

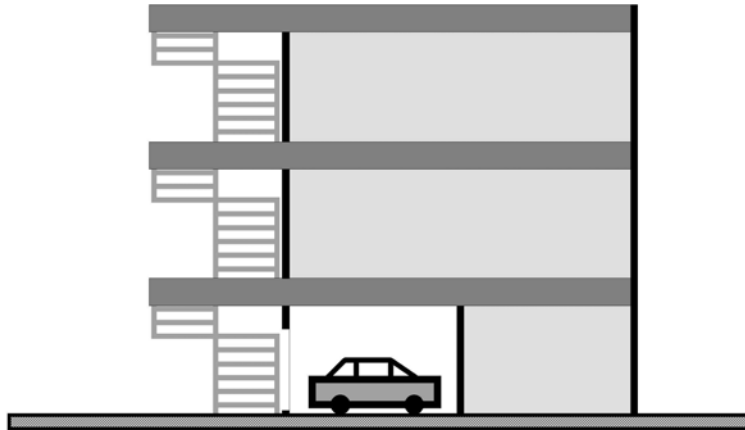
“KNOWN DANGEROUS CONDITION” AS DEFECTIVE CONSTRUCTION *PER SE*?

“We have the choice between despair, hopelessness, and total extinction.
Let us have the wisdom to choose correctly.” Woody Allen

EARTHQUAKE INTRODUCTION

Many buildings in California have been defined as “dangerous buildings” by a variety of local building codes and municipal ordinances. Does the known dangerous condition constitute defective construction “per se”? Given that negligence tort liability requires a “dangerous condition” to be “known,” what happens when a foreseeable event (earthquake, flood, windstorm/tornados) triggers the collapse of such buildings with resultant death and injury? More specifically, was the death or injury preventable but for the owner’s failure to act reasonably in the face of a known risk?

California gets practically all the notoriety for earthquake activity in the United States. However, California hardly holds a monopoly on earthquake activity and aftershocks generated by major national earthquakes; those states sharing the seismic pain have included Tennessee, Massachusetts, South Carolina, Missouri, Alaska, Nevada, Texas, Utah, Arizona, and Washington. Fortunately, in our history, earthquake fatalities have totaled less than two thousand. By contrast, earthquakes worldwide have claimed over three hundred thousand human lives. Most recently the 7.8 earthquake in Sichuan, China caused 55,000 deaths with over 25,000 missing. In the 1994 Northridge Earthquake, fatalities totaled 57 with approximately 9,000 injured. Soft story buildings were responsible for many of those deaths, including 16 alone at Northridge Meadows. Vulnerable soft story structures suffered more damage and injury than any other type of building during the earthquake, which caused over 20 billion dollars in property damage.



SOFT STORIES – TUCK UNDER PARKING

A soft story, illustrated above, is an apartment complex with a row of garages below the first level. This garage level is sometimes called “tuck under parking.” A soft story structure is defined as a building level which has a lateral stiffness of less than 70% of the stiffness of the story above it. Mitigation of the soft story weakness involves the addition of more bracing or sheathing on the soft level to add lateral resistance.

ENLISTING MUNICIPALITIES TO IDENTIFY KNOWN DANGEROUS BUILDINGS

The Northridge earthquake occurred 14 years ago. Since that time, very little has been done to address the earthquake safety of soft story buildings because owners have mostly failed to *voluntarily upgrade* these dangerous structures. However, several municipalities have identified dangerous structures and have either recommended or required retrofitting. As of this writing, the city of Santa Monica is the only California city requiring retrofits on soft story structures. Enforcement, however, is another matter. As of this writing, only 100 of the 2,000 dangerous soft story buildings in Santa Monica have been upgraded since the enactment of the 1995 city ordinance. Other municipalities have identified and catalogued dangerous buildings, along with the risk posed by the likelihood of further earthquakes and collapse and have implemented voluntary retrofit programs.¹

Today, there are thousands of dangerous soft story multifamily buildings in California which are at risk of first-floor collapse and serious personal injury or death to occupants. Essentially, the large openings on the ground floor used for garages or storefront windows make them likely to collapse or suffer significant damage in an earthquake. Ironically, it was the space-saving design of soft story buildings which made them popular in the 1960s and 1970s. Today, we know that the empty space on their ground floors makes these buildings more likely to twist and collapse during earthquakes. Moreover, the California Legislature has identified both unreinforced masonry buildings (URM's) and soft story structures as the most dangerous buildings in the state.

