Products Liability at the Threshold of the Landlord-Lessor

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PRODUCTS LIABILITY AT THE THRESHOLD OF THE LANDLORD-LESSOR

As we enter the computer age we are still far from solving the massive accident problems that began with the industrial revolution. The cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing. There is a wealth of analogy yet to be developed from the exploding bottles of yesteryear, from lathes on the loose, and capricious safety valves, and drugs with offside effects. There are meanings for tomorrow to be drawn from their exceptional behavior.1

Some of the meanings for tomorrow that Chief Justice Traynor refers to above have already become chapters in the "modern history of strict liability." The most recent chapters have extended the doctrine of products liability to other classes of defendants and have further refined its basic rationales. As Chief Justice Traynor implies, however, each chapter not only records history; it also becomes an analogue to the next. Chapters recently written in California and New Jersey suggest that the next chapter may well be "The Extension of Products Liability to the Landlord-Lessor."

It is clear that the same factors that led to strict liability within the law of chattels are presently affecting the law of landlord-tenant. Since the industrial revolution, the leasing of real property has become an industry that directly concerns the health and safety of millions of individuals.2 In the same period the sciences of architecture and building maintenance have developed3 to such a degree that an individual should no longer have to assume greater risks as a lessee than he does as a consumer.4 It follows, therefore, that the public policy underlying re-

2. Twenty million households out of 52 million in 1960 were leased. Of this figure seven million of the lessees had an income of less than $3,000. Twenty-three percent of the total and 42 percent of the poor live in substandard units. See F. Kristof, Urban Housing Needs Through the 1980's: An Analysis and Projection, table 14, at 31 (The National Comm'n on Urban Problems, Research Report No. 10, 1968) [hereinafter cited as Housing Needs]. Although the term "substandard" is not particularly useful in determining what percentage have defects that would sustain a products liability action, the considerations that determine "substandard" suggest that such defects might be more prevalent in substandard housing.
4. The development of knowledge within a given field has been a prerequisite
coveries for personal injury should no longer tolerate distinctions between injuries caused by defective chattels and those caused by defective realty. Indeed, this distinction has already begun to degenerate as the courts recognize that there is nothing sacrosanct about the traditional law of real property insofar as the law of torts is concerned.\(^5\)

Several recent decisions, discussed in this note, strongly suggest that there is no reason to distinguish between builders and lessors, or to continue insulating the lessor of defective realty from the doctrine of products liability. *Elmore v. American Motors Corp.*\(^6\) emphasized that strict liability has become an independent cause of action in tort rather than one dependent upon warranty. *Schipper v. Levitt & Sons, Inc.*\(^7\) extended the doctrine into the law of real property, and *Cintrone v. Hertz Leasing & Rental Service*\(^8\) extended it to the lessor of chattels. It would appear that a syllogistic argument could be constructed from the holdings in these decisions; however, the logic is illusory.\(^9\) The courts have presented nothing more than analogues leading to the conclusion that strict liability in tort should be applied to the landlord. Consequently, the argument must rest on a careful analysis of the foundations of products liability and its inherent limitations, and how it would affect the landlord-lessee.

This note will examine both the vertical and the lateral developments of the doctrine of products liability. As will be seen, the doctrine has been extended vertically from nonliability to strict liability in tort. In addition, there has been a corresponding lateral movement away from the manufacturing industry, toward, and including, a broad class of other potential defendants. Similar developments in the law of landlord-tenant illustrate recent attempts to meet the needs of an in-

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9. For example: Strict liability in tort is applicable to sales of chattels and realty; strict liability in tort is applicable to the lessor of chattels; THEREFORE, strict liability in tort is applicable to the lessor of realty. The argument fails because the first premise is a tautology in that it presupposes that there can be no logical difference between different means of transferring property, that is, the possible differences between leases, sales, and gifts.
ustrial society. These developments are sufficiently analogous to raise a very fundamental question: Will the liability of the landlord gradually continue in a vertical direction culminating in strict liability, or will the already existing doctrine of strict liability in tort be superimposed as a part of the lateral development of products liability?

