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The Landlord's Tort Liability For Injuries Caused By Defects Upon The Demised Premises

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I. Introduction

For some period of time prior to September 27, 1972, Roger Green decided that he was tired of living in a pigsty. Inasmuch as Mr. Green's landlord by his inaction indicated an unwillingness to transform the living quarters back into the residential dwelling unit it had been represented to be, Mr. Green indicated his dissatisfaction with the premises by refusing to pay rent.

On September 27, 1972, the landlord commenced an unlawful detainer action against the tenant for possession of the premises and for back rent. Mr. Green defended on the grounds that the landlord had failed to maintain the leased premises in a habitable condition. The defense was rejected, and Green appealed to the San Francisco Superior Court where a trial *de novo* was held. In this trial, Green introduced evidence that the building in which he lived suffered from some eighty housing code violations and that a condemnation hearing had been scheduled. He also introduced evidence that his apartment had a collapsed bathroom ceiling, was infested with vermin, lacked heat, had blocked plumbing, had exposed and faulty wiring, and had an illegally installed and dangerous stove. The Superior Court was not impressed, holding that the repair and deduct provisions of Civil Code Section 1941, *et. seq.*[1] were his only remedies. Judgment was entered for the landlord.

The California Supreme Court, however, was impressed with Roger Green's defense, and reversed the lower Court's ruling in *Green v. Superior Court of the City and County of San Francisco.*[2] While the primary issue in this case involved the question as to whether the uninhabitable condition of a premises could be raised as a defense in an unlawful detainer action, the Court's discussion included extensive reference to modern products liability law. The significance of the language is that it indicates that the Court at this time may be willing to completely overhaul the traditional

1. Cal. Civ. Code §§ 1941, *et seq.* (West 1954).
2. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

common law which to a great extent still governs landlord and tenant relations, especially with respect to a landlord's liability for injuries caused by defects on the demised premises.

The purpose of this comment is to examine the liability of the landlord for injuries sustained as a result of a dangerous defective condition on the demised premises, the emphasis being on California law. Initially, the focus will be on the general rule regarding such liability and its exceptions. The focus will then turn to recent developments regarding the interpretation of residential lease agreements by the courts and the relation of this interpretation to the rules which govern consumer law. The comment will conclude with what the writer considers to be a more viable alternative with respect to the liability for injuries in the landlord and tenant relationship.

II. THE COMMON LAW

A. *History And The Traditional View*

"At common law, the real estate lease developed in the field of real property law. Under property law concepts, a lease was considered a conveyance or sale of the premises for a term of years, subject to the ancient doctrine of *caveat emptor*."[3] These precepts arose during the agrarianism of the early middle ages,[4] and in the agrarian society, the tenant was primarily interested in the land for farming.[5] ". . . [W]hatever simple living structures may have been included in the leasehold were of secondary importance and were readily repairable by the typical 'jack-of-all-trades' lessee farmer."[6] In fact, since the land was more important, the tenant was still required to pay rent even if any building on the land was destroyed.[7]

Caveat emptor created a presumption that the tenant had conducted a reasonable inspection of the premises before taking

3. *Id.* at 622, 517 P.2d at 1171, 111 Cal. Rptr. at 707.
4. *Id.* at 622, 517 P.2d at 1172, 111 Cal. Rptr. at 708.
5. Comment: *Landlord & Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAWYER 298, 299 (1971).
6. Green v. Superior Court, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974).
7. Javins v. First National Realty Corp., 428 F.2d 1071, 1077-78 (D.C. Cir. 1970).

possession, and the tenant was required to return the property to the landlord in substantially the same condition as he had leased it.[8] Indeed, the tenant for years was required to keep the property in repair. While it was not well settled, there was authority stating that tenants for years were liable for permissive waste.[9]

Because the land was more important than any structures included in the leasehold, and because the tenant was capable of making needed repairs, the common law rule absolved the landlord of all obligation to repair.[10] As a general proposition, the rule also incidentially absolved the landlord of any liability for injuries caused by defects upon the demised premises:

> When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the land for the term of the lease. The lessee acquires an estate in the land, and becomes for the time being the owner and occupier, subject to all the liabilities of one in possession, both to those who enter the land and to those outside of it. Therefore, as in the case of the vendor [of land] . . . , it is the general rule that the lessor is not liable to the lessee, or to others on the land, for injuries occuring after the lessee has taken possession, even though such injuries result from a dangerous condition existing at the time of the transfer.[11]

As it stands today, the general rule is that absent a covenant in the lease, concealment, fraud, or misrepresentation, a lessor is not liable to a tenant, or to the tenant's invitees or employees, for injuries caused by a defective condition or a faulty construction of the premises existing at the time of the letting or arising thereafter.[12] The landlord's liability to the tenant's invitees, including the tenant's family, is no greater than to the tenant himself.[13]

Conveyances of interests in land to the individual remain one of the only areas of the law today where the consumer pretty much takes at his own risk. The rules which apply to one who leases real property are basically the same as the rules which until fairly recently governed vendors and vendees in the sale of land with respect to liability for injuries caused by a defective condition. Some of the rules governing the vendor-vendee relationship have undergone some change in the past few years, and this will be discussed *infra.*

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8. Comment: *Landlord & Tenant: Repairing the Duty to Repair,* 11 SANTA CLARA LAWYER 298, 298-99 (1971).

9. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW at 122-23 (1923).

10. Javins v. First National Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir. 1970).

11. RESTATEMENT (SECOND) OF TORTS § 356, comment *a* (1965).

12. Hogan v. Miller, 153 Cal. App. 2d 107, 114, 314 P.2d 230, 235 (1957); 30 CAL. JUR. 2d, *Landlord & Tenant,* § 146 (1956).

13. Hanson v. Luft, 58 Cal. 2d 443, 445, 374 P.2d 641, 642, 24 Cal. Rptr. 681, 682 (1962).

The general rule was that a vendor of real estate is generally not liable to the vendee or others for personal injuries suffered as a result of a defective condition of the land at the time of transfer.[14] This was perhaps due to the importance of the deed of conveyance, which was taken to represent the full agreement of the parties, and to exclude all other terms and conditions.[15] As the doctrine of *caveat emptor* applied to the sale of land,[16] so it also applied to the conveyance of a leasehold.[17]

There are a few limited exceptions to the landlord's non-liability for injuries caused by defects on the premises. It would be appropriate to discuss them at this point.