Current state building codes in California do not require owners to retrofit or strengthen known, dangerous, older soft story or URM buildings until they remodel or sustain damage to the buildings. Cities can mandate retroactive retrofit by requiring owners of old buildings to bring their properties up to newer standards. However, this approach is controversial, because it requires a balancing act between public safety, and the costs to building owners (constituents), and the disruption of existing businesses. Owners are often reluctant to invest in *voluntary* life safety seismic upgrades because these measures are not seen as protecting the value of the property itself. **This leaves thousands of “dangerous buildings” in California used and occupied today by the “unknowing” public.**

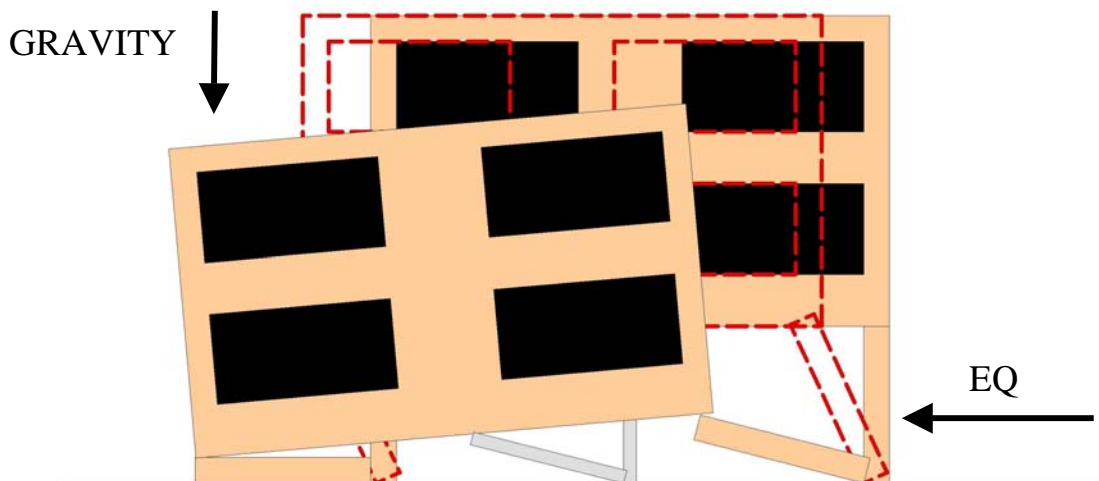
As California braces for its next major foreseeable earthquake, (99% probability of a 6.7 earthquake or larger, USGS, April 15, 2008) these issues will again come into focus. Some renewed attention occurred following the 2003 San Simeon quake, where two people were killed when an historic and unreinforced masonry (URM) building

¹ *400 Berkeley Buildings Prone To Collapse*, – “A study of 150 soft-story buildings near campus completed in September 2002 by 30 UC Berkeley engineering students concluded that more than 90 percent of these buildings would need to be vacated in the event of a major earthquake. Seventeen percent are “severely vulnerable” to collapse. These same soft-story buildings-apartment complexes built on top of storefronts or parking garages-make up nearly 400 buildings and 5,000 apartment units in Berkeley.” ‘Retrofitting soft story buildings to the minimum safety levels costs about \$12.67 per square foot-and there are no ordinances in Berkeley that require landlords to retrofit their soft-story buildings,’ said Berkeley Senior Management Analyst Dan Lambert. Berkeley building codes require only that landlords maintain their buildings-not improve them.” Daily Californian, by Tina Nguyen, February 4, 2005

collapsed. Like soft story buildings, URM structures were known to be dangerous and known to pose risk of death or bodily injury to users and occupants. In the recently tried case of *Myrick v Mastagni*,² a California jury awarded the decedents' families \$2,000,000 for wrongful deaths and injuries suffered in the collapse of a URM building. Plaintiffs argued that URM owners cannot just ignore the inherent dangers in URM buildings they own and keep them open to the general public and innocent users for **business as usual**. Because of the *Myrick* jury verdict, URM owners must anticipate innocent users will enter the dangerous building whether, mail carriers, meter readers, customers, etc. and be put at risk of serious injury or death. The San Simeon Earthquake was found to be a "moderate" and foreseeable earthquake by the jury. Commercial buildings should be able to withstand this level of earthquake movement without collapsing, injuring or killing anyone. Finally, the two victims killed in the collapse of the URM building were not warned that it was an unreinforced masonry building, identified by the California Legislature as a "hazardous building." By law, URM owners are required to post earthquake notices on URM buildings warning users of earthquake risks as set forth in Government Code §8875.8.