Products Liability

The Vertical Development

The development of the doctrine of products liability has been a vertical one highlighted by several landmark decisions. The point of departure was Winterbottom v. Wright, which originally stood for the proposition, inter alia, that only the express terms of a contract could provide a basis of recovery for personal injuries resulting from a defective product. Numerous exceptions to this rule developed on the theory that certain defective products created an unacceptable degree of danger. MacPherson v. Buick Motor Co. consolidated these decisions by recognizing that all defective products were dangerous and by holding the manufacturer of an automobile liable for negligence without relying on privity of contract. Further developments led the courts beyond negligence and into a form of strict liability derived from implied warranties. Thus, by recognizing various warranties that could be inferred from the plaintiff's contract, the courts provided a


15. See generally Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1100 (1960); Seavey, Mr. Justice Cardozo and the Law of Torts, 52 HARV. L. REV. 376, 376-78 (1939).
new remedy in contract. Later, it was held that plaintiff could recover on implied warranty in tort; however, privity of contract was still required.

The tort action on implied warranty is adequately supported by the rationale that the manufacturer is "holding out" his product to the consumer, and that implicit in the product's presence on the market is a representation that it can safely be used for its intended purpose. This implication is justified because of the manufacturer's superior knowledge in selection of materials, design, engineering, and manufacturing. It is assumed that this superior knowledge induces the consumer to rely on an implied representation of safety. Of course, since this rationale did not depend on the existence of a contract between the parties, it was conceptually possible for the courts to abandon the contractual requirement of privity. Thus, in Spence v. Three Rivers Builders & Masonry Supply, Inc. the emerging doctrine of strict products liability was applied to a manufacturer of building materials who was not in privity of contract with the purchaser of a defective house.

The most recent refinement of the doctrine of products liability can be found in California where the supreme court has recognized the risk distribution rationale. This approach assumes that losses will occur; but rather than allow fate to single out a victim to bear the entire cost, it is better to place the loss on those who are most able to bear

16. See T. Street, Foundations of Legal Liability, 389-90 (1906); Prosser, The Implied Warranty of Merchantable Quality, 27 MINN. L. REV. 117 (1943). Although warranty itself was originally a tort action, the contract action resulted from Stuart v. Wilkins, 59 Eng. Rep. 15 (K.B. 1778), when plaintiff first maintained a warranty action in assumpsit. This opened the door to treating warranty as a term of the contract of sale—either express or implied. W. Prosser, HANDBOOK OF THE LAW OF TORTS 651 (3d ed. 1964). See generally Ames, History of Assumpsit, 2 HARV. L. REV. 1 (1888). The result was almost total abandonment of warranty as a tort, which led North Carolina to hold that "[a] warranty is an element in a contract of sale and, whether express or implied, is contractual in nature. Only a person in privity with the warrantor may recover on the warranty; the warranty extends only to parties to the contract of sale." Terry v. Double Cola Bottling Co., 263 N.C. 1, 138 S.E.2d 753, 754 (1964). But see Byrd & Dobbs, Torts, 43 N.C.L. REV. 906, 936 (1965); Note, 43 N.C.L. REV. 647 (1965).


18. Id. at 32, 12 N.E.2d at 560; see Terry v. Double Cola Bottling Co., 263 N.C. 1, 138 S.E.2d 753 (1964) (quoted at note 16 supra); Jaeger, Warranties of Merchantability and Fitness for Use: Recent Developments, 16 RUTGERS L. REV. 493 (1962); Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).


it. They, in turn, redistribute the risk of future losses to the users of the product in the form of higher prices.\(^\text{22}\) Such an approach insures "that the [immediate] 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."\(^\text{23}\)

