

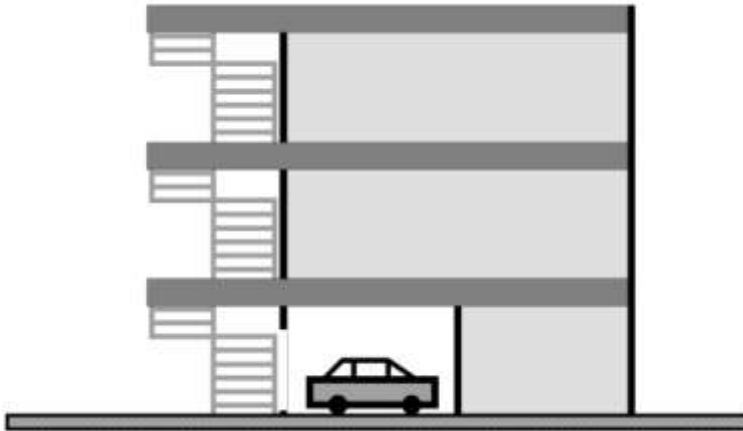
“KNOWN DANGEROUS CONDITION” LIABILITY FOR SOFT-STORY BUILDINGS

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

EARTHQUAKE INTRODUCTION

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.

In the 1994 Northridge earthquake, soft-story buildings were responsible for at least 16 deaths. The total number of fatalities in the Northridge earthquake was 57 with approximately 9,000 people injured. Vulnerable soft story structures (sometimes called “tuck under parking”) caused more damage and injury than any other type of building damaged during the earthquake. The earthquake caused over 20 billion dollars in property damage. The fact that the earthquake occurred at 4:30 a.m. minimized the death toll. Simply stated, it could have been a lot worse. California dodged a bullet.¹



SOFT STORIES – TUCK UNDER PARKING

A soft story is illustrated above, as an apartment complex with a row of garages below the first level. This garage level is sometimes called “tuck under parking.” Structurally, soft story structures are defined as building levels that have 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 in a manner similar to that of cripple walls or unreinforced masonry columns.

¹ Northridge Earthquake – Turning Loss to Gain (1995) Seismic Safety Commission Report to The Governor No. 95-01

ENLISTING MUNICIPALITIES TO IDENTIFY KNOWN DANGEROUS BUILDINGS

The Northridge earthquake occurred 13 years ago. Since that time, very little has been done to address the earthquake safety of soft-story buildings because landlords have mostly failed to *voluntarily upgrade* their dangerous buildings. However several municipalities have identified dangerous structures and have either recommended or required retrofit. 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 have been upgraded since the enactment of the 1995 city ordinance. Other municipalities have identified and cataloged dangerous buildings together with the risk posed by the likelihood of further earthquakes and collapse.²

Today, there are thousands of dangerous "soft-story" multifamily buildings, in California that are at risk of first-floor collapse and causing serious personal injury or death to occupants. Essentially, the large openings on the ground floor used for garages, or storefronts windows, make them likely to collapse or suffer significant damage in an earthquake. Ironically, it was the space-saving design of soft-story buildings that 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.

