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Let the Landlord Beware: California Imposes Strict Liability on Lessors of Rental Housing

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LET THE LANDLORD BEWARE: CALIFORNIA IMPOSES STRICT LIABILITY ON LESSORS OF RENTAL HOUSING

Becker v. IRM Corp.[1]

The California Supreme Court's decision in *Becker v. IRM Corp.*[2] has ousted notice, one of the few remaining vestiges of the five century reign of caveat emptor principles which once dominated real property leasing transactions. Equating the landlord to a distributor who markets rental housing, the court extended a cause of action in strict tort liability to the plaintiff tenant whose personal injuries resulted from a latent defect in rental premises, despite the landlord's inspection to discover such a defect upon purchasing the building in a used condition.

In *Becker*, tenant plaintiff sustained a severely lacerated broken arm when he slipped and fell against an untempered shower glass door in the apartment rented from defendant IRM Corp., who acquired the 15 year old, 36 unit apartment complex four years before plaintiff's accident occurred. A prepurchase inspection by defendant's officers revealed no visible differences in the shower doors. Defendant knew of no prior accidents in the complex involving shower doors. After the accident, defendant's maintenance man inspected all shower doors in order to replace those containing untempered glass. He stated that "[t]here was no way a layperson could tell any difference by simply looking at the shower doors. The only way I was able to differentiate . . . was by looking for a very small mark in the corner of each piece of glass."[3]

Plaintiff's complaint asserted causes of action against the landlord IRM Corp. in both negligence and strict tort liability.[4] The Superior Court, Contra

1. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).
2. *Id.*
3. *Id.* at 457-58, 698 P.2d at 118, 213 Cal. Rptr. at 215.
4. The strict liability cause of action, as interpreted by the court, is an outgrowth of RESTATEMENT (SECOND) OF TORTS § 402A (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property if:
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although

Costa County, entered summary judgment in favor of the landlord, accepting his contention that absent concealment of a known danger or an express statutory or contractual duty to repair, a landlord could not be held liable when a tenant sustained injuries caused by a latent defect in the rented premises.[5] Plaintiff appealed.[6] In a 5-2 decision,[7] the California Supreme Court reversed the trial court's granting of a summary judgment on both the negligence and strict liability claims.[8]

The trial court's holding reflects the traditional view of landlord tort immunity where a tenant's injuries are caused by a hidden defect unknown to the landlord.[9] Other jurisdictions have rejected any rigid categories of immunity in favor of a traditional negligence standard which requires the landlord to exercise reasonable care not to subject others to an unreasonable risk of harm.[10]

With the advent of the implied warranty of habitability for residential dwellings,[11] some courts have allowed recovery in contract for a tenant's personal injuries. These courts have done so by defining them as consequential damages of the landlord's breach of warranty[12] under the common law rules first enunciated in *Hadley v. Baxendale*,[13] or by analogy to U.C.C. 2-715(2)(b).[14] Any recovery under this theory, however, depends upon the plaintiff proving that the landlord had notice of the defect.[15]

The majority's rationale for extending strict liability began by tracing

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(a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

5. *Becker*, 38 Cal. 3d at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214.

6. While the appeal was pending in the California Supreme Court, plaintiff settled with the builder and a door assembler and installer for $150,000, plus an additional $50,000 in the event the appeal proved unsuccessful. *Id.* at n.1.

7. Broussard, J., writing for the majority: Broussard, Kaus, Reynoso, and Grodin, J.J. Bird, C.J., filed a separate concurring opinion. Lucas and Mosk, J.J., concurred as to the negligence reversal and dissented as to the strict liability reversal.

8. 38 Cal. 3d at 469, 698 P.2d at 126, 213 Cal. Rptr. at 223.

9. Zimmerman v. Moore, 441 N.E.2d 690, 693-94 (Ind. Ct. App. 1982). *See generally* W. PAGE KEETON, D. DOBBS, R. KEETON, DAVID OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 53 (5th ed. 1984) (hereinafter PROSSER AND KEETON). *See also Becker*, 38 Cal. 3d at 463, 698 P.2d at 121, 213 Cal. Rptr. at 218 (listing five common exceptions to landlord immunity).

