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A BIRD IN THE HAND: CALIFORNIA IMPOSES STRICT LIABILITY ON LANDLORDS IN *BECKER V. IRM CORP.*

I. INTRODUCTION

In 1730 B.C., Hammurabi, the sixth of eleven kings of the Old Babylonian (Amorite) Dynasty, promulgated his famous lawcode.¹ In this code the following statute appeared: "If a builder constructed a house for a seignior, but did not make his work strong, with the result that the house which he built collapsed and so has caused the death of the owner of the house, that builder shall be put to death."² Hammurabi's intent is evident. If a builder defectively produced a dwelling in such a way as to injure another, after proof of causation, the builder was to suffer punishment in proportion to that injury. The code in essence imposed strict liability on homebuilders for producing defective dwellings.

Justice Traynor's classical concurring opinion in *Escola v. Coca-Cola Bottling Co.*,³ set forth the modern policy justifications for imposing

1. ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 163-77 (J. Pritchard ed. 1950).

2. *Id.* at 176.

3. 24 Cal. 2d 453, 150 P.2d 436 (1944). In *Escola*, the plaintiff, a waitress, was injured when a bottle containing Coca-Cola exploded in her hand. She brought an action against the bottling company which had delivered the bottle to her employer, claiming that they were negligent in selling bottles which, because of excessive gas pressure or because of some defect in the glass bottle itself, were dangerous and likely to explode. *Id.* at 456, 150 P.2d at 437-38. The jury found for the plaintiff and the defendant appealed on the ground that the doctrine of *res ipsa loquitur* did not apply. *Id.* at 457, 150 P.2d at 438. In order for *res ipsa loquitur* to apply, two conditions have to be met, namely, that the defendant must have had exclusive control over the thing causing the injury and that the accident must be of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. *Id.* at 457-58, 150 P.2d at 438.

The defendants seemed to argue that the first requirement was not met because they had relinquished control of the bottle some time before the accident occurred. *Id.* at 458, 150 P.2d at 438. The court held for the plaintiff stating "[u]pon an examination of the record, the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by an extraneous force after delivery . . . by defendant." *Id.* at 459, 150 P.2d at 439.

The concurring opinion, written by Justice Traynor, agreed with the result of the majority, but not their method, stating:

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it

strict liability. These justifications include deterring the marketing of products that are a menace to the public.⁴ Since the *Escola* decision, California's doctrine of strict products liability has expanded by leaps and bounds, covering things Hammurabi could never have anticipated such as power tools,⁵ automobiles,⁶ aeronautical maps⁷ and electricity.⁸

is to be used without inspection, proves to have a defect that causes injury to human beings.

Id. at 461, 150 P.2d at 440 (Traynor, J., concurring). Justice Traynor went on to discuss five related factors which supported his position. *Id.* at 461-69, 150 P.2d at 440-44 (Traynor, J., concurring). For a more detailed discussion of Justice Traynor's concurring opinion in *Escola*, see *infra* text accompanying notes 62-68.

4. *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring).

5. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman*, the plaintiff was injured while using a power tool. Mr. Greenman had seen the combination power tool (the "Shopsmith") demonstrated and had studied a brochure prepared by the manufacturer. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698. Mr. Greenman's wife then gave him a Shopsmith for Christmas. *Id.* The plaintiff was using the Shopsmith as a lathe to turn a piece of wood which he intended to make into a chalice when the piece of wood flew from the machine striking the plaintiff on the forehead and inflicting serious injuries. *Id.* The plaintiff brought actions against the manufacturer and the retailer based on negligence and breach of warranty. *Id.* at 59, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99. The jury found for the retailer and against the manufacturer. *Id.* at 59, 377 P.2d at 899, 27 Cal. Rptr. at 699. The manufacturer appealed, arguing that the plaintiff did not give it notice of breach of warranty within a reasonable time and that therefore his cause of action for warranty was barred by section 1769 of the California Civil Code. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699. The court held that Civil Code section 1769 did not apply to actions by injured consumers against manufacturers with whom they have not dealt. *Id.* at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700. More importantly, though, the court held "it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

California Civil Code section 1732 stated at the time of *Greenman*:

[A]ny affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

CAL. CIV. CODE § 1732 (West 1962) (repealed 1963, amended and recodified at CAL. COM. CODE § 2313 (West 1963)). The court held that "[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 that causes injury to a human being." *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. For a more detailed analysis of the *Greenman* decision, see *infra* text accompanying notes 69-74.

6. See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). In *Daly*, the plaintiffs brought a wrongful death suit against General Motors claiming that the negligent design of defendant's "Opel" model automobile caused the death of their father in an auto accident. *Id.* at 730-31, 575 P.2d at 1165, 144 Cal. Rptr. at 383. The case is more generally known for its holding that comparative fault, under which liability for damages is assigned in direct proportion to the amount of negligence of each of the parties, is to be applied to actions founded in strict products liability. *Id.* at 734-43, 575 P.2d at 1167-73, 144 Cal. Rptr. at 385-91.

7. *Fluor Corp. v. Jepperson*, 170 Cal. App. 3d 468, 216 Cal. Rptr. 68 (1985). In *Fluor*, the defendant designed, produced, and disseminated aeronautical instrument approach charts

In each of these instances, courts felt that the policy reasons enumerated by Justice Traynor in *Escola* compelled expansion of the doctrine.⁹

In *Hyman v. Gordon*,¹⁰ a California appellate court rediscovered

for various airports. *Id.* at 473, 216 Cal. Rptr. at 70. Its approach chart for the Adirondack Airport failed to indicate Johnson Hill, the highest hill in the landing pattern for that airport. The pilot of plaintiff's Lockheed Jet relied upon this approach chart. The plane struck the side of Johnson Hill killing all occupants and destroying the plane. The plaintiff brought an action against the defendant based on theories of breach of warranty, negligence, and strict products liability. The plaintiff's strict liability claim was based on the allegation that the instrument approach chart for Adirondack Airport was defective in design or construction and proximately caused the loss of plaintiff's plane. *Id.* The trial court refused to submit the products liability count to the jury stating that although the court had concluded that the chart was a product, the principles of strict liability did not apply. *Id.* at 475, 216 Cal. Rptr. at 72. The appellate court held that the trial court's actions were in error, stating:

[w]e . . . share the belief expressed by the court in *Lowrie v. City of Evanston* (1977) 50 Ill. App. 3d 376, 8 Ill. Dec. 537, 365 N.E.2d 923, 928, "that the policy reasons underlying the strict products liability concept should be considered in determining whether something is a product within the meaning of its use . . . rather than . . . to focus on the dictionary definition of the word."

When so viewed, characterizing respondent's instrument approach charts as "products" serves "[T]he paramount policy to be promoted by the [doctrine]," i.e., "the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them."

170 Cal. App. 3d at 475, 216 Cal. Rptr. at 71-72.

8. *See Pierce v. Pacific Gas and Elec. Co.*, 166 Cal. App. 3d 68, 212 Cal. Rptr. 283 (1985).

9. *See infra* text accompanying notes 62-68.

10. 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1974). In *Hyman*, the plaintiff, a minor, was in his neighbor's garage where he and the neighbor's son were painting model airplanes. After they had finished, the two boys were looking for solvent to clean their hands. The owner of the house had been doing some indoor painting and had left paint brushes soaking in a can of gasoline in the garage. The plaintiff inadvertently kicked over the can of gasoline. The gasoline flowed in the direction of a gas water heater four or five feet away. The gasoline ignited due to the flame at the base of the water heater. The resulting fire caused severe burns to the plaintiff's left leg from his knee to his ankle. *Id.* at 771, 111 Cal. Rptr. at 263. The plaintiff asserted a strict liability cause of action against the home builder, alleging that the home was defectively designed in that the defendant had selected a defective location for the water heater, i.e., one where fires such as the one which occurred would be more likely to occur. *Id.* at 772, 111 Cal. Rptr. at 264. The trial court nonsuited the plaintiff's strict liability cause of action. *Id.* at 771, 111 Cal. Rptr. at 263.

The court of appeals reversed the nonsuit against the plaintiff and allowed the plaintiff to go ahead with his strict liability cause of action, stating:

[I]t seems clear that the [strict liability] doctrine may be applied where, as the proximate result of a defect in the design of a residential building, and installation of an article pursuant thereto, injury results to a human being. It is possible that an article or a machine may function safely in one location in the design but not another. The gist of plaintiff's allegation in the present case is simply that the Mahan building plan was defective in causing the water heater to be installed on the floor of the garage. The evidence showed that the plumbing contractor, Peterson, had installed the heater on the garage floor of the home with the pilot light and burners elevated four to six inches above the garage floor. Plaintiff testified that, within seconds after he had kicked over the can containing the gasoline, the fire exploded in the garage. We conclude that there was sufficient evidence before the jury to preclude nonsuit as to

Hammurabi's ancient principle of strict liability for defective dwellings. In *Hyman*, a nine year-old boy was severely burned when a water heater, which was placed in a dangerous location in a neighbor's garage, ignited a spilled container of gasoline.¹¹ The court allowed the plaintiff to maintain a strict liability cause of action for the defective design of the house.¹²

One of the most recent expansions of the doctrine of strict liability in California came in the case of *Becker v. IRM Corp.*¹³ In *Becker*, the California Supreme Court held that landlords are strictly liable in tort for latent defects which cause injury to tenants.¹⁴ This Note will discuss the motives, rationales and necessary implications of this decision in conjunction with the practical effects likely to ensue from such an expansive and unfortunate extension of the doctrine of strict liability.

II. STATEMENT OF THE CASE

On November 21, 1978, George Becker, while showering, slipped and fell against the shower door of his rented apartment.¹⁵ As a result, his arm was broken and severely lacerated.¹⁶ The shower door was made of untempered rather than tempered glass.¹⁷ According to undisputed evidence, the risk of serious injury would have been greatly diminished had the shower door been made of tempered rather than untempered glass.¹⁸

The thirty-six unit apartment complex in which the accident oc-

the designer. The determination of whether the presence of the water heater in the garage location constituted a defective design, and the foreseeability of harm resulting therefrom, should have been left to the jury.

Id. at 773, 111 Cal. Rptr. at 264-65.

11. *Id.* at 771, 111 Cal. Rptr. at 263.

12. *Id.* at 775, 111 Cal. Rptr. at 264-65.

13. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

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

15. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 457, 698 P.2d 116, 117, 213 Cal. Rptr. 213, 214 (1985).

16. *Id.*

17. *Id.* There are four types of glass commonly available for use in shower doors. The first is plate or sheet glass. This type of glass is similar to but thicker than the type used in window panes. When broken, it forms hazardous slivers. A second type of glass is tempered glass. When broken, it disintegrates into small pieces that normally do not present a serious laceration hazard. A third type of glass is laminated glass which consists of two pieces of plate glass bonded together by a tough plastic adhesive. When broken by moderate impact, the glass clings to the adhesive and does not shatter. A fourth type of glass is wire glass. Wire glass is similar to laminated glass except that a wire reinforcement rather than a plastic adhesive is used to prevent shattering. Dickerson, *Report on Product Safety: Household Goods*, 43 IND. L.J. 186, 210-14 (1968).

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

currred was built in 1963 and acquired by the IRM Corporation (IRM) in 1974.¹⁹ Out of the thirty-six units, thirty-one had untempered glass shower doors and five had tempered glass shower doors.²⁰ The appellant's shower door was installed prior to the date on which IRM acquired the apartment complex.²¹ Apparently, the shower doors made of untempered glass were very hard to distinguish from those made of tempered glass in that they both had a frosted glass appearance and no distinguishing markings except for a very small mark in the corner of each piece of glass.²²

The plaintiff brought negligence and strict liability actions against IRM in the Superior Court of Contra Costa County. The trial court entered summary judgment in favor of IRM. The Court of Appeal reversed the lower court's ruling, finding that material issues of fact existed in both the plaintiff's negligence and strict liability claims which precluded summary judgment in favor of IRM.²³ The California Supreme Court, in an opinion by Justice Broussard, affirmed the appellate court's holding on both the negligence and strict liability causes of action.²⁴ In a separate concurring opinion, Chief Justice Bird adopted, in large part, the opinion of the appellate court.²⁵ Justice Lucas, joined by Justice Mosk, filed a separate opinion in which he concurred with the majority as to respondent's negligence cause of action but dissented from the majority as to respondent's strict liability cause of action.²⁶ This Note addresses only those portions of the appellate and supreme court opinions dealing with respondent's strict liability cause of action.

III. A REVIEW OF THE APPLICABLE LAW

A. Introduction

In examining the holding of the *Becker* court, it is difficult to determine whether the majority extended the law of strict liability by characterizing an apartment as a product or whether it extended the law of premises liability to cover latent defects. This confusion arises from the fact that the majority relied on two distinct legal concepts for support of

19. *Id.* at 457-58, 698 P.2d at 117, 213 Cal. Rptr. at 214.

20. *Id.* at 458, 698 P.2d at 118, 213 Cal. Rptr. at 215.

21. *Id.* at 457-58, 698 P.2d at 117, 213 Cal. Rptr. at 214.

22. *Id.* at 458, 698 P.2d at 116, 213 Cal. Rptr. at 215.

23. *Becker v. IRM Corp.*, 144 Cal. App. 3d 321, 192 Cal. Rptr. 570 (1983), *aff'd*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

24. *Becker*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213.

25. *Id.* at 469-70, 698 P.2d at 126, 213 Cal. Rptr. at 223 (Bird, C.J., concurring).

26. *Id.* at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., concurring in part and dissenting in part).

its extension of the law of premises liability. While these two concepts, "liability for injury due to defective conditions" and "uninhabitability," have a certain degree of cross over, in an attempt to discern exactly what the *Becker* court held, it is important to first outline what the state of the law was in each of these areas before the decision was rendered.

B. Landlord Liability According to Traditional Property Principles

1. Landlord liability for uninhabitability

The earliest approach to a landlord's duty in this area imposed no obligation on the landlord, absent an agreement, to present or sustain a leased dwelling in a habitable condition.²⁷ The approach became known as "caveat emptor" or "let the buyer beware."

a. statutory warranties of habitability

More recently, however, the trend has been to impose a greater duty on the landlord to present and sustain a leased dwelling in habitable condition.²⁸ This trend is reflected in both modern statutes and case law.