The risk distribution approach was first proposed by Justice Traynor in 1944\(^\text{24}\) and was unanimously recognized by the California court in Greenman v. Yuba Power Products, Inc.\(^\text{25}\) In that decision, the risk distribution rationale was given as an alternative to the implied warranty rationale in justifying the court's decision to abandon an action on warranty and adopt a more refined form of products liability, strict liability in tort. These alternative rationales for liability, however, soon presented a new problem. If a bystander were injured by a defective product, upholding the plaintiff's recovery would require the California court to choose between the implied warranty or risk distribution rationales because of the impossibility of implying warranties in favor of a stranger.\(^\text{26}\) The problem arose in Elmore v. American Motors Corp.,\(^\text{27}\) where a defective automobile left the road and injured the plaintiff who was a stranger to the driver, the dealer and the manufacturer. Approaching the bystander problem directly, the court held "that the doctrine may not be limited on the theory that no representation of safety is made to the bystander."\(^\text{28}\) Such an injury "is often a perfectly foreseeable risk of the maker's enterprise, and the considerations for imposing such risks on the maker without regard to his fault do not stop with those who undertake to use the chattel."\(^\text{29}\) Clearly, there was no reliance on the manufacturer's skill or representations, either express or implied; rather, the bystander recovered against the manufacturer and retailer because they had either manufactured or placed on the market a defective product that caused injury to a hu-

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28. Id. at 623, 451 P.2d at 88, 75 Cal. Rptr. at 656.
29. Id. at 623, 451 P.2d at 89, 75 Cal. Rptr. at 657, quoting F. HARPER & F. JAMES, THE LAW OF TORTS 1572 n.6 (1956).
It would be very easy to overestimate the meaning of "a perfectly foreseeable risk of the maker's enterprise" and conclude that the risk distribution rationale has matured to an absolute or strict enterprise liability. This is not the case. Elmore and the cases on which it relies are products liability cases, and each is grounded on a common fact situation: The defendant either produced or distributed a defective product that was the cause of the plaintiff's injury. The decision is carefully written to reflect that it falls within this context, and it refrains from using any complete sentence that could be construed as a recognition of liability for any injury occasioned by the defendant's enterprise.

The real importance of Elmore is that liability no longer must be traced back to the manufacturer on the basis of an implied warranty. This refinement is significant for two reasons. First, it clearly emphasizes the difference between products liability decisions which sound in tort but are based on implied warranties, and California's pure tort approach, which is the culmination of the vertical development. Second, once strict liability in tort has been conceptualized as a distinct basis of recovery for injuries resulting from defective products, it can then be applied to reality without running afoul of the traditional rules of the law of real property.

The Lateral Development

Coincidental with the vertical development towards strict liability in tort, there has been a corresponding lateral movement which has had the effect of broadening the class of responsible defendants. Products liability, resting on either the MacPherson doctrine of negligence or the

32. "The rationale of risk spreading and compensating the victim has no special relevancy to cases involving injuries resulting from the use of defective goods... Thus a manufacturer would be strictly liable even in the absence of fault for an injury to a person struck by one of the manufacturer's trucks being used in transporting his goods to market. It seems to us that the enterprise liability rationale... proves too much and that if adopted would compel us to apply the principle of strict liability in all future cases where the loss could be distributed." Wights v. Staff Jennings, Inc., 241 Ore. 301, 309-10, 405 P.2d 624, 628-29 (1965). For an analysis of various situations involving strict enterprise liability see Steffen, Enterprise Liability: Some Exploratory Comments, 17 Hastings L.J. 165 (1966).
33. See text accompanying note 98 infra.
34. See text accompanying notes 14-18 supra.
doctrine of strict liability in tort,\textsuperscript{35} has been extended to the makers\textsuperscript{36} and assemblers\textsuperscript{37} of component parts, retail dealers,\textsuperscript{38} wholesale dealers,\textsuperscript{39} chattel repairmen,\textsuperscript{40} contractors,\textsuperscript{41} builder-developers,\textsuperscript{42} installers,\textsuperscript{43} and lessors of chattels.\textsuperscript{44} In a recent decision\textsuperscript{45} that relied heavily on the financial responsibility of a lender, the California Supreme Court found a lending institution negligent toward various purchasers when it failed to exercise reasonable control over an incompetent builder who had built the plaintiffs' houses with major structural defects.\textsuperscript{46}