10. *See* Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

11. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 921 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

12. George Washington Univ. v. Weintraub, 458 A.2d 43, 45 (D.C. App. 1983).

13. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

14. U.C.C. § 2-715(2)(b) (1978): "Consequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty." *See generally* PROSSER AND KEETON, *supra* note 9, 98.

15. *See infra* note 59.

the parallel application of strict liability under a contractual warranty theory in the contexts of commercial transactions and real estate law.

Strict warranty liability for the sale of goods, more recently the sale of real estate containing mass produced houses marketed by a builder/developer, and leases of personalty all grew out of the decision in *Greenman v. Yuba Power Products, Inc.*[16] to shift the burden of loss from the consumer to the "overall producing and marketing enterprise."[17] Although manufacturers and their distributors are most often the target for liability, lessors and bailors of personal property have also been held strictly liable on an expanded analogy to the distributor's responsibility.[18] Builders of mass produced tract homes have been likened to a manufacturer and held liable under the same principles.[19] Landlord-tenant law, by comparison, underwent a similar upheaval of traditional thinking with the adoption of an implied warranty of habitability for residential dwellings.[20] In California, intrusions into the landlord's cloak of immunity from liability for personal injury resulting from a defective condition of the premises included five well recognized exceptions: where the landlord voluntarily undertakes repairs; where the landlord had knowledge of defects; where a safety law was violated; where the landlord retained a part of the premises for common use; and where the lease was for a semi-public purpose.[21]

The court also outlined scattered cases holding a landlord in the rental business strictly liable under express or implied warranty principles for injuries resulting from defective fixtures or furnishings on the premises.[22]

The majority concluded from this analysis that the present duties of the landlord, combined with the policy behind strict liability in tort, [23] "required"

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16. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

17. *Becker*, 38 Cal. 3d at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216 (quoting Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).

18. *Id.*, 698 P.2d at 119, 213 Cal. Rptr. at 216 (citing Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970)).

19. *Id.* at 460, 698 P.2d at 119-20, 213 Cal. Rptr. at 216-17 (citing Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969)); Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 663 (1969)).

20. Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (following reasoning of Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 921 (1970)).

21. *Becker*, Cal. 3d at 463, 698 P.2d at 121, 213 Cal. Rptr. at 218 (citing 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2135-36 (8th ed. 1973)).

22. *Id.* at 463-64, 698 P.2d at 121-22, 213 Cal. Rptr. at 218-19.

23. The three most common justifications for adopting strict tort liability include: (1) the costs resulting from damaging events due to defective products can best be borne by the enterprisers who make and sell the products by distributing the losses of the few among the many who purchase the products; (2) promotion of accident prevention through safer design by eliminating the need to prove negligence; and (3) although negligence may often be present with respect to defective products, it may be difficult to prove and should no longer be required if product defect is properly defined and limited. *See* PROSSER AND KEETON, *supra* note 9, at 98.

them to hold that "a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant."[24] Such a landlord plays a substantial role in an enterprise; that the enterprise involves real estate should no longer immunize him from liability.[25]

Defendant argued that since he purchased an existing building, not new, he should be exempted from strict liability because, like dealers in used personalty, he had no continuing business relationship with the manufacturer/builder, therefore removing him from the manufacturing and marketing enterprise which produced the defect.[26]

The court, however, characterized the "enterprise" as one of marketing *rental* housing, not as one of marketing housing or the components thereof. It then concluded that a continuing business relationship[27] was not essential to the paramount policy behind imposing strict liability: "the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects."[28] In the majority's opinion, a manufacturer's possible unavailability enhanced their justification for imposing liability on "persons engaged in the enterprise who can spread the cost of compensation."[29]

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24. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. The court then justified their imposition of strict liability on virtually identical grounds to those for adopting the implied warranty of habitability: tenant's inability to adequately inspect; tenant's reliance on landlord's implied assurance of safety; landlord in superior position to bear the risks and costs. *Id.* at 464-65, 698 P.2d at 122-23, 213 Cal. Rptr. at 219-20.