B. Latent Defects

The landlord is liable to the tenant and his invitees for injuries caused by hidden defects existing at the time of the making of the lease, if the defects were not apparent to the tenant, and if the landlord had actual knowledge of the defects, or the defects had existed for such an unreasonable length of time that the landlord can be charged with constructive knowledge of their existence.[18] Further, if the landlord creates a condition on the premises which is less safe than before and where the hazards are not open and obvious in all particulars, a duty is owed to the tenants or invitees who were familiar with the former condition to apprise them of the increased risk.[19]

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14. Annot., 48 A.L.R.3d 1027, 1031 (1973).

15. *Id.*; *See also* RESTATEMENT (SECOND) OF TORTS § 352, comment *a* (1965).

16. *Supra* note 14.

17. Daulton v. Williams, 81 Cal. App. 2d 70, 75, 183 P.2d 325, 328 (1947); *see generally* 30 CAL. JUR. 2d, *Landlord & Tenant* § 150 (1956).

18. Hanson v. Luft, 58 Cal. 2d 443, 445, 374 P.2d 641, 642, 24 Cal. Rptr. 681, 682 (1962); Powell v. Stivers, 108 Cal. App. 2d 72, 73, 238 P.2d 34, 35 (1951); Daulton v. Williams, 81 Cal. App. 2d 70, 75, 183 P.2d 325, 328 (1947); *see generally* 30 CAL. JUR. 2d, *Landlord & Tenant* § 147 (1956). The *Restatement* view is that the lessor is liable for concealment or non-disclosure of a dangerous condition if the lessee does not know or have reason to know of the condition, if the lessor knows or should know and realizes or should realize the risk involved, and if the lessor has reason to expect that the lessee will not discover the condition or realize the risk. RESTATEMENT (SECOND) OF TORTS § 358 (1965).

19. Foster v. A.P. Jacobs & Associates, 85 Cal. App. 2d 746, 750, 193 P.2d 971, 974 (1948).

With regard to the sale of land, the rule is similar:

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
>
> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
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> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.[20]

The application of these rules to the landlord and tenant relationship would almost seem to imply that a leasehold carries with it an implied warranty of fitness for its intended purpose. While this may be true to a certain extent (as indicated by the warranty of habitability, discussed *infra*, or where the parties contemplate that premises which are not yet in existence will be put to a certain use[21]), the landlord's duties in this respect are quite limited. For instance, the landlord is responsible for injuries caused by a concealed condition only if the dangerous condition would not be discoverable by a reasonable inspection by the tenant. If the defect or danger would be apparent to the tenant on a reasonably careful inspection, there is no duty upon the landlord to notify the tenant of the condition.[22] The tenant must himself use reasonable care and diligence to inspect the premises in which he is to reside.[23]

The landlord under these rules can safely take the attitude that if the defect can be discovered on reasonable inspection, he need

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20. RESTATEMENT (SECOND) OF TORTS § 353 (1965); Annot., 48 A.L.R.3d 1027, 1036, n. 10 (1973).

21. *See* Woolford v. Electric Appliance, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938).

22. Powell v. Stivers, 108 Cal. App. 2d 72, 73-74, 238 P.2d 34, 35 (1951). The Court goes on to say that the tenant assumes the risk of all defects obvious to ordinary observation. *Id.* at 74, 238 P.2d at 35. There is an implication here that the Court might be willing to equate that which may become apparent on reasonable inspection to that which is obvious to ordinary observation. The Court fails to consider that possibly the landlord has no busines leasing an apartment in the first place if it contains an obvious dangerous defect.

Further, the landlord's attitude under this interpretation may well be that he will not disclose a defect which could be uncovered on reasonable inspection, because disclosure would significantly diminish the possibility of a lease agreement with the prospective tenant.

See also 30 CAL. JUR. 2d, *Landlord & Tenant* § 150 (1956).

23. Daulton v. Williams, 81 Cal. App. 2d 70, 75, 183 P.2d 325, 328 (1947).

not mention it, much less do anything about it. So when a five year old child's pajamas caught fire when he came too close to a gas heater which had no cover, the Court stated,

> . . . [W]hile the landlord is under a duty to warn the tenant of any hidden danger or defect in the leased premises of which he has knowledge [citations omitted] there is no duty to warn the tenant of obvious and patent defects and dangers [citations omitted].[24]

If the defect is known to the tenant and the tenant fails to protect his invitee, the tenant may be liable, but the landlord is not, for if the landlord was required to warn everyone the tenant allowed on the premises of a dangerous condition, the landlord would have the duties of an occupant while divested of the benefits.[25]

Of course, in this case it is conceivable that a warning to be wary of a dangerous defective condition might have been lost on the five year old child. While it is possible to impute knowledge of the defect to the parents, why further impute this knowledge to an innocent child as a basis for denying recovery, when it would have been a simple matter for the landlord to remedy the defect before the tenancy began?

However, as the Court notes, the landlord cannot be overly burdened. After all, he receives none of the benefits of the occupant—he only collects the rent.

The idea that the landlord is responsible for injuries caused by hidden defects of which he has knowledge evaporates further when it is realized that the landlord has no duty to inspect his tenement with the object of locating latent defects or of repairing them, for the doctrine of *caveat emptor* applies.[26] In applying the two rules, that the landlord has no duty to warn his tenant of defects which could be discovered by the tenant on a reasonably careful inspection, and that the landlord has no duty to inspect for latent defects, it can readily be seen that the concealment exception to the general rule of the landlord's non-liability is largely fictional. It would only seem to apply in a case where the landlord gained knowledge

24. Hanson v. Luft, 58 Cal. 2d 443, 445, 375 P.2d 641, 642, 24 Cal. Rptr. 681, 682 (1962).

25. *Id.* The Court affirmed a judgment for the defendant landlord.

26. Daulton v. Williams, 81 Cal. App. 2d 70, 75, 183 P.2d 325, 328 (1947); *see generally* 30 CAL. JUR. 2d, *Landlord & Tenant* § 148 (1956).

of a hidden defect because of a prior tenant, who may have been unfortunate enough to discover a defect such as an unsupported floor by falling through it.