IDENTIFYING THE STATE OF KNOWLEDGE RE: KNOWN DANGEROUS BUILDINGS

Universities and governmental entities are always good resources to evaluate and identify dangerous or hazardous buildings. According to UC Berkeley civil engineering professor Khalid Mosalam, "in an earthquake, damage to soft-story buildings concentrates in the bottom level, the rest of the building goes along for the ride, and you would end up with the complete destruction of the building." The diagram below illustrates rotation of the soft story first floor and its ultimate collapse.



Following the 2003 San Simeon earthquake, San Luis Obispo County suffered hundreds of millions of dollars in damages from the 6.5 magnitude earthquake mostly from soft story and unreinforced masonry buildings. Significantly, both the Northridge

² *Myrick v. Mastagni*, was the first URM case successfully tried in the State of California. The 2-month jury trial, in San Luis Obispo Superior Court was tried by Rick Friedman and Joel Castro.

earthquake and the San Simeon earthquake did not exceed “design levels.”³ This means that builders and owners are required to build and maintain structures which will be able to withstand “design level” earthquakes or other design hazards without collapse. Many states have similar code design requirements for their particular risks, including hurricane, flooding, and high winds.⁴

LEGISLATION FOR KNOWN RISK – A PAPER TIGER?

In 1979, the California Legislature attempted to address the known danger posed by URM and soft story structures by adopting the Earthquake Hazardous Building Reconstruction Act, *Cal. Health & Safety Code* §§19160 et seq. The Legislature has amended this act several times. In the current version, the Legislature declared that California will experience future *moderate* to *severe* earthquakes, and that in such earthquakes, tens of thousands of buildings will pose a serious danger to the life and safety of hundreds of thousands of Californians who live and work in them:

“(a) Because of the generally acknowledged fact that California will experience moderate to severe earthquakes in the foreseeable future, increased efforts to reduce earthquake hazards should be encouraged and supported.

(b) Tens of thousands of buildings subject to severe earthquake hazards continue to be a serious danger in the event of an earthquake to the life and safety of hundreds of thousands of Californians who live and work in them.

(c) Improvement of safety to life is the primary goal of building reconstruction to reduce earthquake hazards.

(d) In order to make building reconstruction economically feasible for, and to provide improvement of the safety of life in, seismically hazardous buildings, building standards enacted by local government for building reconstruction may differ from building standards which govern new building construction.”

Cal. Health & Safety Code §19161 identifies the danger in the two most vulnerable structures in the state: (a) Each city, city and county, or county may assess the earthquake hazard in its jurisdiction and identify buildings subject to its jurisdiction as

³ Design level earthquakes, are earthquakes that buildings should be able to withstand in Seismic Zone 4. The Uniform Building Code required that all buildings in Seismic Zone 4 be designed and constructed to withstand predictable earthquake intensity such as a Richter 6.7 earthquake.

⁴ Storm flooding caused by wind-driven sea water which can wash out foundations and crumble is a major concern for coastal homes (i.e., on the beach or barrier islands). Therefore, it is highly recommended that these houses be placed on pilings in accordance with (1) local regulations which may be based on the National Flood Insurance Program (NFIP), (2) FEMA coastal construction manual guidelines, or (3) a design by a qualified design professional. Pilings elevate the living areas of a home above the storm surge height, typically based on an estimated 100-year flood height (including wave height).

For inland homes along the Gulf and Atlantic coastlines, wind is the major risk factor. Wind can cause structural damage such as blown-off roofs. More commonly, wind causes the roofing, siding, windows, and other exterior finishes to be damaged, allowing wind-driven rainwater to enter and damage the contents of the home. Such damage may be attributed to any number of causes, including the storm magnitude or rarity, minimum code requirements, construction quality, material durability (i.e., corrosion or rot), site exposure, and many other factors. *Residential Structural Design Guide: 2000 Edition*, U.S. Department of Housing and Urban Development, Washington, DC

being potentially hazardous to life in the event of an earthquake. *Potentially hazardous* buildings include the following:

(1) URM buildings constructed prior to the adoption of local building codes requiring earthquake resistant design of buildings that are constructed of unreinforced masonry wall construction and exhibit any of the following characteristics:

- (A) Exterior parapets or ornamentation that may fall.
- (B) Exterior walls that are not anchored to the floors or roof.
- (C) Lack of an effective system to resist seismic forces.

