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Products Liability - Real Property - Builder-Vendors

Stephen M. Sokol

Case Comment

PRODUCTS LIABILITY—REAL PROPERTY—BUILDER-VENDORS—The Court of Appeals of California has held that the doctrine of strict liability applies to home builders and that privity of contract is no longer required to maintain the action.

Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (1969).

This case of first impression arose upon injuries to the property of a homeowner when the radiant heating system of the home failed. The home had been constructed by the defendant, Eichler Homes, Inc. in 1951 and was then sold to the Kriegler's predecessors in title. The home was purchased in 1957 by the plaintiff Kriegler. Due to a shortage of copper tubing during the Korean War, Eichler's plumbing sub-contractor had installed steel tubing in the heating system. The system was installed according to ordinary procedures, and the installation was inspected and approved by the F.H.A. inspectors. In November, 1959 the system failed as a result of corrosion to the steel tubing and the entire system was replaced. The emergency repairs to the system required removal and storage of the furniture as well as temporary shelter for Kriegler and his family.

The trial court found that due to Eichler's negligence, Kriegler suffered damages amounting to over $5,000 and that regardless of negligence, Eichler was liable to Kriegler in the above amount on a theory of strict liability. At the trial and appellate stages, Eichler raised the defense that the common law has never applied the doctrine of strict liability to homes or builders. In this contention, Eichler raised a time-honored defense, but the California Court of Appeals chose to dispense with the ancient rule of law that owners and builders of real property could not be held strictly liable for injuries occurring on such property. The California Court recognized that the doctrine of strict liability had previously been applied only to manufacturers and retailers of personal property, however, it could find no meaningful distinction between the manufacturer of mass-produced chattels and the builder of mass-produced homes which would justify continued limitation of the doctrine.

History of the Doctrine

Prior to 1916, the general rule of law extended negligent liability of sellers of chattels only to the most immediate seller of that chattel. The law required privity of contract between the injured party and the negligent manufacturer or seller in order to recover. The rule requiring privity was changed in the decision of *MacPherson v. Buick Motor Co.*[1] In the same case, liability was extended to types of manufacturers formerly held immune. The suit arose after the defendant, Buick Motor Co., had sold one of its automobiles to the plaintiff, MacPherson. While driving the car, one of the wooden-spoked wheels suddenly collapsed and the plaintiff was injured. Although the wheel was produced by another reputable manufacturer, the Court of Appeals of New York, per Mr. Justice Cardozo, held defendant Buick responsible for the finished product. There was no claim in the case that the defendant knew of the defect and willingly concealed it. The court stated that a producer would be held for his negligence to subsequent purchasers of his product if the product is that type which is reasonably certain to place persons in peril when negligently made. The *MacPherson* decision, however, did more than extend liability to producers of inherently dangerous articles. The reasoning behind the decision was clearly a break with the older notion that a seller's liability to his purchaser was based upon contract. The manufacturer, by placing such articles on the general market, assumes the responsibility for any foreseeable harm to consumers. The action is clearly one in tort and not contract. Hence, privity of contract, that is, a contractual relationship between the manufacturer and the buyer, was no longer required in an action against the manufacturer. The result of this decision was to enable the ultimate purchaser in a chain of purchasers to sue the manufacturer and possibly recover.[2]

With this new rule which placed liability upon the negligent manufacturer of chattels, it was logical to further extend the principle of ordinary negligence of *MacPherson* to a principle of strict liability. This movement began to develop in 1905 in agitation over the marketing of defective foods.[3] The first decisions imposing strict liability without privity of contract were applied to cases in this area. In the 1950's and '60's, the application of the doctrine was extended beyond

1. 217 N.Y. 382, 111 N.E. 1050 (1916).
2. Restatement of Torts § 395 (1934).
3. W. Prosser, Torts § 97, at 673 (3d ed. 1964).

products inherently dangerous to bodily use. Courts began to hold manufacturers of such items as grinding-wheels, automobiles, tires, and chairs strictly liable, and without requiring privity.[4] The movement in this area is not yet complete but it can be generally said that the courts have dispensed with the requirement of privity and have been liberal in imposing strict liability upon manufacturers of chattels. Introduction of these concepts has been slow, however, in the law of real property.