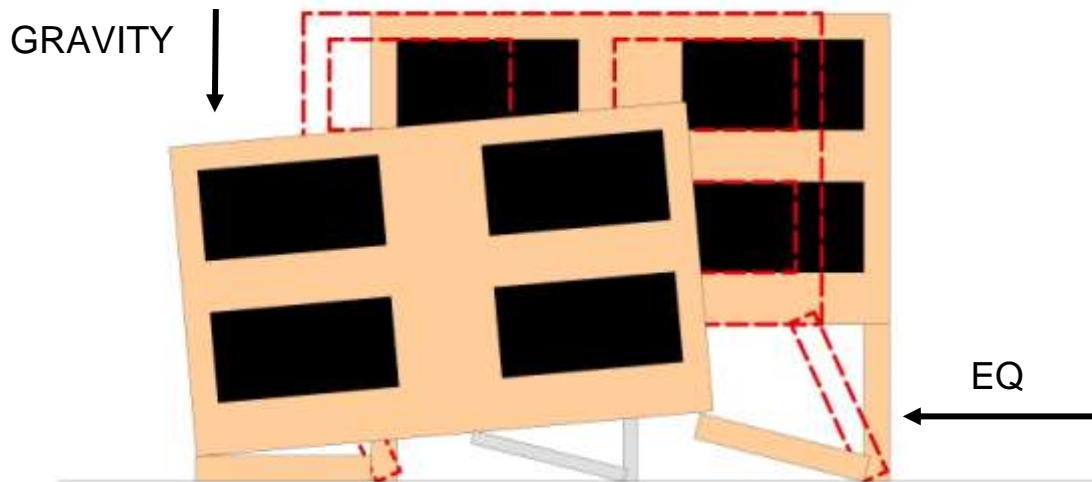
Current state building codes in California do not require owners to retrofit or strengthen known, dangerous, older soft-story buildings until triggered by a remodel or damage to the buildings. Cities can mandate retroactive retrofits, by requiring owners of old buildings to bring their properties up to newer standards. However, this approach is controversial, because it requires a balancing act between public safety, the costs to building owners, 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 "known dangerous" buildings in California, used and occupied by the "unknowing" public. As California braces for its next major earthquake, these issues will become a reality

In the 1994 Northridge Earthquake, sixteen people died in a soft-story collapse and thousands more were injured throughout the city. In the 2003 San Simeon quake, two people were killed in Paso Robles when a historic and un-reinforced masonry (URM) building collapsed. Both types of structures were known to be dangerous and known to pose risk of death or bodily injury to users and occupants. What are the obligations and duties for building owners when the risks involved in the use of their buildings are foreseeable and not theoretical? This paper will examine civil liability for building owners and how can civil claims be brought by injured users of such buildings.

² *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

IDENTIFYING THE STATE OF KNOWLEDGE RE KNOWN DANGEROUS BUILDINGS

Universities and governmental entities are always a good resource to evaluate and identify known dangerous 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.”



In San Luis Obispo County hundreds of millions of dollars were lost when a 6.5 magnitude earthquake in December 2004, struck the county's buildings-most of them soft-story and un-reinforced masonry. Significantly, both the Northridge earthquake and the Paso Robles earthquakes were “design level” earthquakes, or earthquakes within the design level for predictable earthquake intensity and anticipated by the building codes. This means that builders are required to build structures that will be able to withstand “design level” earthquakes or other hazards without collapse. Many states have similar code design requirements for their particular risks including hurricane, flooding, and wind design.³

³ Storm-flooding caused by wind-driven sea water that 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 that 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, it 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. 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

LEGISLATION FOR KNOWN RISK – A PAPER TIGER?

In 1979, the California Legislature attempted to address the known danger posed by unreinforced masonry buildings (URM) 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 would experience future *moderate* to *severe* earthquakes, and that in such earthquakes, tens of thousands of buildings would 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 to the life and safety of hundreds of thousands of Californians who live and work in them in the event of an earthquake.
- (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 identified the danger in the two most vulnerable structures: (a) Each city, city and county, or county, may assess the earthquake hazard in its jurisdiction and identify buildings subject to its jurisdiction as being potentially hazardous to life in the event of an earthquake. Potentially hazardous buildings include the following:

(1) Unreinforced masonry 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.