25. *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

26. *Id.* at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220. RESTATEMENT (SECOND) OF TORTS § 402(A) comment q (1965), distinguishes "a seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer." No opinion is offered on whether such sellers should be held strictly liable. Cases discussing the issue in the context of used rental housing have rejected liability on an analogy to the dealer who sells used goods. *See* Kahf v. Charleston South Apartments, 461 N.E.2d 723, 732-33 (Ind. Ct. App. 1984); Zimmerman v. Moore, 441 N.E. 2d 690, 694 (Ind. Ct. App. 1982); Henderson v. W.C. Haas Realty Management Co., 561 S.W.2d 382, 387 (Mo. Ct. App. 1978).

27. It is unclear from the opinion whether the court meant the relationship with the previous owner of the housing or the relationship with various manufacturers of products which comprise each dwelling unit. The latter seems the logical inference from the text of the opinion.

28. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.

29. *Id. But cf. Becker*, 38 Cal. 3d at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221. The majority acknowledged that:

> along with other numerous factors the price of used rental housing will depend in part on the quality of the building and reflect the anticipated costs of protecting tenants, including repairs, replacement of defects and insurance. Further, the landlord after purchase *may* be able to adjust rents to reflect such costs.

Id. (emphasis added).

The court then distinguished between a seller of used goods (who merely resells them without warranty or alteration of their demised condition) which would otherwise be scrapped,[30] and a landlord who has a "continuing relationship to the property following renting, in contrast to the used machinery dealer, who sells."[31] These factors, in addition to the notion that "the landlord will also *often* be able to seek equitable indemnity for losses,"[32] led the court to conclude that "[t]he cost of protecting tenants is an appropriate cost of the enterprise."[33]

Chief Justice Byrd's concurrence adopted the appellate court's majority opinion,[34] reemphasizing the characterization of the landlord as a "'retailer' of rental housing"[35] who would be able to redistribute the burden of loss to the marketplace thus: "It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand and reliance upon the product . . . which calls for imposition of strict liability."[36] Byrd also elaborated on the flexibility of the California courts' definition of the "defect" in strict products liability cases.[37]

In his dissenting opinion, Justice Lucas attacked on two bases the majority's "unprecedented leap" of allowing the strict liability claim. After describing their logic as inconsistent with the policy established by prior precedent, he argued that imposing such a broad burden on the landlord is both unfair and impractical.[38]

The dissent analyzed the development of strict products liability as follows. Historically, the courts based their rationale for strict tort liability upon a manufacturer's ability to prevent the defect through careful design.[39] The extension of liability to retailers[40] grew logically from the philosophy that retailers and distributors profited from their extensive participation in the marketing enterprise and should therefore be required to share the burden of losses caused by injuries from defective products which they made avail-

30. *Id.*
31. *Id.*
32. *Id.* (emphasis added).
33. *Id. But cf.* cases cited *infra* note 50 and accompanying text.
34. Becker v. IRM Corp., 144 Cal. App. 3d 321, 192 Cal. Rptr. 570 (1983), *rev'd*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).
35. *Becker*, 38 Cal. 3d at 476, 698 P.2d at 131, 213 Cal. Rptr. at 228 (Bird, C.J., concurring).
36. *Id.* at 475, 698 P.2d at 130, 213 Cal. Rptr. at 227 (Bird, C.J., concurring).
37. *Id.* at 478-79, 698 P.2d at 132-33, 213 Cal. Rptr. at 229-30 (Bird, C.J., concurring); *cf. infra* note 66 and accompanying text.
38. *Becker*, 38 Cal. 3d at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., dissenting).
39. *Id.* at 480-81, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., dissenting).
40. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

able through a continuous course of business.[41] Furthermore, this extension was fair in light of the continuing business relationship with the manufacturer, which gave the distributor an ability to bargain for indemnification agreements to deflect the compensation burden.[42]