The MacPherson Doctrine Excluded Real Property Transactions

It is important to note that the *MacPherson* decision dealt solely with chattels. Persons involved in the manufacture, sale or lease of real property, no matter how negligent, were generally excluded from any liability to remote vendees. Ordinarily, therefore, the vendor who becomes separated from title and possession is allowed to step out of the picture completely and shift all liability to the present owner or occupier of the property. Two exceptions have since been applied to this general rule: (1) where injuries result from a latent defect which the vendor knew (or, in some cases, should have known) to exist but which he failed to disclose to the vendee and (2) where injuries were sustained upon property which in itself presented an unreasonable risk of harm to those outside of the premises.[5]

In sales of real property, the courts have traditionally held that all preliminary negotiations must be merged into the deed if they are to be given any legal effect. The contract of sale controls only until the deed is given and any liability based upon the seller's promises during the period of negotiation leading to the contract of sale will be precluded unless the deed contains such promises. Section 352 of the Restatement (Second) of Torts states that a vendor of real estate is not subject to the liability for physical injuries of subsequent purchasers or to third persons by a dangerous condition, natural or artificial, except in such instances that the dangerous condition is undisclosed to the purchaser, yet known to the seller. In a note to section 352, the reporter states that the ancient doctrine of caveat emptor still retains much of its original force in the area of real

4. Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Circ 1959).

5. W. Prosser, Torts § 62, at 409 (3d ed. 1964).

property sales. While the truth of this statement cannot be doubted, the decided trend of today's decisions, as exemplified by the case under consideration, is to make a distinction when the vendor is *also* the builder of the home. In some of these decisions, as will be discussed in more detail, the deed has not been regarded with the customary deference. Whether so obliged by the terms of the deed or not, in more recent years, the builder-vendor has been held for his defective work after surrender of title and possession on one or more theories: (1) an ordinary negligence theory such as that stated in *MacPherson*; (2) implied warranty; or (3) strict liability. The following pages will discuss the historical evolution from an invariable rule of non-liability of vendors of real estate, to a modern trend which goes beyond imposing ordinary liability for negligence and imposes a standard of strict liability on the builder-vendor.

It is difficult to explain exactly why the policy considerations behind the notions of ordinary negligence, strict liability, and privity of contract pre-*MacPherson* have taken so long to die in the area of real property transactions. Indeed, it seems that only tenuous distinctions can be drawn between a manufacturer of chattels and a manufacturer of houses, especially if both produce prefabricated products for a mass market. Both seem to have similar attributes, in manner of manufacturing as well as of marketing. One, then, may validly question why the similarities have not been to compel identical standards of liability.

The question of duty has been crucial here, for although the courts recognized that the builder-vendor may have caused the injury, they rationalized the rule of non-liability by simply not recognizing a duty of the vendor to use reasonable care. As no such duty was attached, negligence could not be imputed to the vendor; the elements required by tort law to establish negligence were simply not present.

The MacPherson Doctrine Is Now Majority

As the period prior to the *MacPherson* decision witnessed an inevitable drift toward the eventual decision of Justice Cardozo, so, in the area of real property, the general rule that the vendor-builder of real estate was immune from liability began to totter with exceptions. In different words, the courts began to place a duty of reasonable care upon builder-vendors.[6]

6. Grodstein v. McGivern, 303 Pa. 555, 154 A. 794 (1931).

In the case of *Davey et al. v. Turner*,[7] a gas heater was not provided with an adequate ventilation system, which thereby constituted the nuisance *per se*. The court held that whereas normally an independent contractor is not liable for injuries occurring after the completing of the work, even if the injury occurred through a failure to properly carry out the contract, the independent contractor would nonetheless be liable if his defective work causes a condition constituting a nuisance *per se*.