Further, the extent of the landlord's duty, when it does exist, is to warn; he is under no obligation to remedy the defect. The landlord discharges his full liability regarding hidden defects known to him if he informs the tenant of those defects. The duty to warn others in turn falls upon the tenant.[27]

In reality, for the most part the tenant assumes all the risks of injury arising from a defective condition in the premises. As will be pointed out *infra*, this result is not only unfair but is now also unrealistic.

C. Covenant To Repair

"At common law, there was no duty resting upon the lessor of real property . . . to put or keep the property in any particular condition or fit for any particular purpose."[28] Further, ". . . it [was] not in the power of a tenant to make repairs at the expense of the landlord, unless there is a special agreement between them authorizing him to do this. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent."[29]

One type of agreement addressing itself to the problem of who will pay for and make repairs to the leased premises is the landlord's covenant to repair, wherein the landlord agrees to repair delapidations occurring on the premises. Under some circumstances, such a covenant effectively fixes responsibility for injuries caused by a defective condition of the premises on the landlord. Where such a covenant is in effect, the covenant is construed to mean that repairs will be made within a reasonable time after notice from the tenant.[30] Keeping this in mind, the rule is that the landlord is subject to liability for harm caused to the tenant by a condition of disrepair existing before or arising after the tenant has taken possession if the landlord has agreed to keep the land in repair, and the disrepair creates an unreasonable risk of harm to persons on the land which the performance of the landlord's agreement would have prevented.[31] The fact that the tenant has

27. Shotwell v. Bloom, 60 Cal. App. 2d 303, 311, 140 P.2d 728, 733 (1943).
28. Sieber v. Blanc, 76 Cal. 173, 174, 18 P. 260, 261 (1881).
29. Van Everly v. Ogg, 59 Cal. 563, 565 (1881).
30. Sieber v. Blanc, 76 Cal. 173, 174, 18 P. 260, 261.
31. Singer v. Eastern Columbia, Inc., 72 Cal. App. 2d 402, 411, 164 P.2d 531, 535 (1945). The Court adopts this passage from RESTATEMENT OF

knowledge of a dangerous condition does not relieve the landlord of liability where the landlord has agreed to repair, for when the duty rests on the landlord ". . . the tenant will naturally depend upon him to make the repairs and allow conditions to exist which he would otherwise cause to be corrected."[32]

The landlord's duty in this respect is not contractual, but rather is a tort duty based upon the fact that the contract gives the landlord the ability to make the repairs, and it gives him control over them.[33] The warranty of fitness which proved to be illusory in the concealment exception is present here, and the landlord is required to compensate those injuries resulting from unfitness of the premises.

A distinction should be made between a covenant to repair in the lease and a promise to repair by the landlord after being notified of a state of disrepair absent a covenant to repair on his part in the lease. In the latter situation, mere failure to make repairs after notice or a promise to do so imposes no tort liability on the landlord.[34]

In the absence of a covenant to repair, the landlord's failure to make promised repairs is nonfeasance, and does not give rise to a right of action for damage caused by a state of disrepair. However, even absent such a covenant to repair, where the landlord undertakes to make repairs on the demised premises, he is liable for injuries caused by the negligence of himself or his servants in making such repairs, the liability extending to all persons who, within the contemplation of the parties, were to use the premises under the

TORTS § 357 (1939). *See also* 30 CAL. JUR. 2d, *Landlord & Tenant* § 151 (1956).

32. Singer v. Eastern Columbia, Inc., 72 Cal. Ap. 2d 402, 411, 164 P.2d 531, 536 (1945); Mariotti v. Berns, 114 Cal. App. 2d 666, 670, 251 P.2d 72, 74 (1952).

33. Singer v. Eastern Columbia, Inc., 72 Cal. App. 2d 402, 411, 164 P.2d 531, 535-36 (1945). At least until recently, the landlord's breach of his covenant still did not justify the tenant's refusal to pay rent. "A covenant to repair on the part of the lessor and a covenant to pay rent on the part of the lessee are usually considered as independent covenants, and unless the covenant to repair is expressly or impliedly made a condition precedent to the covenent to pay rent, the breach of the former does not justify the refusal on the part of the lessee to perform the latter." Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424 (1915).

34. Dorswitt v. Wilson, 51 Cal. App. 2d 623, 625, 125 P.2d 626, 627 (1942).

hiring.[35] The landlord is duty bound to use ordinary care when he undertakes to make repairs to the demised premises, and his failure to use such care is misfeasance which renders him legally liable for injuries caused thereby.[36]

The distinction made between nonfeasance and misfeasance in this regard is unfortunate. While it is true that the tenant is lured into a sense of security because of his feeling that a defect has been repaired when the landlord has undertaken to make such a repair, the rule seems unnecessarily harsh on those landlords who, because of humanitarian motives or simple generosity, undertake to make their tenant's living quarters slightly more livable. It is not suggested that these landlords should be immunized from liability for negligence in making repairs, but rather that those landlords who do nothing at all (or worse, promise to undertake a repair, and yet do nothing) should be subject to the same liability. Surely in the latter instances the tenant is lulled into a false sense of security, but the landlord is not liable if the tenant should find out, by way of an unfortunate accident, that the promised repair has not been made.

The rule as it presently exists would tend to discourage a landlord from making repairs when he was not obligated by law or agreement to do so. This is unfair, not only to the landlord who would ordinarily undertake to make repairs, but also to the tenant, who in the great majority of cases would benefit from the undertaking.

D. Common Areas

Another exception to the general rule of non-liability of the landlord relates to "common areas":

> One who leases a part of the premises, retaining control of other portions such as common walks and passages which the tenant is entitled to use, is subject to liability to persons lawfully on the land with the consent of the tenant for damages caused by a dangerous condition existing on the part under the owner's control, if by reasonable care he could have discovered this condition and made it safe.[37]

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35. Donahoo v. Kress House Moving Corp., 25 Cal. 2d 237, 242, 153 P.2d 349, 352 (1945); *see also* 30 CAL. JUR. 2d, *Landlord & Tenant* § 154 (1956).