In contrast, the landlord has no such continuing relationship.[43] Earlier cases finding landlords strictly liable characterized their role as a lessor of furniture or appliances which they purchased and placed in the dwellings, not as a lessor of real property and its fixtures.[44] Justice Lucas argued that the majority avoided this distinction by focusing on the wrong stream of commerce—the lessor's relationship to the property—rather than the lessor's relationship to those up the original chain of distribution.[45] A landlord owning used property will not know the origin of many of its component parts nor will he have the bargaining power necessary to defray the risk of liability.[46]

That the premises contain a myriad of products, none of which the landlord has necessarily selected or installed, further lessens his opportunity to personally inspect and ensure the safety of each individual component.[47] Such a situation leaves the tenant with the reasonable expectation that a landlord will repair or replace defective components when they become known or discoverable.[48] The majority's emphasis on the risk-spreading function of strict liability thus results in inherent problems and unfairness by failing to take into account these practical considerations of extending liability.[49]

In effect, the dissent merely echoes the concerns raised by other jurisdictions rejecting a strict liability cause of action for injured tenants.[50]

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41. *Becker*, 38 Cal. 3d at 480, 698 P.2d at 134, 213 Cal. Rptr. at 231 (citing Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970)).

42. *Id.* at 480, 698 P.2d at 134, 213 Cal. Rptr. at 231 (Lucas, J., dissenting) (citing *Vandermark*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 89).

43. *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220. It is this distinction, the dissent argues, that makes IRM Corp. more like a dealer in used goods who should not be held strictly liable. California courts have rejected strict liability for dealers of used goods such as machinery. *See Id.* at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232 (Lucas, J., dissenting).

44. *Id.* at 481, 698 P.2d at 134, 213 Cal. Rptr. at 231 (Lucas, J., dissenting).

45. *Id.* at 483-84, 698 P.2d at 136, 213 Cal. Rptr. at 233 (Lucas, J., dissenting).

46. *Id.* at 485, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., dissenting).

47. *Id.*, 698 P.2d at 138, 213 Cal. Rptr. at 235 (Lucas, J., dissenting).

48. *Id.* at 486, 698 P.2d at 138, 213 Cal. Rptr. at 235 (Lucas, J., dissenting) (citing Dwyer v. Skyline Apartments, 123 N.J. Super. 48, 301 A.2d 463 (Ct. App. Div.), *aff'd obiter dictum*, 63 N.J. 577, 311 A.2d 1 (1973)).

49. *Id.* at 484-85, 698 P.2d at 137, 213 Cal. Rptr. at 234.

50. *See* Dwyer v. Skyline Apartments, 123 N.J. Super. 48, 53, 301 A.2d 463, 467 (Ct. App. Div.), *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973); *see also* George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. App. 1983); Mondreau v. General Electric Co., 2 Haw. 10, 625 P.2d 384 (Ct. App. 1981); Dapunkas v. Cagle, 42 Ill.

Unlike *Becker*, both *Zimmerman* and *Boudreau* involved "occasional" landlords who could not be considered "in the business" of leasing.[51] One court reasoned that liability based on the 402A theory was unnecessary because the privity between lessor and lessee affords the tenant greater protection than an ordinary consumer purchasing goods.[52] Other cases emphasize that a tenant's recovery is contractually based.[53]

In refusing to allow a cause of action for personal injuries based on the implied warranty of habitability, the court in *Dapkunas v. Cagle*[54] pointed out:

> At the time of the early product liability law developments away from privity notions, purchasers of manufactured products did not have the benefit of anything comparable to a building code to control manufacturers. It can hardly be said, therefore, that a present-day tenant injured by a defect in the leased premises is in the same remediless position with respect to the landlord as the injured purchaser once was with respect to the product manufacturer.[55]