One may ask whether the rationale for this decision should have been limited to simple negligence rather than made on the basis of negligence *per se*. But two reasons dictated against this. Firstly, this would have required an application of a *MacPherson* type of negligence rationale to sales of real property and, as mentioned, many courts were reluctant to move in this direction. Secondly, proof of negligence is not required if a nuisance *per se* exists since strict liability is imposed on one who creates a nuisance *per se*. Hence, if it can be established that the defendant is engaged in a highly dangerous activity, such as storing or transporting explosives, any resulting injuries may be said to be the effect of a nuisance *per se*. This court, moving conservatively, chose rather to expand the formerly limited area of businesses which engaged in *per se* negligent conduct rather than to extend the ordinary negligence of *MacPherson* to businesses involved in the sale of real property.

Various exceptions to a general rule have tended to survive because they have enabled the courts to hold the defendant liable without stating a new general rule. A point, however, may be reached where the numerous exceptions render the old rule no longer the general rule. At this point, the law in any particular area becomes inconsistent and erratic, often leading to inequitable results. Such a tendency denotes a field of law which is in a state of flux and in search of some stability. It is suggested that one answer to the problem is to develop a new general rule to cover the numerous exceptions which have been developing. A small number of cases thus began to apply the principles of the *MacPherson* decision to real property transactions.[8] It now appears that the ancient, pre-*MacPherson* approach so long in force in the area of real property transaction is in retreat, if

7. 55 Ga. App. 786, 191 S.E. 382 (1937).
8. *See* Grodstein v. McGivern, 303 Pa. 555, 154 A. 794 (1931), where a contractor was held liable for the negligent construction of the real property of plaintiff after plaintiff fell through the loosely attached railings on a porch.

not defeat. The principle of ordinary negligence established by the *MacPherson* decision is now the majority rule in cases involving the sale of real property.[9] It can be stated with some assurance that the builder-vendor of real property with a new dwelling thereon is liable for any injury resulting from a defect in which the builder-vendor had, or should have had, knowledge. That is, he is liable for his negligence, and has a duty to exercise reasonable care.

This rule is expressed in the 1949 Pennsylvania case of *Foley v. Pittsburgh-DesMoines Steel Co.*[10] This action arose out of a disaster in which leakages from a gas tank caused the tank to collapse, igniting free gas, thereby resulting in death to over one hundred persons. The action was instituted by a victim's widow under the Wrongful Death Statutes alleging negligence in design and construction by the manufacturer of the tank. The court concluded that one who erects a structure upon land is subject to the liability for personal injury and thus with respect to negligence the same rules which govern manufacturers of a chattel should apply to manufacturers of real property structures.

More recent cases have explicitly stated the analogy to *MacPherson.* In *Dow v. Holly Mfg. Co.*[11] the builder of a four-year-old home was held liable for carbon monoxide deaths of members of the second family to own the house caused by a defective gas heater. The court analogized the facts to *MacPherson* and could find no reasonable distinction for holding the manufacturer of non-real property for his negligence and allowing the manufacturer of real property to escape liability. To the argument that defendants did not have control of the heater, the court stated that the contractor is in full control and is in the best position to know exactly what is to go into the house. As the Buick Motor Co. in the *MacPherson* decision was held despite the fact that a reputable manufacturer had constructed the defective wooden wheel, the California court stated that the contractor, even though a subcontractor may negligently intervene to create the hazardous condition, is nonetheless liable since he is in full control.

One particular inconsistency which should be noted has arisen in those jurisdictions where the *MacPherson* rule has been extended to builder-vendors. The duty of care which is placed upon the owner of real property has been traditionally limited by elaborate and complex principles from the common law. The landowner has tradition-

9. W. PROSSER, TORTS § 99, at 695 (3d ed. 1964).
10. 363 Pa. 1, 68 A.2d 517 (1949).
11. 49 Cal. 2d 720, 321 P.2d 736 (1958).

ally owed no duty of care to a trespasser. The landlord is not responsible to his lessee to maintain safety in areas not within his control. There is generally no duty owed to a licensee to keep the premises safe. In fact, only to business invitees does a landowner owe any particular duty of care.[12] The builder-vendor in those jurisdictions which have applied the *MacPherson* doctrine is thus held under a duty of care as to the item of real property where the *owner* of the property has no corresponding duty. The courts have not yet faced this issue. Whether they will continue to ignore the problem or whether they will begin to reconcile the disparity by raising the ancient standard of care of the landowner will be interesting to watch.