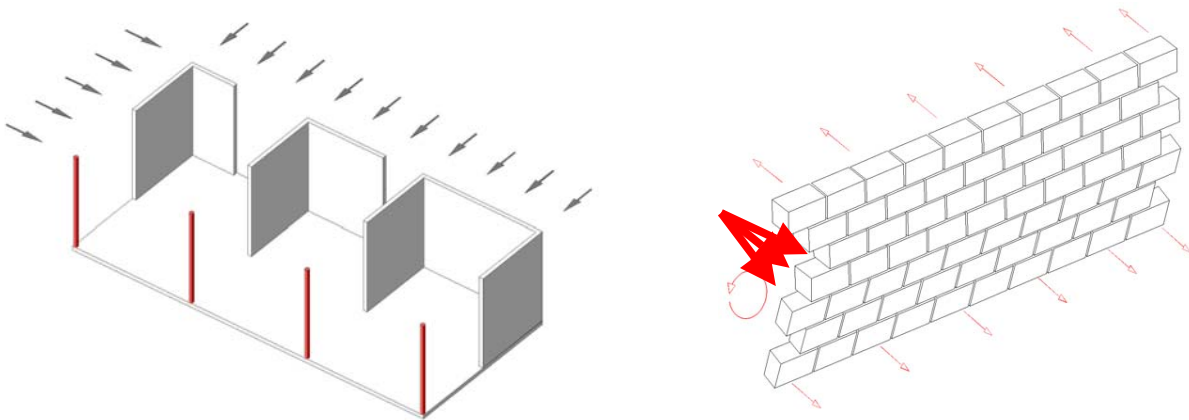
(2) (*Soft Story*) Wood-frame, multi-unit residential buildings constructed before January 1, 1978, where the ground floor portion of the structure contains parking or other similar open floor space that causes soft, weak, or open-front wall lines, as provided in a nationally recognized model code relating to the retrofit of existing buildings or substantially equivalent standards.

HAZARDOUS BUILDING IDENTIFICATION - NOTIFICATION

For soft-story and URM buildings that *lacked an effective system to resist seismic forces*, the Legislature directed that each city and county identify those hazardous buildings and assess the earthquake hazard for each. In 1986, the Legislature passed a law, codified as *Cal. Government Code* §§8875 et seq., that required local governments to

- (1) inventory all unreinforced masonry and soft story buildings, and
- (2) notify the legal owner that the “building is considered to be one of a general type of structure that historically has exhibited little resistance to earthquake motion.”

Once owners receive these statutory notices, they have *actual or constructive knowledge* of the risks from these *potentially hazardous* buildings.



Earthquake loads (lateral loads) impacting soft story and URM structures

Finally, *Government Code* §8875.8 requires owners of URM buildings, who have received notice that their building is located in *seismic zone 4* (the highest risk earthquake zone in the nation), to post, in a conspicuous place at the entrance of the building on a sign not less than 5 inches by 7 inches and printed in not less than 30-point bold type, that a URM building *may be unsafe in a major earthquake*.⁵ Unfortunately, identifying and cataloguing inventories of dangerous buildings is a far cry from actually doing something affirmative to repair or retrofit those structures. Query: what should building owners do when the government has declared their buildings “potentially hazardous,” but has not enacted “mandatory” ordinances requiring retrofit or repairs? Can the owner rely on the government’s failure to mandate retrofit or repairs as evidence of their reasonable conduct?

NEGLIGENCE PRINCIPLES – PREMISES LIABILITY: FORESEEABILITY OF INJURY TO OTHERS

In *Rowland v. Christian* (1968) 69 Cal.2d 108, plaintiff was the social guest of defendant in her apartment and the water faucet in the bathroom basin was cracked and broke when plaintiff used it, causing severe injuries to his hand. The California Supreme Court repudiated the *trespasser-licensee-invitee classification* and substituted the basic approach of **foreseeability of injury to others**:

“General principle of liability for negligence. Under C.C. 1714, **all persons are required to use ordinary care to prevent injury to others**, unless an exception is recognized for reasons of public policy, in accordance with broad criteria newly declared. . . . The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism.” (*id.* at 111.)