This lateral expansion has been influenced by the application of the risk distribution rationale discussed earlier. For the lessor, a pertinent example of its influence can be found in the New Jersey case of Cintrone v. Hertz Truck Leasing & Rental Service,\textsuperscript{47} where the plaintiff, an employee of the lessee, sued for personal injuries he sustained in an accident caused by the defective brakes of a rented truck. The trial court dismissed plaintiff's action on strict liability. On appeal, Hertz apparently argued that plaintiff's proof had not shown Hertz to be in the business of leasing trucks.\textsuperscript{48} The Supreme Court of New Jersey sup-


\textsuperscript{36} E.g., Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (strict liability).

\textsuperscript{37} Sherward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942) (negligence).

\textsuperscript{38} E.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (strict liability).


\textsuperscript{43} Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (strict liability).


\textsuperscript{46} With respect to other defendants see Prosser, The Fall, supra note 10; Prosser, The Consumer, supra note 10, for extensive citations.

\textsuperscript{47} 45 N.J. 434, 212 A.2d 769 (1965).

\textsuperscript{48} See id. at 439, 212 A.2d at 785 (dissenting opinion).
plied the missing evidence by taking judicial notice "of the growth of the business of renting motor vehicles, trucks and pleasure cars." This fact was footnoted by the court with reference to the $155 million revenue of the Hertz Company as reported by Fortune and supported by two of Hertz' advertising claims. The court then concluded that "warranties of fitness" arise from the transfer of possession for a consideration; hence, there was no good reason for restricting such warranties to sales as opposed to leases. The lessor of the truck was thus held to fall within the doctrine of strict liability in tort.

The court justified the extension of strict liability in tort to the lessor on the grounds that "one party [the lessor] is in a better position than the other [the lessee] to know and control the condition of the chattel transferred and to distribute the losses which may occur because of a dangerous condition the chattel possesses." This recognition of both the implied warranty and risk distribution rationales in New Jersey provided the basis for answering the crucial question in a leasing transaction:

When the implied warranty or representation of fitness arises, for how long should it be considered viable? Since the exposure of the user and the public to harm is great if the rented vehicle fails during ordinary use on a highway, the answer must be that it continues for the agreed rental period. The public interests involved are justly served only by treating an obligation of that nature as an incident of the business enterprise. The operator of the rental business must be regarded as possessing expertise with respect to the service life and fitness of his vehicles for use. That expertise ought to put him in a better position than the bailee to detect or to anticipate flaws or defects or fatigue in his vehicles. Moreover, as between bailor for hire and bailee the liability for

49. Id. at 448, 212 A.2d at 776.
50. Id. at 448 n.1, 212 A.2d at 776 n.1. Part of the court's note reads: "See Mahoney, 'It's Hertz Itself in the Driver's Seat,' Fortune, Oct. 1963, p. 119.

'About 98 percent of [Hertz'] $155 million revenues last year came from the short-term rental (one hour to one month) and the long-term leasing (generally two years and up) of the 35,000 cars and 18,000 trucks that make up the Hertz-owned fleet. Car rental brought in $77 million; the leasing and renting of trucks, $60 million; and the long-term leasing of cars, $14 million. Hertz is the leader in all three of these sectors of its industry, * * *

Over the past five years, industry-wide revenues increased at a startling annual rate of some 15 percent. * * * The company keeps maintenance costs low by getting rid of its cars before major repairs are necessary * * *'.

The article notes that Hertz has engaged in 'aggressive, insistent advertising.' An advertising agency devised the slogan, 'Let Hertz put you in the driver's seat,' and it 'has been dinned into the ears of TV audiences ever since.' Id. at p. 228. One can hardly conceive of a more persuasive representation that lessees may rely on Hertz vehicles as being fit for use."