The Doctrine of Caveat Emptor

The *MacPherson* decision has had a profound effect upon the liability of persons involved in the sale of real property, but it should be noted that certain jurisdictions have moved slowly, if at all, in extending the ordinary negligence theory of the *MacPherson* decision beyond personal property. These courts have generally found it difficult to analogize between a producer of a chattel such as an automobile, and a producer of realty such as a storage silo or a home. In bolstering their conservative stance, these courts have generally employed the common law arguments supplemented by some modern and valid policy considerations. Some of these policy considerations are expressed in the New Jersey case of *Levy v. C. Young Construction Co.*[13] Here, a purchaser brought an action to recover cost incurred in replacing a defective sewer line which connected the purchaser's dwelling with the main line. The defendant-builder was not held in tort since the purchaser failed to establish either an express or implied warranty in its construction of the connecting line. The court returned to the *caveat emptor* doctrine used so often in the frontier areas of products liability.[14] This common-law rule, simply stated, is

12. W. Prosser, Torts 61, at 402 (3d ed. 1964).
13. 26 N.J. Super. 293, 134 A.2d 717 (1951).
14. *See* Druid Homes, Inc. v. Cooper 272 Ala. 415, 131 So. 2d 884 (1961), where the court applied the rule of caveat emptor upon the policy consideration of the need for certainty in the area of real estate law and that express warranties can be easily stipulated if so desired by the purchaser. The court also cites 4 Williston, Contracts, § 296 (revised edition) as stating what the doctrine of caveat emptor is in full force in the area of real property sales. *But see* Humber v. Morton 426 S.W.2d 554 (1968), which questions whether the doctrine ever did apply to the sale of a house by a builder-vendor.

that a person who purchases a dwelling does so at his own risk. The courts rejected any contentions to the contrary, repeatedly stating that ample opportunity is afforded everyone to observe the dwelling before consummating the transaction.

Two reasons dictate against continuing the application of *caveat emptor* in the limited area of real property sales, and particularly in the sale of homes. Firstly, a home is simply too complex for the average buyer to detect and understand all of the possible defects. Many hours have been spent by architects, engineers and skilled workmen in constructing an average house. For such reasons the doctrine of *caveat emptor* has been long dispensed with in the purchase of non-real property of complex design and manufacture as the *MacPherson* decision will attest. Secondly, it seems harsh to apply so stringent a doctrine to an item which usually demands the greater part of the purchaser's savings. As stated in a recent decision, "Buyers of mass produced development homes are not on an equal footing with the builder-vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in a bill of sale."[15]

Due to the *MacPherson* decision and its progeny, the doctrine of *caveat emptor* has lost some of its force if the contractor has been negligent in constructing the dwelling. The doctrine is given continued force, however, when the argument of implied warranties is raised. To Williston,[16] cited in the *Levy* decision, the rule of *caveat emptor* is in full force as applied to real estate transactions. One who contracts to buy real estate generally must specify in the deed, through an express warranty, any condition he may wish the seller to ameliorate. If the purchaser fails to do this, he is afforded no remedy for breach by the vendor of any promise contained in the contract, though omitted in the deed.