36. *See* Minoletti v. Sabini, 27 Cal. App. 3d 321, 324, 103 Cal. Rptr. 528, 529 (1972); cite omitted, Black v. Partridge, 115 Cal. App. 2d 639, 645, 252 P.2d 760, 763 (1953); CAL. CIV. CODE § 1714 (West 1973).

37. Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 399, 170 P.2d 5, 7-8 (1946); Mariotti v. Berns, 114 Cal. App. 2d 666, 672, 251 P.2d 72, 75-76 (1952). The rule applies to a portion of the premises reserved by the landlord for use in common by himself and his tenants, or by different tenants. Harris v. Joffe, 28 Cal. 2d 418, 423, 170 P.2d 454, 458 (1946); *accord* Mariotti v. Berns, *supra* at 673, 251 P.2d at 76. 30 CAL. JUR. 2d, *Landlord &*

The care required of the landlord in this regard is that he make reasonably careful inspections of such areas at reasonable intervals to learn of dangers not apparent to the eye.[38] The landlord is not liable unless he had actual knowledge of a condition, or it has existed for such a period of time to justify the conclusion that in the exercise of ordinary care he should have known of its existence within such time as would have given him a reasonable opportunity to make repairs.[39]

Aside from the actual or constructive knowledge prerequisite for liability, there appears to be a further limitation. In *Watwood v. Fosdick*,[40] the plaintiff fell down a flight of stairs within a tenement primarily because there were no handrails on which she could retain her balance. After this tenement had been built, an ordinance was enacted which required handrails on such stairways. Although alterations had been made to the apartment house after the enactment of the ordinance, handrails were still not provided.

The California Supreme Court held that the ordinance applied only to tenements constructed after its enactment, and that the alterations were not sufficient to bring this tenement within the terms of the statute. It was further held that while the landlord has a duty to keep parts of the building used in common by the tenants in repair, he is under no duty to remove structural defects which are visible and known to the tenants, as the tenants take the premises as they are at the commencement of the tenancy.[41]

It is difficult to understand the rationale behind this decision, especially in light of the fact that the ordinance should have been sufficient to give the landlord constructive notice of a defect on

Tenant, § 152 (1956) states that the rule applies to areas which the tenant has the privilege of using, or areas which are to be used in common and are necessary to the safe use of the part leased. *See also* Donahoo v. Kress House Moving Corp., 25 Cal. 2d 237, 244, 153 P.2d 349, 353 (1945); Freeman v. Mozzera, 150 Cal. App. 2d 61, 63, 309 P.2d 510, 511 (1957); RESTATEMENT (SECOND) OF TORTS §§ 360 and 361, (1965).

38. Di Mare v. Cresci, 58 Cal. 2d 292, 298, 373 P.2d 860, 863, 23 Cal. Rptr. 772, 775 (1962); *see* CAL. CIV. CODE § 1714 (West 1973).

39. Busby v. Silverman, 82 Cal. App. 2d 393, 396, 186 P.2d 442, 445 (1947).

40. 212 Cal. 84, 297 P. 881 (1931).

41. *Id.* at 85, 297 P. at 881. A judgment for the Plaintiff was reserved. For further cases exempting the landlord from liability for dangerous conditions in common areas *see* Annot., 49 A.L.R.3d 387, 397-400 (1973).

his premises. While it is one thing to say that a tenant assumes a risk of harm when he encounters an avoidable defect (such as where a tenant attempts to jump over an excavation instead of passing around it), it is quite another to say that the tenant voluntarily assumes the risk of encountering an unavoidable defect (such as here, where the stairway is the tenant's only means of access to her apartment); this is especially true when the landlord had at least constructive notice that an ordinance set a standard of safety for stairways (they must have handrails), and especially when the landlord, with such knowledge that a dangerous defective condition existed within his tenement, made alterations to his tenement, yet made not the slightest attemp to remedy the defect.

In passing, it might be noted that there is an exception to the landlord's non-liability which is related to the common areas exception. The lessor is liable for injuries resulting from a dangerous condition on land leased for a purpose involving public admission if the lessor

> (a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and
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> (b) has reason to expect that the lessee will admit them before the land is put in safe condition for their reception, and
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> (c) fails to exercise reasonable care to discover or remedy the condition, or otherwise to protect such persons against it.[42]

E. Nuisance

A further exception to the general rule of the landlord's non-liability relates to injuries to third parties resulting from activities upon the premises which constitute a nuisance. The rule is that while ordinarily a landlord is not liable for injuries to others arising from a tenant's activities, there is an exception in the case of conditions upon the property which constitute a nuisance, which conditions, although not originally created by the owner, existed at the time the premises were demised.[43]

This rule will generally apply where the tenant has created a nuisance during the duration of a first tenancy, and the landlord re-leases the premises to the tenant or to another with the condi-

42. RESTATEMENT (SECOND) OF TORTS § 359 (1965).

43. Dennis v. City of Orange, 110 Cal. App. 16, 22, 293 P. 865, 867 (1930). With regard to the sale of land, some cases have held the vendor liable where the vendee knew of a condition existing at the time of the conveyance but had insufficient time to remedy it, and where the defect caused an unreasonable risk of harm to outsiders. *See* Annot., 48 A.L.R.3d 1027, 1038-40 (1973). This rationale is probably equally applicable to landlords.

tion unremedied and existing as created during the first tenancy. Conceivably, the rule would also apply where the landlord has some degree of control over his tenants' conduct on the leased premises, yet fails to take action when the tenant creates a condition which constitutes a nuisance.

III. CONSUMER LAW

Modern consumer law relating to liability for injuries caused by defective products might well be said to have its origin in *MacPherson v. Buick*,[44] a New York case in which the plaintiff was injured as a result of the collapsing of a defective wheel on his automobile. The defect could have been discovered on reasonable inspection. The Court, in affirming a judgment for the plaintiff, administered a beating to the doctrine of *caveat emptor*, and stated that "[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[45] *MacPherson* thus established a duty of care on the part of the manufacturer of any potentially dangerous product to any person who might foreseeably be expected to be injured by it.[46]

However, even this interpretation of the law proved to present grave difficulties to the plaintiff who was attempting to prove his case. Negligence was very difficult to prove, and even if the plaintiff overcame this obstacle, there was still the ever-present danger that he would be found contributorily negligent.[47]

Fairly recently, however, the area of consumer law underwent vast changes with regard to liability for injuries caused by a dangerous defective condition of a product placed on the market. Those who place goods on the market are now strictly liable in tort for injuries caused by a dangerous defective condition of those goods.

