Recreational Trail Immunity is Narrowed By Courts of Appeal

by Arne B. Sandberg

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The English common law rule of *rex non potest peccare* ("the king can do no wrong"), which is the basis of government immunity in the United States, has recently received a second look in California in relation to the recreational trail immunity. Immunity for public agencies relating to recreational trails has traditionally been broadly applied, providing significant protection from liability when hazards on adjacent property result in injuries to users of recreational trails. However, two 2017 cases have narrowed that protection from liability so that public agencies now should think carefully about how their trails relate to their surroundings.

California Government Code section 831.4 ("Section 831.4") provides immunity for public agencies and employees from an injury caused by a "condition of" any trail used for fishing, hunting, camping, hiking, riding, water sports, recreational or scenic areas, or access to these purposes. If the condition of the trail is "relating to [the trail's] design," then the immunity still applies.[1]

But what if the condition causing the harm is *adjacent* to the trail? Is it still a "condition of" the trail so that it provides immunity under Section 831.4(b)? *Amberger* addressed this issue in 2006, but no other case did so until 2017 and 2018, when four were published. *Amberger* and two of the recent cases held that conditions adjacent to a trail would be treated as a condition of the trail, but the other two recent cases created a new approach and refused to apply the immunity.

I. AMBERGER-WARREN V. CITY OF PIEDMONT

In this decision, plaintiff was bumped off a path and started to slip down a hill. She injured her hand as she grabbed for the edge of the path to stop her slide. The plaintiff argued that the trail's dangerous location next to a slope where people could fall was a condition "unrelated" to the trail, and that the recreational trail immunity did not protect the city from liability.

The Court of Appeal held that the hill was "not unrelated to the trail because the trail is what provides access to the hill and exposure to the alleged danger. Plaintiff is in effect arguing that the trail is situated in a dangerous location …, but *location, no less than design, is an integral feature of a trail*, and both must be immunized for the same reasons."[2]

II. LEYVA V. CROCKETT & COMPANY, INC.

In January 2017, the appellate court in *Leyva v. Crockett & Company, Inc.* relied on *Amberger* and *Prokop* to hold that Section 831.4(b) protected the owner of the trail from liability for an injury caused by a condition adjacent to the trail (an errant ball from a golf course).[3] The owner of the trail also owned the golf course, and it claimed immunity under Section 831.4(b). The plaintiff argued that the condition that caused the injury was the lack of safety barriers on the golf course which would have stopped balls from flying onto the trail, and that this condition was not a faulty design or "condition of" the trail.[4]

The Fourth Appellate District agreed with the owner that the immunity applied. "Just as the trail's location next to a hill in [*Amberger*] is an integral feature of the trail, *so is the trail's location next to the golf course*. Further, it makes no difference whether the alleged negligence in failing to erect safety barriers along the boundary … occurred on the golf course or on the trail itself because the effect is the same. [¶] Additionally, the erection of a safety barrier … is equivalent to the installation of a handrail in [*Amberger*]."[5]

III. GARCIA V. AMERICAN GOLF CORPORATION

In May 2017, the Second Appellate District in *Garcia v. American Golf Corporation* departed from the previously

1. *Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332, 1341-1342 [immunity available where narrow exit gate caused by adjacent fence]; *Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 1084-1085 (immunity available to city despite lack of a handrail next to trail to protect users from a hillside).

2. *Amberger, supra,* at 1085, emphasis added.
3. *Leyva v. Crockett & Company, Inc.* (2017) 7 Cal.App.5th 1105 (rev. denied Apr. 12, 2017).
4. *Id.* at 1109-1110.
5. *Id.* at 1111 (emphasis added).

broad application of the recreational trail immunity, and the California Supreme Court later denied review of the opinion.[6]

The *Garcia* court held that the recreational trail immunity did *not* apply, despite the strong factual similarity to the *Leyva* case. The plaintiff in *Garcia* was a child in a stroller who was hit in the head by a golf ball while on a pedestrian walkway between a roadway and a golf course. The defendant city owned the roadway, the walkway, and the golf course, and a third party operated the golf course for the city. The walkway supported the same asphalt surface as the roadway but was painted light brown, and it was only separated from the roadway by a 12-inch white painted line and intermittent "delineators." The walkway and the golf course were separated by a concrete wall topped by a chain link fence almost 7 feet high.