The *Levy Case* stated other considerations militating against the new standard of strict liability. Were plaintiffs successful under the facts presented, the court argued, a chaotic situation would result and the element of uncertainty would pervade the entire field of real property transactions. The court also employed the argument that since control of the premises has passed entirely from the vendor to the vendee, any attempt to place liability upon the vendor, who may have

15. Schipper v. Levitt and Sons, 44 N.J. 70, 207 A.2d 314 (1965).
16. 7 WILLISTON, CONTRACTS § 926 (3d ed. 1963).

lost control some years prior to ultimate injury or defect, would be unjust. The court finally ended with the admonition that to extend strict liability to sellers of real property could lead to seemingly limitless liability of particular vendors. An added argument against implied warranties, not advanced in the *Levy* decision, is that real property admits of no clear standard of quality against which deviations from a norm may be accurately discerned and measured. In the case of most chattels, the article sold is of the ordinary kind of like articles.

Finally, the courts may not be able to justly designate who is and who is not a mass-producer upon whom liability attaches. The decisions to date have not been exactly clear as to whether a rule of liability will be extended to home builders who do not mass-produce. Nor do decisions give any numerical guidelines for determining which builder-vendors produce the requisite number of homes to be deemed mass-producers.

Kriegler: A Further Development

Application of principles of strict liability to sellers of personal property and the recent decisions dispensing with privity of contract have already been explained.[17] This note and the principal case under consideration also suggest a further and more radical trend by an extreme minority of courts toward applying either a rule of strict liability of implied warranty to vendors of defective real property. This runs counter to the established rule in nearly all jurisdictions that implied warranties are not permitted in the sale of real property. The policy considerations which have led the substantial majority of our courts to reject the newer rule of strict liability or implied warranty sound familiar. Many of these same reasons are still being applied by the minority of courts which are reluctant to extend the negligent liability principles of *MacPherson* to vendors of realty which have already been considered. Whether the doctrine of privity of contract, dispensed with in sales of personal property by the *MacPherson* decision, should now be added to the stringent doctrine of strict liability in the sale of real property is a perplexing question.

It will be recalled that in the case to which this note is devoted, the plaintiffs, were not the original purchasers from the defendant Eichler Homes, Inc. Another family had originally purchased the newly com-

17. *See* Henningsen v. Bloomfield Motors, Inc. 32 N.J. 358, 161 A.2d 69 (1960).

pleted dwelling and had resided in it for a period of over five years. The problems raised by this occurrence have understandably plagued the courts in the whole area of products liability since its inception, and have usually been presented in the context of the principle of privity of contract. The erosion of the principle of privity has been "vertical," that is, allowing the injured owner to go directly against the manufacturer and thus by-pass the intermediate wholesalers and retailers. The *MacPherson* decision dispensed with this "vertical" privity. Privity has also eroded "horizontally" thereby allowing members of the purchaser's family and other users of the commodity to maintain an action against the manufacturer. But the courts which have rejected this privity requirement have not stated how far the rejection will extend. The *Kriegler* decision makes no mention whatever of this matter. May a mailman, for example, directly sue the builder of a twenty-year-old home on strict liability for injuries he sustained due to manufacture below a given standard, though perhaps not low enough to constitute negligence? The question remains open after *Kriegler.*

Prior to the *MacPherson* decision, a manufacturer's negligence would not be recognized as the proximate cause of injury to any remote purchaser who was not in privity of contract with the manufacturer. *MacPherson* dealt only with the manufacturer who was negligent in his manufacture of the good; what rule applied to a manufacturer whose liability was predicated on the more stringent principle of strict liability? *MacPherson* had no application in this area and privity of contract was still required if one were suing on strict liability. In a 1960 article, Dean Prosser foresaw that actions in strict liability would no longer be inhibited by the requirement of privity of contract.[18] And later in that year a crushing blow was indeed applied to the "citadel of privity" in the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*[19] Here, the buyer of an automobile brought an action against the manufacturer and dealer to recover damages sustained by his wife while driving the allegedly defective automobile. The court held both the manufacturer and the dealer liable without a finding of negligence or a requirement of privity of contract. The opinion discarded the long-held policy considerations which exempted only food intended for human consumption

18. Prosser, *Assault Upon the Citadel,* 69 YALE L.J. 1090 (1950).
19. 32 N.J. 358, 161 A. 2d 69 (1960).

from the general requirement of privity, the court held that privity of contract is an antiquated doctrine as applied to the mass produced articles marketed through the high pressure advertising of the fifties and sixties. In such an environment, the court concluded that consumers should be afforded a degree of protection commensurate with the risk of physical injury which the industries have created.[20] But while privity is no longer the rule in cases of the manufacture of chattels, most courts have continued to apply the rule to sales of real property when the builder-vendor is being sought on a strict liability theory. As has been seen, whether the distinctions between automobiles and finished pre-fabricated homes are valid and adequate to justify the reluctance of the law to drop this requirement of privity is a debatable issue.