> (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

44. 217 N.Y. 382, 111 N.E. 1050 (1916).
45. *Id.* at 389, 111 N.E. at 1053.
46. 4 B. WITKEN, SUMMARY OF CALIFORNIA LAW 3105 (8th ed. 1974).
47. *Id.*

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the 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 or entered into any contractual relation with the seller.[48]

In California, at least, the foregoing rule has been further relaxed in that the plaintiff need now show that the product was unreasonably dangerous, but only that it was defective,[49] the prevailing interpretation of defective being ". . . that the product does not meet the reasonable expectations of the ordinary consumer as to its safety. It has been said that this amounts to saying that if the seller knew of the condition, he would be negligent in marketing the product."[50]

Strict liability for defective products applies to the design as well as the manufacture of a product.

> . . . [T]here is no rational distinction between design and manufacture [in the application of strict liability for products containing defects] since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risk as if its manufacture does so.[51]

In order for the doctrine of strict liability to come into play, the defective product must have been placed in the stream of commerce, that is, the transfer to the consumer must not have been a casual or isolated transaction.[52] However, once the doctrine comes into play, at least in California, its protection extends to any person who might foreseeably be injured by the defect, and thus it may not be restricted on a theory of privity of contract:

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48. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

49. 4 B. WITKIN, *supra* note 46 at 3110. The limitation that a defect must be unreasonably dangerous burdens the injured plaintiff with proof of an element which rings of negligence. Cronin v. J.B.E. Olson Corporation, 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972).

50. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 659-60 (4th ed. 1971). "Unreasonably dangerous" has been interpreted as meaning that ". . . the article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer." 4 WITKIN, *supra* note 46 at 3112; RESTATEMENT (SECOND) OF TORT: § 402A, comment *i* at 352 (1965).

51. Pike v. Frank G. Hough Company, 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970). *See also* Cronin v. J.B.E. Olson Corporation, 8 Cal. 3d 121, 134, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972); 4 B. WITKIN, *supra* note 46 at 3111.

52. Fakhoury v. Magner, 25 Cal. App. 3d 58, 64, 101 Cal. Rptr. 473, 476 (1972).

> Since the doctrine applies even where the manufacturer has attempted to limit liability, [the applicable cases] further make it clear that the doctrine may not be limited on the theory that no representation of safety is made to the bystander . . . The liability has been based on the existence of a defective product which caused injury to a human being . . . [A]n injury to a bystander is often a perfectly forseeable risk of the maker's enterprise . . . If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made . . . to extend greater liability in favor of the bystanders.[53]

A. Liability For Defects In Personal Property

The doctrine of strict liability was initially applied to manufacturers.

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being. Since the liability is strict, it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another.[54]

It was then determined that strict liability should not be limited to the manufacturer, but should be extended to the retailer engaged in the business of distributing goods to the public as well:

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citation omitted]. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure

53. Elmore v. American Motors Corporation, 70 Cal. 2d 578, 586, 451 P.2d 84, 88-89, 75 Cal. Rptr. 652, 656-57 (1969). *Cf.* W. PROSSER, *supra* note 50 at 663.

54. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 260-61, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964). *See also* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 59, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 694, 700 (1963); *see generally* 35 CAL. JUR. 2d, *Negligence* § 85 (Supp. 1975).

> on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufactureer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.[55]

In 1969, the scope of the doctrine of strict liability was again expanded, and strict liability was imposed upon the lessor of a chattel for the same reasons it had been imposed on the retailer.[56] This result was approved by the Californis Supreme Court in *Price v. Shell Oil Company*[57] where the Court stated that there is

> . . . no substantial difference between sellers of personal property and non-sellers, such as bailors and lessors. In each instance, the seller or non-seller 'places an article on the market, knowing that it is to be used without inspection for defects' . . . Having in mind the market realities and the widespread use of the lease of personalty in today's business world, it makes good sense to impose on the lessor of chattels the same liability for physical harm which has been imposed on the manufacturers and retailers. The former like the latter are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an adjustment of the rental . . . In some cases the lessor may be the only member of that enterprise reasonably available to the injured plaintiff [citation], and the imposition of strict liability upon him serves, as in the case of the retailer, as an incentive to safety.[58]

B. Liability For Defects In Real Property

As mentioned *supra*, the rules governing the vendor-vendee relationship in the sale of realty have undergone some change in recent years. The veil of protection to realty transactions provided by the doctrine of *caveat emptor* began to erode as some courts began applying strict liability against the builder or other vendor of a new dwelling for defective construction causing injury or loss to the vendee or others where:

1. The builder or other vendor was in the business of selling new dwellings;

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55. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964). *See also* Read v. Safeway Stores, 264 Cal. App. 2d 404, 407-08, 70 Cal. Rptr. 454, 457 (1968).

56. McClaflin v. Bayshort Equipment Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969).

57. Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

58. *Id.* at 251-52, 466 P.2d at 726-27, 85 Cal. Rptr. at 182-83. The Court also stated that the lessor should be in the business of leasing rather than engaging in an isolated transaction. *Id.* at 254, 466 P.2d at 728, 85 Cal. Rptr. at 184.

2. The new dwelling was expected to and did reach the vendee or other user of the dwelling without substantial change in the condition in which it was sold;
3. Without regard to whether or not the builder or other vendor exercised due care or whether or not the injured person was in a contractual relationship with such builder or other seller.[59]

California initially rejected this approach, the rule being that a contractor's liability rests on proof of negligence because:

1. The contractor is seldom in a position to limit his liability by disclaimer;
2. It is considerably less difficult for the occupant of a building to trace the source of a defect to the builder;
3. The occupant of a building has a much greater opportunity to inspect a building before using it.[60]

The initial rejection was itself rejected several years later. The language used in the subsequent decisions also appeared to predict the demise of the traditional distinctions between real and personal property:

> . . . [T]he reasoning behind the doctrine [of strict liability] applies to any case of injury resulting from the risk creating conduct of a seller in any stage of the production and distribution of goods . . . [I]n terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and . . . the pertinent overriding policy considerations are the same. Law, as an instrument of justice, has an infinite capacity for growth to meet changing needs and mores. . . The law should be based on current concepts of what is right and just and the judiciary should be alert

59. *See* Annot., 25 A.L.R.3d 383, 407-09 (1969).