This statement illustrates various courts' concern with the strained [56] analogy between a landlord and a retailer of commercial goods. Rental property, although in a sense a "package of goods,"[57] is comprised of numerous products which vary in age, quality and complexity. As to many of these components, a landlord may have no greater expertise than the ordinary consumer, especially when the landlord buys used housing.[58] Absent notice[59]

App. 3d 644, 357 N.E.2d 575 (1976); Zimmerman v. Moore, 441 N.E.2d 690 (Ind. Ct. App. 1982); Henderson v. W.C. Haas Realty Management Co., 561 S.W.2d 382, 387 (Mo. Ct. App. 1978); Curry v. New York City Housing Auth., 77 A.D.2d 534, 430 N.Y.S.2d 305 (1980) (overruled earlier case extending strict liability by analogy to RESTATEMENT (SECOND) TORTS § 402(A) (1965)); Kaplan v. Coulston, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (N.Y. City Civ. Ct. 1976).

51. *See supra* note 26. The majority vaguely confines its extension of strict liability to those "in the business of leasing dwellings." *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

52. Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 768 (1976), *dismissed on other grounds*, 267 Ind. 176, 369 N.E.2d 404 (1977).

53. *See, e.g.*, Chubb Group of Ins. Co. v. C.F. Murphy & Assoc., 656 S.W.2d 766 (Mo. Ct. App. 1983).

54. 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976).

55. *Id.* at 652, 356 N.E.2d at 581.

56. *Old Town*, 349 N.E.2d at 768.

57. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 921 (1970); *see generally* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?* 1975 WIS. L. REV. 19, 130-60.

58. Zimmerman v. Moore, 441 N.E.2d 690, 694 (Ind. Ct. App. 1982).

59. Jurisdictions disagree on the proper application and effect of the notice requirement in negligence and warranty claims. In order to recover under either theory, all other jurisdictions (except Louisiana, see discussion *infra* notes 78-80 and accompanying text) require the landlord to have actual or constructive notice of a

from the tenant who has control and possession,[60] the landlord has little opportunity to discover latent defects through continuous inspection and preventative maintenance. Finally, "[a]lthough a landlord may well be in a better economic position to bear the risk than is his tenant, [unlike the builder-vendor] he may not be in the position of creating the defect."[61]

In her concurring opinion, Chief Justice Bird elaborates on the concept of "defect" used by the California courts in products liability actions. *Barker v. Lull Engineering Co.*[62] set forth the standards for establishing a "defect" thus:

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defect before incurring liability. *See, e.g.*, George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. App. 1983); Henderson v. W.C. Haas Realty Management Co., 561 S.W.2d 382 (Mo. Ct. App. 1978). Jurisdictions differ as to whether liability should be imposed from the date of notice, Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. Cir. 1978), or from the date upon which a landlord has had a reasonable time to repair and fails to do so, Mahlmann v. Yelverton, 109 Misc. 2d 127, 439 N.Y.S.2d 568 (N.Y. Civ. Ct. 1980). Courts acknowledge that "this notice requirement would seem to reduce the concept of implied warranty of habitability to one of negligence . . . ." *Henderson*, 561 S.W.2d at 387. "Liability for negligence and breach of warranty turn out to be virtually the same: the former for failure to use reasonable care to cure a known (or constructively known) defect, and the latter for breach of a covenant not to permit a known (or constructively known) defect." *Weintraub*, 458 A.2d at 52 (Ferren, J., dissenting).

60. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 137-38 (1982). Browder states that notice is the central theme of landlord tenant law because, unlike sales transactions, the *tenant* is in possession and control, but not complete ownership of the premises, while the landlord will remain liable for the defects:

> It does make a difference if you are in control, if for no other reason than that you are the one who will know what is wrong. If you know it, can you hide it or forget about it? If your being in possession, or at least in constant contact, is no longer the basis for putting all the risks on you, you may well remain under a duty to communicate what you see. It is the kind of communication that tenants have never been reluctant to make; they do it all the time, even under the old law. The only alternative is to prescribe a right in a landlord to inspect leased premises regularly. Apart from the invasion of privacy this entails, inspection from time to time is not an effective substitute for the knowledge of a defect by the person who lives there. The ultimate goal of the new regime in landlord-tenant law is to keep premises in a habitable condition. Can a tenant who sees a defect, perhaps small but possibly dangerous, in a floor, a balcony, or in plumbing or heating equipment, be permitted to keep it to himself and later claim damages, perhaps staggering damages, for hospitalization or doctors' bills, if he is hurt by it, or for wrongful death if his child is killed by it? And where, if the defect were made known, it could have been repaired at a relatively insignificant cost to the landlord?

Id. at 136-37; *see also* Kahf v. Charleston South Apartments, 461 N.E.2d 723, 731 (Ind. Ct. App. 1984).

61. *Kahf*, 461 N.E.2d at 733.

62. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

> First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. [The Consumer Expectations test] Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. [The Risk-Utility test][63]

Although Justice Bird proceeds to enumerate the factors to be considered by a jury in evaluating the product's design,[64] neither she nor the majority attempt to explain how the concept of a design defect relates to a dwelling unit. Is the *dwelling unit* defective in design because it contains a defective product, or is the plaintiff merely expected to present the same case against the landlord as he would against the manufacturer? In either situation, practicality concerns abound.

If the dwelling unit is the "defective product," the tenant will be unable to rely on the landlord's knowledge regarding the design of each individual component of the dwelling. Rather, the landlord will evaluate the dwelling unit as one "product" when taking into account the benefits of the design versus risk of the danger. Under the risk-utility test, the plaintiff will encounter problems in meeting the landlord's defense that the benefits of the overall design of the dwelling outweigh the danger imposed by a single defective component.

If the plaintiff attempts to show that the dwelling unit violates consumer expectations, he encounters another curious situation. The landlord, his agent, or perhaps even a city building inspector (or any combination thereof) may have thoroughly examined the dwelling unit prior to occupancy and concluded that it meets *their* safety expectations (as both a consumer and a quasi-expert). In this situation, how does a jury reconcile these differences to determine the correct "expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case[?]"[65] Will the plaintiff's expectations be allowed any benefit of the hindsight produced by his injury? At least one author has suggested that the injection of this reasonableness concept into California's strict liability formula defeats the enunciated purpose of simplifying a plaintiff's recovery (despite the shifting of the burden of proof under the risk-utility test) and lulls an unwary plaintiff into a false sense of virtually certain recovery.[66]

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63. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr at 237-38.

64. *Becker*, 38 Cal. 3d at 470, 698 P.2d at 132, 213 Cal. Rptr. at 229 (Bird, C. J., concurring).

65. Use of the "hypothetical reasonable consumer" appears to be required by Campbell v. General Motors Corp., 32 Cal. 3d 112, 126 n.6, 649 P.2d 224, 233 n.6, 184 Cal. Rptr. 891, 900 n.6 (1982) (en banc).

66. Wildman & Farrell, *Strict Products Liability in California: An Ideological Overview*, 19 U.S.F. L. REV. 153 (1985).

If, on the other hand, the plaintiff need only make out the same case against the landlord as he would against the manufacturer, policy questions, in addition to those raised by the dissent[67] will undoubtedly arise. For example, will a defendant landlord, faced with an unavailable manufacturer—a situation which the majority concludes is a proper reason for extending liability[68]—be expected to defend the technical advantages of a product without access to information or experts describing the origin and formulation of a particular design? Must the landlord defend the product to defend himself? If not, how *does* he defend himself?[69]

Unlike a merchant whose volume of sales and resulting profit depends in a large part upon the goodwill generated by quality sales and service, a landlord has a limited number of units, usually offered at a fixed yearly rental rate. A landlord will not necessarily derive any greater profit by providing the safest available components for his dwelling, and his liability will ultimately depend upon the skill of the component's manufacturer, not the landlord's skill in choosing the best component. The landlord's profit depends on the supply and demand for the type of housing he offers, not on the availability of safer alternatives to a dwelling's component parts. The landlord is thus placed in the position of having to bear the burden of the manufacturer's risk, without expectation of receiving the attendant benefit.[70] These concerns illustrate the problem with adopting strict liability for landlords based on an analogy to a theory designed to justify products liability claims.