The city filed a motion for summary judgment. In opposition, the plaintiff argued that the dangerous condition at issue was not the walkway, but the golf course itself since the golf course's holes were too narrow and the fences were too low, and since the warning signs inside the course did not provide a reasonable warning to pedestrians outside the golf course. The plaintiff's experts submitted declarations that the warning signs were inadequate, that the walkway was "inherently unsafe," and that protection "could have easily been accomplished." These dangers were especially present where the plaintiff was hit, the plaintiff argued, due to golf holes being close together, the short fence, and the trees obscuring both the pedestrians' vision of incoming golf balls and the golfers' vision of pedestrians who needed warning.

The trial court granted summary judgment to the city, and the plaintiff appealed.

The appellate court concluded that *Amberger* "did not hold that there must be immunity for every injury occurring on a trail when an adjacent public property was a contributing factor. Rather, the [*Amberger*] court examined the causation question in light of the policy of section 831.4. It identified the issue as whether the trail and an adjacent public property meet a relatedness test. That test has two parts: proximity and liability that will likely cause the trail to close. Thus, the [*Amberger*] court embraced a nuanced, policy based relatedness test for determining whether an injury is caused by a condition of a trail when an adjacent public property may have contributed to the injury."[7]

Next, the *Garcia* court summarized *Prokop* by stating that the *Prokop* court "did not have to decide whether an adjacent public property had caused injury" since it had decided that the gate was an "integral part" of the path.[8] The *Garcia* court also summarized the *Leyva* case.[9]

The *Garcia* court then concluded that the golf course "does not pass the relatedness test" of *Amberger* (i.e., "unless properties are deemed related for policy reasons, courts will not immunize adjacent public properties") and it distinguished *Amberger*, *Prokop*, and *Leyva*. The *Garcia* court concluded that *Amberger* does not control since the hill was clearly related to the path on the hill, and not applying the immunity would have likely led to the path's closure. In *Garcia*, however, the golf course was *not* related to the walkway since, among other things, people did not use the walkway to go to the course, there was a risk of harm from third parties (i.e., golfers), and imposing liability would not likely close the walkway since the golf course generated revenue that could pay for insurance and renovations to protect users of the walkway. In short, the *Garcia* court concluded that the *Amberger* path and hill were inseparable, but the *Garcia* walkway and golf course were separable.[10]

The *Garcia* court then quickly distinguished the *Prokop* and *Leyva* cases, even though the effort to distinguish the latter's facts could be viewed as weak.[11]

Despite its creation of a "relatedness test" and failure to follow *Leyva*, it should be noted that the *Garcia* court issued a narrow holding when reversing the trial court's summary judgment ruling: A public golf course cannot assert a trail immunity defense when the trail abuts a public street, the course is a commercially-operated revenue-generating enterprise, the course has a dangerous condition, and the dangerous condition caused harm to a user of the trail.[12]

Essentially, *Garcia* holds that the scope of the "condition of" the trail did not include an unrelated adjacent golf course.

IV. TOEPPE V. CITY OF SAN DIEGO

In July 2017, the Fourth Appellate District issued its opinion in *Toeppe v. City of San Diego*, which reached the same result as *Garcia*, but with clearer reasoning.[13] In *Toeppe*, the plaintiff was walking through Mission Bay Park on a bicycle path when a branch from a eucalyptus tree fell on her. The trunk of the tree was 25 feet from the trail, the tree was planted when the park was constructed by the defendant city (or was the "offspring" of such a tree), and it had been maintained by the city.

