



1968

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Recommended Citation

W. Wilson Jones, *Negligence - Financial Institution's Liability to Borrower's Customers*, 22 Sw L.J. 869 (1968)
<https://scholar.smu.edu/smulr/vol22/iss5/11>

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ping, modern developments make the doctrine questionable. The old argument that it is fair to subject a voluntary visitor to local laws becomes somewhat hollow when the voluntary entry into a jurisdiction amounts to no more than an accidental fall in an aircraft. In this situation there is such an insignificant relationship between the injured party and the place of the injury that even the desirable advantage of certainty should yield to considerations reflecting the real interests of the parties concerned. Texas has moved in this direction by abandoning its prior refusal to apply the law of *lex loci delicti* because of its dissimilarity with that of the forum. Perhaps this signals a recognition that the place of the tort should not always be the controlling consideration in the adjudication of tort claims arising outside the forum state.

R. Randall Bridwell

Negligence — Financial Institution's Liability to Borrower's Customers

Defendant, Great Western Savings and Loan Association, provided most of the money for a one-hundred-acre housing development in California. When house buyers suffered economic loss from construction defects, they sought recovery for the negligence of both the savings and loan association and its borrower, a corporation capitalized at \$5,000 by two men with no experience in large-scale tract development.¹ The savings and loan association's financial involvement was three-pronged: it purchased the land and later resold it to its borrower;² it made construction loans after the houses were presold from a model set up on the tract; and it exercised a right of first refusal on first trust deed financing for most of the approximately 250 house buyers. It could be inferred that the savings and loan association committed financing before receiving financial statements or customary feasibility studies from its borrower's inexperienced organizers. The savings and loan association's involvement further included approval of its borrower's house plans, which lacked features to compensate for the expansive nature of the tract's soil. Houses on the tract were heavily damaged,³ probably⁴ when soil expansion cracked their foundations. The sav-

¹ The issues at the trial's first phase were: "[1. whether] a principal-agent, joint venture, or joint enterprise relationship existed between the [two defendants]; [2. if not] whether Great Western had any independent duty to [the house buyers]; and [3] whether Great Western . . . committed fraud upon which it could be liable." *Connor v. Conejo Valley Dev. Co.*, 61 Cal. Rptr. 333, 341 (Ct. App. 1967). The court held against the plaintiffs on the first issue, for them on the second, and did not reach the third.

² Details of the land purchase are at 61 Cal. Rptr. at 337-38. The total original acquisition cost was \$340,000, of which the development company put up \$190,000, and the savings and loan association \$150,000. Four months later and for \$180,000, the borrower took title under an option from the savings and loan association.

³ The houses sold for about \$15,000 each, and they were damaged to the extent of about forty per cent of their value. 61 Cal. Rptr. at 346.

⁴ Since the appeal was from a nonsuit, the court "[disregarded] conflicting evidence, [gave] to the plaintiff's evidence all the value to which it is legally entitled, and [indulged] in every legitimate inference which may be drawn from that evidence." 61 Cal. Rptr. at 341. The court's lengthy discussion of the soil indicates its inference of causation.

ings and loan association could have known of the soil condition, since it had a representative on the construction site.⁵

At trial, house owners were nonsuited with respect to the defendant savings and loan association. *Held, reversed and remanded*: The savings and loan association might have breached an independent duty to house owners to avoid gross structural defects in the houses of a residential subdivision it almost totally financed. *Connor v. Conejo Valley Development Co.*, 61 Cal. Rptr. 333 (Ct. App. 1967).

I. CURRENTS OF CALIFORNIA LAW

House owners who suffer loss from construction defects fare differently from state to state as to available theories and sources of recovery.⁶ In California, the use of a negligence theory to recover from a financial institution emerges from the availability of negligence recoveries from building contractors, from exceptions to a rule involving "economic harm," and from a broad policy framework for judicial decisions on duty in negligence cases.⁷

Negligence Actions Against Builders. Traditional objections to the imposition of negligence liability on builders include the difficulty of discovering defects and consequent long time lapses before actions are brought. A 1948 California case⁸ emphasized that these objections dealt only with fact questions which were merely obstacles to any particular recovery.⁹ That case began the recognition of builders' negligence liability by categorizing construction features as "reasonably certain to place life and limb in peril" when negligently made.¹⁰ A personal injury case thus opened the door to builders' negligence liability, but later decisions allowed recoveries for property damage alone. In *Stewart v. Cox*¹¹ the owner of a negligently constructed swimming pool recovered for both damage to surrounding property and damage to the pool itself. In a later case, *Sabella v. Wisler*,¹² a contractor was held liable for damage which occurred only in the negligently

⁵ The expansive soil is "readily distinguishable by the naked eye . . ." And the savings and loan association also had a water supply study which referred to the dryness of the soil. 61 Cal. Rptr. at 339.

