

## **Wait and See**

No Tort Recovery for Defects Not Yet Resulting in Damage

**By Daniel Lee Jacobson**

In a Dec. 4, 2000 decision that could have far-reaching consequences on California construction-defect litigation, the California Supreme Court decided that homeowner plaintiffs cannot receive tort recovery for negligent construction that has not yet resulted in damage. In *Aas v. Superior Court*, 24 Cal.4th 627 (2000), the court decided that negligent construction itself does not constitute "damage" for which a plaintiff can be compensated in tort.

The five-member majority opinion was authored by Justice Kathryn M. Werdegar. Chief Justice Ronald M. George and Justice Stanley Mosk each wrote separate concurring and dissenting opinions.

The plaintiffs alleged in negligence and strict liability that the builders of their homes had improperly constructed those homes. They sought damages for alleged failure to properly construct "shear walls" and "one-hour and two-hour fire protection in party walls" and for other defective construction that allegedly did not meet the requirements of the Uniform Building Code and other applicable codes.

"Shear walls" are required to have adequate strength to withstand wind and earthquakes. "One-hour and two-hour fire protection" is supposed to prevent a fire from passing from one condominium to another. The plaintiffs also sought damages for less-serious defects, such as "discolored drain stoppers and inoperable garbage disposals."

Defendants brought motions in limine requesting the exclusion of evidence of those alleged construction defects that had not yet caused property damage. The trial court granted the motions. The 4th District Court of Appeal upheld the trial court's decision. *Aas v. Superior Court*, 64 Cal.App.4th 916 (1998). Now the Supreme Court has affirmed.

The Supreme Court treated the motions in limine as the functional equivalent of common-law motions for judgment on the pleadings and, thus, reviewed their disposition as a matter of law. The court said that the issue was not a simple one: "[I]t arises from the nebulous and troublesome margin between tort and contract law." The court acknowledged that the plaintiffs may have homes that were negligently constructed but went on to hold that negligent construction itself does not equate to damages that are recoverable in tort.

Regarding the plaintiffs' allegation that there were improperly constructed shear walls, the court decided that because those walls have not yet succumb to an earthquake or wind, the plaintiffs have not yet suffered tort damages. Regarding the allegation that the homes lacked reasonable fire protection, the court decided that since that lack of fire protection has not yet led to damage caused by a fire, the plaintiffs have not yet suffered tort damages. As to every allegation of negligent construction that had not yet resulted in harm, the court concluded that there were no recoverable tort damages.

The court conducted an extensive review of its product-liability decisions and their cumulative effect on construction-defect remedies. As to strict-liability remedies, the court quoted extensively from *Seely v. White Motor Co.*, 63 Cal.2d 9 (1965): "'The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss,' we wrote, 'is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.' ... A

manufacturer 'can appropriately be held liable for physical injuries caused by defects by requiring his good to meet a standard of safety,' but not 'for the level of performance' of its products unless the manufacturer 'agrees that the product was designed to meet the consumer's demands.'"

Relying on this language, the court concluded that "strict liability affords a remedy only when the defective product causes property damage or personal injury. The tort [of strict liability] does not support recovery of damages representing the lost benefit of a bargain, such as the cost of repairing a defective product or compensation for its diminished value."

Addressing the issue of remedies available in negligence, the court again quoted from *Seely*: "Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." The court said that this statement embodied "the economic loss rule," which kept the *Aas* plaintiffs from recovering in negligence.

The court acknowledged that an exception to the economic-loss rule is found in *Biakanja v. Irving*, 49 Cal.2d 647 (1958), and *J'Aire Corp. v. Gregory*, 86 Cal.App.3d 499 (1979). Those cases applied a six-factor test in determining whether a plaintiff can recover in negligence for economic loss.

The factors were listed in *Biakanja* as follows: "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm."

The *Aas* court concentrated on the foreseeability of harm and the degree of certainty that the plaintiff suffered injury. The plaintiffs had argued that their damages were the cost of repairing their negligently constructed homes and bringing them up to code. The court responded: "This confuses the measurement of alleged damages with the ability of particular facts to support a tort action. To say that one's house needs repairs costing a certain amount is not necessarily to say that one has suffered the type of harm cognizable in tort, as opposed to contract."

The court concluded: "We do not believe ... that the *J'Aire* court intended to dispense with the rule that appreciable, nonspeculative, present injury is an essential element of a tort cause of action." The court decided that the plaintiffs do not have nonspeculative, present injury and thus cannot rely on these factors.

