

Can absentee landlords escape liability by claiming they never inspected?

Landlord neglect is not a defense to the affirmative duty to inspect

By Daniel Boord

Property owners and landlords will assert: "I never inspected for dangerous conditions on my property, so the law should absolve me." In other words, the "see no evil, hear no evil, speak no evil" defense. It defies logic, and it's not the law.

To escape trial, defendant landowners might argue they did not owe the plaintiff a legal duty because they delegated the responsibility to inspect, so they were unaware of the dangerous condition. Common arguments involve blaming property management or some other independent contractor.

Let's face it, even during a market downturn, land ownership is a great way to build wealth; ownership can provide cash flow, appreciation, and tax advantages, as well as leverage and a hedge against inflation. What "passive" investors want injured plaintiffs, adjusters, mediators, judges, and, eventually, jurors to believe is that the substantial benefits of land ownership come free of responsibility. But that is not the case. They are the only ones with complete control over the management of the dangerous condition of their properties. And, with ownership and management of property comes responsibility. The law embodies that responsibility by placing an affirmative, nondelegable duty on landlords to inspect and make their properties safe.

The duty element: Who must exercise care, and to whom?

California premises-liability law sounds in negligence. The general rule is that everyone is responsible, not only for harms caused by willful acts, but also for the failure to use reasonable care or skill in managing property. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111-112 (citing Civ. Code, § 1714, subd. (a)).)

Landowners must maintain land in their possession and control in a "reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.) Property owners have to exercise ordinary care in the management of such premises "in order to avoid exposing persons to an unreasonable risk of harm." (*Brooks v. Eugene Burger Mgmt. Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

A defendant claiming "no duty" as a matter of law will argue that the court's determination of duty requires a particularized inquiry, focusing on the "scope of duty." (See *Vasquez v. Residential Invs., Inc.* (2004) 118 Cal.App.4th 269, 280.) Indeed, whether or not a premises defendant owed a duty is a question of law to be decided by the court. (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 22.) However, the particularized analysis a court undertakes to define the scope of duty involves balancing *generalized* public policy considerations, not whether a particular defendant should be excused for his or her actions.

Ultimately, a determination that a legal duty of care exists is a "shorthand expression of the sum total of public policy considerations which lead the law to protect a particular plaintiff from harm." (*Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 504). The California Supreme Court has admonished that no exception to the general rule of Civil Code section 1714 liability for harms caused by negligent management of property should be made unless "clearly supported by public policy." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 363.) Thus, a finding of no duty is the exception, not the rule.

A finding of no duty for a negligent property owner can only be made if, on balance, the following public policy considerations warrant departure from the fundamental principle that landowners are responsible for reasonably managing their properties:

- the foreseeability of harm to the plaintiff;
- the degree of certainty that the plaintiff suffered injury;
- the closeness of the connection between the defendant's conduct and the injury suffered;
- the moral blame attached to the defendant's conduct;
- the policy of preventing future harm;
- the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach;
- and the availability, cost, and prevalence of insurance for the risk involved.

(*Rowland*, *supra*, 69 Cal.2d at 113.)

In practice, courts have afforded foreseeability significant weight in defining the scope of a premises owner's duty. Importantly, "foreseeability" should be measured, not by "whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more *generally* whether the category of negligent conduct at issue is sufficiently likely to result in the *kind of harm* experienced that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573 n.6 (quotations omitted and emphasis added).)

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The more particularized inquiries directed at the specific injury and the defendant's conduct, as well as whether the defendant's negligence was a proximate cause of the plaintiff's injury are reserved for the jury. (*Ibid.*; see also CACI 1000 and 1001.)

So, when a defendant invokes *Rowland* in support of a "no duty" argument, the particularized inquiry a court may undertake involves balancing generalized public policy considerations. And "the courts have repeatedly declared the existence of a duty by landowners to maintain property in their possession and control in a reasonably safe condition." (*Lawrence*, *supra*, 231 Cal.App.4th at 22.)

That a particular defendant did not exercise control over the property because the landowner chose to hire a property management company or lease the property to another entity departs from the general public policy of imposing a duty upon landowners to reasonably manage and maintain their properties. Blaming other entities goes to apportionment of fault between defendants, not to the existence or absence of a duty.

The duty to safely manage property applies to landowners, landlords, and land possessors

The duty to safely manage property applies to landowners, landlords, and land possessors. Multiple defendants can be liable under a premises liability theory. A claim that the defendant is "merely" a master tenant or independent contractor controlling the property will not relieve the defendant of the duty to maintain the property in a reasonably safe condition.