60. Conolley v. Bull, 258 Cal. App. 2d 183, 196, 65 Cal. Rptr. 689, 696 (1968); Halliday v. Green, 244 Cal. App. 2d 482, 486-87, 53 Cal. Rptr. 267, 271 (1966). "The laws governing sales of real property, like those of regulating landlord and tenant relationships, have developed along different lines from those laws governing sales of commercial goods. . . . The property cases which have developed the relevant governing principles for this area of the law state no doctrine of strict liability in tort for sales of defective real estate. In view of the fact that sales of real estate normally take considerable time to transact, thus affording prospective purchasers ample time to assure themselves of the condition of the property. . . we hold that the strict liability in tort doctrine of *Greenman* has no application in this case." Conolley v. Bull, *supra* at 196-97, 65 Cal. Rptr. at 696.

> to the never ending need for keeping legal principles abreast of the times. Ancient distinctions which make no sense in today's society and that tend to discredit the law should be readily rejected. . . When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in a reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional advisor of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.
>
> 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 the automobile purchasers in a position to protect themselves in the bill of sale.[61]

The result would have been startling enough if the courts had limited the imposition of strict liability merely to structures built upon the land. However, the imposition was not so limted, as it was held that when a developer manufactures a

> . . . lot by cutting, grading, filling and compacting for the purpose of sale to the public and the construction of a house thereon, knowing that if said work was defective, it would cause damage to any improvements thereon; . . . the manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the manufacturing process.[62]

Necessarily, if only for purposes of space, the foregoing discussion of modern products liability law has been brief. However, the essential point to be made is that these principles have not only been extended to govern commercial transfers of personalty, but also to the development and sale of the land itself. Yet, while these principles have been extended to leases of personalty, they have not been extended to leases of real property and, most notably, to leases involving the residential tenant, who, in reality, has far less control over his piece of "realty" than does the purchaser of

61. Avner v. Longridge Estates, 272 Cal. App. 2d 607, 610-11, 77 Cal. Rptr. 633, 636 (1969); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 244, 227-28, 74 Cal. Rptr. 749, 752-53 (1969). *See generally* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

62. Avner v. Longridge Estates, 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633, 639 (1969).

a home in a development tract. At this time, any distinctions between the seller and lessor of personalty, and the seller and lessor of commercial residential property are not convincing, and should be re-examined in the light of the trend of modern products liability law.

IV. Recent Trends in the Landlord-Tenant Relationship

The landlord-tenant relationship has been considerably changed by recent decisions involving the rights of tenants and the quality of their dwelling units. What should have been a significant holding with regard to the landlord's tort liability for defects upon the premises was the decision that a lease agreement contains an implied warranty of habitability,[63] that is, that a dwelling unit will meet certain standards which make it fit for occupancy by human beings:

> The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable . . .[64]

The cases which have dealt most effectively with this duty of the landlord have been cases generally involving eviction of the tenant for nonpayment of rent. However, with regard to the landlord's tort liability, it has long been held that the tenant's only remedies for a breach of the landlord's statutory obligation to put the premises in a condition fit for human occupancy (Civil Code Section 1941)[65] are to either expend one month's rent for repairs (Civil Code Section 1942)[66] or to vacate the premises.[67] The general rule that absent fraud, concealment, or covenant in the lease, the landlord is not liable to the tenant for injuries due to

63. Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 662 (1972). *See also* Javins v. First National Realty Corp., 428 F.2d 1071, 1072-73 (D.C. Cir. 1970).

64. Cal. Civ. Code § 1941 (West 1954).

65. *Id.*

66. Cal. Civ. Code § 1942 (West Supp. 1975).

67. Gately v. Campbell, 124 Cal. 520, 523, 57 P. 567, 568 (1899). Civil Code Section 1942 provides that if the landlord fails to repair a condition within a reasonable time after he has been given notice to repair, the tenant may repair the condition where the cost is not greater than one month's rent. The remedy is available once in a twelve month period. Cal. Civ. Code § 1942 (West Supp. 1975).

the defective condition or faulty construction of the demised premises is not changed by Civil Code Section 1941.[68]

This appears to be an unrealistic interpretation of Civil Code Section 1941, especially when considering other statutes, for a violation of which the landlord has been held liable in tort.

In *Ewing v. Balan*,[69] the tenant, injured by an exploding gas heater, sued the landlord for damages. The Court examined former Health and Safety Code Section 16905[70] (requiring gas appliances to be kept in good repair) and determined that the statute was designed to protect, among others, occupants of apartment houses.[71] The Court, in upholding the plaintiff's right of action, then held that where a penal statute establishes a standard of care, and a violation of the statute causes the kind of injury to a member of the protected class that the statute is designed to prevent, negligence is presumed.[72]

> . . . [W]here legislation prescribes a standard of conduct for purpose of protecting life, limb, or property from a certain type of risk, and harm to the interest sought to be protected comes about through breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities.
>
> A penal statute which is imposed for the protection of particular individuals establishes a duty of care based on contemporary community values and ethics. The law of torts can only be out of joint with community standards if it ignores the existence of such duties.[73]

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68. Singer v. Eastern Columbia, Inc., 72 Cal. App. 2d 402, 407, 164 P.2d 531, 533 (1945); 30 CAL. JUR. 2d, *Landlord & Tenant* § 146 (1956). *See also* Sieber v. Blanc, 76 Cal. 173, 174, 18 P. 260, 261 (1888). Under Civil Code §§ 1941 and 1942, ". . . it is the duty of the landlord to repair upon notice, and if he does not perform this duty he is to be compelled to pay, by deduction from the rent, to the extent of a month's rental—or, at the option of the tenant, the term be concluded without redress to the landlord." Van Everly v. Ogg, 59 Cal. 563, 566 (1881).