In applying the six factors, the court distinguished two cases and overruled one. The court explained that in *Sumitomo Bank v. Taurus Developers Inc.*, 185 Cal.App.3d 211 (1986), the distinction between economic damages and physical harm was not raised as an issue and that the conclusion in *Cooper v. Jevne*, 56 Cal.App.3d 860 (1976), that the economic-loss rule does not apply to professional-negligence claims, was dictum.

The court overruled *Huang v. Garner*, 157 Cal.App.3d 404 (1984), in which plaintiffs had been allowed to recover repair costs for construction defects that had not resulted in property damage.

In an unusual move, the court voiced its deference to the Legislature on the issue raised in *Aas*, saying: "The Legislature, whose lawmaking power is not encumbered by precedent is free to adopt a rule like that proposed in the Chief Justice's concurring and dissenting opinion." The court noted: "In our view, the many considerations of social policy this case implicates, rather than justifying the imposition of liability for construction defects that have not caused harm of the sort traditionally compensable in tort ... , serve instead to emphasize that certain choices are better left to the Legislature."

George's concurring and dissenting opinion was strongly critical of the majority, saying: "In determining that a negligently constructed home must first collapse or be gutted by fire before a homeowner may sue in tort to collect costs

necessary to repair negligently constructed shear walls or fire walls, the majority today embraces a ruling that offends both established common law and basic common sense."

George would have imposed a rule whereby a homeowner may maintain a cause of action in negligence to recover the costs of correcting significant building safety-code violations. Such significant violations would include improperly constructed shear walls that would put the structure at risk of collapse and improperly constructed fire walls that would allow a fire to spread rapidly. Under this rule, such significant code violations would not have had to yet manifest themselves in physical damage; but there would be no tort recovery for the minor defects alleged by the plaintiffs, such as "discolored drain stoppers and inoperable garbage disposals."

George began his analysis with *Connor v. Great Western Sav. & Loan Ass'n*, 69 Cal.2d 850 (1968). In that case, then-Chief Justice Roger Traynor authored the opinion, which upheld a negligence cause of action by homeowners against a lending institution that had financially backed and extensively controlled a new housing development. The *Connor* court said that "a home is not only a major investment for the usual buyer but also the only shelter he has. Hence it becomes doubly important to protect him against structural defects that could prove beyond his capacity to remedy."

The fact that Traynor wrote the *Connor* decision is important because Traynor also wrote the *Seely* decision, upon which the *Aas* majority heavily relied. George found it difficult to believe that the author of *Connor*, which afforded tort protection for construction defects, would have meant to limit that protection in *Seely*.

George pointed out that *Seely* was not a negligence case but was instead a warranty and strict-liability case. The *Seely* court approved damages to the plaintiff based on the plaintiff's warranty theory. According to George, the *Seely* court discussed the strict-liability theory in dictum and then addressed a nonexistent negligence theory "in dictum within dictum."

So, George did not feel at all restrained in allowing the *Aas* plaintiffs a tort recovery. But, rather than allowing the plaintiffs a traditional lump-sum recovery, George would have provided for a "fund recovery." In a fund recovery, the court would supervise the expenditure of the money that the plaintiffs were awarded to encourage the spending of money only on appropriate items and to limit the liability of the defendants to the amount of expenses actually incurred. See *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965 (1993).

Mosk also wrote a concurring and dissenting opinion in which he stated that it is unnecessary to apply the six *Biakanja/J'Aire* factors. He wrote, "The rule I favor would state that property damage occurs when what may be termed fixtures for purposes of discussion, inseparable from the structure of the houses or condominiums and inaccessible for repair without destroying existing features, are negligently built or installed." Under this rule, significant defects could be remedied in tort, but minor defects such as "discolored drain stoppers and inoperable garbage disposals" could not be so remedied.

Mosk stated that "I believe that by being subjected to the risk posed by defective shear walls and fire walls, plaintiffs would have suffered appreciable present compensable injury. Indeed, plaintiffs' knowledge of these defects places upon them a legal duty to make necessary repairs or corrections."

The majority opinion and the concurring and dissenting opinions allow for the recovery of contract damages for construction defects that have not yet manifested themselves in further property damage. But George pointed out in his opinion that "contract or warranty claims in this setting are difficult to prove and to enforce, and our decisions have recognized that problems with privity, disclaimers inserted into contracts by developers or contractors, and notice requirements, often frustrate the ability to recover on contract or warranty theories."

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