The applicable California statute is Civil Code section 1941 which provides:

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 untenable, except [those dilapidations arising from the hirer's want of

27. See, e.g., *Brewster v. DeFremery*, 33 Cal. 341, 345-46 (1867). In *Brewster*, an action was brought on behalf of the estate of the deceased. *Id.* at 345. The deceased was a tenant in defendant's house. While the deceased occupied the house, the owners of the adjoining lot began to excavate that lot. The defendant was given notice of the excavation and warned that if proper precautions were not taken, the wall of the deceased's home would fall. No precautions were taken by the defendant. One night, the building fell and crushed the deceased. *Id.* The court held for the defendant stating, "[t]here was no covenant on the part of the lessors, the defendants, to uphold or keep the premises in repair, or in a habitable condition. Without an express covenant to that effect, they were not bound to repair, or to keep the premises in a habitable condition." *Id.*

28. The Restatement (Second) of Property provides:

The common law placed the risk on the tenant as to whether the condition of the leased property made it unsuitable for the use contemplated by the parties. In recent years, the definite judicial trend has been in the direction of increasing the responsibility of the landlord, in the absence of a valid contrary agreement, to provide the tenant with property in a condition suitable for the use contemplated by the parties. This judicial trend has been supported by the statutes that deal with this problem. This judicial and statutory trend reflects a view that no one should be allowed or forced to live in unsafe and unhealthy housing.

RESTATEMENT (SECOND) OF PROPERTY ch. 5 introductory note (1976).

ordinary care].²⁹

California Civil Code section 1941.1 outlines a series of affirmative standards which a dwelling must meet in order to be "tenantable," i.e., habitable under section 1941.³⁰ Some of those standards include adequate and effective waterproofing and weather protection, plumbing and gas facilities, hot and cold water supply, sewage system, heating facilities, electrical lighting and wiring and clean and sanitary buildings, grounds and appurtenances.³¹

It is commonly thought that a tenant's sole statutory remedy under section 1941 is provided for in Civil Code section 1942,³² California's

29. CAL. CIV. CODE § 1941 (West 1984).

30. CAL. CIV. CODE § 1941.1 (West 1984). California Civil Code section 1941.1 provides: A dwelling shall be deemed untenable for purposes of section 1941 if it substantially lacks any of the following affirmative standard characteristics:

(a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

(b) Plumbing or gas facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.

(c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.

(h) Floors, stairways, and railings maintained in good repair.

31. *Id.*

32. CAL. CIV. CODE § 1942 (West 1984). California Civil Code section 1942 provides:

(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period.

(b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from

"repair and deduct" statute. Section 1942 provides that when a reasonable time elapses after notice to the landlord a dilapidation rendering the dwelling untenable under section 1941.1 is not repaired, the tenant may repair the dilapidation (providing the repair does not cost more than one month's rent) and deduct the cost of the repair from the following month's rent.³³ Section 1942 also gives the tenant the option to vacate the premises, in which case the tenant will be immediately discharged from the obligation of paying further rent.³⁴ The statute is careful to leave open the possibility of other remedies provided either by statute or common law.³⁵

Even though section 1941 includes the phrase "in the absence of an agreement to the contrary," section 1942.1 provides that "[a]ny agreement by a lessee of a dwelling waiving or modifying his rights under section 1941 or 1942 shall be void as contrary to public policy"³⁶ The sole exception to this broad mandate is that a tenant may agree to improve, repair, or maintain all or stipulated portions of the dwelling as part of the consideration for rental.³⁷

Civil Code section 1942.5 protects a tenant from retaliation by the landlord. That section provides that a landlord may not retaliate against a tenant for the exercise of the tenant's rights under the preceeding statutes by recovering possession in a proceeding, causing the lessee to quit involuntarily, increasing the rent or decreasing any services within 180 days after a lessee complains to the landlord or an outside agency, or after he files documents concerning the tenantability of the dwelling or after entry of a judgment on that issue.

It is apparent from these provisions that California has sought to

repairing and deducting after a shorter notice if all the circumstances require shorter notice.

. . . .

(d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

Id.

33. *Id.*

34. *Id.*

35. *Id.*

36. CAL. CIV. CODE § 1942.1 (West 1984). California Civil Code section 1942.1 provides: Any agreement by a lessee of a dwelling waiving or modifying his rights under section 1941 or 1942 shall be void as contrary to public policy with respect to any condition which renders the premises untenable, except that the lessor and the lessee may agree that the lessee shall undertake to improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental.

Id.

37. *Id.*

provide an adequate statutory scheme to protect tenants from unscrupulous landlords who neglect their duty to provide habitable dwellings.

b. common law implied warranty of habitability

As previously mentioned, under traditional common law the landlord owed no duty to place leased premises in a habitable condition and had no obligation to repair subsequent dilapidations.³⁸ At the inception of this common law rule, any structure on the leased premises was likely to be of the most simple nature, easily inspected by the lessee to determine if it fit his needs and easily repairable by the typically versatile tenant farmer.³⁹ Additionally, to the traditional agrarian tenant before the industrial revolution, the land, rather than the structure upon it, was the most important element in a lease.⁴⁰ For these reasons, the traditional common law approach to habitability was well suited for the time period in which it developed.

Further, the real estate lease emerged from the area of property law, not contract law. One of the peculiarities of property law is that, because the law of property predated the development of mutually dependent covenants in contract law, a lessee's covenant to pay rent was considered to be independent of any covenants which the landlord may have had under the agreement. This meant that even if a landlord breached his covenant to make repairs, this, in and of itself, did not free the tenant from his duty to pay rent.

In *Green v. Superior Court*⁴¹ the California Supreme Court found that every lease of a dwelling includes an implied warranty of habitability which, if breached, can be remedied by the statutory "repair and deduct" remedy, and by whatever other common law remedy⁴² is available.⁴³ The court based its decision on the fact that unlike the traditional agrarian lessee of the middle ages, the modern tenant enters a lease not for the land surrounding the dwelling, but rather for a place to live. Addi-

38. See *supra* note 27.

39. *Green v. Superior Court*, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1171-72, 111 Cal. Rptr. 704, 707-08 (1974).

40. *Id.* at 628, 517 P.2d at 1182, 111 Cal. Rptr. at 718.

41. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). In *Green*, a tenant refused both to pay rent and to vacate the apartment claiming that the existence of some 80 housing code violations made the premises uninhabitable. *Id.* at 620-21, 517 P.2d at 1170, 111 Cal. Rptr. at 706. He used a theory of implied warranty of habitability as a defense to an unlawful detainer action initiated by the landlord. *Id.* at 620, 517 P.2d 1170, 111 Cal. Rptr. at 706. The *Green* court allowed the tenant to use a breach of the implied warranty of habitability (if on remand one was found) as a defense in an action for unlawful detainer. *Id.*

42. Constructive eviction is an example of a common law remedy.

43. *Green*, 10 Cal. 3d at 631, 517 P.2d at 1178, 111 Cal. Rptr. at 714.

tionally, the court recognized that the modern tenant generally has acquired only a single specified skill by which he makes his living, quite unlike the "multi-skilled lessee of old" who was able to repair dilapidations to his simple dwelling.⁴⁴ The court also reasoned that modern dwellings are much more complex than those which existed at the time the traditional common law rule was formulated. The court reasoned that this complexity rendered it virtually impossible for a tenant to adequately inspect a dwelling prior to leasing. The court went on to state that a landlord who has had experience with the building is certainly in a better position to discover and repair dilapidations in the premises.⁴⁵

Further, the court recognized that prior California courts had increasingly recognized the largely contractual nature of contemporary lease agreements.⁴⁶ The court concluded that its holding reflected its belief that the application of contract principles, including the dependency of covenants, is appropriate when dealing with residential leases of urban dwelling units.⁴⁷ With this in mind, the court held that the trial court erred in refusing to permit the tenant to raise the landlord's breach of an implied warranty of habitability as a defense in an unlawful detainer proceeding.

Thus, it seems clear that the statutory and common law schemes in California at the time the *Becker* case was decided provided the tenant various remedies for a *contractual* breach on the part of the landlord to uphold his obligations under the lease agreement.

2. Landlord liability for injury due to defective conditions

The traditional common law rule in the area of landlord liability for injury due to defective conditions was that a landlord was not liable absent a covenant in the lease, fraud, concealment of the defect or a statutory duty to repair.⁴⁸ The rule was based on reasoning similar to that

44. *Id.* at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See, e.g., Del Pino v. Gualtieri*, 265 Cal. App. 2d 912, 919-20, 71 Cal. Rptr. 716, 721 (1968) (quoting *Gustin v. Williams*, 255 Cal. App. 2d 929, 931-32, 62 Cal. Rptr. 838, 839 (1967)). In *Del Pino*, the plaintiff rented a dwelling from her landlord which was equipped with a staircase. However, the handrail on the staircase started halfway down the stairs. On the day of the accident, the plaintiff was on her way down the stairs to get her cat when the linoleum on the stairs gave way and she fell down injuring herself. The plaintiff brought an action against her landlord on the theories of negligence and implied warranty of fitness for a particular use. *Id.* at 915, 71 Cal. Rptr. at 718. The trial court nonsuited both of plaintiff's causes of action. *Id.* The appellate court affirmed the trial court's ruling reiterating the common law rule:

used in the area of habitability⁴⁹ and on the fact that the landlord lacked possession and control of the property.⁵⁰

A number of exceptions to the traditional common law rule of caveat emptor developed. These exceptions included liability where the landlord knew of the defect,⁵¹ where a safety law was violated,⁵² where

[T]here is no liability from the landlord either to a tenant or others for the defective condition of the demised premises whether existing at the time of the lease or developing thereafter. This rule applies in California in the absence of: (1) concealment of a known danger, (2) an express covenant to repair or a promise to repair supported by consideration, or (3) a statutory duty to repair.

Id. at 919-20, 71 Cal. Rptr. at 721 (citations omitted).

49. See *supra* note 27.

50. See, e.g., *Brennan v. Cockrell Invs., Inc.*, 35 Cal. App. 3d 796, 799-801, 111 Cal. Rptr. 122, 124-26 (1973). In *Brennan*, the tenant was injured when a handrail outside the dwelling he rented from the defendant collapsed, causing him to fall to the ground. *Id.* at 799, 111 Cal. Rptr. at 124. The court held that lack of possession by the landlord was not a bar to recovery and that even though a landlord lacked possession at the time of an accident, and thus lacked control, *id.* at 800, 111 Cal. Rptr. at 125, this did not compel a judicial amendment to California Civil Code section 1714. Section 1714 states in part:

(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

CAL. CIV. CODE § 1714 (West 1984).

51. See, e.g., *Shotwell v. Bloom*, 60 Cal. App. 2d 303, 309-10, 140 P.2d 728, 732 (1943) (damage to property of employee-invitee of tenant); *Stanley v. Lander*, 3 Cal. App. 2d 284, 288, 39 P.2d 225, 227 (1934); *Hassell v. Denning*, 84 Cal. App. 479, 481, 258 P. 426, 428 (1927). Cf. *Kearns v. Smith*, 55 Cal. App. 2d 532, 534, 131 P.2d 36, 37 (1942) (no liability where defect obvious to ordinary inspection).

52. See, e.g., *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 416, 432, 218 P.2d 17, 21, 31 (1950) (landlord held liable when, contrary to city ordinance, exit door opened inward instead of outward causing injuries in fire); *McNally v. Ward*, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961). In *McNally*, the defendant leased an apartment to the plaintiff which had a garbage can near the stairway landing. *Id.* at 874, 14 Cal. Rptr. at 261-62. The wooden railing on the stairway was defective and the plaintiff fell from the stairs and suffered injuries. *Id.* at 873, 14 Cal. Rptr. at 261. A city safety ordinance required maintenance of buildings, including egress facilities, in a safe condition. *Id.* at 874 n.1, 14 Cal. Rptr. at 262 n.1. The trial judge ruled that the defendants had no duty to inspect the landing and entered judgment for the defendant. *Id.* at 874, 14 Cal. Rptr. at 262. The appellate court reversed, stating:

We have concluded that the crowded conditions of urban living, which probably inspired the kind of protective ordinance we consider here, render impractical bisected interpretation of the ordinance; it does not establish a duty to the municipality only but to the tenant as well. If its purpose is to be at all served it must require inspection of exterior porches and railings by the landlord, who is the most likely person to be interested in the permanent safety of the property. Similar considerations forbid a two minute mathematical subdivision of areaways in defining common areas. The landlords' covenant to maintain the premises does not, however, pursuant to the cases, render them liable for repairs in the absence of notice. We think that these are the lines of landlord responsibility which the current considerations and cases draw as to the particular porch and railing here involved.

Id. at 884-85, 14 Cal. Rptr. at 268-69.

the landlord retained a common area⁵³ or where the lease was for a semipublic purpose.⁵⁴

Thus, with respect to a tenant's possible *tort* claims against a landlord, the state of the law at the time of the *Becker* decision was that a tenant could only recover for injuries in the limited circumstances enumerated above.

C. Strict Liability

In outlining the modern law of strict liability for personal injury caused by defective products, two distinct theories require attention. They are: (1) the theory of strict liability in contract for breach of express or implied warranty; and (2) the theory of strict liability in tort for physical harm to persons and tangible things.

1. Strict liability in contract for breach of express or implied warranty

It is generally thought that the origins of strict liability in warranty for physical injury lie in the early tort warranty cases dealing with food and drink.⁵⁵ These cases, however, like warranty cases in other areas, were restricted by the requirement of privity of contract between the victim and the target defendant. In *Mazetti v. Armour & Co.*⁵⁶ the require-

53. See, e.g., *Di Mare v. Cresci*, 58 Cal. 2d 292, 297, 373 P.2d 860, 863, 23 Cal. Rptr. 772, 775 (1962) (outside stairs used by tenants to reach various floors and garbage chute; stairs rotted and unsecured); *Hardin v. Elvitsky*, 232 Cal. App. 2d 357, 368, 42 Cal. Rptr. 748, 753 (1965) (duplex with defective stairs); *Sockett v. Gottlieb*, 187 Cal. App. 2d 760, 766, 9 Cal. Rptr. 831, 834 (1960) (apartment with lawn area leading to driveway and street, without fences or warning signs, and ending abruptly in retaining wall 32-48 inches high).

54. See, e.g., *Hayes v. Richfield Oil Corp.*, 38 Cal. 2d 375, 380, 240 P.2d 580, 583 (1952) (service station); *Borroughs v. Ben's Auto Park*, 27 Cal. 2d 449, 453, 164 P.2d 897, 899 (1945) (parking lot); *Rau v. Redwood City Woman's Club*, 111 Cal. App. 2d 546, 549, 245 P.2d 12, 14 (1952) (auditorium for music recital).

55. PROSSER AND KEETON ON THE LAW OF TORTS 690 (W. Keeton 5th ed. 1984) [hereinafter KEETON].

56. 75 Wash. 622, 135 P. 633 (1913). In *Mazetti*, plaintiffs, owners of a profitable Seattle restaurant, served a customer a slice of cooked tongue which had at its center "a foul, filthy, nauseating, and poisonous substance." *Id.* at 623, 135 P. at 633. Apparently, in the wake of his nausea, the customer was able to publicly denounce the service to him of the foul and poisonous food. *Id.* at 623, 135 P. at 633-34. The restaurant sued claiming loss of reputation and injury to business. *Id.* at 623, 135 P. at 634. The defendant demurred to the complaint, apparently on the grounds that under former law, the manufacturer is not liable to any person other than the food product's ultimate consumer. The demurrer was sustained by the trial court. The appellate court reversed stating "[t]his opinion is already too long drawn out Our holding is that, in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade." *Id.* at 630, 135 P. at 636.

ment of privity was finally discarded in cases dealing with foodstuffs.