Premises defendants are liable for injuries on land they "own, possess, or control." And the phrase "own, possess, or control" is stated in the alternative. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 (internal citations omitted).) Indeed, a "possessor" of land also has a "duty to take affirmative action for the protection of individuals coming upon the land . . . ." (*Sprecher*, *supra*, 30 Cal.3d at 368.)

The duty arises because ownership and possession of land include the right to control and manage the premises. "[M]ere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." (*Sprecher*, *supra*, 30 Cal.3d at p. 370.) The right to control the premises lies at "the very heart of the ascription of tortious responsibility" in premises-liability actions. (*Id.* at 369.)

A landowner's duty of care is nondelegable

A landowner must reasonably manage and maintain his or her property, even if the landowner hires a property management company or enters into a commercial lease, leaving control of the property under control of the tenant. Doing so only apportions the fault between defendants, but does not let the landowner off the hook.

It should be noted, however, that a significant exception exists in the case where the injured plaintiff is an employee of a hired contractor and workers' compensation is the exclusive remedy against the employer-contractor. (See Lab. Code, § 3602, subd. (a); *Privette v. Superior Court* (1993) 5 Cal.4th 689.) But even in that context, a landowner can still be held liable for a duty that preexists and does not arise from the contract for hire. (*Seabright Ins. Co. v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590, 600-601.)

A landlord's duty of care to maintain property in a safe condition is nondelegable. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726.) Even where a landlord attempts to delegate responsibility, the landlord is vicariously liable for the contractor's negligent maintenance of property. (*Id.* at 726.) This is commonly known as the "nondelegable duty rule.":

> [A] landlord cannot escape liability for failure to maintain property in a safe condition by delegating such duty to an independent contractor. Simply stated, the duty which a possessor of land owes to others to put and maintain it in a reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in a reasonably safe condition.

(*Id.* at 726 (citations, quotations, and brackets omitted).) Thus, "the party charged with the non-delegable duty is 'held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.'" (*Id.* at 727.)

Similarly, commercially leasing the property does not relieve a landowner of the duty to maintain it in a reasonably safe condition; "a commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease." (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781.)

California courts have routinely held that a landlord's duty of care extends not only to their tenants, but also to third-party entrants. (See *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134; *Mora*, *supra*, 210 Cal.App.3d at 781.) "As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons." (*Mora*, *supra*, 210 Cal.App.3d at 781.)

The duty of care extends to dangerous conditions on nearby land

The duty of care extends to dangerous conditions on nearby land and unsafe conditions not owned by the land possessor. Other common defenses are that the land possessor did not own the unsafe condition on the land that harmed the plaintiff, or that the harm-causing condition was an artificial condition. Premises liability defendants may also argue that their duties end at their

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property lines. None of these arguments are supported by law, nor will such arguments move a jury.

California courts have routinely 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 or control." (*Alcaraz*, *supra*, 14 Cal.4th at 1156 [finding that the defendant owed a duty to reasonably manage a water meter box located on adjacent land not owned by the defendant]; see also *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 233 [holding that a defendant landowner owed a duty to warn its tenant of the danger posed by overhead electrical lines neither owned nor maintained by the landowner].)

The traditional distinction between artificial and natural conditions has been rejected. Land possessors have the same duty to reasonably manage their properties, regardless of whether the unreasonably dangerous condition is natural or artificial. (*Sprecher*, *supra*, 30 Cal.3d at 371.) The test is the same: whether the land possessor has reasonably managed the property in view of the probability of injury to others. (*Ibid.* (citing *Rowland*, *supra*, 69 Cal.2d at 118).)

Additionally, a landowner's duty of care is not limited to injuries that occur on premises owned or controlled by the landowner. (*Annocki v. Peterson Enterprises, LLC* (2004) 232 Cal.App.4th 32, 38.) "Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Ibid.*; see also *Barnes v. Black*, (1999) 71 Cal.App.4th 1473, 1478.)

Landlords have an affirmative duty to inspect

Landlords have an affirmative duty to inspect upon purchase, lease and renewal of lease, and when they have the right to retake possession of their properties. In addition to the general duty imposed on land owners and possessors to reasonably manage their properties, California courts have articulated that landlords have an *affirmative* duty to inspect their properties and exercise ordinary care to keep the premises in a reasonably safe condition. (*Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 469; see also *Portillo*, *supra*, 27 Cal.App.4th at 1134.)