69. Ewing v. Balan, 168 Cal. App. 2d 619, 336 P.2d 561 (1959).

70. *See* the former California State Housing Act, CAL. HEALTH & SAF. CODE §§ 15000-17902 (Deerings 1961), repealed Stats. 1961 ch. 1844 § 7. Now *see* CAL. HEALTH & SAF. CODE §§ 17910-17995 (West Supp. 1975); 25 CAL. ADM. CODE §§ 1000-1096.

71. Ewing v. Balan, 168 Cal. App. 2d 619, 621-22, 336 P.2d 561, 563 (1959).

72. *Id.* at 622, 336 P.2d at 564. *See also* Annot., 17 A.L.R.2d 705 (1951) (effect of a statute requiring the property to be kept in good repair on the landlord's liability for injury to the tenant or his privies); Annot., 84 A.L.R.2d 1143 (1962) (landlord's liability for injury or death to the tenant resulting from the plumbing system or equipment); Annot., 84 A.L.R.2d 1190 (1962) (same, water heater); Annot., 86 A.L.R.2d 791 (1962) (same, heating system); Annot., 86 A.L.R.2d 838 (1962) (same, electrical system).

73. Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 946 (D.C. Cir. 1960). The case involved a breach of housing regulation which

It has been said that the paramount policy underlying recent amendments to the California State Housing Law and accompanying regulations is the public health and safety.[74] Yet, at least for the purposes of the landlord's tort liability, this policy has not been imputed to Civil Code Section 1941.

The non-existence of the landlord's tort liability for a violation of the standards imposed by Civil Code Section 1941 may be due to the fact that the statute is not considered penal. However, the distinction is faulty in that Section 1941 establishes a standard designed to protect the tenant from living in an uninhabitable dwelling unit. If a violation of that standard creates a condition of uninhabitability which thereby causes an injury, the landlord should be similarly liable for the damage caused as he would under what is considered to be a penal statute.

V. A PROPOSAL

In *Fakhoury v. Magner*,[75] the plaintiff was injured by a defective couch in her rented furnished apartment. The landlord lost during the trial, but successfully moved for a new trial, and the tenant appealed. In reversing the order for a new trial and affirming the tenant's judgment, the Court stated that a landlord of a furnished apartment is also a lessor of the personalty within that apartment and, as such, he is held to the same degree of liability for defects in those furnishings as any lessor of personalty. Thus, ". . . the doctrine of strict liability does apply to the landlord [of a furnished apartment] . . . as lessor of the furniture."[76]

Perhaps it is presumptious, but possibly a tenant should be able to expect the ceilings and walls of an apartment to be as stable

required the landlord to put the premises in a safe condition prior to their rental. *Id.* at 950.

74. Baum Electric Company v. City of Huntington Beach, 33 Cal. App. 3d 573, 581-82, 109 Cal. Rptr. 260, 266 (1973). This policy is expressly stated in the Health and Safety Code. CAL. HEALTH & SAFETY CODE §§ 17921 and 17964 (West Supp. 1975).

75. Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

76. *Id.* at 63, 101 Cal. Rptr. at 476. The landlord has traditionally been held liable for damages caused by defects in furnishings existing at the beginning of the term under an implied warranty theory. *See* Green v. Superior Court, 10 Cal. 3d 616, 626, n.11, 517 P.2d 1168, 1174, n.11, 111 Cal. Rptr. 704, 710, n.11 (1974); Forrester v. Hoover Hotel & Inv. Co., 87 Cal. App. 2d 226, 232, 196 P.2d 825, 828-29 (1948); Charleville v. Metropolitan Trust Co., 136 Ca. App. 349, 355, 29 P.2d 241, 244 (1934).

as a furnished couch. It is submitted that the landlord should be held strictly liable in tort for injuries or damages resulting from a dangerous defective condition of the demised premises. When a tenant rents a dwelling unit, it is not realistic to view the transaction as a conveyance of an interest in land; a more analogous transaction is the leasing of a product.

In *Inman v. Binghampton Housing Authority*,[77] the plaintiff was injured after falling from the porch of an apartment which he alleged was negligently designed, and suit was brought against the landlord and the builder. In reversing the dismissal of the cause of action against the builder, the intermediate appellate court applied the principles of *MacPherson v. Buick*[78] and stated:

> . . . [W]e can see no valid reason for a distinction between real and personal property so far as the principle of liability is concerned. Indeed, the arguments for and against liability are almost precisely the same in each instance. The trend of modern legal scholarship appears to sustain the view that no cogent reason exists for continuing the distinction . . . [W]e can see no logic in the assertion that because one is affixed to real estate and the other is a movable chattel that there must be a difference in principle so far as liability to third persons is concerned. . . [S]uch a distinction has become outmoded in our complex and highly industrial society. The imminence of danger should be the test and not the classification of the object from which the danger emanates.[79]

"The continued vitality of the common law depends upon its

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77. Inman v. Binghampton Housing Authority, 1 App. Div. 2d 559, 152 N.Y.S. 2d 79 (1956).

78. 217 N.Y. 382, 111 N.E. 1050 (1916).

79. Inman v. Binghampton Housing Authority, 1 App. Div. 2d 559, 563, 152 N.Y.S. 2d 79, 83 (1956). The decision in favor of the tenant in this case was reversed by the Court of Appeals. Inman v. Binghampton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). While the Court of Appeals agreed with the Appellate Division's discussion regarding the distinction between real and personal property, *Id.* at 144, 143 N.E.2d at 898-99, 164 N.Y.S.2d at 703-04, the Court stated that *MacPherson* had a bearing only on the ". . . duty of guarding against hidden defects and giving notice of concealed dangers. . . [A] duty is owed, a liability is imposed, *only if* the defect or danger be not known or patent or discoverable by a recent inspection." (emphasis is original.) *Id.* at 145, 143 N.E.2d at 899, 164 N.Y.S.2d at 704. The Court reversed the decision of the Appellate Division because the plaintiff had not alleged that the defect was latent. *Id.* at 145-46, 143 N.E.2d at 899-900, 164 N.Y.S.2d at 704-05. Neither case is clear as to the disposition of the case against the landlord.