The court refused to grant immunity to the city under Section 831.4. Whereas the *Amberger* hill could not be separated from the path and the only way to be exposed to the danger of the hill was to use the path, the *Toeppe* tree could be accessed by persons on the trail *and* persons using the other park areas (grass, picnic tables,

6. *Garcia v. American Golf Corporation* (2017) 11 Cal. App.5th 532 (rev. denied Aug. 9, 2017).
7. *Id.* at 541-542.
8. *Id.* at 542.
9. *Id.* at 542-543.
10. *Id.* at 544-546.
11. *Id.* at 546.
12. *Ibid.*
13. *Toeppe v. City of San Diego* (2017) 13 Cal.App.5th 921.

and benches) surrounding the tree. The alleged dangerous condition (the tree) "is independent of the trail." In addition, the dangerous conditions in *Amberger* (the hill and the lack of handrails) were of a different nature since protection from the dangerous conditions would have required modification to the design of the trail, but the tree did not require any improvements to the trail. Lastly, the *Toeppe* court reasoned that the *Amberger* hill was fundamentally different than the *Toeppe* tree since the hill was a natural condition that was not maintained by the public agency, but the tree was in a man-made park and was maintained by the city.[14]

Even though the Fourth Appellate District also issued the *Leyva* case six months earlier, the *Toeppe* case distinguished *Leyva*. The *Toeppe* court held that "the condition of the golf course could not be dangerous but for the location of the trail next to it," but "[t]he same cannot be said about the eucalyptus tree here. If that tree was negligently maintained, it was a dangerous condition regardless of the location of the subject trail."[15] It could be argued that this reasoning lacks persuasive effect, since persons off the trail near the golf course *would* be equally in danger of being hit by a golf ball. Anyone who has played (or suffered through) a round of golf, or has spent significant time near a golf course, knows that balls leave the course at a wide variety of trajectories and speeds, thus landing across a wide area. The balls are not limited to just landing in a path next to the course.

In addition, the *Toeppe* court observed that the plaintiff in *Leyva* claimed that the lack of safety barriers to prevent golf balls from hitting the trail created a dangerous condition, but that the plaintiff in *Toeppe* does not claim that the trail lacked safety barriers or should have been designed differently. This logic could also be questioned since the alleged lack of safety barriers in *Leyva* concerned the golf course, not the trail. The plaintiff in *Leyva* claimed that there should have been barriers on the course to protect persons off the course.[16]

The *Toeppe* court concluded "In short, this is not a case about trails. It is about trees."[17]

V. ARVIZU V. CITY OF PASADENA

In February 2018, the Second Appellate District – the same District that issued the *Garcia* decision – decided *Arvizu v. City of Pasadena*.[18] Despite the park in question being closed during the night, plaintiff and his friends decided to enter the park and climb down a steep hill to reach a particular trail. Unfortunately, plaintiff lost control down the hill, and then tumbled onto the trail, across the trail, and over the top of a 10-foot high retaining wall. There was no guardrail on the downhill side of the trail.

Plaintiff argued that the trail immunity should not apply since he was not injured by a condition of the trail, but by the lack of guardrails or warnings along the retaining wall. The appellate court disagreed, and relied on *Amberger-Warren*, *Prokop*, and *Leyva* for the proposition that the immunity applies to the design and location of the trail, which includes the areas adjacent to the trail.[19] Plaintiff specifically argued that the trail immunity should not apply due to *Garcia*, but the appellate court quickly distinguished *Garcia* since the present case did not involve a golf course or a revenue-generating City asset.[20] Although decided seven months after the *Toeppe* decision, the *Arvizu* decision did not mention it.

VI. RECONCILIATION OF THESE DECISIONS

It appears that the *Garcia* and *Toeppe* courts were not comfortable with the *Leyva* court's broad application of the *Amberger* holding, but they did not want to openly disagree with *Leyva* and create a new rule for analysis out of thin air. Thus, the *Garcia* court construed *Amberger* to require a "relatedness test," *Toeppe* characterized it as a matter of "independence," and both courts attempted to distinguish *Leyva*.

However, despite the *Garcia* and *Toeppe* courts' apparent fear of directly disagreeing with the *Leyva* court's holding, the *Garcia* and *Toeppe* courts' approaches may have identified a flaw in the *Leyva* court's broad holding, thus justifying their exception to the broad application of the immunity. After all, if there is a hazardous condition on adjacent public property that is unrelated to the recreational trail, it seems to make little sense that a plaintiff should be barred from suing the owner of that condition for that condition simply because he/she was on a recreational trail.