51. Id. at 449-50, 212 A.2d at 777. For additional discussion see Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 COLUM. L. REV. 653 (1957).
52. Id. at 446, 212 A.2d at 775 (emphasis added).
flaws or defects not discoverable by ordinary care in inspecting or testing ought to rest with the bailor just as it rests with a manufacturer who buys components containing latent defects from another maker, and installs them in the completed product, or just as it rests with a retailer at the point of sale to the consumer. And, with respect to failure of a rented vehicle from fatigue, *since control of the length of the lease is in the lessor, such risk is one which, in the interest of the consuming public as well as of the members of the public traveling the highways, ought to be imposed on the rental business.*

Thus, not only did the court in *Cintrone* impose strict liability on the lessor, it also extended that liability for the life of the lease as an incident of the rental business.

**Inherent Limitations in the Doctrine**

The doctrine of products liability has only been concerned with those products that were defective when they left the control of the last person in the marketing chain and that later caused the plaintiff's injury. The doctrine is not concerned with defects that subsequently appear or with injuries not resulting from defects; and since a defense akin to contributory negligence or assumption of risk is permitted where the plaintiff is aware of the defect, the doctrine is effectively limited to latent defects. Furthermore, the doctrine applies only to the normal use of the product; unforeseeable uses have been held to interrupt the chain of causation that would otherwise link the

53. *Id.* at 450-51, 212 A.2d at 778 (emphasis added).
54. Justice Proctor in his concurring opinion excepted from the conclusion that the lessor should be liable for all defects arising during the lease. He would, however, impose strict liability where, as in *Cintrone*, there was a covenant to repair. *Id.* at 460, 212 A.2d at 783. Justice Hall, dissenting, agreed that strict liability in tort should apply to the renter of vehicles for defects existing at the time of each particular rental, but any subsequent injuries that are occasioned by "other happenings" should not fall within the strict liability basis. Rather, a covenant to repair should create no greater liability than negligence. *Id.* at 463, 212 A.2d at 785.
plaintiff's injury to the alleged defect. It is important to note that these limitations were developed from the law of torts, and that they are distinguishable from contractual limitations, such as privity, which were abandoned in the vertical development of the doctrine of products liability.

The various courts' emphasis on the difference in size or economic stature between the two parties suggests another possible limitation on the doctrine of products liability. Are small businessmen exempted from liability, at least where the decision of the court rests on the risk distribution rationale? The cases involving chattels have not made such a distinction. In Vandermark v. Ford Motor Co., the court held that as a retailer engaged in the business of distributing goods to the public, Maywood-Bell was strictly liable in tort for personal injuries caused by defects in cars it sold. No mention was made by the court of Maywood-Bell's financial ability to withstand the loss, and no reference was made to its volume of business or its insurance coverage. The decision clearly includes the retailer of any defective product without reservation for a difference in economic stature of the parties.

In California, when the doctrine of strict liability was extended to the lessor of chattels, the court mentioned the defendant's size merely to prove that the defendant was in the business of leasing ladders. The court mentioned that the plaintiff had used the ladder in the normal course of his own business, a fact that would suggest equality of economic stature, but that apparently had no significant bearing on the court's decision.

From the above discussion, it is clear that the relative size of the parties is not a limitation on the doctrine of products liability and that it has only been used as a makeweight in initial decisions. The de-
terminating factor suggested by these cases lies in the character of the sale itself. A housewife selling a jar of preserves on one occasion to a neighbor, or a man selling his used car to a dealer are engaged in “occasional sales,” which do not give rise to strict liability. As Professor Prosser observed, “no case has been found in any jurisdiction which has imposed it upon anyone who was not engaged in the business of supplying goods of the particular kind” normal to his business. In Vandermark, the defendant Maywood-Bell was in the business of selling automobiles. In McClain v. Bayshore Equipment Rental Co., the defendant maintained two signs advertising that it was in the business of leasing ladders. The essential limitation, therefore, is not the size of the defendant’s enterprise, but that the transfer of possession occur in the course of the defendant’s business.