Eventually strict liability in warranty expanded beyond food and drink. The leading case in this expansion was *Henningsen v. Bloomfield Motors, Inc.*,⁵⁷ a New Jersey decision which relied on food and drink cases to hold that the manufacturer and retailer of an automobile were strictly liable under an implied warranty of safety,⁵⁸ regardless of privity.⁵⁹ What occurred after *Henningsen* has been described as "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."⁶⁰ These cases provided courts and plaintiffs with a whole new theory on which to base recovery for injuries which might not have been compensated under a negligence theory.

There were severe problems, however, with a theory of recovery based on warranty. These problems stemmed from the fact that the legal community identified the term "warranty" with contract law. Contract law required that in order for a plaintiff to recover under a warranty theory, he had to rely on the express or implied representations of the defendant. Often this requirement could not be met.

Additionally, most states had adopted the Uniform Commercial Code (UCC) or its predecessor, the Uniform Sales Act, to govern the law of warranty for goods. This presented two major problems in applying a theory of strict liability for personal injury based on warranty. The first problem was that the UCC contained a provision requiring the buyer to give notice within a reasonable time after the breach of warranty occurred.⁶¹ This provision acted as a trap door to unwary plaintiffs who otherwise might have had valid claims. Secondly, the Uniform Sales Act permitted sellers to insert disclaimers severely limiting or entirely defeating the warranty.

57. 32 N.J. 358, 161 A.2d 69 (1960).

58. *Id.* at 384, 161 A.2d at 84. The court stated "[w]e see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile." *Id.* at 383, 161 A.2d at 83.

59. *Id.* at 384, 161 A.2d at 84. The court stated "[t]he unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity." *Id.* at 383, 161 A.2d at 83.

60. KEETON, *supra* note 55, at 690.

61. U.C.C. § 2-607(3) (1980). U.C.C. section 2-607(3) states:

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

2. Strict liability in tort for physical harm to persons
and tangible things

Because of these two significant problems in the area of contractual warranty, in addition to the overall confusion to lawyers and judges caused by having personal injury cases subjected to the law of contracts, Justice Traynor wrote his classical concurring opinion in *Escola v. Coca-Cola Bottling Co.*⁶² Justice Traynor seemed to base his concurring opinion on five interrelated factors. First, he felt, "[i]t is to the public interest to discourage the marketing of products that are a menace to the public."⁶³ Second, he felt that the negligence cause of action was not always adequate to provide a remedy for a party injured by a defective product.⁶⁴ Third, he felt that the area of liability for products should be treated no different than that of foodstuffs. He stated:

This court and many others have extended [strict liability] to consumers of food products, taking the view that the right of a consumer injured by unwholesome food does not depend "upon the intricacies of the law of sales." . . . Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products.⁶⁵

Fourth, he reasoned that hand-crafted items had been replaced by mass produced items, thus altering the once close relationship between the consumer and the manufacturer whereby the consumer no longer had the means or skill to inspect the soundness of a product.⁶⁶ Fifth, as a result of the altered relationship between the consumer and the manufacturer, "[the consumer's] erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as a trade-marks [sic]. . . . Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark."⁶⁷ For these reasons, Justice Traynor concluded in *Escola* that "[t]he retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product."⁶⁸

62. 24 Cal. 2d 453, 150 P.2d 436 (1944). For a discussion of *Escola*, see *supra* note 3.

63. 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring).

64. *Id.* at 463, 150 P.2d at 441 (Traynor, J., concurring).

65. *Id.* at 465, 150 P.2d at 442 (Traynor, J., concurring).

66. *Id.* at 467, 150 P.2d at 443 (Traynor, J., concurring).

67. *Id.* (Traynor, J., concurring).

68. *Id.* at 464, 150 P.2d at 441-42 (Traynor, J., concurring).

Some nineteen years after Justice Traynor wrote his concurrence in *Escola*, he wrote the majority opinion in *Greenman v. Yuba Power Products, Inc.*,⁶⁹ the case which made strict liability for products the law in California. In *Greenman*, the notice requirement of the Uniform Sales Act⁷⁰ once again came into controversy.⁷¹ Justice Traynor, again outraged at seeing a plaintiff's case bogged down by the "intricacies of the law of contracts," declared that

to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for the plaintiff to establish an express warranty as defined in section 1732 of the Civil Code. 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 that causes injury to a human being.⁷²

He further stated that "[w]e need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated."⁷³ Thus, Justice Traynor made strict liability for products the rule in California, stating that the "costs of injuries resulting from defective products [should be] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."⁷⁴

IV. REASONING OF THE COURT IN *BECKER V. IRM CORP.*

A. *The Majority Opinion*

In *Becker v. IRM Corp.*,⁷⁵ the court began its analysis with a discussion of the history of strict liability. While the court acknowledged *Escola v. Coca-Cola Bottling Co.*⁷⁶ and *Greenman v. Yuba Power Products, Inc.*⁷⁷ as the cases most applicable to a discussion of the modern policy considerations behind strict liability, it recognized that earlier cases imposing liability on product manufacturers and retailers relied on the the-

69. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For a discussion of *Greenman*, see *supra* note 5.

70. CAL. CIV. CODE § 1769 (repealed 1963).

71. 59 Cal. 2d at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

72. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700 (citing his own concurring opinion in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944)) (citation omitted).

73. *Id.*

74. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

75. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

76. 24 Cal. 2d 453, 150 P.2d 436 (1944). For a discussion of *Escola*, see *supra* note 3.

77. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For a discussion of *Greenman*, see *supra* note 5.

ory of express or implied warranties running from the manufacturer to the plaintiff.⁷⁸ The majority then recognized that *Escola* and *Greenman* sought to remove cases dealing with product safety from the realm of the "intricacies of the law of sales."⁷⁹

In reaching its ultimate conclusion, the *Becker* court reasoned that the paramount policy reason behind the imposition of strict liability, expounded by Justice Traynor in *Escola* and in *Greenman*, was also present in cases of landlord liability. The court stated that "*Greenman* . . . noted that the purpose of strict liability in tort is 'to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.'"⁸⁰

The court next seemed to suggest that the law of strict liability has not been restricted to manufacturers of fungible products. Rather, the concept had been extended to parties traditionally accessible only under the auspices of property law: lessors of personal property,⁸¹ builders who impliedly represent the quality of their product⁸² and manufacturers of

78. *Becker*, 38 Cal. 3d at 458-59, 698 P.2d at 118, 213 Cal. Rptr. at 215.

79. *Id.*

80. *Id.* at 459, 698 P.2d at 118, 213 Cal. Rptr. at 215.

81. See *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970). In *Price*, the plaintiff, an airplane mechanic, sustained injuries when a ladder he was climbing split into segments. *Id.* at 248-49, 466 P.2d at 723-24, 85 Cal. Rptr. at 179-80. The ladder was attached to a truck leased from Shell by plaintiff's employer. *Id.* The plaintiff brought causes of action against the defendant based on negligence, breach of warranty and strict liability. *Id.* at 249, 466 P.2d at 24, 85 Cal. Rptr. at 180. The jury awarded the plaintiff \$41,000. Shell contended the trial court erred in submitting the case to the jury on the issue of strict liability. *Id.* The California Supreme Court affirmed, holding:

[W]e are of the opinion that the doctrine of strict liability in tort should be made applicable to bailors and lessors of personal property in the same manner as we have held it applicable to sellers of such property. Mindful of the purpose of such doctrine as explicated by us in *Greenman* and *Vandermark* and most recently in *Elmore* we can find no significant difference between a manufacturer or retailer who places an article on the market by means of a sale and a bailor or lessor who accomplishes the same result by means of a lease.

Id. at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183.

82. See *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). In *Kriegler*, the defendant built a home and installed at the time of construction a radiant heating system. *Id.* at 225-26, 74 Cal. Rptr. at 751. A radiant heating system is one in which pipe is laid in the center of the cement foundation of the house. The pipe is then heated by some substance passing through. This process results in the heating of the home. *Id.* The defendant used steel tubing in the construction of the heating system because copper was scarce as a result of the Korean War. *Id.* at 225, 74 Cal. Rptr. at 751. The steel pipe eventually corroded, causing the heating system to leak and become ineffective. *Id.* at 226, 74 Cal. Rptr. at 751. Eichler appealed from a judgment in favor of the plaintiff. *Id.* at 225, 74 Cal. Rptr. at 751. The appellate court sustained the judgment for the plaintiff stating, "[w]e think, in terms of today's society, there are not meaningful distinctions between Eichler's mass pro-

residential lots.⁸³

The court stated that developments in the area of landlord-tenant liability have led courts to imply a warranty of habitability for rented dwellings.⁸⁴ The court quoted the Restatement (Second) of Property, which provides that "[i]n recent years, the definite trend has been in the direction of increasing the responsibility of the landlord, in the absence of a valid contrary agreement, to provide the tenant with property in a condition suitable for the use contemplated by the parties."⁸⁵ This trend, it was argued, was followed in *Green v. Superior Court*,⁸⁶ where the court implied a warranty of habitability. The *Green* court referred to a lease for a certain period of time as a "product," recognizing that the average prospective lessee is not qualified or allowed to inspect the product thoroughly.⁸⁷ Further, the *Green* court stated that the primary responsibility for keeping the leased premises in a habitable condition should fall on the landlord.⁸⁸

The *Becker* majority further based its opinion on past California Supreme Court decisions holding that a landlord who offers an apartment for rent makes an implied representation that the apartment offered is safe and fit for use as a dwelling.⁸⁹ Justice Broussard reasoned that a tenant purchasing housing for only a limited period of time is generally

duction and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." *Id.* at 227, 74 Cal. Rptr. at 752.

83. See *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969). In *Avner*, the defendant was the owner and developer of lots in the Santa Monica Mountains near Los Angeles, California. *Id.* at 608, 77 Cal. Rptr. at 635. The defendant prepared the lot for the construction of a home. *Id.* The plaintiff's predecessor in interest purchased the lot and built a house upon it. *Id.* Due to inadequate draining and improper compaction of fill on the lot, the slope of the lot failed on several occasions causing the plaintiff damages. *Id.* at 609, 77 Cal. Rptr. at 635. The trial court dismissed the suit and the plaintiff appealed. The appellate court reversed stating:

We are unable to distinguish the obligation of a builder to a purchaser for a defective radiant heating system installed in a cement floor slab [see *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969), discussed *supra* note 82] from the obligation of a manufacturer of a lot to a purchaser for defective subsurface conditions resulting from improper filling and grading that cause instability. In view of the recent action of the Supreme Court in denying a hearing in *Kriegler*, we conclude that 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.

Id. at 615, 77 Cal. Rptr. at 639.

84. *Becker*, 38 Cal. 3d at 462, 698 P.2d at 120, 213 Cal. Rptr. at 217.

85. RESTATEMENT (SECOND) OF PROPERTY ch. 5 introductory note (1976).

86. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). For a discussion of *Green*, see *supra* text accompanying notes 41-47.

87. *Green*, 10 Cal. 3d at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

88. *Id.* at 623-28, 517 P.2d at 1172-75, 111 Cal. Rptr. at 708-11.

89. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

in no position to inspect for defects in light of the relative complexity of the modern apartment building/unit.⁹⁰ Further, even if the tenant could adequately inspect the apartment for such defects, he is generally in no position to bear the pecuniary obligation of permanent repairs on an apartment in which he has no equitable interest.⁹¹

Conversely, the majority reasoned, the landlord is in a better position to bear the costs of injury because (1) he may adjust the price he originally pays for a rental building based on the quality of the building, the cost of protecting the tenants, the cost of repairs and replacement of defects and insurance, (2) the landlord may increase the rent charged for a rental unit, and (3) the landlord will often be able to seek equitable indemnity for losses or be able to indemnify himself through strict liability insurance.⁹² Here, the court stressed that it is fundamentally preferable for the landlord to bear the cost of injuries "rather than the injured persons who are powerless to protect themselves."⁹³

Additionally, Justice Broussard reasoned that a line of California cases had already extended the doctrine of strict liability to the landlord-tenant relationship. Traditionally, the court stated, a landlord was not liable for injuries suffered by tenants resulting from defects in the leased premises unless there was a covenant in the lease, or the tenant could prove fraud or concealment.⁹⁴ Prior to *Greenman*, California afforded the tenant/victim a remedy only through the doctrines of express⁹⁵ and implied warranty.⁹⁶ However, subsequent to *Greenman*, two important appellate court decisions applied the doctrine of strict liability to land-

90. *Id.*

91. *Id.*

92. *Id.* at 466, 698 P.2d at 124, 213 Cal. Rptr. at 220.

93. *Id.* at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221 (citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)).

94. *See Del Pino v. Gualtieri*, 265 Cal. App. 2d 912, 71 Cal. Rptr. 716 (1968). For a discussion of *Del Pino*, see *supra* note 48.

95. *See Shattuck v. Saint Francis Hotel & Apartments*, 7 Cal. 2d 358, 60 P.2d 855 (1936). In *Shattuck*, the door to which a folding bed was affixed fell and injured the plaintiff. *Id.* at 359-60, 60 P.2d at 856. The landlord had assured the plaintiff that the construction of the bed was safe. *Id.* The court held that a lessee could recover for breach of an express warranty of fitness. *Id.* at 360-61, 60 P.2d at 856.

96. *See Fisher v. Pennington*, 116 Cal. App. 248, 2 P.2d 518 (1931). In *Fisher*, the plaintiff sustained injuries from a bed which was included in a room he leased from the defendant. The door to which the bed was attached fell off over the top of the bed and caused injury to the plaintiff. *Id.* at 249, 2 P.2d at 519. The court held that "[i]n the renting of a furnished apartment there is an implied warranty that the furniture is fit for use or occupation. The defendants had a superior knowledge of the operation of the door and bed." *Id.* at 250-51, 2 P.2d at 520.

lords for injuries to tenants.⁹⁷

The first of those appellate court decisions was *Fakhoury v. Magner*.⁹⁸ In *Fakhoury*, a tenant was injured when a couch which had been selected by the landlord and included with a furnished apartment collapsed.⁹⁹ The court, relying on cases holding a lessor of *personal* property strictly liable in tort,¹⁰⁰ held that the landlord was strictly liable in tort for the leasing of defective furniture.¹⁰¹ The *Fakhoury* court took special pains to emphasize that its holding did not grant to the plaintiff a strict liability cause of action for defective premises, but limited the cause of action to strict liability for the supply of defective furniture.¹⁰²

In the second important appellate court decision, *Golden v. Conway*,¹⁰³ a tenant suffered property loss in a fire caused by a defectively manufactured or installed wall heater.¹⁰⁴ The *Golden* court declined to follow the distinction made in *Fakhoury* between defective fixtures and defective furniture, holding that a landlord engaged in the business of leasing property¹⁰⁵ is strictly liable in tort when he equips the premises with an appliance¹⁰⁶ which proves to have defects which cause injury to

97. *Fakhoury v. Magner*, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972), and *Golden v. Conway*, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

98. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

99. *Id.* at 61, 101 Cal. Rptr. at 475.

100. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970). For a discussion of *Price*, see *supra* note 81; see also *McClaffin v. Bayshore Equip. Rental Co.*, 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969). In *McClaffin*, the plaintiff brought a wrongful death suit against the defendant who had rented a step ladder to the decedent. While using the ladder to drill holes in the ceiling, the ladder cracked, throwing the decedent to the floor and causing him to sustain head injuries from which he died two days later. *Id.* at 449, 79 Cal. Rptr. at 338. The trial court refused to instruct the jury on strict liability. The appellate court reversed stating "[i]n sum, the rationale of *Greenman* and *Vandermark* applies as logically and desirably to a lessor of chattels as to the manufacturers or retailers thereof." *Id.* at 452, 79 Cal. Rptr. at 340.

101. *Fakhoury*, 25 Cal. App. 3d at 63, 101 Cal. Rptr. at 476.

102. *Id.* See also *infra* notes 155-59 and accompanying text.

103. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

104. *Id.* at 951, 128 Cal. Rptr. at 71.

105. See *infra* text accompanying note 204 for an analysis of what "engaged in the business" of leasing property might mean.

106. The court makes no attempt to define what is meant by "appliance." Further, no other courts have sought to define the term. Webster's defines an appliance as "a household or office utensil, apparatus, instrument, or machine that utilizes a power supply, esp. electric current (as a vacuum cleaner, a refrigerator, a toaster, an air conditioner)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 104-05 (14th ed. 1968). While the court is most cryptic in its use of the word appliance, it is probable that they sought to include something more than what Webster's suggests—a couch such as the one in *Fakhoury* was obviously meant to fall within the confines of the term—and something less than those things the term "fixture" would describe. See *infra* note 158 for the definition of "fixture."

the tenant.¹⁰⁷ Unfortunately, the *Becker* opinion did nothing more than mention these cases, their holdings and policy. The majority was silent as to how these cases might prove useful in analyzing the facts before the court.

Justice Broussard concluded that the rationale of the foregoing cases required the court to conclude that "a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant."¹⁰⁸

B. Concurring and Dissenting Opinions

1. Chief Justice Bird's concurrence

In Chief Justice Bird's concurring opinion, she stated that "Justice Newsom wrote a fine opinion in the Court of Appeal with which I agree. It is adopted herewith as my own."¹⁰⁹ Thus, her concurring opinion merely restated the opinion of the appellate court.

The concurring opinion, discussing the plaintiff's strict liability cause of action, stated that California courts have "freely applied strict liability in tort law link by link in the marketing chain"¹¹⁰ to all those who are "an 'integral part of the overall producing and marketing enterprise.'"¹¹¹ The opinion further stated that prior cases have included landlords within the scope of the strict liability doctrine.¹¹²

The opinion then went on to discuss *Fakhoury* and *Golden* in light of this "marketing enterprise" idea by emphasizing that the defective items in those cases were supplied by the landlord. The concurring opinion stated that "[h]ere, respondent is in the business of leasing apartments, including appliances and fixtures, and is therefore an integral part of the marketing enterprise by which the shower door in question reached the user public."¹¹³ The opinion, after quoting at length from *Green*, stated:

The landlord is a vital link in the commercial chain, and directly profits from the consumer's use of products provided as

107. 55 Cal. App. 3d at 961-62, 128 Cal. Rptr. at 78. See also *infra* notes 160-65 and accompanying text.

108. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

109. *Id.* at 470, 698 P.2d at 126, 213 Cal. Rptr. at 223.

110. *Becker*, 38 Cal. 3d at 475, 698 P.2d at 130, 213 Cal. Rptr. at 227 (Bird, C.J., concurring).

111. *Id.* (Bird, C.J., concurring) (citing *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).

112. *Id.* (Bird, C.J., concurring).

113. *Id.* at 476, 698 P.2d at 228, 213 Cal. Rptr. at 228 (Bird, C.J., concurring).

part of the rental unit. We think it a reasonable rule that a landlord should be treated as a "retailer" of rental housing, subject to liability for defects in the premises rented.¹¹⁴

Thus, the concurring opinion seemed to suggest that IRM was liable to Mr. Becker because, as the supplier of the entire apartment, it acted as a vital link in the marketing chain which ultimately brought the plaintiff into contact with the defective shower door.

The opinion went on to enumerate the policy considerations which weighed in favor of the imposition of strict liability. Specifically, these considerations included the protection of otherwise defenseless victims, the placing of the economic burden of injury upon those most culpable and those most able to bear it, the fact that a landlord may be able to spread the cost of injury through insurance and, finally, the fact that the landlord has control of the rental premises from which the possibility of harm from defective appliances can be eliminated.¹¹⁵ The concurring opinion seemed to suggest that the defective shower door in the plaintiff's apartment was a design defect rather than a manufacturing defect and ended its analysis by restating the *Barker v. Lull*¹¹⁶ test for whether a product is defective in design:

First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his

114. *Id.* (Bird, C.J., concurring).

115. *Id.* (Bird, C.J., concurring).

116. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In *Barker*, the defendant manufactured a "high lift loader" designed to lift massive loads so that they can be kept level while the vehicle itself rests on sloped terrain. There was evidence that the regular operator of the high lift loader did not show up on the day of the accident because he knew that the loader was not designed to make the lifts scheduled for that day. Instead, the plaintiff, who was relatively inexperienced, was assigned the task. During the lifting of lumber on particularly difficult terrain, the plaintiff felt the high lift ladder begin to vibrate. Some of his co-workers shouted to the plaintiff to jump from the loader because it was beginning to tip. The plaintiff did so, but while scrambling away, he was struck and injured by lumber falling from the vehicle. *Id.* at 419, 573 P.2d at 447, 143 Cal. Rptr. at 229. The plaintiff brought a cause of action based in strict liability against the defendant. *Id.* at 417, 573 P.2d at 445-46, 143 Cal. Rptr. at 227-28. The case is famous for its discussion of what is meant by the term "defect." The trial court instructed the jury that strict liability for a defect in design was based on a finding that the product was "unreasonably dangerous for its intended use." *Id.* at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228. The California Supreme Court held that to give this instruction to the jury was error. *Id.* The court then stated a new test for finding design defects. See *infra* text accompanying note 117.

injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.¹¹⁷

Finally, Chief Justice Bird stated that the design of a product must take into consideration a certain degree of foreseeable misuse.¹¹⁸ She thereby inferred that the apartment which incorporated into its design this particular shower door was indeed defective under *Barker v. Lull* in that it failed to perform safely in a situation which would seem foreseeable.

2. Justice Lucas' concurrence and dissent

Justice Lucas concurred with that portion of the majority's opinion which dealt with the plaintiff's negligence cause of action, but dissented with the majority as to the plaintiff's strict liability cause of action.¹¹⁹ Justice Lucas argued that the majority made an "unprecedented leap"¹²⁰ from previous formulations of landlord liability and imposed "'an unusual and unjust burden on property owners [T]he landlord [will] be faced with liability for every injury claim resulting from any untoward condition in every cranny of the building, whether it is reasonably foreseeable or not.'"¹²¹

Justice Lucas discussed *Escola* and *Greenman*, pointing out that at

117. *Id.* at 432, 573 P.2d 445-46, 143 Cal. Rptr. at 237-38.

118. *Becker*, 38 Cal. 3d at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Bird, C.J., concurring).

119. *Id.* at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., concurring in part and dissenting in part).

120. *Id.* (Lucas, J., concurring in part and dissenting in part).

121. *Id.* (Lucas, J., concurring in part and dissenting in part) (quoting *Dwyer v. Skyline Apartments, Inc.*, 123 N.J. Super. 48, 301 A.2d 463, 467 (N.J. Super. Ct. App. Div.), *aff'd obiter dictum*, 63 N.J. 577, 311 A.2d 1 (1973)). In *Dwyer*, the defendant was the landlord of the apartment in which plaintiff had been a tenant for 15 years. *Id.* at 51, 301 A.2d at 464. The plaintiff, while in the bathtub, sought to add hot water. As she turned on the hot water faucet, the entire fixture came out of the tile, as a result, scalding water gushed out and burned the plaintiff on various parts of her body. *Id.* The trial judge found for the plaintiff on the ground that a landlord is strictly liable because of a contractual responsibility flowing from a continuing implied covenant of habitability. *Id.* The Superior Court of New Jersey held that even though the warranty of habitability imposed a duty on the landlord, the nexus between duty and liability was proof of *negligence*. *Id.* at 52, 301 A.2d at 465. The court held that an extension of strict liability to cover landlords was unwarranted, stating:

[t]he underlying reasons for the enforcement of strict liability against the manufacturer, seller or lessor of products or the mass builder-vendor of homes do not apply to the ordinary landlord of a multiple family dwelling.

Such a landlord is not engaged in mass production whereby he places his product—the apartment—in a stream of commerce exposing it to a large number of consumers. He has not created the product with a defect which is preventable by greater care at the time of manufacture or assembly. He does not have the expertise

the time those decisions were rendered, strict liability applied only to the party who actually *made* the product. Subsequently, strict liability was extended to retailers in the case *Vandermark v. Ford Motor Co.*¹²² The rationale in support of the extension, Justice Lucas pointed out, was that liability under such circumstances would work no injustice to the defendants because they could “‘adjust the costs of such protection between them in the course of their continuing business relationship.’”¹²³ Justice Lucas impliedly suggested that the requirement of a “continuing business relationship” with its accompanying policy considerations also played a

to know and correct the condition, so as to be saddled with responsibility for a defect regardless of negligence.

An apartment involves several rooms with many facilities constructed by many artisans with differing types of expertise, and subject to constant use and deterioration from many causes. It is a commodity wholly unlike a product which is expected to leave the manufacturer's hands in a safe condition with an implied representation upon which the consumer justifiably relies.

The tenant may expect that at the time of the letting there are no hidden dangerous defects known to the landlord and of which the tenant has not been warned. But he does not expect that all will be perfect in his apartment for all the years of his occupancy with the result that his landlord will be strictly liable for all consequences of any deficiency regardless of fault. He expects only that in the event anything goes wrong with the accommodations or the equipment therein, the landlord will repair it when he knows or should know of its existence; and that if injury results liability will attach.

To apply the broad brush of strict liability to the landlord-tenant relationship in a dwelling house would impose an unusual and unjust burden on property owners. It would mean that the landlord would be faced with liability for every injury claim resulting from any untoward condition in every cranny of the building, whether it is reasonably foreseeable or not. How can a property owner in any practical sense prevent a latent defect or repair it when he has no way of detecting it? And if he cannot prevent the defect or the occurrence, why should he be liable? . . .

. . . Neither justice no [sic] reason dictate the advisability of a change in landlord-tenant law which would permit recovery for personal injuries without proof of deviation from the standard of reasonable care.

Id. at 55-56, 301 A.2d at 467.

122. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). In *Vandermark*, the defendant, a Ford dealer, sold an automobile to the plaintiff who was seriously injured when the steering failed causing the plaintiff's car to swerve into a pole. *Id.* at 259, 391 P.2d at 169-70, 37 Cal. Rptr. at 897-98. The court held that a retailer could be held strictly liable in tort for injuries caused by a defective product, stating:

[R]etailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing expertise that should bear the cost of injuries resulting from defective products. . . . Strict liability on the manufacturer 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. Accordingly, as a retailer engaged in the business of distributing goods to the public, [the defendant] is strictly liable in tort for personal injuries caused by defects in cars sold by it.

Id. at 262-63, 391 P.2d at 171-72, 37 Cal. Rptr. at 899-900.

123. *Becker*, 38 Cal. 3d at 480, 698 P.2d at 134, 213 Cal. Rptr. at 231 (Lucas, J., concurring in part and dissenting in part) (emphasis omitted) (quoting *Vandermark*, 61 Cal. 2d at 262, 391 P.2d at 172, 37 Cal. Rptr. at 900).

significant role in the extension of strict liability in *Price v. Shell Oil Co.*¹²⁴ to cover lessors and bailors of personal property.¹²⁵

Justice Lucas stated that the requirement of a "continuing business relationship" was given no meaningful consideration by the majority.¹²⁶ He pointed out that in *Kriegler v. Eichler Homes, Inc.*,¹²⁷ a case relied upon by the majority, the court's holding that strict liability extended to mass producers and sellers of homes rested on the identification of Eichler as a "manufacturer"¹²⁸ of homes. Justice Lucas doubted the applicability of strict liability where, as here, the defendant was a purchaser of property that had already been "manufactured." In illuminating this distinction, Justice Lucas pointed out the distinction between "a party actually selecting, installing, constructing and buying the defective product and a party who plays no such role and *therefore has no connection with anyone up the ladder of distribution.*"¹²⁹ He further noted that this distinction was fundamentally adhered to by the court of appeal in both the *Fakhoury* and *Golden* cases cited by the majority. Justice Lucas suggested that the cases dealing with the sale of used machinery offer an excellent example of courts' unwillingness to extend strict liability absent a " 'continuing business relationship with the manufacturer in the course of which he can adjust the cost of protection from strict liability.' "¹³⁰

Justice Lucas stated that the majority opinion placed too much emphasis on the "risk spreading" function of strict liability and too little emphasis on "other crucial and long-recognized justifications for [the] imposition of strict liability,"¹³¹ such as using strict liability as an incentive for a manufacturer to improve product safety and as a way to remedy a plaintiff who was misled by a false representation. Justice Lucas stated that these rationales mitigate *against* application of the doctrine in the leasing of property in that: (1) a landlord who purchases a leasable dwelling from another is unable, through subsequent dealings with the

124. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970). See *supra* note 81.

125. *Becker*, 38 Cal. 3d at 480, 698 P.2d at 134, 213 Cal. Rptr. at 231 (Lucas, J., concurring in part and dissenting in part).

126. *Id.* (Lucas, J., concurring in part and dissenting in part).

127. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). For a discussion of *Kriegler*, see *supra* note 82.

128. *Kriegler*, 269 Cal. App. 2d at 227, 74 Cal. Rptr. at 752.

129. *Becker*, 38 Cal. 3d at 481, 698 P.2d at 134, 213 Cal. Rptr. at 231 (Lucas, J., concurring in part and dissenting in part) (emphasis in original).

130. *Id.* at 482, 698 P.2d at 135, 213 Cal. Rptr. at 231 (Lucas, J., concurring in part and dissenting in part) (citing *Tauber-Arons Auctioneers v. Superior Court*, 101 Cal. App. 3d 279, 283, 161 Cal. Rptr. 789, 798 (1980)).

