning the loss resulting from the injury

* Critical issue in determining primary or secondary assumption of risk: Whether the Defendant’s conduct is an “inherent risk” of the activity such that liability does not attach as a matter of law
Wrongful death action brought by family of rock climber barred by primary assumption of risk


Summary judgment affirmed for ski resort as risk of collision with tower is inherent in activity and Mammouth Mtn did nothing to increase risk.

* Judo student’s claim against Cultural Center for injuries sustained while practicing a throw barred by primary assumption of risk; instructor might ask a student to do more than the student can manage is inherent risk in activity


    * Tennis instructor increased risk inherent in game of tennis and primary assumption of risk defense denied

    * Bicycle race sponsor held to have increased risk inherent in sport by creating manmade jumps
Cases Interpreting Assumption of Risk Cont’d

* Action by baseball player hit in head by pitched ball barred by primary assumption of risk
  
  *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148

* Triable issue of fact as to whether riding scooter on sidewalk constitutes recreational activity subject to assumption of risk defense


* No primary assumption of risk by 7th grade student struck on head by golf club during golf class; risk not inherent

Multi Use Facility
Risk Management Solutions and Strategies
Where to Focus Attention

* After school/Drop-in Programs
* Shared Use Facilities
  * Bauman v. City & Co. of San Francisco (1940)
* Use Conflicts
  * State of California v. Superior Ct. of Sonoma County, Young (1995)
* Warnings – To Sign of Not to Sign, That is the Question?
* Make hazards obvious
* Command attention of users
* Clear, simple text
* Give time for response – place warnings effectively
NO SLEDDING

Too many trees.

You can hit one and break your neck, back, arm.
Waivers

“I’ll be happy to make some suggestions, if you’ll be so kind as to sign this waiver.”

Schochet
Released/Waivers
Lessons Learned

* Specific to Activity
* Specific to Injury
* Clear Language Describing Hazards
* On-Line Waivers
∗ Have a plan of action; identify problem areas / priorities / assign funding / develop a plan.

∗ Address known problems; replace hard surfacing; remove exposed concrete footings.

∗ Prevent losses; improve inspection & maintenance procedure; staff training.

∗ Implement proactive programs; ongoing training; purchase playground equipment from reputable manufacturers.

∗ Document all activities; communicate program to everyone in organization; paper trail; helps ensure consistent implementation.
Aquatic Risk Management

- Facility Inspections
- Hazardous Chemicals
- Programs
- Lifeguard Certification
- Training
- Hiring
- Design
* Accident Reporting/Investigation
* Near Miss Reporting
* Accident Investigation tips
* Accident Investigation tools
Maximizing Risk Management

* Understand nature of activity and exposure
* Provide a problem solving approach – be part of the solution
* Be proactive
* Murphy’s Law – anticipate what can go wrong will go wrong
* Document all activities
The 19th Hole