For example, consider the incongruous result if the *Garcia* court had applied the *Leyva* holding to the *Garcia* facts: Motorists on the roadway would be allowed to sue for the hazardous golf course condition, but pedestrians on the walkway (who need more protection than the motorists on the roadway) would not be allowed to sue. If the *Leyva* holding had been applied to the *Toeppe* facts, then a person injured by a falling branch on the trail would not have recourse, whereas persons elsewhere near the tree would.

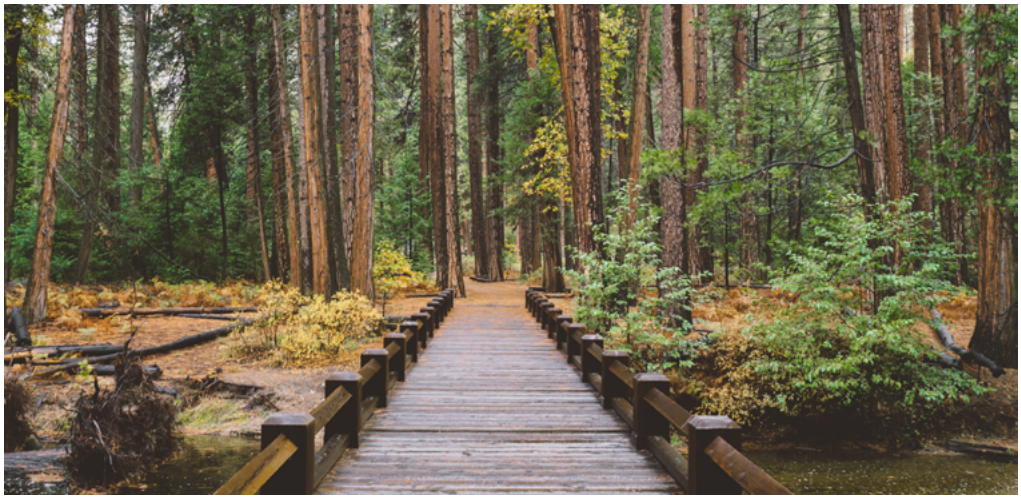
The potential flaw in the broad scope of *Leyva*'s holding also becomes apparent by slightly changing the *Leyva* facts. Consider a situation where the public golf course (i.e., the hazardous adjacent condition) is owned by a *different* public agency (unlike the cases discussed above). Rather than the public owner of the golf course being able to avoid liability due to the recreational trail immunity, the immunity would *not* protect the public owner of the golf course since it is *not* the owner of the trail. No logical reason seems to exist for the trail user's ability to sue

14. *Id.* at 927-929.
15. *Id.* at 930.
16. *Leyva, supra*, at 1109.
17. *Toeppe*, *supra*, at 931.
18. *Arvizu v. City of Pasadena* (2018) 21 Cal.App.5th 760.
19. *Id.* at 767-770.
20. *Id.* at 770-771.

the public golf course to depend on whether the golf course is owned by the same public entity that owns the trail.

As to *Arvizu*, while it distinguished *Garcia* and ignored *Toeppe*, its holding does not appear to be inconsistent with them. If the *Arvizu* court had applied the *Garcia* and *Toeppe* tests, it could have easily reached the same result since the plaintiff's injuries were caused by the steep hillside and retaining wall adjacent to the trail, which were clearly related to, and not independent of, the trail.

In short, while the *Garcia* and *Toeppe* courts may have taken the backstreets to distance themselves from *Leyva*, and while their holdings may not be the ones desired by public agencies, their holdings may ultimately prove to be more sound, thus resulting in more cohesive and reasoned application of recreational trail immunity.



For the time being, due to the potentially increased risk of liability caused by these two cases, public agencies may wish to review conditions that are adjacent to, and independent of, their recreational trails. If such a hazard exists for users of a trail, the agency may want to consider what measures could be taken to protect users of the trail.

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