A More Adequate Standard for Applying Strict Liability

The *Kriegler* decision in California adopts the following rule. In the future, the builder-vendor of a mass produced home may be found strictly liable to subsequent purchasers. However, we have seen that this rather broad holding leaves many questions unanswered. Other jurisdictions, such as Pennsylvania, may be more fortunate in that a standard may already exist to help to determine future cases with some degree of accuracy, thereby obviating uncertainty in builders and buyers of homes. The standard is Section 402A of the Restatement (Second) of Torts which was adopted in Pennsylvania in the 1967 case of *Webb v. Zern*.[21] It states:

> Special liability of seller of product for physical harm to user or consumer—
>
> (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

20. The assumption underlying this policy of placing the risk upon the manufacturer of the chattel is that he is particularly able in paying for the injury. He can do this, it is said, by simply raising the price of his commodity to cover the prospective injuries calculated to occur through the commodity's use. He is also the person most likely to have adequate liability insurance. The economics of this question are quite complex and much debate has centered upon whether the courts, which may not be suited for such complex decisions, should not leave the matter to the legislatures. At any rate, the courts have so held.

21. 422 Pa. 424, 220 A.2d 853 (1967).

(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
(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.

It will be noted that the Restatement specifically prescribes that the builder or other vendor be in the business of selling new dwellings. Privity of contract between the vendor and the aggrieved vendee is not required. But neither is liability open-ended since the dwelling must reach the vendor without "substantial change" in the condition in which it was sold.

Section 402A of the Restatement has rarely been used in cases where the product involved was real property. A recent Mississippi case is an exception. In *State Stove Manufacturing Co. et al. v. Hodges*,[22] after a heater exploded thereby substantially destroying their house and all personal property within, the home owners brought an action against the manufacturer of the heater and the contractors who constructed the home and installed the heater. Using section 402A, the court dismissed the action against the manufacturer of the heater since the heater reached the vendees in a "substantially changed" condition. The court found that the plumber who installed the heater was an agent of the contractor and not an independent contractor, and that he had failed to to follow the explicit directions of the manufacturer. Although the court refused to impose liability on the manufacturer of the heater for several other reasons, it specifically adopted § 402A of the Restatement as applicable to a manufacturer of a product as well as the contractor who builds and sells a dwelling. The court went on to support its strict liability argument with various policy considerations already outlined in this note. But conspicuously absent from the decision is any reconciliation with the common law's reluctance to impose any liability, whether based on ordinary negligence or strict liability, upon persons engaged in the selling of real property.

Precursors of Kriegler

While the Restatement may afford an adequate standard, most of the cases which have applied strict liability to real property sales have

22. 189 So. 2d 113.

done so without its support. In a leading case, *Schipper v. Levitt and Sons*,[23] the court found the builder-vendor liable on the theory of "warranty or strict liability." In this case, the developer of the home had installed a hot water heater which was capable of heating the water to a temperature of 210 degrees Fahrenheit. The plaintiff had leased the house from the original purchaser. The record indicates that the owner knew that the system lacked a heat regulator and that he had therefore recommended to the plaintiffs that they turn the cold water on first, slowly adjusting the hot water tap until a suitable temperature was reached. Expert testimony disclosed that this was quite an outdated and unsafe substitute for a heat control device. The plaintiff-lessee's son was severely scalded by the hot water and the action ensued to recover damages for the physical injury. The New Jersey Supreme Court reversed the trial court and held that the plaintiff in spite of lack of privity could proceed in his action upon a theory of negligence, as well as strict liability or implied warranty. The court could find no basis for distinguishing between mass-producers of homes and mass-producers of automobiles stating that the impelling policy considerations which led to the ordinary negligence adopted in *MacPherson* are equally applicable to strict liability.