⁶ See Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953); Gibson & Lownderry, *Implied Warranties—Sale of a Completed House*, 1 CAL. W.L. REV. 110 (1965); Note, *Implied Warranty of Fitness for Habitation*, 19 MODERN L. REV. 544 (1956). See also *Staff v. Lido Dunes, Inc.*, 47 Misc. 2d 322, 262 N.Y.S.2d 544, 553 (Sup. Ct. 1965).

The Texas rule is announced in *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). A contractor was liable for breach of implied warranty of good workmanlike construction and suitability for human habitation. The court notes that "in Texas, the notion of implied warranty . . . is considered to be a tort rather than a contract concept." *Id.* at 556. The court cites the *Connor* case, *id.* at 561.

⁷ Strict liability in tort has not been imposed on builders in California, but that result has been predicted in two jurisdictional surveys. Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 So. CAL. L.R. 30, 57 (1965); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 29 (1966).

⁸ *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1, 3 (1948).

⁹ See 2 F. HARPER & F. JAMES, *LAW OF TORTS* 1043 (1956).

¹⁰ *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1, 3 (1948).

¹¹ 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961).

¹² 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

made property. The general contractor in *Sabella* negligently compacted soil around the foundation of a house he built with no particular purchaser in mind. The court held that the builder's negligence liability was for major defects only.¹³

The Economic Harm Limitation. The property damage compensated in *Sabella* may be characterized as "economic harm,"¹⁴ which is purely pecuniary or loss-of-value injury, as distinguished from harm to the person or damage to one's property inflicted by another. In California,¹⁵ as elsewhere, courts admit reluctantly the use of negligence as a basis for compensating economic harm.¹⁶ A California Supreme Court opinion notes that "[e]ven in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."¹⁷

The economic harm limitation may be seen merely as a preference for the use of warranty or contract law in cases where "economic harm" may be equated with loss of bargain.¹⁸ Or it may be considered an expression of judicial caution¹⁹ in cases where liability for economic harm might be in an "indeterminate amount for an indeterminate time to an indeterminate class."²⁰ Another explanation for the limitation is that it results from "historical accident": pecuniary interests standing alone have not ranked high in the priority of interests protected by the common law.²¹ This historical relative disinterest of the common law has afforded some immunity from negligence actions to entities such as lenders, whose activities likely will affect only pecuniary interests.

California courts have maintained the economic harm limitation in situations where a warranty might exist,²² but they have relaxed the limitation in other cases. There is a specific exception to the limitation in actions by house owners against negligent builders,²³ but this exception does not affect the practical immunity which the limitation bestows on the entities mentioned above. However, that practical immunity was weakened in California by *Biakanja v. Irving*,²⁴ in which a notary was held liable to persons not in privity for negligently preparing a will which would have benefited the plaintiffs but for his negligence. *Biakanja* has broad language

¹³ 27 Cal. Rptr. at 694.

¹⁴ The phrase is borrowed from Seavey, *Actions for Economic Harm—A Comment*, 32 N.Y.U.L. REV. 1243 (1957).

¹⁵ See *Fentress v. Van Etta Motors*, 157 Cal. App. 2d 863, 323 P.2d 227 (1958); *Wyatt v. Cadillac Motor Car Div.*, 145 Cal. App. 2d 423, 302 P.2d 665 (1956).

¹⁶ The best general discussion is in Seavey, *Candler v. Crane, Christmas & Co., Negligent Misrepresentation by Accountants*, 67 L.Q. REV. 466 (1951). See also Seavey, *supra* note 14.

¹⁷ The statement is dictum in a case of strict liability in tort, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

¹⁸ See Prosser, *supra* note 7, at 35; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

¹⁹ Seavey, *supra* note 16, at 474.

²⁰ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 444 (Ct. App. 1931).

²¹ Seavey, *supra* note 16, at 473.

²² See cases cited note 15 *supra*.