“We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has **acted as a reasonable man in view of the probability of injury to others**, and, although the plaintiff’s status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.” (*Id.* at 119.)

DANGEROUS CONDITION ON ADJACENT PROPERTY - FAILURE TO WARN

Alcaraz v. Vece (1997) 14 Cal.4th 1149

In *Alcaraz*, the plaintiff tenant was injured when he stepped into an uncovered utility meter box owned and maintained by the city. Alcaraz sued the owners of the rental property arguing that since they had actual notice that the cover was missing or broken, they owed a duty to warn or protect him from a known hazardous condition on adjacent property. For purposes of premises liability, the duty to warn or to retrofit a known dangerous condition is

⁵ Leroy and Vicky Myrick, parents of 20 year old Jennifer Lynn Myrick, killed by the collapse of the URM building during the San Simeon earthquake, successfully worked with the California Legislature to enact *Jenna’s Law*, (*amendment to Government Code* §8875.8) imposing monetary fines for failure to post the mandatory signage.

“not invariably placed on the person [holding title] but, rather, by the person in possession of the land [citations] because [of the possessor’s] supervisory control over the activities conducted upon, and the condition of, the land.’ ” *Alcaraz v. Vece* (1997) 14 Cal.4th 1149

The Supreme Court held that the duty to maintain land in one's possession in a reasonably safe condition exists, even where the dangerous condition on the land is caused by an instrumentality that the landowner does not own. Accordingly, if the condition of the meter box created a dangerous condition on land that was in defendants' possession or control, defendants owed a duty to take reasonable measures to protect persons on the land from that danger, whether or not defendants owned, or exercised control over, the meter box itself. In other words, if the **presence of the broken meter box made it dangerous** to walk across land in defendants' possession or control, defendants had a duty to place a warning or barrier near the box to protect persons on the land from that danger. Two recent cases, *Vasquez* and *Tan* provide further insight on a landowner's response to a *known risk*.

LIABILITY FOR FAILURE TO REPAIR BROKEN GLASS PANE IN FRONT DOOR - KNOWN RISK

In *Vasquez v. Residential Investments Inc.*, (2004) 118 Cal. App. 4th 269, Abigail Ramirez (decedent) and her infant daughter lived in an apartment in a building owned by Residential Investment. The front door was a wood door with diamond - shaped glass pane in the top half. When the Ramirez family moved in, the glass pane was missing and a piece of cardboard covered the opening.

Decedent's mother complained to the manager and requested the missing pane be replaced because it was "pretty cold." Decedent's parents made several requests that the glass pane be replaced because they felt the absence of the pane created a security risk. However, the missing pane was never replaced. Decedent's brother replaced the cardboard with a small piece of plywood using finishing nails to tack the plywood to the door.

On August 6, 2000, Jesus (decedent's ex) heard that decedent was having an affair. Jesus (armed with a knife) drove to Apartment 6 to confront decedent. He pounded on the door twice, and when no one responded, he removed the plywood panel that replaced the glass pane, reached through the opening, opened the door from the inside, and entered the apartment. Jesus then confronted decedent, fatally stabbed her, cut the telephone line and escaped. Jesus was later convicted of murder. Jesus testified he would not have tried to break in through a glass pane because of the risks and difficulties, but because of the condition of the front door, only a "hard knock" was required to push it aside without risking potential injury to his hands.

No one was aware that Jesus was potentially violent. However, the neighborhood surrounding the apartment building had experienced some violent crimes, and there were reports of an alleged rape in the apartment building. Decedent's family had experienced an incident in which two men had attempted to enter Apartment 6 but then fled when decedent's father warned them not to enter. The defense argued that Jesus's criminal conduct was a superseding intervening cause.

Held: Owners, as lessors, were negligent for not replacing the missing window pane, and that negligence was a direct and proximate cause of the attack on decedent and her death. Courts have repeatedly declared the existence of a duty by landowners to maintain property in their possession and control in a reasonably safe condition. *Rowland v. Christian* (1968) 69 Cal.2d 108, 119. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord.

Did Owners owe plaintiffs a duty to make reasonable efforts to replace the missing windowpane? The evidence is undisputed that the burden would have been minimal: the materials for replacing the missing pane had already been purchased, and the **cost of completing the pane replacement** would have been **approximately \$15.00**.