131. *Id.* at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232 (Lucas, J., concurring in part and dissenting in part).

manufacturer, to improve product safety in the future; and (2) contrary to the majority's implication, even though a landlord may impliedly represent to a tenant that the premises are habitable, he does not represent that he has expertise concerning every item forming the apartment or that every item in the premises is in perfect condition.¹³²

The majority pointed out that landlords who buy used leasable dwellings are essential to the rental business, that they have more than a random or accidental role in the marketing enterprise and, therefore, that landlords are in the stream of commerce and subject to strict liability.¹³³ The dissent asserted that one major difficulty with the majority's approach is that it focuses on the wrong "stream of commerce."¹³⁴ The majority focused on the fact that landlords play an essential role in renting dwellings. Justice Lucas asserted, however, that attention should instead be focused on the stream of commerce through which defective products reach the market and that landlords who buy used buildings are likely to have no direct or continuing relationships with the manufacturers and marketers of the particular defective products found on the premises.¹³⁵ Justice Lucas stated that "[i]t is illogical to conclude that [IRM] became part of the overall *marketing* scheme for the shower doors merely by purchasing property in which they had long since been installed."¹³⁶

Justice Lucas also questioned the majority's contention that a continuing business relationship is never essential to the imposition of strict liability.¹³⁷ Justice Lucas suggested that only where the manufacturer is unavailable may it be appropriate to go outside the marketing chain in order to compensate the plaintiff.¹³⁸ However, the majority stated in its recitation of facts that the plaintiff had previously settled its case against the builder and a door assembler and installer for a minimum of \$150,000 and had actions pending against defendants other than the landlord.¹³⁹ Thus, it would not have been necessary in this case to go

132. *Id.* at 482-83, 698 P.2d at 135, 213 Cal. Rptr. at 232 (Lucas, J., concurring in part and dissenting in part).

133. *Id.* at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221.

134. *Id.* at 483, 698 P.2d at 136, 213 Cal. Rptr. at 233 (Lucas, J., concurring in part and dissenting in part).

135. *Id.* (Lucas, J., concurring in part and dissenting in part).

136. *Id.* at 484, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., concurring in part and dissenting in part).

137. *Id.* at 484, 698 P.2d at 136-37, 213 Cal. Rptr. at 233-34 (Lucas, J., concurring in part and dissenting in part).

138. *Id.* at 484, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., concurring in part and dissenting in part).

139. *Id.* (Lucas, J., concurring in part and dissenting in part).

outside the marketing chain to compensate the plaintiff for his injuries.

Finally, Justice Lucas noted that "[n]o matter how carefully [landlords] inspect, and no matter how impossible to discern the defect, [landlords] are now the last outpost of liability for countless unrelated products in which they have no particular expertise."¹⁴⁰ In a footnote, the dissent quoted a New Mexico case which stated that "[a] major consideration in holding lessors of commercial products strictly liable was that such lessors possessed expert knowledge of the characteristics of the equipment or machines they leased."¹⁴¹ That case refused to extend strict liability to a motel operator, holding that a person who makes a one-time purchase of furnishings and fixtures about which he has no particular expertise could not be realistically compared with a commercial lessor of personal property.¹⁴² Justice Lucas suggested that the same rationale applied to landlords who purchase used buildings and who may now, under the majority's holding, be "strictly liable for defects of which he or she has no knowledge or reason to know and which appear in any part of the property no matter how esoteric the understanding necessary to comprehend the working of that part."¹⁴³

IV. ANALYSIS

A. Premises as Product

The first of the many important issues which must be discussed is the *Becker* majority's characterization of an apartment, as a whole, as the product to which strict liability applies. In its discussion, the majority seemed to suggest that there are really two different theories on which to base its conclusion that an apartment is a product.

1. *Green's* interchanging use of the terms "apartment" and "product"

The first theory equating an apartment with a product is based on

140. *Id.* at 485, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., concurring in part and dissenting in part).

141. *Id.* (Lucas, J., concurring in part and dissenting in part) (quoting *Livingston v. Begay*, 98 N.M. 712, 716, 652 P.2d 734, 738-39 (1982)). In *Livingston*, the plaintiff brought an action as a representative of a motel guest who was asphyxiated overnight when gas escaped from a gas space heater in his motel room. 98 N.M. at 714, 652 P.2d at 736. The court held that a motel operator is not strictly liable for defects in the fixtures and furnishings of the rooms he lets out to the public. *Id.* at 717, 652 P.2d at 739.

142. *Livingston*, 98 N.M. at 716-17, 652 P.2d at 739.

143. *Becker*, 38 Cal. 3d at 483-84, 698 P.2d at 136, 213 Cal. Rptr. at 233 (Lucas, J., concurring in part and dissenting in part).

certain language interchanged by the court in *Green v. Superior Court*.¹⁴⁴ However, before embarking upon this discussion, it is important to isolate precisely what part *Green* plays in the discussion of a tenant's recovery for personal injury on a theory of strict liability.

On their face, *Green*'s facts are fundamentally distinguishable from those in *Becker*. In *Green*, the tenant refused both to pay rent and to vacate the apartment because of the existence of some eighty housing code violations which he claimed made the premises uninhabitable. The tenant used a theory of implied warranty of habitability as a defense to an unlawful detainer action initiated by the landlord, a contractual defense based on the theory of independent covenants.¹⁴⁵ Conversely, *Becker* was an action instituted by the tenant against the landlord for personal injuries based on the theories of negligence and strict liability in tort. No housing code violations were alleged. These factual distinctions in *Green* and the resulting legal theories relied upon for analysis should point to the conclusion that *Green* will prove to be of limited applicability in a suit by a tenant for personal injury based on a theory of strict liability.

The primary factual similarity between *Becker* and *Green* is that, in both cases, the California Supreme Court sought to extend the rights of tenants. In accomplishing this goal, both cases relied on a common set of policy considerations. Stated simply, those considerations were that modern city dwellers are ill equipped to repair or inspect modern apartments and that there exists a severe shortage of low-cost housing, leaving tenants with little bargaining power. *Green* analogized to the dramatic changes in the law of commercial transactions, where modern decisions have recognized that the consumer in an industrial society should be entitled to rely on the skill of a supplier or the assurances of a retailer.¹⁴⁶

It is at this point that the language of *Green* bears relevance to the first theory equating an apartment with a product. The *Green* court stated:

In most significant respects, the modern urban tenant is in the same position as any other normal 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 reason-

144. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). For a discussion of *Green*, see *supra* note 41.

145. See *supra* text accompanying notes 46-47.

146. *Green*, 10 Cal. 3d at 627, 517 P.2d at 1174-75, 111 Cal. Rptr. at 710-11.

ably expect that the *product* he is purchasing is fit for the purpose for which it is obtained, that is, a living unit.¹⁴⁷

The *Becker* court used this language equating an apartment with a "product" as a stepping stone to its conclusion. The majority stated that the *Green* court "[p]oint[ed] out that the modern urban tenant is in the same position as any normal consumer of goods," concluding that "a tenant may reasonably expect that the *product* purchased is fit as a living unit"¹⁴⁸ This reference to *Green*'s interchangeable use of the terms "apartment" and "product" seems to have been a primary basis for the *Becker* court's conclusion that an apartment is, in and of itself, a product.

However, the *Becker* majority's reliance upon the *Green* language is problematic. The interchanging of the words "product" and "apartment" in *Green* was used to help the reader visualize a new and difficult concept. The product to which the *Green* court referred seems to be the "package of goods and services"¹⁴⁹ performed by the landlord, such as the supplying of adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.¹⁵⁰ In *Green*, the "product"—this package of goods and services—was found to be "defective" only after the landlord had been given notice of and an opportunity to correct the conditions rendering the dwelling uninhabitable.¹⁵¹ Thus, the *Green* court interchanged the words "apartment" and "product" to illustrate the concept that the

147. *Id.* at 626-27, 517 P.2d at 1175, 111 Cal. Rptr. at 711 (emphasis added).

148. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 462, 698 P.2d 116, 121, 213 Cal. Rptr. 213, 218 (1985) (emphasis added).

149. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970). The facts of *Javins* are similar to those in *Green*. A coalition of three tenants refused to pay rent. When their landlord sought an unlawful detainer against the tenants, they raised housing code violations by the landlord as a defense to nonpayment. *Id.* at 1073. The court stated that:

[T]he assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Id. at 1074 (footnote omitted).

The court went on to hold that a warranty of habitability, measured by the standard set out in the Housing Regulations for the District of Columbia, is implied by operation of law in all leases. *Id.* at 1081.

150. *Id.* at 1074.

151. *Green*, 10 Cal. 3d at 620-21, 517 P.2d at 1170-71, 111 Cal. Rptr. at 706-07.

package of goods and services for which the tenant contracted, if found lacking after proper notice, could supply a tenant with a "defense against nonpayment"; in other words, a "contractual"¹⁵² warranty.

It is obvious from the facts of *Green* and its procedural posture that it was not attempting to add apartments to the list of "products" covered by the doctrine of strict liability or to affect the law of strict liability in any way. *Green* merely analogized to an area where the law seemed to be providing more protection to the consumer. For this reason the *Becker* court seems to have placed too much weight on *Green*'s interchanging of terms. *Becker*'s reliance upon *Green*'s characterization of an apartment as a product is, it appears, ill-founded.

2. The contributions of *Fakhoury* and *Golden*

a. the characterization of an apartment as a product—a second theory

The second theory supporting *Becker*'s characterization of an apartment as a product comes from the court's analysis of two California appellate court decisions which applied strict liability in a landlord-tenant relationship, *Fakhoury v. Magner*¹⁵³ and *Golden v. Conway*.¹⁵⁴

In *Fakhoury*, the plaintiff tenant was injured when a defective couch, which was purchased by the defendant landlord and included with plaintiff's furnished apartment, collapsed.¹⁵⁵ The plaintiff sat on the couch and, due to the looseness of the wires supporting the cushion, fell through and injured her back.¹⁵⁶ The appellate court held that "under the circumstances of this case, the doctrine of strict liability does apply to the landlord, not as lessor of real property, but as lessor of the furniture."¹⁵⁷ In this way the *Fakhoury* court acknowledged the difference between holding the landlord strictly liable for defective fixtures¹⁵⁸ on the premises, an issue which should be decided on the basis of strict premises liability, and holding the landlord strictly liable as a lessor of

152. The distinction between strict contractual warranties and common law tort warranties is important here. In *Green*, the court recognized that the common law rule regarding leases—that they were independent covenants, see *supra* text accompanying notes 46-47—was being supplanted by the contractual rule that covenants are dependent upon each other. Thus, in formulating its holding, the *Green* court recognized the contractual nature of the issue before it.

153. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

154. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

155. *Fakhoury*, 25 Cal. App. 3d at 62, 101 Cal. Rptr. at 475.

156. *Id.* at 61, 101 Cal. Rptr. at 475.

157. *Id.* at 63, 101 Cal. Rptr. at 476.

158. Fixtures have been described as "[c]hattels placed on or affixed to land or structures attached to land by the landowner for the purpose of 'improving' the land . . ." R. CUNNINGHAM, W. STOECK & D. WHITMAN, *THE LAW OF PROPERTY* 13 (1984).

defective chattels.¹⁵⁹

In *Golden*, the landlord hired an independent contractor to install a wall heater¹⁶⁰ in what was arguably a residential leased premises.¹⁶¹ It was argued that the wall heater, because of either defective manufacture or installation, caused a fire in which the tenant suffered a loss of property.¹⁶² The court of appeal noted the distinction made in *Fakhoury* between defective fixtures and defective furniture¹⁶³ but saw "no reason to distinguish between appliances which are attached to the realty, and appliances or furniture which are not,"¹⁶⁴ concluding:

[When] a lessor of real property who . . . is engaged in the business of leasing apartments and appurtenant commercial premises, equips the premises with an appliance without knowing whether or not it is defective because of the manner in which it was manufactured or installed, and it proves to have defects which cause injury to persons or property when used in a normal manner, [he] is strictly liable in tort.¹⁶⁵

The *Becker* majority seemed to suggest that *Golden* erased the distinction raised in *Fakhoury* between liability for the leasing of defective chattels and strict liability based on leasing an apartment with defective fixtures (i.e., defective premises). This apparently provided the *Becker* majority with the missing link in the chain between strict liability for leased chattels and strict liability for leased premises.

There are inherent problems with a theory of liability based on this reasoning. In *Golden*, the court of appeal was struggling with what it perceived to be an artificial distinction: those who were injured by rented property which was not attached to their rented premises were allowed recovery while those injured by rented property which was attached to the rented premises were not allowed recovery. The court, therefore, fashioned a rule which broke down this artificial distinction. That rule, distilled to its essence, is that if an owner of a leased premises installs an

159. The court cited *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) for support of the proposition that strict liability in tort is applicable, "under certain circumstances, to lessors who have placed articles on the market knowing that they are to be used without inspection for defects." *Fakhoury*, 25 Cal. App. 3d at 63, 101 Cal. Rptr. at 476.

160. *Golden*, 55 Cal. App. 3d at 952, 128 Cal. Rptr. at 71.

161. The premises in *Golden* was a store which was rented by the tenant in which he allowed an employee to live. The store was admittedly designed for the occupation of human beings in that it was equipped with a kitchen, bath and an extra room. *Id.* at 962, 128 Cal. Rptr. at 78.

162. *Id.* at 953, 128 Cal. Rptr. at 71-72.

163. *Id.* at 961, 128 Cal. Rptr. at 77.

164. *Id.* at 961, 128 Cal. Rptr. at 77-78.

165. *Id.* at 961-62, 128 Cal. Rptr. at 78.

appliance¹⁶⁶ which turns out to be defective, the plaintiff may recover, whether or not that appliance was attached to the leased premises. The court of appeal could have just as easily held that premises containing a fixture with a dangerous propensity are defective. It did not do so. Instead, it focused its holding upon the defective nature of the *appliance*. In *Becker*, the majority did not conclude that the appliance itself (the shower door) was defective,¹⁶⁷ but that the premises were defective. That is, the apartment itself was defectively designed or manufactured because it was designed and manufactured with a dangerous shower door.¹⁶⁸

The import of this distinction becomes obvious when one considers an example where, in the absence of any sort of defective fixture or appli-

166. The court in *Golden* left this term undefined. See *supra* note 106.

167. The court could have ruled that the shower door was defective under the first prong of the test given to us in *Barker v. Lull*, i.e., it did not meet ordinary consumer expectations. For a discussion of *Barker*, see *supra* text accompanying note 116. The plaintiff may also have had a claim based on the doctrine of foreseeable misuse/crashworthiness. See *Cronin v. J.B.E. Olson Co.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In *Cronin*, the plaintiff, the driver of a bread delivery truck, was injured when his truck collided with another vehicle and a metal hasp (a hasp is a hinged fastening device which consists of a flat metal piece with a hole which fits over a metal "staple" through which a lock or pin is inserted) behind the driver's seat failed. The loaded racks of the bread truck flew forward striking the plaintiff in the back and forcing him through the windshield. *Id.* at 124, 501 P.2d at 155, 104 Cal. Rptr. at 435. The case is famous for disapproving the requirement that a product be "unreasonably dangerous" before an action can be brought in strict liability. See RESTATEMENT (SECOND) OF TORTS § 402A (1972) (amended 1973 to delete "unreasonably dangerous" requirement). The court additionally refuted the defendant's argument that plaintiff's use of the delivery van was unforeseeable. The court stated:

[The defendant's] argument that the van was built only for "normal" driving is unavailing. We agree that strict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable. Although a collision may not be the "normal" or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products The design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use.