²³ *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

²⁴ 49 Cal. 2d 647, 320 P.2d 16 (1958).

which has been taken to reopen for California the question of the compensability of economic harm.²⁵

"Duty" and Public Policy. The breadth of *Biakanja* lies in its description of the factors relating to rulings on the possible existence of a duty, the breach of which would be negligent conduct. The possible existence of a duty is first a question of law,²⁶ and it is a question touched by "various and sometimes delicate policy judgments."²⁷ These policy considerations were mentioned in *Biakanja*: "The extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the closeness of connection between defendant's conduct and plaintiff's injury; moral blameworthiness of defendant's conduct; preventative policies."²⁸ A later opinion²⁹ mentions such factors as the social usefulness of the injurious activity, the kind of person with whom a defendant may be dealing, the workability of a rule of care, and parties' relative abilities to bear the financial burden of injury.

II. CONNOR V. CONEJO VALLEY DEVELOPMENT CO.

No prior case has been found which is similar in facts and result to *Connor v. Conejo Valley Development Co.*³⁰ Yet it is suggested that the result in *Connor*, while unprecedented, is not unprincipled, for the case represents a convergence of several currents of California law.

From existing remedies for house owners against builders,³¹ *Connor* draws the availability of negligence actions to compensate losses resulting from construction defects. Earlier objections to the use of negligence theory for such recovery have been overcome by making traditional difficulties merely obstacles of proof for any particular recovery.³² *Connor* iterates the rule that recoveries for negligence are limited to damage resulting from major defects.³³ The court wrote, "[n]or do we hereby suggest that the . . . responsibility should cover the repair of every leaky faucet, sagging door or hap-hazard paint job."³⁴

Connor rests on California precedents³⁵ which delineate a broad judicial function in determining the possible existence of a duty in negligence cases. To support the holding that a duty might exist, the opinion in *Connor* spells out strong policy arguments, which include, appropriate to negligence theory, the moral blameworthiness of the savings and loan as-

²⁵ For an interpretation of *Biakanja v. Irving, id.*, in conjunction with *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 444 (Ct. App. 1931), see *Lucas v. Hamm*, 11 Cal. Rptr. 727 (Ct. App.), *rev'd on other grounds*, 56 Cal. 2d 583, 364 P.2d 683, 15 Cal. Rptr. 821 (1961). The supreme court held that an attorney's mistake in dealing with the Rule Against Perpetuities was not negligence.

²⁶ W. PROSSER, *LAW OF TORTS* 207 (3d ed. 1964).

²⁷ *Raymond v. Paradise Unified School Dist.*, 28 Cal. App. 2d 1, 31 Cal. Rptr. 847, 852 (1963).

²⁸ 49 Cal. 2d 647, 320 P.2d 16, 19 (1958).

²⁹ *Raymond v. Paradise Unified School Dist.*, 28 Cal. App. 2d 1, 31 Cal. Rptr. 847, 852 (1963).

³⁰ 61 Cal. Rptr. 333 (Ct. App. 1967).

³¹ See text accompanying notes 8-13 *supra*.

³² See text accompanying note 9 *supra*.

³³ See text accompanying note 13 *supra*.

³⁴ 61 Cal. Rptr. at 347.

³⁵ See notes 27-30 *supra*, and accompanying text.

sociation, particularly in that aspect of its conduct relating to an "insubstantial and inexperienced" building contractor.³⁶ The opinion mentions the desirability of extending effective remedy to house owners who are "uninformed,"³⁷ who deal on no real bargaining basis for mass-produced homes,³⁸ whose purchase represents a crucial investment of a large part of their incomes,³⁹ and who may be otherwise remediless.⁴⁰ The decision also rests on policies preventive of shoddy construction in an area where residential development can take place very quickly.⁴¹ Yet the opinion presents no explicit rationale for the decision's surprising turn, which is that a financial institution can be liable for major construction defects customarily associated with other enterprises.⁴² The *Connor* opinion relies on *Biakanja v. Irving*⁴³ for its policy-based decision that a duty might exist. *Connor* might also have looked to that case as precedent for attaching liability to an entity, such as a savings and loan association, once indirectly immunized by the limitation against compensating economic harm caused by negligence.⁴⁴

Two qualifications attend the innovative rule of *Connor*. The first is that lenders must exercise a certain amount of control before a duty such as Great Western's may be held to exist. Great Western's control included the opportunity to approve or disapprove the plans for its developer's houses.⁴⁵ In a wider sense, control seems to have been inferred when the court characterized the savings and loan association as the developer's "indispensable accomplice"⁴⁶ and the "energizing force"⁴⁷ behind the tract development. The court stated that "[t]he degree of [a lender's] responsi-

³⁶ 61 Cal. Rptr. at 340, 344.