NEGLIGENCE FOR NO SECURITY GATES AFTER KNOWLEDGE OF KNOWN RISK

In *Tan v. Arnel Management Company* (2008) 162 Cal. App.4th 621, plaintiff Tan was shot in an attempted carjacking in the un-gated portion of the common area of his apartment complex. The family sued the management company and property owners for failure to take steps to properly secure their premises against foreseeable criminal acts of third parties.

Plaintiffs' retained expert, UCLA Sociology Professor who looked at police reports, complaints to police and property management reports. Professor Katz found 10 incidents he viewed as being "particularly significant warning signs," and three which involved "prior violent incidents." All involved a sudden attack without warning, late at night. Professor Katz said these incidents "show that the probability is foreseeable here that people on this property will be attacked at some point by a stranger in open parking areas late at night."

The trial court asked plaintiffs to "articulate what additional security measures defendants were under a duty to have in place to prevent the harm" to plaintiff. Plaintiff stated that first, they wanted defendants to install gates on the entrance roadway and visitor parking lots.

"anything that could effectively deter escape is going to help reduce . . . the probability of a carjacking occurring."

Counsel declared that plaintiffs were not asking that defendant undertake a measure that would require ongoing surveillance or monitoring, or the expenditure of significant funds. The cost to defendants to install the two security gates barricading the two roads was about \$13,050.

At an Evidence Code §402 hearing, the trial court held that three prior violent crimes against others occurring on the common areas were not sufficiently similar crimes to impose a duty on defendants to protect tenants of the apartment complex. The appellate court reversed.

"We have already concluded that the actual measures sought by plaintiff were not especially burdensome under the facts of this case."

“As set forth in *Ann M. and Sharon P.*, the test is prior ‘similar’ incidents [citations], not prior identical incidents.” In light of the minimum security measures proposed by plaintiffs, they have presented substantial evidence of prior, sudden, vicious assaults by a stranger at Pheasant Ridge. Plaintiffs demonstrated a reasonably foreseeable risk of violent criminal assaults on the property. (*Id.* at 634)

HOW THE JURY WILL BE INSTRUCTED

California’s CACI jury instructions codify the liability yardstick for juries in “known dangerous building” cases:

“Plaintiff claims he was harmed by a hidden condition on defendant’s property. An owner, a lessee, an occupier or one who controls the property is responsible for an injury caused by a hidden condition if:

1. The condition created an unreasonable risk of harm;
2. The owner/lessee/occupier/or one who controls the property knew or should have known about it; and
3. The owner/lessee/occupier/or one who controls the property failed to take reasonable precautions to protect against the risk of harm.

An owner/lessee/occupier/or one who controls the property must make reasonable inspections of the property to discover such conditions.” *CACI Jury Instruction* 1003, *Unsafe Concealed Conditions*, 2008 edition.

Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, “the landowner’s lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care he would have discovered the dangerous condition, he is liable.” *Within Summary of California Law* (10th Ed. 2005) Section 1102, cited by *Swanberg v. O’Mectin* (1984) 157 Cal.App.3d 325, 330.

An owner of property is not an insurer of safety, but must use reasonable care to keep the premises in a reasonably safe condition and must give warning of latent or concealed perils. *Lucas v. George T. R. Murai Farms Inc.* (1993) 15 Cal.App.4th 1578, 1590. If a dangerous condition is created by the owner’s negligence or by his or her employees acting within the scope of their employment, then the owner may be presumed to know that the condition exists. *Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806.

Additionally, CACI jury instructions on “Landlord’s Duty” provides:

“Before giving possession of leased property to a tenant [or upon renewal of a lease], a landlord must conduct a reasonable inspection of the property for unsafe conditions and correct any such condition discovered in that process. The inspection must include common areas under the landlord’s control.

After a tenant has taken possession, a landlord must use reasonable care to correct an unsafe condition under the landlord's control if the landlord knows or reasonably should have known about it." *CACI Jury Instruction 1006, Landlord's Duty*, 2008 edition.

Finally, owners may be held to "constructive knowledge" of the dangerous condition even if they perform no inspection. CACI jury instructions on "Constructive Notice of Dangerous Conditions" provides:

"In determining whether defendant should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough so that it would have been discovered and corrected by an owner using reasonable care.

If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that an owner using reasonable care would have discovered it." *CACI Jury Instruction 1011, Constructive Notice Regarding Dangerous Conditions on Property*, 2008 edition.