The case, however, leaves many of the same questions unanswered. The court makes no attempt to reconcile the complex common-law which has traditionally placed an anomalously low standard of care upon the owner of real property, and the stringent principles of "strict liability or implied warranty" which are now to be applied to the mass-producer of homes. Also the court treats the tort concept of strict liability and the contract concept of implied warranty as nearly synonymous. In the *Schipper* decision, the builder-vendor is to be held where he has not been negligent, but his attorney can only guess whether tort law is holding his client strictly liable, or whether contract law is holding his client on an implied warranty. The result may be the same but it seems that the uncertainty of the courts can only lead to uncertainty in the defense attorney's briefs, and this uncertainty may be crucial to the outcome of his case.

Some courts have corrected this problem by applying a *specific theory* of liability. In the 1967 decision of *Waggoner v. Midwestern Development, Inc.*,[24] an action by purchasers of a new residence was

23. 44 N.J. 70, 207 A.2d 314 (1965).
24. Waggoner v. Midwestern Dev., Inc., 154 N.W. 2d 803.

commenced against the builder-vendor for damages resulting from water seepage into the basement. While no problem of privity of contract was involved, the court held that where the vendor of a house is also the builder, there is an implied warranty of reasonable workmanship surviving the delivery of the deed. It is recalled that the *Kriegler* case also adopted a specific theory of liability—strict liability in tort.

The court in the *Schipper* case does, however, adequately explain a policy consideration which is principal in this area; that is the ability to suffer the loss. Applied in various other terms such as the "deep pocket" theory and spreading the risk, the court stated, "The public interest dictates that if such injury does result from the defective construction, its costs should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss . . ." This principle has been increasingly applied in this century with the advent of the industrial society and particularly in the fields of tort and agency law. It is because of this theory that the court places great emphasis on the fact that Levitt and Sons is a "mass-producer" of homes for he, more than smaller builder-vendors, can bear the cost of creating the danger. But again, while the court found Levitt to be a mass producer of homes, no adequate standard was presented to determine if other lesser firms could also be so defined. So to date, virtually all home builders whose volume of business is moderately heavy must remain uncertain as to how the courts will so define them, and upon this unclear definition lie many millions of dollars.

Conclusion

The *Kriegler* decision has thoroughly rejected the pre-*MacPherson* principles of negligence and privity of contract. The California court exhibits a method of dispensing with privity of contract by raising the remedy in tort through the principle of strict liability. The imposition of negligence principles on builder-vendors is predicated upon sound policy considerations, some of which were stated by the court. By placing liability on the party causing the negligence, this area of the law is finally in tune with the general law of products liability. The change will hopefully encourage builder-vendors to use due care in the construction of homes. And this point is particularly

germane in the America of the 1970's with the accelerated growth in the population and the corresponding rise in pre-fabricated homes to house this population. Builders should be encouraged through a reliable and authoritative system of laws to maintain care in construction.

To move one step beyond ordinary negligence, and to apply principles of strict liability or implied warranty to builder-vendors of "mass-produced" homes, however, presents problems not evinced by the ordinary negligence principles. In ordinary negligence any builder, whether he produces on a large scale or small scale, is held accountable for his negligence. But the California court has limited strict liability to the "mass-producer" of pre-fabricated homes. The contours of this class of builders are vague indeed. Moreover, even if the court had attempted to establish a standard which builders could follow with certainty, it is doubtful whether the court could have gathered the complex economic information and then to have mastered it in order to make a comprehensive and knowledgeable determination of the classification. In such areas, the legislatures have the resources to make such determinations. The legislatures should also make these resolutions where the policy considerations are particularly controversial, and the law is without case precedent.

STEPHEN M. SOKOL