³⁷ *Id.* at 344.

³⁸ *Id.* at 346.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Since *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916), courts have faced a notable problem in deciding which entities will bear the burden of injury where a constellation of entities are connected with an injurious event. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (Ct. App. 1963). The problem seems to have been more acute in enterprise liability theory, with its economic rationale, than in negligence theory with its fault rationale and attendant individualistic overtones. Cf. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961), for an economic approach; A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), a short treatise setting out the theory of enterprise liability and contrasting it with traditional negligence theory; and this language by a California writer on strict liability in tort:

[I]t is submitted that any person or organization who is engaged in the business of manufacture and/or distribution, and who plays any but a random and accidental role in that enterprise is a proper defendant The practices of the particular industry will be material to the number of defendants who may properly be joined, and their number will multiply with the necessity for financial responsibility and amenability to service.

Lascher, *supra* note 7, at 55, 56. The opinion writer in *Connor* mixed freely his citations to cases of negligence and strict liability in tort, 61 Cal. Rptr. at 344, but the holding in the case is as to negligence, *id.*

⁴³ 49 Cal. 2d 647, 320 P.2d 16 (1958).

⁴⁴ See text accompanying notes 22, 25 *supra*.

⁴⁵ 61 Cal. Rptr. at 339.

⁴⁶ *Id.* at 347, quoting *Lercoc & Dobson, Savings Associations as Land Developers*, 75 YALE L.J. 1271, 1282 (1966).

⁴⁷ 61 Cal. Rptr. at 342.

bility should be measured inversely proportional to the degree of experience, skill, and responsibility of the [borrower-developer].⁴⁸

The second qualification is that the duty imposed on financial institutions by *Connor* arises only in mass market situations. *Schipper v. Levitt & Sons*,⁴⁹ a New Jersey case from which the *Connor* opinion draws heavily, applies on its face, and by later interpretations,⁵⁰ to mass market situations only. The *Connor* opinion notes that the impersonality of mass merchandising weakens a house buyer's propensity or ability to protect himself through equal-strength bargaining.⁵¹ For strict liability theory the California Supreme Court has renounced this "rationale [which rests] on the analysis of financial strength or bargaining power of the parties."⁵² But the renunciation of this rationale for strict liability theory does not imply that factors such as relative bargaining power are irrelevant in negligence cases. While negligence remains fault-related,⁵³ those factors are part of determining where fault lies.

III. CONCLUSION

*Connor v. Conejo Valley Development Co.*⁵⁴ is an orderly but lively development in common law.⁵⁵ The decision is an extension and convergence of two lines of precedents, one⁵⁶ dealing with house owners who suffer economic harm from construction defects, the other defining and enlarging the scope of duty in negligence cases.⁵⁷ The case is an appropriate one for recognizing a duty in an entity once immunized by the economic harm limitation for negligence liability.⁵⁸ The duty, and its accompanying possible liability, is limited as to potential plaintiffs by a determinate group of house buyers.⁵⁹ The liability is limited in amount by the difficulties which long time lapses will bring.⁶⁰ The defendant savings and loan association is an entity usually affecting only intangible, pecuniary interests, but its business is closely associated with a tangible product. Only a short step is taken by *Connor* in applying to such a defendant the common law already surrounding that product.

W. Wilson Jones

⁴⁸ *Id.* at 347.

⁴⁹ 44 N.J. 70, 207 A.2d 314 (1965).

⁵⁰ *Hut v. Antonio*, 95 N.J. Super. 62, 229 A.2d 823, 826 (Super. Ct. 1967); *Controy v. 10 Brewster Ave. Corp.*, 97 N.J. Super. 75, 234 A.2d 415, 418 (Super. Ct. 1967).

⁵¹ 61 Cal. Rptr. at 346.

⁵² *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 150 (1965).

⁵³ See Traynor, *supra* note 18, at 376.

⁵⁴ 61 Cal. Rptr. 333 (Ct. App. 1967).

⁵⁵ Immediately after citing the *Connor* case, the Texas Supreme Court observed that "[t]he common law is not afflicted with the rigidity of the law of the Medes and Persians 'which altereth not'" *Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968).

⁵⁶ See text accompanying notes 8-14 *supra*.

⁵⁷ See text accompanying notes 25-29 *supra*.

⁵⁸ See text accompanying notes 21, 24 *supra*.

⁵⁹ See text accompanying note 20 *supra*.

⁶⁰ See text accompanying notes 8, 20 *supra*.