THE DUTY TO WARN - NEGLIGENCE PER SE

In 2004, in response to the two San Simeon earthquake deaths, the California Legislature amended the language of *Government Code* §8875.8 regarding the required warning the owners of URM buildings must now post if a dangerous unretrofitted building is located in a seismic zone 4 area. This new warning sign must now state:

"Earthquake Warning. This is an unreinforced masonry building. You may not be safe inside or near unreinforced masonry buildings during an earthquake."

The phrase "Earthquake Warning" must now be printed in 50-point bold type and the remaining words in 30-point type. The sign must now be 8" x 10." In addition, an owner who fails to post a sign is now subject to an administrative fine if the owner fails to post the sign within 15 days of notification by the building department. If the owner still does not comply within 30 days of the first administrative fine, the owner may be subject to an additional administrative fine of \$1,000. Independent of the administrative fines, failure to comply could also establish negligence *per se* against the building owner.

Negligence *per se* liability in Evidence Code section 669(a) is defined as follows:

The *failure of a person to exercise due care is presumed* if:

- (1) He violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation

was adopted.

The burden of proof is on the plaintiff to establish each of the four elements, and only if all four are established does a presumption of negligence arise. *Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 596-597.

Pursuant to the *Restatement 2d., Torts*, § 342, “Dangerous Conditions Known to Possessor,” “a possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if;

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.”

When the California Supreme Court overturned status classifications such as licensee and invitee in *Rowland v. Christian, supra*, 62.Cal.2d 108, it did not eliminate the possessor’s duty to warn. For example, an owner – possessor (invitor) even has an affirmative *duty to warn users* (invitees) of dangerous conditions existing on a public street or sidewalk adjoining the business which, because of possessor’s special benefit, convenience, or use of public way, creates the danger. *Schwartz v. Helms Bakery Ltd.* (1967) 67 Cal.2d 232, 239.

An owner or possessor of premises who knows or should know of an unsafe condition on the premises, and who has no basis for believing that the invitees will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe or to give a warning adequate to enable the invitees to avoid the harm. *Chance v. Lawry’s Inc.* (1962) 58 Cal.2d 368, 373.

An owner or possessor must make reasonable inspections of those portions of the premises open to invitees. The absence of inspections within a particular period of time prior to an accident may warrant an inference that a person exercising reasonable care would have and should have discovered the condition. *Bridgman v. Safeway Stores Inc.*, (1960) 53 Cal.2d 443, 447. The duty of an owner or possessor of premises to maintain the premises in reasonably safe condition is non-delegable and if an independent contractor is employed to perform that duty, the possessor is liable for harm caused by the negligent failure of the contractor. *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260.

Finally, the absence of accidents or prior similar accidents does not eliminate the question of foreseeability: the test is whether or not a reasonable person could, in light of the circumstances, have foreseen the accident happening. *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 329.

STATUTORY EXTENSIONS IN RETROFIT LEGISLATION – “ANOTHER FINE MESS”

Owners of dangerous buildings may seek to rely on retrofit ordinance extensions granted by local municipalities to escape user liability. For example, following the San Simeon earthquake and the two deaths from the building collapse, the city of Paso Robles amended its 2008 retrofit ordinance to permit compliance as late as 2018. Do such local enactments exculpate building owners from injuries or death in the interim? No. Municipal ordinances that extend deadlines for owners to complete the retrofit of potentially dangerous buildings **do not immunize the property owner** if the building collapses in the interim.

Extensions however, can encourage owners to delay needed building retrofits because they “think with their pocketbook,” and believe the extension by their local municipality means they are not unreasonable to delay their retrofit to the new deadline. While such ordinances may result in municipalities not taking enforcement action against owners until the new deadline compliance dates, such ordinances cannot sweep away existing statutory and decisional law. To hold otherwise would violate fundamental public policy and would turn the tort system on its head. For example, if a city issued a notice for brush clearance to a property owner with 60 days for brush removal and a fire occurred on the 59th day and destroys a neighbor’s property, the owner cannot say that because the 60-day period had not expired, he is immune from tort liability.

Article XI, §7 of the California Constitution permits a local jurisdiction to enact laws that are not in conflict with the general laws of the state, such as general tort liability statutes. Accordingly, cities cannot enact legislation that expressly or impliedly conflicts with Civil Code §1714. *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 894. To interpret local ordinances as establishing such authority directly conflicts with 100 years of California law, both statutory and decisional.