A corollary of this principle is that a landlord's lack of knowledge is not a defense. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1207.) The duty to inspect and make safe applies if the owner had "either actual or constructive knowledge of the dangerous condition" or had been able "by the exercise of ordinary care to discover the condition" which the landlord should have realized posed an unreasonable risk to land entrants. (*Ortega*, *supra*, 26 Cal.4th at 1206.)

California jury instructions summarize the duty of care imposed specifically on a landlord:

- A landlord must reasonably and periodically inspect the premises for unsafe conditions and must take reasonable precautions to prevent injury;
- The duty to periodically inspect arises whenever the landlord has the legal right of possession;
- Specifically, a landlord must conduct a reasonable inspection before giving possession of leased property to a tenant, on renewal of a lease, or after retaking possession from a tenant;
- A landlord who retains control over an area of the premises must take reasonable precautions regarding unsafe conditions if the landlord knows or reasonably should have known about it;
- A landlord must also take reasonable precautions regarding unsafe conditions in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right to correct it.

(CACI No. 1006. Landlord's Duty.)

A landlord has an affirmative duty to conduct reasonable, periodic inspections. Even if a commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated – at least at the time the lease is executed – to take reasonable precautions to avoid unnecessary danger. (*Mora*, *supra*, 210 Cal.App.3d at 781; *Portillo*, *supra*, 27 Cal.App.4th at 1134.)

Importantly, the landlord's duty to perform an initial inspection does not automatically extinguish with time. And the duty to inspect can subsequently arise under numerous circumstances. California courts have held that a land "owner should conduct frequent inspections," whenever the landlord has the right to possess the property. (*Ortega*, *supra*, 26 Cal.4th 1200, 1207; see also *Portillo*, *supra*, 27 Cal.App.4th 1128.) Additionally, if the landlord retains or, after leasing the property, acquires a recognizable degree of control over the dangerous condition, the landlord's duty to maintain the property in a reasonably safe condition is ongoing. (*Portillo*, *supra*, 27 Cal.App.4th at 1134 n.4; see also *Mora*, *supra*, 210 Cal.App.3d at 780-781.)

In *Mora*, *supra*, 210 Cal.App.3d 771, the plaintiff appealed an order granting a motion for summary judgment, contending that the landlord had failed to inspect and make the premises safe from dangerous conditions because a vessel which was part of the refrigeration system exploded and injured the plaintiff. The vessel, which contained ammonia gas, had been made 50 to 60 years earlier, and the landlord failed to establish that it inspected the premises prior to leasing the property.

In reversing summary judgment in favor of the landlord, the Court of Appeal concluded that the defendant landlord had a duty to conduct a reasonable inspection at the time of lease. Observing that it would not be reasonable to charge a lessor with liability if the lessor did not have the "power, opportunity and ability to eliminate the danger," the appellate

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court held that a landlord cannot abrogate its duty to inspect by signing a lease. (*Mora*, *supra*, 210 Cal.App.3d at 779-780, 781.) "At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and *must inspect the premises* to make the premises reasonably safe from dangerous conditions. (*Mora*, *supra*, 210 Cal.App.3d at p. 781 (emphasis added).)

Having found an affirmative duty to inspect, the *Mora* court concluded that the defendant landlord did not meet its burden to show no breach of duty because the affidavits presented did not show that there was an inspection; the mere possibility – without actual inspection – that the property was in a reasonably safe condition at the time of lease was not sufficient to relieve the landlord of its duty. (*Id.* at 782.)

Mora stands for the proposition that a landlord's failure to inspect the property at the time of lease does not get "cured" by the mere passage of time. Rather, the scope of a landlord's duty affirmatively requires an inspection "at the time the lease is executed to take reasonable precautions to avoid unnecessary danger," and charges the landlord with the duty to inspect "those matters which would have been disclosed by a reasonable inspection." (*Id.* at 781-782.) Thus, each lease agreement and renewal imposes an independent, affirmative duty on the landlord to inspect.

Conclusion

Because land ownership vests in the owner the right to control and manage the conditions on the property, the duty to do so is nondelegable. The "vacuum" of authority created by delegating management to some other company or leasing the property do not absolve a landowner from the duty to maintain property in a reasonably safe condition.

Additionally, a landlord has an affirmative duty to inspect the property at the time of every lease, lease renewal, and right of possession. Feigning ignorance of a reasonably discoverable dangerous condition is no defense if the landlord caused its own ignorance by failing to inspect the property.



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