Id. at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

Given the facts in *Becker*, a court could have found that the realities of a shower door's everyday use (i.e., used in the immediate proximity of wet and slippery surfaces, generally no other means of support were a consumer to slip, the prominence of shower doors designed to lessen the severity of such accidents), were such that an accident involving a shower door was reasonably foreseeable.

168. For the purposes of this Note, it might be clearer to use the terms used by the court in this difficult and elusive area. When the court says an apartment is manufactured, they seem to be referring to its construction. When they allude to its design, they are speaking of how it was drawn out in blueprints or engineered. A similar situation was presented in *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969), where the court held the defendant strictly liable in tort for damages suffered by the plaintiff as a result of a defectively "manufactured" residential lot. The "manufacturing" process in that case evidently consisted of moving in fill dirt and grading in preparation for the construction of the house. *Id.* at 615, 272 Cal. Rptr. at 639.

ance, premises may be considered defective.¹⁶⁹ For example, setting rooms at different floor levels was a popular architectural style at one time. When entering a different room, one is necessarily forced to either step up or step down. If a tenant were at some point to do neither and injure himself, what appliance is to be blamed for the injury?¹⁷⁰ The defect, if one were indeed found, would not lie in any particular appliance, but in the defective design of the apartment itself. Under *Becker*, the tenant, if he could prove causation, would be allowed to assert a strict liability cause of action. Under *Golden*, which requires the presence of a defective appliance, he would not be allowed to assert a strict liability cause of action.¹⁷¹ Further, the *Golden* court leaves the term "appliance" undefined. Is a shower door an appliance under *Golden*? Is a doorknob, paint or wooden framing? A defect in any of these might subject a landlord to liability under *Becker* but, arguably, not under *Golden*.

In conclusion, *Becker's* characterization of an apartment as a product is clearly too broad, if that characterization is to be based on *Golden* and *Fakhoury*. *Fakhoury* plainly attempted to limit strict liability to furniture only, while *Golden* intended to broaden that liability but only to the extent of using the broader word "appliances." Moreover, the characterization of an apartment as a product may lead to results unforeseen by the *Becker* court. Plaintiffs with otherwise meritless cases would be allowed to recover under *Becker's* overbroad formulation of the duty owed by landlords.

169. The full implications of the *Becker* opinion are not apparent from the facts of the case because the defect in the apartment stemmed from a defect in a shower door, arguably a "fixture."

170. Louisiana, a state which by statute imposes strict liability for latent defects upon the landlord, has ruled on a case with closely related facts. In *Morgan v. Hartford Accident and Indem. Co.*, 402 So. 2d 640 (La. 1981), the decedent, a woman in her 80's, was walking down a church corridor on her way to the bathroom when she tripped and fell on an eight inch step between the corridor and the church's gown room. *Id.* at 641. The decedent suffered a fractured hip and died four days later as a result of complications from surgery. *Id.* The court held that the eight inch drop between the rooms constituted a defect in that it was "difficult if not impossible for the approaching [person] to discern the difference in levels of the floor." *Id.* at 642.

Another example would be where a landlord leases a room to a tenant which is equipped with a glass wall such that a person who thought that there was no glass walked through it. There are endless other examples, such as a floor which is unduly slippery, a counter level which is not dangerous to adults but dangerous to children, an auto garage which is designed defectively, etc.

171. Of course, under *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), principles of comparative negligence would be applicable to products liability actions and might limit the plaintiff to only partial recovery. See *supra* note 6. The set-off would be measured by the extent to which the tenant's own negligence is found to have contributed to his tripping.

b. expertise as a rationale for applying strict liability

Apart from the above-mentioned reasons for disfavoring extension of the term "product" to include an apartment as a whole, there lies another reason which deals with the underlying rationale for the application of strict liability.

In *Becker*, Justice Lucas suggested in his dissent that one of the traditional rationales for applying strict liability to products is that manufacturers, unlike consumers, through their experience in manufacturing a product develop an expertise in that area.¹⁷² This rationale most likely does not apply to extend the concept of strict liability to a landlord and his "product," the leased premises.

It has been held that, while this rationale applies to lessors of personal property, it does not apply to motel operators who lease rooms. Justice Lucas, in his dissenting opinion in *Becker*, quoted the New Mexico case of *Livingston v. Begay*,¹⁷³ where it was stated that

[a] major consideration in holding lessors of commercial products strictly liable was that such lessors possessed expert knowledge of the characteristics of the equipment or machines they leased These considerations do not apply when a motel operator makes a one-time purchase of furnishings and fixtures about which he has no special expertise. Therefore, we hold that a motel operator is not strictly liable for defects in the fixtures and furnishings of the rooms he held out to the public.¹⁷⁴

The *Livingston* court suggested that a motel operator should not be held strictly liable for defects in "fixtures" and "furnishings" because he cannot be held to the same level of expert knowledge as a product manufacturer or lessor of non-realty. Because a motel operator cannot be expected to possess expertise in all the areas covered in a modern motel, the court concluded that a very important public policy behind imposing

172. *Becker*, 38 Cal. 3d at 485 n.4, 698 P.2d at 137 n.4, 213 Cal. Rptr. at 234 n.4 (Lucas, J., concurring in part and dissenting in part). This rationale was also suggested by Justice Traynor in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring). Justice Traynor sought to explain why strict liability in tort should apply to manufacturers as well as retailers. In doing so, he stated "[c]ertainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test." *Id.* at 468, 150 P.2d at 443-44. Justice Traynor thereby suggested that one of the reasons strict liability should be imposed on manufacturers is related to their ability to differentiate between a good and a bad product, in other words, their "expertise."

173. 98 N.M. 712, 652 P.2d 734 (1982).

174. *Becker*, 38 Cal. 3d at 485 n.4, 698 P.2d at 137 n.4, 213 Cal. Rptr. at 234 n.4 (Lucas, J., concurring in part and dissenting in part) (citing *Livingston v. Begay*, 98 N.M. 712, 716-17, 652 P.2d 734, 738-39 (1982)).

strict liability was absent. The motel operator cannot realistically be expected to spot defects in furnishings or fixtures with one hundred percent accuracy. For example, a motel operator is less likely than the manufacturer of a gas heater to know the difference between a defective gas heater and a nondefective gas heater. However, the *Becker* court would hold landlords of leased dwellings to an expert's standard. The *Livingston* court felt that such a rule would be absurd and held instead that the motel operator's lack of expertise should weigh in favor of non-imposition of strict liability.

Further, even if the *Livingston* court had adopted strict liability for motel operators, distinctions between motel operators and apartment owners readily come to mind. For example, motel operators have more control over rooms because they have daily access to them. Motel rooms also require continual maintenance and upkeep for the next guest. An apartment owner has neither the same amount of control nor the duty to clean and inspect a room every day. Thus, the arguments against holding a motel operator strictly liable seem to apply with even more force to apartment owners.

In *Becker*, the court's characterization of the entire rented premises as the product allowed it to gloss over this point. Although the majority did not expressly refer to the foregoing policy consideration, in characterizing the entire premises of the leased dwelling unit as a singular product it implied that, much like the producer of a product made up of components, the landlord should have expert knowledge in every aspect of the rental of that apartment. However, it is one thing to say that a landlord is an expert at leasing rental dwellings. It is quite another to say that a landlord possesses expert knowledge of the myriad of components which comprise the leased dwelling. Because of the practical impossibility of obtaining expert knowledge of all the components of an apartment, landlords must rely on others for their safe manufacture, installation and repair. In this respect, landlords are in no better position to know of defects than are tenants, yet they are held to the ultimate standard.¹⁷⁵

175. It may be argued that landlords are in a better position to inspect than a tenant in that they have the benefit of ownership for an extended period of time. This argument is suspect for two reasons. First, it ignores the possibility that a tenant who has lived in his apartment for 15 years may sue a person who has owned the apartment building for 15 days. Second, it ignores the fact that the amount of time an apartment is actually open to landlord inspection may be limited to the time between successive tenants. The aggregate of this time over several years may not amount to the time of tenancy of a single occupant.

c. *deciding the case under Fakhoury or Golden*

As stated above, *Fakhoury* stood for the proposition that a landlord may be subject to strict liability if he leases a tenant furniture which proves to be defective and which injures a tenant. *Golden* stood for the proposition that a landlord may be subject to strict liability if he leases a tenant a dwelling he has equipped with fixtures or appliances which prove to be defective and injure the tenant. Thus, it seems that at the time that *Becker* was decided, the law was that the landlord was always subject to strict liability for leased furnishings, but he was only subject to strict liability for fixtures in his leased dwelling if he actually installed the defective fixture.

IRM claimed that *Fakhoury* was not applicable because the injury in that case resulted from defective furniture, while Mr. Becker was injured by a defective fixture. IRM additionally claimed that *Golden* was inapplicable because there the landlord installed the heater, while in the present case the shower door was apparently installed by the builder.

As a result, in order to grant Mr. Becker a strict liability cause of action, the court was compelled to extend the law in some way. There were several ways in which the court could have done so.

One option the court had was to hold a landlord strictly liable for defective furniture *or* fixtures. This would have been a variation of the *Fakhoury* holding. This option would focus the analysis on the issue of whether the shower door was a defective fixture. It would have required a slight extension of the law, but the inherent problems of characterizing a leased premises as a whole as the defective product would have been avoided. However, the problem with this option is that *Fakhoury*'s facts are distinguishable from *Becker*'s as the landlord in *Fakhoury* directly supplied the defective couch. The *Becker* court could have avoided this problem by reasoning that a landlord, in supplying premises, likewise supplies those component parts installed by the builder or previous owners.¹⁷⁶ Thus, even though IRM did not *install* the defective shower door, the court could have found that they did indeed *supply* the shower door.

A second option the court had was to hold a landlord strictly liable for defective fixtures regardless of who *installed* them. This would have allowed the court to accomplish its goal of spreading risk of injury

176. This option would only apply to installations by the builder or previous owners. It would not apply to installations carried out by former tenants or their agents. Thus, for example, if a landlord did not know that a former tenant repainted several rooms in an apartment with lead paint and the landlord painted over that paint with a safe paint before a new tenant leased the apartment, the landlord would not be liable for injuries resulting from the lead paint.

throughout the marketplace while again avoiding the characterization of the leased dwelling as a whole as the defective product. This option is slightly different from the one above in that it would include installations by former tenants.

A third option was to do exactly what the *Becker* court did, which was, specifically, to ignore the difference between fixtures and furnishings—thereby placing the focus on the leased dwelling as a whole—and to extend strict liability to apply to landlords who did not install the defective component. In choosing this option, the court managed to extinguish the *Fakhoury* distinction between leased personalty and leased premises and to blur the distinction made in *Golden* between landlords who install the fixtures and those who do not. By adopting this third option, the *Becker* majority extended not one, but two separate doctrines. An extension of this magnitude was not required to provide Mr. Becker with a strict liability cause of action.

B. The Effectiveness of Prevention or Detection Through Imposing Strict Liability

The majority stated, as support for holding landlords strictly liable for latent defects, that “[t]he tenant purchasing housing for a limited period is in no position to inspect for latent defects in the increasingly complex modern apartment buildings . . . whereas the landlord is in a much better position to inspect for and repair latent defects.”¹⁷⁷

This argument may be founded on either or both of the following assumptions. The first assumption is that a landlord is *more capable* than a tenant to inspect apartments. However, this argument was addressed earlier in this Note, where it was pointed out that landlords are not capable of providing an inspection so thorough that all defects would be eliminated.¹⁷⁸ Knowledge of an apartment’s structure and components is not a prerequisite to ownership. It would be unrealistic to expect *any* person to be an expert in *every* aspect of an apartment. Thus, the court’s reliance on this assumption to support their holding seems ill-founded.

The second assumption is that a landlord has a greater *opportunity* to inspect than does a tenant. However, this assumption is also questionable. Is it true that a landlord has a greater opportunity to inspect an apartment for latent defects than does a prospective tenant?¹⁷⁹ How is

177. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 464, 698 P.2d 116, 122, 213 Cal. Rptr. 213, 219 (1985).

178. See *supra* text accompanying notes 172-75.

179. The definition of “latent” is “[h]idden; concealed; dormant.” BLACK’S LAW DICTIONARY 794 (5th ed. 1979). It may be argued that the defect in the premises in *Becker*, the shower

"adequate opportunity" to be defined? Even if IRM had completed "adequate inspection" of the premises, there inevitably would have been some defects in the apartment which would have defied discovery. It appears that the *Becker* court expected IRM to have not only determined the breakage propensities of the shower door but to also have inspected the condition of electrical conduits running behind walls, the hidden plumbing, the insulation and the foundation of the building. If the expectations of the *Becker* court are taken at face value, a landlord might very well feel compelled to come to the apartment at the time of the inspection not with a magnifying glass but with a demolition crew.

C. Strict Liability as an Effective Deterrent

In his classical concurrence in *Escola v. Coca-Cola Bottling Co.*,¹⁸⁰ Justice Traynor stated: "Even if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market . . .,"¹⁸¹ and later, "[i]t is to the public interest to discourage the marketing of products having defects that are a menace to the public."¹⁸² Justice Traynor made it clear that one of the primary policy reasons for imposing strict liability on product manufacturers is that by imposing such liability, manufacturers will be encouraged to produce safer products.¹⁸³

Is this policy consideration served by imposing strict liability upon landlords for latent defects in the premises? This question must be answered in the context of two distinct factual settings. The first is where

door, was not a latent defect, but a patent one. The court, in its statement of undisputed facts, indicated that the shower door had a marking which somehow revealed that the glass was untempered rather than tempered. See *supra* note 22. It is not clear from the statement of facts whether this mark was obscure enough to render the untempered nature of the glass hidden or concealed. On the other hand, even if the marking could be clearly read, there is some question as to whether the "reasonable tenant" would find the description "tempered" or "untempered" meaningful.

180. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944).

181. *Id.* at 462, 150 P.2d at 436 (Traynor, J., concurring).

182. *Id.* at 462, 150 P.2d at 441 (Traynor, J., concurring).