The *MacPherson* requirement that the defect be latent is no longer followed in the recent strict liability cases. *See* Luque v. McClean, 8 Cal. 3d 136, 139, 144-45, 501 P.2d 1163, 1165, 1169-70, 104 Cal. Rptr. 443, 445, 449-50 (1972); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 127, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972); RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

ability to reflect contemporary community values and ethics."[80] Yet, where is that vitality when the principles governing the tort obligations of today's landlord and tenant relationship are basically the same as those which governed the agrarian tenant of the early middle ages? In *Green v. Superior Court*,[81] the Court stated that recent decisions have recognized that the geographic and economic conditions that characterized the agarian lessor-lessee transaction have been entirely transformed in the modern urban landlord and tenant relationship. "The typical city dweller . . . cannot realistically be viewed as acquiring an interest in land; rather, he has contracted for a place to live."[82] Further, the increasing complexity of modern apartment buildings not only renders them much more difficult and expensive to repair than the living quarters of an earlier day, but also makes adequate inspection of the premises by the prospective tenant a virtual impossibility; the landlord, who has had experience with the building, is certainly in a much better position to discover and to cure dilapidations.[83]

The idea that a new theory of tort liability may be imposed on the landlord and tenant relationship appears compelling from the language of the major decisions construing the warranty of habitability.[84] In their decisions, the Courts are using the major product liability cases as support for their conclusions regarding the warranty of habitability. It appears certain that the courts will not limit themselves to major revision of only one aspect of the landlord and tenant relationship, that is, that the premises be habitable, but the concepts stated in the habitability cases will be

80. Javins v. First National Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

81. Green v. Superior Court, 10 Cal. 2d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

82. *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708. The court goes on to state that California courts have increasingly recognized the largely contractual nature of contemporary lease agreements, and have frequently analyzed such leases' terms pursuant to contractual principles, *id.* at 624, 517 P.2d at 1172, 111 Cal. Rptr. at 708, and that the application of contract principles is particularly appropriate in dealing with residential leases of urban dwelling units. *Id.* at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

83. *Id.* at 624, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

84. *See* Boston Housing Authority v. Hemingway, 293 N.E. 2d 831 (Mass. 1973), where the Court states that since no tort liability was involved in the case, it would not consider liability for injuries arising from conditions making an apartment uninhabitable. *Id.* at 843 n.14.

expanded to concern tort liability for injuries resulting from an uninhabitable condition of the premises.

> Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of good and services must rely on the skill and honesty of the supplier to at least the same extent as a purchaser of goods. Courts have not hesitated to find implied warranties of fitness and merchantibility in such situations. . . Now, . . . courts have begun to hold sellers and developers of real property responsible for the quality of their product. For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness. . . . Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality . . . into leases of apartments. Recent decisions have offered no convincing explanation for their refusal; rather they have relied without discussion on the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contracts.[85]

Yet, the refusal of the courts to re-examine their positions in this regard completely ignores the contemporary landlord and tenant relationship as it exists in a residential setting. As was stated by the Court in *Green*:

> In most significant respects, the modern urban tenant is in the same position as any other consumer of goods. Through a residential lease, a tenant seeks to purchase 'housing' from his landlord for a specified period of time. The landlord 'sells' housing, enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building. A tenant may reasonably expect that the *product* he is purchasing is fit for the purpose for which it is obtained, that is, a living unit. Moreover, since a lease contract specifies a designated period of time during which the tenant has a right to inhabit the premises, the tenant may legitimately except that the premises will be fit for such habitation for the duration of the term of the lease. It is just such reasonable expectations of consumers which the modern 'implied warranty' decisions endow with formal legal protection. [emphasis added][86]
>
> . . . [T]he tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural, the tenant's position corresponds precisely with 'the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose'.[87]

85. Javins v. First National Realty Corp., 428 F.2d 1071, 1075-76 (D.C. Cir. 1970).

86. Green v. Superior Court, 10 Cal. 2d 616 at 627, 517 P.2d 1168 at 1175, 111 Cal. Rptr. 704 at 711 (1974).

87. Javins v. First National Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970).

The courts have now indicated that they will see the residential apartment as a product, as it should be seen. The residential apartment unit is made available to the consumer in much the same way as a lessor of chattels makes his product available. The only real difference is that the dwelling unit cannot be removed from where it stands.

In actuality, the tenant does not contract for an interest in land. With regard to a residential dwelling unit in a multi-unit complex, the tenant generally has no right to use the land itself as an owner in fee or a holder under a commercial lease might. Essentially, what the tenant receives is a product to be used for a particular purpose, the purpose being occupancy. The tenant's ability and opportunity to inspect this product is no greater than his ability and opportunity to inspect a marketable product such as an automobile. A dangerous defective condition in the tenant's product can result in consequences as serious as a dangerous defective condition in any product, and possibly more so. At least with certain products such as an automobile, the user has at least a vague realization that its use can be dangerous. Yet this same user will have no such realization regarding the normal use of his apartment, but in all liklihood will feel safe and secure from the dangers of the outside world while protected by its walls.

A new theory of liability for dangerous defective conditions within the residential premises is compelling. In reality, the dwelling unit is a product, and the use of that product, including the means of access, should be safe. To attain this end, the living facilities of the residential tenant ought to be treated as a product for all purposes, including the imposition of strict liability in tort for a dangerous defective condition upon the residential premises.

VI. CONCLUSION

In conclusion, it is submitted that the landlord should be strictly liable in tort for injuries to his tenants and at least to others lawfully on the premises caused by dangerous defective conditions not only within the individual dwelling units, but also within the entire residential apartment complex. An exception would be where a tenant who caused a defect were *himself* injured by that defect.

However, even if a defect were to develop after the tenancy commenced, if the landlord had notice of the defect but failed to act within a reasonable time, he should still be held strictly liable for the ensuing damages. (Admittedly, the failure to act could also be seen as negligence).

> The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public.[88]

By the same token, the risk of injury can be insured by the landlord and distributed among his tenants as a cost of doing business. It is to the public interest to discourage the leasing of residential dwelling units having defects that are a menace to those who use them.

MICHAEL K. MCKIBBIN

88. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). *See also* Fakhoury v. Magner, 25 Cal. App. 3d 58, 64, 101 Cal. Rptr. 473, 477 (1972), for the application of this principle to the landlord of a furnished apartment.