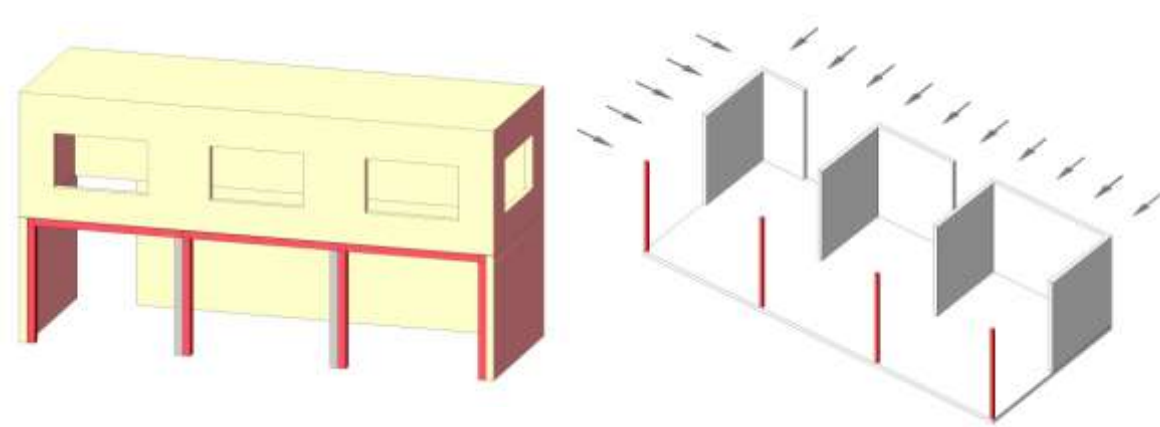
(2) (Soft Story) Wood-frame, multi-unit residential buildings constructed before January 1, 1978, where the ground floor portion of the structure contains parking or other similar open floor space that causes soft, weak, or open-front wall lines, as provided in a nationally recognized model code relating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

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. Unfortunately, identifying and cataloguing inventories of dangerous buildings is a far cry from actually doing something affirmative to have those structures repaired or retrofitted.

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 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.”

In 1992, the Legislature added Government Code §8875.8 which required owners of URM buildings, who 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, printed in not less than 30-point bold type that a URM building may be unsafe in a major earthquake.



GENERAL PRINCIPALS OF NEGLIGENCE LIABILITY GOVERN

In *Rowland v. Christian* (1968) 69 C.2d 108, the California Supreme Court repudiated the trespasser-licensee-invitee classification and substituted the basic approach of **foreseeability of injury to others**. 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.

“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*, 69 C.2d 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." (69 C.2d 119.)

HOW THE JURY WILL BE INSTRUCTED

California's CACI jury instructions provide the liability yardstick that can be used in such "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*, 2007 edition.

Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, "the landowners 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." *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 owners 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*, 2007 edition.

Finally, 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*, 2007 edition.

THE DUTY TO WARN

In 2004, in response to the two deaths in Paso Robles, the California Legislature amended the language of Government Code §8875.8, that the owners of URM buildings must post if a dangerous un-retrofitted building is located in a seismic zone 4 area.⁴ 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 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, a person 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 establish negligence per se against the building owner.⁵

⁴ Government Code §8875.8 required owners of URM buildings, who received notice that their building was 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, printed in not less than 30-point bold type that a URM building may be unsafe in a major earthquake.

⁵ Evidence Code section 669(a) provides: 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 above 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, but only 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.”

While the California Supreme Court overturned the status classifications such as licensee and invitee, in *Rowland v. Christian*, it did not overturn 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 it, 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 because 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

DEALING WITH EXTENSIONS IN RETROFIT LEGISLATION – “ANOTHER FINE MESS”

While, the failure to comply with a building code or with custom or usage is evidence of negligence. The converse, however, 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 and that the knowledge, experience, and training of a builder or owner may require additional design considerations or additional precautions. For purpose of establishing liability against a builder, the standard is fixed by the legal theory of liability, not by the building code.

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 for injuries or death in the interim? No.

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. 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 the state law, of which it is a part, and over 100 years of statutory and decisional law.

A local ordinance that extends the deadline for owners to complete the retrofit of potentially dangerous buildings does not immunize the property owner if the building collapses in the interim. Under such logic, if a city issued a notice for brush clearance to a property owner giving the property owner 60 days to remove the brush and if a fire occurs on the 30th day and destroys a neighboring property, the 60-day deadline wipe out any tort liability on or before the 60th day. 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.

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; 14 Cal.Rptr. 877, 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 p. 72-73.

Finally, the building codes themselves 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. The building codes states 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.

CONCLUSION

Owners of high risk buildings can run but they cannot hide. California has identified dangerous structures, including soft story and unreinforced masonry buildings. Other states have identified particular risks (earthquakes hurricanes and flooding) that chronically threaten the life and safety of the public.

Once plaintiffs establish that the condition of the premises poses a dangerous condition and risk of harm, . . .

An owner "should have known" of a dangerous condition when it exists long enough for a reasonable person to remedy the dangerous condition.