183. Further support for this policy consideration is supplied by cases from other jurisdictions. See, e.g., *First Nat'l Bank of Albuquerque v. Nor-Am Agric. Prods., Inc.*, 88 N.M. 74, 537 P.2d 682 (children injured when they consumed part of hog feed grain treated with seed disinfectant), *cert. denied*, 88 N.M. 29, 536 P.2d 1085 (1975); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974) (defective sanding machine). Some commentators have argued, however, that strict liability is not generally an effective deterrent to production of defective products. See Raleigh, *The "State of the Art" in Product Liability: A New Look at an Old "Defense,"* 4 OHIO N.U.L. REV. 249 (1977); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

the landlord has himself installed the defective component or has had a building built which has defects apart from any components. In that case, the landlord would be in a position of control over the building which will be leased. If he knows that he will bear the burden of compensating a tenant who is injured as a result of a defect in materials or workmanship, the landlord may indeed take greater precautions. For example, he is likely to pay more for a more experienced contractor or generally keep tighter control over the installation or construction.¹⁸⁴

The second circumstance is the situation where, as in *Becker*, the landlord purchases a building from another and leases units in the building. Here, the result is different. In that case, the imposition of strict liability can have no deterring effect because the landlord took no part in producing the leased dwelling or installing the defective component. Quite the contrary, the landlord who is forced to rely on the expertise of those who built the leased dwelling and installed its components is now going to be held strictly liable for actions on their part even though he has absolutely no opportunity to change the method of operation.

D. The Propriety of Holding a Second Buyer Strictly Liable

In *Becker*, IRM argued that a landlord who purchases existing used housing should not be held strictly liable.¹⁸⁵ It based this argument on language found in *Vandermark v. Ford Motor Co.*,¹⁸⁶ which stated that "[s]trict liability on the manufacturer 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*."¹⁸⁷ IRM claimed that it had never been in a business relationship with the builder and that purchasers of used housing normally do not retain continuous business relationships with builders which would allow them to adjust costs.¹⁸⁸ IRM sought to illustrate an analogous trend in the practice of selling used machinery.¹⁸⁹ The cases in this area hold that a seller of used machinery, who sells that machinery "as is" and who does not rebuild or rehabilitate it, is not strictly liable in tort.¹⁹⁰ Some of these decisions seem to suggest

184. It may also be argued, however, that a landlord will be less likely to make needed improvements if by doing so he would subject himself to further liability.

185. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 465, 698 P.2d 116, 123, 213 Cal. Rptr. 213, 220 (1985).

186. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

187. *Id.* at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900 (emphasis added).

188. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.

189. *Id.*

190. *Wilkinson v. Hicks*, 126 Cal. App. 3d 515, 179 Cal. Rptr. 5 (1981) (strict liability cause

that a used machinery dealer is not part of the manufacturing and marketing enterprise.¹⁹¹

The court brushed over IRM's argument by holding that a continuing business relationship is not essential to the imposition of strict liability.¹⁹² It first reasserted its view that the paramount policy in imposing strict liability

remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects. . . . Just as the unavailability of the manufacturer does not militate against liability, the absence of a continuing business relationship between builder and landlord is not a factor warranting denial of strict liability of the landlord.¹⁹³

The court further contended that "[i]f anything, the unavailability of the manufacturer is a factor militating in favor of liability of persons engaged in the enterprise who can spread the cost of compensation."¹⁹⁴ Apparently, this statement is based on the court's feeling that the primary policy consideration behind extending strict liability is the compensation of defenseless victims.

The court distinguished landlords who purchase existing rental units from sellers of used machinery by first asserting that, unlike the sellers of used machinery, a landlord plays an essential (i.e., not "random" or "accidental") role in the rental business. Second, landlords are unlike the sellers of used machinery because they retain a continuing relationship to the leased dwelling. Third, the landlord differs from the seller of used machinery in that he makes representations, implied or express, of habitability and safety.

Are all of the court's distinctions viable? First, consider the court's statement that "a continuing relationship is not essential to imposition of strict liability" because the paramount policy for applying strict liability is to spread throughout society the cost of compensating "defenseless"

of action rejected against seller of 50-year-old punch press); *LaRosa v. Superior Court*, 122 Cal. App. 3d 741, 176 Cal. Rptr. 224 (1981) (strict liability cause of action rejected against seller of used punch press); *Tauber-Arons Auctioneers Co. v. Superior Court*, 101 Cal. App. 3d 268, 161 Cal. Rptr. 789 (1980) (strict liability cause of action rejected against seller of used planer).

191. *See supra* note 186.

192. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220. It is important to note, however, that here the court overstates IRM's argument. IRM did not assert that it was essential to the imposition of strict liability that there be a continuous business relationship, merely that it would be unfair to the landlord to do so in the absence of a continuous business relationship.

193. *Id.* at 466, 698 P.2d at 123-24, 213 Cal. Rptr. at 220-21 (citations omitted).

194. *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.

victims. However, how much cost spreading actually occurs? The court stated in a footnote that the plaintiff had already settled with the builder, door assembler and installer for "\$150,000 plus \$50,000 in the event plaintiff is unsuccessful against the remaining defendants."¹⁹⁵ In light of the fact that the plaintiff had already made a good faith settlement with the builder, assembler and installer, the defendant landlord is precluded from seeking equitable indemnification from them.¹⁹⁶ Additionally, since there is no continuing relationship between the builder and the landlord who buys a used building, the cost of protection cannot be considered in further dealings. In the words of Justice Lucas, "[u]nlike retailers, lessors, bailors, wholesalers or others in the original chain of distribution of the product, the landlord owning used property cannot adjust the costs of protection up the chain. He may only do it, at best, *down* the chain of 'distribution,' namely by charging more to his tenants."¹⁹⁷ In light of the current shortage of low cost housing in most areas, one must wonder whether passing added costs on to tenants, perhaps driving decent housing out of the reach of some, serves public policy.

The court's distinction between landlords who purchase used buildings and sellers of used machinery must also be scrutinized. The court sought to distinguish landlords who purchase old buildings and sellers of used machinery on the grounds that landlords have an essential role in the rental business. That is to say, without landlords, buildings could not be let. However, if it were not for used machinery salesmen, could used

195. *Id.* at 457 n.1, 698 P.2d at 117 n.1, 213 Cal. Rptr. at 214 n.1. Indeed, one is forced to wonder whether a plaintiff who can negotiate a settlement for \$200,000 for injuries sustained when he slipped in the shower can in all propriety be characterized as "defenseless."

196. CAL. CIV. PROC. CODE §§ 877, 877.6 (West 1984). Section 877 provides:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—

....

(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

CAL. CIV. PROC. CODE § 877 (West 1984).

Section 877.6 provides:

(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors

....

(c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

CAL. CIV. PROC. CODE § 877.6 (West 1986).

197. *Becker*, 38 Cal. 3d at 485, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., concurring in part and dissenting in part).

machinery be sold? The court skirted this issue by suggesting that sellers of used machinery are not essential to the sale of "machinery" implying *all* machinery. *All* machinery, however, is not of importance. For the purposes of the court's example, only defective *used* machinery should be considered. But for used machinery salesmen, defective used machinery would not reenter the market. Thus, used machinery salesmen are just as essential to defective used machinery sales as landlords who lease second-hand buildings are essential to defective rental dwellings.

The court further attempted to distinguish used machinery salesmen from landlords who purchase and lease old buildings by stating that landlords have a continuing relationship to the leased property. However, the meaning of this distinction is unclear. If the court is suggesting that it is proper to impose strict liability because of the landlord's ability to inspect and repair, the fact is that the landlord has little ability to inspect an unwilling tenant's apartment once the tenant has assumed residence.¹⁹⁸ Conversely, if the court was suggesting that privity exists between the landlords and tenants, but not between used machinery salesmen and their customers, the answer is that: (1) this is not true and; (2) it has been clear for some time in California that privity is not required to assert a tort cause of action.¹⁹⁹

The court then distinguished sellers of used machinery and land-

198. In California, the applicable statute is CAL. CIV. CODE § 1954 (West 1985). Section 1954 provides, in relevant part:

A landlord may enter the dwelling unit only in the following cases:

- (a) In case of emergency.
- (b) To make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen or contractors.
- (c) When the tenant has abandoned or surrendered the premises.
- (d) Pursuant to court order.

Id.

Even though subsection (b) impliedly allows entry for necessary "services," inspection of an uncooperative tenant's apartment is not clearly sanctioned. Given the fact that the possible consequences of entry against a tenant's will include both civil and criminal liability, it would be an optimistic attorney, indeed, who would advise his client to enter the apartment and inspect against the tenant's wishes. *Id.*; CAL. CIV. PROC. CODE § 1159 (West 1985); *Winchester v. Becker*, 4 Cal. App. 382, 88 P. 296 (1906) (landlord found guilty of forceable entry into tenant's dwelling).

199. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). In *Biakanja*, the plaintiff's brother died testate leaving all his property to the plaintiff. 49 Cal. 2d at 648, 320 P.2d at 17. Because defendant did not see to it that the will was properly attested, the plaintiff received only one eighth of the decedent's estate. *Id.* She brought a negligence action against the defendant. The court stated that the issue in the case was "whether defendant was under a duty to exercise due care to protect plaintiff from injury and was liable for damage caused plaintiff by his negligence even though they were not in privity of contract." *Id.* at 648, 320 P.2d at 18. The court concluded that the plaintiff should be allowed to recover despite the absence of privity. *Id.* at 651, 320 P.2d at 19.

lords who buy used buildings by stating that landlords, unlike sellers of used machines, make representations of habitability and safety. The court suggested that when the landlord rents an apartment, he "guarantees" that it will be habitable and safe. The court cited no authority for this statement, but it is likely that it was derived from language in *Green v. Superior Court*.²⁰⁰ A careful reading of *Green*, however, requires a different interpretation.

In *Green*, the tenant refused to pay rent because of the existence of over eighty housing code violations in his apartment. These included: "(1) the collapse and nonrepair of the bathroom ceiling; (2) the continued presence of rats, mice, and cockroaches on the premises; (3) the lack of any heat in four of the apartment's rooms; (4) plumbing blockages; (5) exposed and faulty wiring; and (6) an illegally installed and dangerous stove."²⁰¹ *Green* held that substantial compliance to the housing code would in most cases suffice to meet the landlord's obligation to provide habitable living quarters.²⁰² In *Becker*, the plaintiff did not contend that the shower door in question violated the housing code. Additionally, the defect was latent. In other words, from all appearances, IRM was justified in representing²⁰³ that Mr. Becker's apartment was habitable and safe because there was virtually no way of telling otherwise. IRM was not required by the *Green* decision to guarantee that no tenant would ever be injured in its apartment. *Green*, in attempting to battle the mounting problem of "slum lords," required at least substantial compliance with the housing code from those who let apartments. The *Green* court imposed an implied guarantee from landlords that leased dwellings would meet the minimum standards required by the housing code. Mr. Becker did not argue that his apartment did not meet this standard. Thus, IRM did not breach its duty to provide a habitable dwelling as that term is defined in *Green*. Holding that *Green* imposes an implied guarantee of absolute safety misinterprets the law and imposes an impossible duty on landlords.

E. Who is Strictly Liable Under Becker?

In view of *Becker's* extensions in the law of landlord-tenant liability, it must be determined who exactly is liable under the court's holding. How many apartments must a landlord own before he is "engaged in the

200. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

201. *Id.* at 620-21, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

202. *Id.* at 637, 517 P.2d at 1183, 111 Cal. Rptr. at 719.

203. There is nothing in the factual statement of the case to suggest that any representations were made to Mr. Becker, other than those implied in law by cases such as *Green*.

business of leasing dwellings?"²⁰⁴ Does the *Becker* rule apply to both residential and commercial landlords?

The *Becker* court, in the rule it fashioned, held that a landlord "engaged in the business of leasing dwellings" is strictly liable in tort for injuries resulting from latent defects. This language suggests that only those landlords for whom leasing dwellings is an actual business will fall within the rule. The same language, however, may also be read to suggest that *any* person who rents a dwelling to another is engaged in the business of leasing.

Turning to the *Becker* decision for clues, the court stated earlier in its opinion that California follows a "stream of commerce" approach to strict liability in tort, which extends liability to "all those who are part of the 'overall producing and marketing enterprise that should bear the cost of injuries from defective products.'" ²⁰⁵ In its discussion of California's stream of commerce approach, the court cited *Price v. Shell Oil Co.*²⁰⁶ which defined what is meant by "commerce." The *Becker* majority stated that in *Price*, where the court held that strict liability was applicable to lessors and bailors, "it was pointed out that strict liability does not apply to isolated transactions such as the sale of a single lot."²⁰⁷

There is no other mention in the majority's opinion as to what constitutes a landlord "in the business of leasing dwellings" and therefore becomes subject to the *Becker* rule. It is unlikely that the court intended that persons are only subject to the rule of this case if they lease dwellings as their sole occupation. It is also likely that, by citing *Price*, the majority intended that only a landlord who offers more than one dwelling for rent will fall under its rule. Given the paramount policy consideration of the *Becker* court, that the loss from injury should fall not upon the victim but upon the party more able to bear the burden, it is at least arguable that whenever a landlord is making money on a rental, even if it is from renting a single room of a house, he will be held strictly liable as the party most able to bear the economic burden. However, this should not be the result because a landlord who rents a single room of his house has no way to pass on the cost of liability. Thus, if this reading were given to the *Becker* opinion, the cost of injury would be arbitrarily shifted from one party to the other. In conclusion, although the court's intent is not

204. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 464, 698 P.2d 116, 122, 213 Cal. Rptr. 213, 219 (1985).

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

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

207. *Becker*, 38 Cal. 3d at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216.

clear, it appears that the lessor of a single dwelling would escape strict liability.

The second question is whether the court's rule applies only to residential rentals or whether it also extends to units rented for commercial purposes. The court's holding stated that a landlord is strictly liable in tort if he is engaged in the business of leasing "dwellings."²⁰⁸ The term "dwellings" has been defined as "[t]he house or other structure in which a person or persons live; a residence."²⁰⁹ Therefore, the holding on its face seems to apply only to landlords who lease units for housing purposes.

Although the facts of this case concern a residential rental unit, and a vast majority of the cases cited by the majority in support of its proposition concern housing units, it can be argued that the policy considerations considered by the *Becker* court are equally applicable to lessors of commercial units. The policy consideration of spreading the cost of compensating a victim applies with equal validity to the lessee of a store who is injured on a defectively designed loading dock. Thus, while this actual issue was not addressed by the *Becker* court, it is likely that other courts may interpret the rule as applying to lessors of commercial units. Arguably, however, a distinction exists between a residential tenant and a commercial tenant. A commercial tenant is not the "innocent victim" that the *Becker* court seemed to be concerned with. A commercial tenant is more likely to be aware of its exact needs when searching for a building and more aware of the characteristics and problems with a particular building once it is leased. It can be argued that a commercial tenant needs less protection. Thus, in light of the policy considerations espoused in *Becker*, and in light of the increased sophistication of most commercial tenants, the inclusion of the commercial building within its rule does not seem likely.²¹⁰

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

209. BLACK'S LAW DICTIONARY 454 (5th ed. 1979).

210. Large commercial investors, however, do not seem so convinced. At a recent Coldwell Banker Symposium, a memo was circulated dealing with the presence of asbestos in leased commercial buildings. The memo stated:

One thing came out loud and clear at the Coldwell Banker Symposium; the asbestos problem is enormous in terms of potential impact and currently no one knows how to solve the problem. Insurance companies are, or soon will be, excluding this item from liability coverages. The word is that the EPA soon will be requiring disclosure to tenants. Major sophisticated tenants are requiring landlord representations in their leases that buildings are asbestos free.