Professor Browder[71] predicted that such an analogy could merely divert attention from the main issue,[72] which he summarized thus: Does current public policy, *inhering in landlord tenant relations*, compel or justify holding landlords in all cases as insurers of the condition of leased premises?[73]

Browder suggests that such a policy would be most palatable in the limited circumstance where a tenant is injured by a defect in leased premises

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67. *See supra* notes 43-49 and accompanying text.

68. *See supra* note 29 and accompanying text.

69. Justice Lucas' dissent observes that the result of *Becker*'s holding "amounts, in effect, to insurance for tenants, because it does nothing to aid in the goals of deterrence or products safety." *Becker*, 38 Cal. 3d at 487, 698 P.2d at 139, 213 Cal. Rptr. at 236 (Lucas, J., dissenting) (footnote omitted); *see also infra* note 77.

70. Justice Lucas' dissent concludes:

> Even if landlords can sue participants in the original line of manufacturing and marketing, the litigation costs involved will likely also have an effect on the price of rental housing. Arguably, instead of risk distribution, the majority's conclusion will result in a general increased cost attributable to the risks involved without a concurrent benefit. Someone will have to pay for the additional litigation today's decision is likely to create.

Becker, 38 Cal. 3d at 487 n.6, 698 P.2d at 138 n.6, 213 Cal. Rptr. at 236 n.6.

71. Browder, *supra* note 60.

72. *Id.* at 136.

73. *Id.* (emphasis added).

which is unknown to him [the tenant] and to the landlord and which could not have been reasonably discovered by either.[74] In that case, the notice requirement serves no function,[75] except to insulate the landlord from liability,[76] and the question becomes: who must bear the loss? One common modern response to this question is that the loss can be spread either through a public entitlement program or private insurance plan purchased by the tenant or landlord.[77] Louisiana approaches the problem of loss spreading by holding the landlord strictly liable for all defects in the premises "provided they do not arise from the fault of the lessee."[78] Thus, the landlord's "strict" liability is tempered by defenses of voluntary assumption of the risk and contributory negligence.[79] Landlords typically insure themselves against liability for unanticipated injurious defects,[80] and presumably pass at least some of this cost to their tenants, although the effect on rental rates has been debated.[81]

Becker represents an ideological leap in the field of landlord liability—a leap over (or around) notice of a defect. Not only does the decision leave practicality concerns unanswered, the theory used by the court focuses unnecessarily on an analogy designed to equate compensation with protection. In doing so, the court blurs its justification of its stated goal: shifting tenants' unanticipated financial burdens by redistribution of costs. The court reduces its credibility by failing to confront the policy issue in the context of real property law, where both of the contractors—landlord and tenant—are consumers, and never answers the question implicit in extending liability: Why should the *landlord* subsidize the manufacturer's responsibility to pay for manufacturing mistakes?

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74. *Id.* at 137-38.

75. *Id.* at 138 ("The basic policy of forcing improvements in deteriorated or defective housing is not relevant if no one knows of the particular defect.").

76. *Id.*

77. *Id.* at 138-39. Browder notes, however, that "courts have traditionally avoided framing rules of tort law on the basis of the availability of insurance to one or both of the parties in a legal relationship."

78. LA. CIV. CODE ANN. art. 2695 (West 1973).

79. Frey v. Galle, 399 So. 2d 1300, 1301-02 (La. Ct. App. 1981).

80. *See, e.g.*, Andersen v. Sciambra, 310 So. 2d 128 (La. Ct. App.), *cert. denied*, 313 So. 2d 835 (1975).

81. *Compare* Love, *supra* note 57, at 135 n.662 *with* Browder, *supra* note 60 at 138-39 n.10.