While the failure to comply with a building code or with custom or usage is evidence of negligence, the converse is not true. Compliance with the building code does not absolve the defendant of liability. The cases in California recognize that a building code establishes a *minimum standard* at best and that the knowledge, experience, and training of a builder or owner is established by professional and legal standards of care. Innumerable California decisions hold that compliance with a statutory or regulatory standard does not establish as a matter of law due care, because these standards are **minimum standards** and do not prevent a finding that a reasonable person should have taken additional precautions. *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901 and cases cited therein; *Beeks v. Joseph Magnin Company* (1961) 194 Cal. App. 2d 73, 79-80; *Firemen’s Ins. Co. v. Indermill* (1960) 182 Cal.App. 2d 339, 342; *Owen v. Rheem Manufacturing Co.* (1947) 83 Cal.App.2d 42, 45; *Pauly v. King* (1955) 44 Cal.2d 649, 655; *Reagh v. San Francisco Unified School District* (1953) 119 Cal.App.2d 65, 70-71.

In *Beeks v. Joseph Magnin Co.* (1961) 194 Cal.App.2d 73, the court held that “[t]he standard set up by this code was only a minimum and would not preclude a finding that the defendant was negligent in failing to take additional precautions. Mere compliance with the local building requirements and obtaining a building permit would not absolve the defendant from negligence” *Id.* at 79.

Similarly, in *Pauly v. King* (1955) 44 Cal.2d 649, 655, a negligence action, the court remarked that if the builder fails to observe a custom, that may be evidence of negligence. Nevertheless, if a builder observes a custom or usage, it does not necessarily relieve the builder of liability. Custom or usage is not a substitute for due care and does not alter the standard of due care. *Id.* at 655.

In *Jensen v. Southern Pacific Co.* (1954) 129 Cal.App.2d 67, the decedent was killed when a train struck his truck at a railroad crossing. Relying upon the regulations of the California Public Utilities Commission, the railroad company argued that the Commission had exclusive jurisdiction over the safety of the traveling public and that the Legislature conferred authority upon the commission to establish both the minimum and maximum standard of care to be exercised in warning the traveling public. The Court of Appeal rejected the argument and explained the functions of the legislative and judicial branches of government:

“The commission lays down requirements governing future conduct by the company for the safety of the public at grade crossings. The court determines whether or not the past conduct of the company was in violation of duties owed by it to particular members of the public. The state, in prescribing such safety regulations (whether done by legislative enactment expressed in a statute or by action of the commission expressed in an order), has never gone so far as to say to a utility company that compliance therewith constitutes a complete discharge of its duties toward the public. **The state does not undertake to foresee and declare in advance what, under all circumstances, constitutes ordinary care.** Regulations of this nature lay down *minimum*, not maximum, requirements.” *Id.* at 72-73.

The building codes state that the express purpose of the building codes is to “provide minimum standards to safeguard life or limb, health, property and public welfare” Section 102 of the Uniform Building Code. The building codes expressly state that a building code shall not be interpreted to relieve or lessen the responsibility of an owner of property for damages to person or property caused by defects in the property. *Section 104.2.6 of the Uniform Building Code; Section 205 of the Uniform Code for Building Conservation.*

CONCLUSION

Owners of “known dangerous” or high risk buildings can run but they can’t hide. The California Legislature has identified these dangerous structures, including soft story and unreinforced masonry buildings, as buildings which must be retrofitted. A palpable stretch of time lies between identification, enforcement and retrofit of these buildings. **The reasonableness of building owners during this interlude** will determine liability. In pursuing “known dangerous building” claims, practitioners should make sure to:

1. Research governmental codes and regulations to determine if there are voluntary or mandatory repair / retrofit ordinances;
2. Establish through industry experts that the building is dangerous or has a dangerous condition;
3. Evaluate general performance of the subject dangerous building types when known risks such as tornados, floods or earthquakes strike;

4. Establish that building owners knew or had constructive knowledge of the dangerous condition. If ordinances or statutes have been violated, establish presumptive negligence or negligence *per se*;
5. Establish the conduct of the owners during the time of first knowledge to the time of the damage, death or injury.
6. Establish a “reasonable cost” for compliance or retrofit that was within the owner’s knowledge.

Finally, communicate to the jury that prior to injury or death, the dangerous building was a “ticking time bomb,” or defective construction *per se*. Communicate that the dangerous building/condition could have been repaired or retrofitted and introduce evidence of the reasonable cost. Let the jury know that they are dealing with a “preventable death,” and that the owner elected to save money instead of lives.