The net result is that *no one I talked to will buy a building with an asbestos problem . . .*

I want to reinforce *our policy*. *We will not buy or invest in any building that has asbestos in it*. There will be no exceptions until further notice . . .

*F. Viability of the Court's Reasons Why Its Ruling is
Not Unfair to Landlords*

The *Becker* court, in the latter part of its opinion, suggested three factors within landlords' control which may mitigate the harshness of imposing strict liability. They are, briefly, first, that a buyer can bargain to pay less for an apartment building which is likely to contain defective apartments; second, that a landlord can indemnify himself through the doctrine of equitable indemnity or through the purchase of insurance; and third, that a landlord can adjust the cost of rent.

1. The buyer may bargain with the seller

The majority began its argument by stating that "the cost of protecting tenants is an appropriate cost of the enterprise."²¹¹ It stated that the cost of purchasing rental housing is based on the anticipated risks and rewards of the purchase, thereby suggesting that a landlord can protect his economic interest by obtaining a purchase price "set off" equal to the amount that the apartment will probably end up costing in terms of injuries to tenants. The court suggested that the price of used rental housing may depend "in part on the quality of the building and reflect the anticipated costs of protecting tenants, including repairs, replacement of defects and insurance."²¹² It is clear, though, that a landlord can only repair things he knows about. If the defect is latent, the landlord cannot reasonably discover it by inspection and thus, he will pay full price on the purchase of the building. Then, once the latent defect which existed at the time of the sale causes an injury, he will be liable. This gives the seller a windfall. He received full price for the building and escaped any liability he may have had if he had retained ownership. The buyer is liable even though he could not do anything to protect himself.

Assume, however, for the sake of analysis, that things go according to the court's plan. The buyer and seller of used rental property are now free to bargain over the price of the building based on the quality of the

Memo to Coldwell Banker employees (1985) (copy on file at *Loyola of Los Angeles Law Review* Office).

This memo exemplifies one major difficulty brought about by the *Becker* opinion. Imposing strict liability on landlords may inhibit banks and other financial lenders from making loans to those who wish to buy older buildings. Further, commercial investors may shy away from buildings they feel are a "bad risk." This may have drastic economic effects on the rental market forcing those with high risk buildings to make a choice between taking a huge loss in selling their buildings or suffering potentially disastrous liability.

211. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 466, 698 P.2d 116, 124, 213 Cal. Rptr. 213, 221 (1985).

212. *Id.*

building and the likelihood that a tenant will be injured by a latent defect which the landlord has not discovered. The obvious issue is whether this is possible. Take, for example, IRM's thirty-six-unit complex. Of those thirty-six units, thirty-one had untempered shower doors. Mr. Becker's recovery to date has been \$200,000.²¹³ If IRM had exercised an amazing level of foresight as to its potential liability for this single type of defect and had bargained for a set off in the purchase price, that set off would have equaled \$7.2 million (\$200,000 x thirty-one untempered shower doors). However, if the court instead meant that the set off amount should equal the recovery for one injury with the landlord repairing the remaining apartments within the complex, the set off in IRM's case would have been \$200,000.²¹⁴ But what other latent and undiscovered defects lurk in IRM's apartment complex? And how can a dollar amount be placed on these?

For the entire preceding discussion it has been assumed that IRM knew about the rule adopted in this case and had thought ahead to realize that it would be strictly liable for latent defects. However, IRM did not negotiate its purchase of the apartment complex with the rule of this case in mind and neither did any landlord who purchased his apartment before the *Becker* decision was rendered.²¹⁵ The result is that no landlord who purchased a preexisting apartment complex before that date did so using the anticipated risk/cost balancing formula suggested by the majority. They had no opportunity to weigh any factors. The majority fails to take into consideration hardships placed upon landlords due to the quasi-retroactive effect of its ruling.

2. The landlord may insure

The majority's second suggestion, that a landlord can indemnify himself by seeking equitable indemnity for losses or through insurance is also unsatisfactory. As previously addressed, Mr. Becker had completed a good faith settlement with the builder, assembler and installer for the amount of \$150,000 plus \$50,000 in the event that the plaintiff was unsuccessful against IRM.²¹⁶ Because of this good faith settlement with the builder of the apartment complex, the assembler of the shower door and the installer of that door, IRM is probably precluded from bringing an

213. See *supra* text accompanying note 195.

214. At least \$200,000, exclusive of what the plaintiff stands to recover should it go on to success against IRM Corp. at trial.

215. The *Becker* decision was rendered on April 29, 1985.

216. See *supra* text accompanying note 195.

action against those parties for equitable indemnification.²¹⁷ In other cases, the builder of the apartment complex or the installer of a defective component may no longer be in business or they, like the other defendants in *Becker*, may wish to settle out of court rather than to undergo expensive and time-consuming litigation. Because of these actions by the other defendants, the landlord may find himself with no place to spread the cost of compensating "defenseless" victims but down the marketing chain, i.e., to his tenants by raising rents. Further, insurance may be difficult, if not impossible, to obtain because of the recent trend of insurance companies to stop writing insurance in certain high risk areas. If insurance is available, it may prove to be prohibitively expensive. Once again, with nowhere else to spread the burden of this cost, the landlord may be forced to spread the cost down the marketing chain to tenants.

3. The landlord may raise rents

The court's final suggestion is that after the purchase of a used rental dwelling landlords may "be able to *adjust* rents to reflect [the cost of protecting tenants.]"²¹⁸ In light of the current shortage of low-cost housing, however, how feasible is this solution? It would seem fair to impose this extended form of strict liability for the tenant's protection only if it were certain that the tenant could afford to pay for it.²¹⁹ Alternately, the tenant might be better off purchasing her own policy of insurance to cover medical costs, etc.; at least she would have the option of bargaining for a policy tailored to her needs at a competitive rate. It is, however, manifestly unjust for the court to give with one hand and take with the other.

Further, landlords in some areas are subject to rent control ordinances which effectively leave them without the ability to "adjust" rents.²²⁰ To impose strict liability upon landlords who have no way of spreading the cost of injury up the marketing chain nor down the mar-

217. See *supra* note 196.

218. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221 (emphasis added).

219. This situation differs from that of car buyers who must pay more per car to get the added protection that the government requires in that housing is a necessity. There are reasonable alternatives to the lease or ownership of an automobile. If a prospective car buyer is out looking for a car and finds that the model he wants is out of his price range, he can generally go to a less expensive model without much disruption of his lifestyle. However, if a young family of four goes out apartment shopping, a slight difference in price may mean the difference in affordability between an adequate two bedroom apartment and an inadequate one bedroom apartment.

220. See, e.g., *Alpha Standard Inv. Co. v. County of Los Angeles*, 118 Cal. App. 3d 185, 173 Cal. Rptr. 328, cert. denied, 454 U.S. 966 (1981); *Apartment and Office Bldg. Ass'n of Metro. Wash. v. Washington*, 381 A.2d 588 (D.C. 1977); *City of Evanston v. Create, Inc.*, 85

keting chain leaves the landlord with no alternative other than to simply go out of business. Certain municipal ordinances in California require that once a piece of property is used to rent dwellings, it must remain in that use.²²¹ Thus, in some locales, even if the landlord is in danger of losing the business, perhaps his only means of livelihood, he cannot change the use of his property.²²² Further, if the landlord *could* sell his property, in light of this decision, what will it now be worth?

H. Probable Repercussions of the Rule

How does the rule formulated in *Becker* affect the future of strict liability law in California, and how does it affect the future of tort law in general?

As has been seen, the rule of *Becker*, intentionally or unintentionally, extends the law regarding the imposition of strict liability in two ways. First, it focuses the discussion of "defect" on the apartment as a whole rather than on one of the apartment's component parts. This results from the court's characterization of the leased dwelling as a product in and of itself. Second, it imposes liability regardless of the fact that the landlord did nothing to install, modify, or repair the defective fixture. *Becker* made these two extensions on the basis of what it considered the paramount policy for applying strict liability, that is, spreading the cost of injury throughout society. In holding this as the paramount policy consideration, the court ignored several other important policy considerations. What is the fundamental statement of the court's paramount policy consideration, though, and does it offer a useful rule by which to extend the doctrine of strict liability in other areas? Spreading the cost of injury throughout society amounts to no more than a judicially imposed insurance system. To use this rationale for imposing strict liability in isolation of other rationales is to write a judicial ticket to impose strict liability in any area of law where there are injured plaintiffs who may not be compensated.

The rule of *Becker* affects tort law in general in that it threatens the very heart and soul of the tort industry, the insurance dollar base. The trend of insurance companies in previous years has been to write almost

Ill. 2d 101, 421 N.E.2d 196 (1981); *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978), *appeal dismissed*, 440 U.S. 978 (1979), *clarified*, 82 N.J. 128, 411 A.2d 203 (1980).

221. See, e.g., *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed*, 105 S. Ct. 1740 (1985); *Sterling v. Santa Monica Rent Control Bd.*, 168 Cal. App. 3d 176, 214 Cal. Rptr. 71 (1985); *Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside*, 157 Cal. App. 3d 887, 204 Cal. Rptr. 239 (1984).

222. See *supra* note 221.

any type of liability insurance at extremely low rates. Due to the losses that have assailed that industry over the past few years (which some argue were self inflicted), insurance companies ceased writing certain types of high risk liability policies and have raised premiums to prohibitive levels.²²³

The result of this condition has left industries which operate at a high risk of loss without insurance or with limited coverage at steadily increasing rates. By creating a strict liability cause of action in any area of the law, courts artificially inject into an industry a high risk of loss. This forces the small proprietors of that industry to collapse under the financial burden of either the likelihood of successful suits or the burden of paralyzing insurance premiums.

In our society of ever-increasing population and urbanization, landlords serve an increasingly important function, providing housing to those unable or unwilling to buy housing for themselves. If this function is in any way deterred or hindered, who suffers? Those at the bottom of the social strata suffer first. Those in need of inexpensive housing will now find that commodity dwindling under the excessive burden placed upon the industry by the courts. Further, as insurance companies find their losses outweighing their gains, they will rapidly flee from writing policies in the area.

I. An Alternative Reading of the Rule of Becker

The *Becker* court, in formulating its holding, sought to extend the rights of the tenant by offering him more protection in his relationship with his landlord. This goal is certainly a worthwhile one. However, the way in which it was accomplished seems undesirable for the reasons enumerated above. One way to eliminate *Becker's* undesirable aspects, yet to retain its positive ones is to fashion an alternative reading of that rule.

Perhaps *Becker* can be read to impose strict liability on a landlord only if he fails to detect defects which are "reasonably discoverable." Those defects which are reasonably discoverable may be included in a checklist offering both courts and landlords certainty, while offering the tenant added protection.

Foundation for this interpretation of *Becker* may be found in the decision itself. The holding in *Becker* states "a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises *when the defect existed at the time the*

223. See, e.g., L.A. Times, Apr. 7, 1986, at 1, col. 2; L.A. Times, Sept. 14, 1985, at 1, col. 1.

premises were let to the tenant."²²⁴ The last clause seeks to distinguish those defects existing at the time the premises were let from those arising after the premises are let. This suggests that the court was willing only to extend liability to the extent that the landlord had an opportunity to inspect for defects and disclose their existence to prospective tenants. This reading is reinforced by the court's further language stressing the importance of the landlord's superior ability to inspect and his obligation to disclose.²²⁵

These things, taken together, suggest that the court may have been attempting to set a minimum standard of inspection for landlords. This minimum standard included, in *Becker*, inspection of glass fixtures to determine their safety propensities. The legislature or later courts may find it useful to formulate a list of other things which a landlord has an absolute duty to inspect. This list might include inspection of electrical wiring by a certified electrician, inspection of plumbing by a certified plumber, inspection for insect and rodent infestation and inspection for dangerous fixtures or furniture. The submission by a landlord of this list with signed compliance notices might be required as a prerequisite for the leasing of any building or rental unit. Violators could be fined and compelled to comply. If non-compliance could be proved where a tenant or guest was injured, then strict liability could be imposed.²²⁶

This interpretation of *Becker* coupled with an effective system of enforcement seems to retain the good effect sought by the *Becker* court, yet impinges less on the useful (albeit artificial) barriers erected around the doctrine of strict liability.

IV. CONCLUSION

In conclusion, in light of the considerations enumerated above, *Becker* represents a vast and unwarranted extension in the area of strict

224. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 464, 698 P.2d 116, 122, 213 Cal. Rptr. 213, 219 (1985) (emphasis added). The court states in a footnote "[w]e do not determine whether strict liability would apply to a disclosed defect." *Id.* (citations omitted).

225. As has been stated earlier, the court stressed that the "tenant's ability to inspect is ordinarily substantially less than that of a purchaser of the property." *Id.* at 465, 698 P.2d at 122, 213 Cal. Rptr. at 219. Further, the court stated "[a]bsent disclosure of defects, the landlord in renting the premises makes an implied representation that the premises are fit for use as a dwelling and the representation is ordinarily indispensable to the lease." *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

226. This system is reminiscent of a negligence per se system. It should be noted, however, that this system, in order to retain the integrity of the strict liability doctrine, cannot constitute merely a general "reasonable inspection" (negligence) standard. Rather, specific guidelines should be adopted. These guidelines would be available for landlords to avoid strict liability and for courts to impose strict liability where required.

liability, and this extension threatens to increase exponentially the already dire shortage of low cost housing and imposes undue and unnecessary hardships on landlords. In assessing the propriety of tort liability, the California Supreme Court seems to have lost sight of the fact that the essence of law is justice. Justice requires a delicate balancing of hardships and culpability before one party is forced to compensate another. Recent decisions, including *Becker*, seem to disregard the fact that in order to compensate a plaintiff for his injury, a corresponding injury must be inflicted on a defendant. Thus, in a system like California's where the issue of liability for injury due to defective products does not involve an inquiry into the culpability of the defendant's conduct, a defendant's right to be free from injury should weigh as heavily as a plaintiff's. For this reason and those enumerated above, *Becker* should be read as imposing a minimum standard of inspection upon the landlord with a violation of this standard accompanied by injury resulting in strict liability to the landlord.

*Richard Deeb**

* This article is dedicated to the memory of David Jon Vaca, 1962-1985.