A New Cause of Action

The foregoing limitations, when coupled with the risk distribution rationale, further emphasize that strict liability in tort is essentially a new basis of liability. In refining the doctrine of products liability, the courts have made it clear that the plaintiff’s new remedy is a pure tort rather than a hybrid derived from warranty. Its limitations...
are not determined by its contractual origin since it is no longer subject to the doctrines of privity or disclaimer, or any requirements for notice of defect. It is not limited by inconsistencies with express warranties, and it is independent of both the Uniform Sales Act and the Uniform Commercial Code. The limitations that do apply all reflect the existence of a pure tort action—causation, abnormal use, requirement of a defect. Cintrone clearly emphasized this departure by recognizing that liability depends more upon transfer of possession than transfer of title. Moreover, with the extension of protection to the bystander in Elmore, the fundamental basis of liability itself made a distinct change from implied representation (warranty) to risk distribution.

Thus, in its most refined form, strict liability in tort is distinguishable from any other tort; but at this point, its full impact is not yet thing separate and distinct which sounds in tort exclusively, and not at all in contract; which exists apart from any contract between the parties; and which makes for strict liability in tort. " Rosenau v. City of New Brunswick, 51 N.J. 130, 141, 238 A.2d 169, 174-75 (1968), quoting Prosser, Spectacular Change: Products Liability in General, 36 CLEVELAND B.A.I. 149, 167-68 (1965). See also Prosser, The Consumer, supra note 10, at 20.

known. If it is eventually to become strict enterprise liability, the impact will of course be enormous. More likely, the courts will refrain from expansive definitions until changing social conditions necessitate absolute liability. In the interim, the courts will carefully analyze the consequences before extending strict liability into other enterprises; but it does not appear that purely arbitrary limitations will be made. For example, strict liability in tort has already made its first inroads into the law of real property, and the decisions recognizing this extension provide a sound theoretical basis for its application to the landlord-lessee.

Products Liability in the Law of Real Property

Real Property Law of Liability

The historical development of the law of real property has been retarded when compared to the developments occurring in other fields of the law. Perhaps, as Professor Powell suggests in discussing the landlord-tenant relationship, it is because this body of private law has not been centered in the public interest as much as other branches of the law. Since "[t]he likelihood of change or development in any given area of the law varies directly with the number of persons affected by the particular norm under consideration," and their ability to communicate their desire for reform, little has been done. Alternatively, this retardation may be of feudal origin if the land-owning classes, in developing the laws of real property, adopted and maintained principles of liability that were best suited to their own interests. Whatever the historical basis, the law regarding personal injuries that arise from defects in real property remains founded on the ancient doctrine of caveat emptor. This foundation, however, as far as it concerns tort liability, is subject to numerous exceptions developed by the courts in an attempt to find justice in rules adopted centuries ago


by a land-oriented society. 86

In recent years, the courts have begun reevaluating the applicability of these outdated rules and, where necessary, have recognized that the reasons for the rules no longer exist. 87 In certain instances the courts have completely overthrown the old rule in favor of a better one. 88 An excellent example is the reevaluation of the liability of a builder-vendor and the application of the new tort doctrines derived from products liability.

Builder-Vendor Liability

Originally a conveyance of land and its structures fell under the doctrine of caveat emptor; once the vendee took possession the builder was not liable for personal injuries resulting from dangerous conditions either existing at the time the vendee took possession or developing thereafter. 89 As with Winterbottom v. Wright, 90 this rule became the point of departure for a vertical development toward strict liability 91 that has progressed through negligence, 92 implied warranties 93 on uncompleted houses, 94 and implied warranties on completed houses. 95

86. See generally id. §§ 1230-48. "[T]he number of cases which apply the rule of caveat emptor strictly appears to be diminishing, while there is a distinct tendency to depart therefrom, either by way of interpretation, or exception, or by simply refusing to adhere to the rule where it would work injustice." 7 S. WILLISTON, CONTRACTS § 926A, at 802 (3d ed. 1963); see note 101 infra.

87. For example, under the modern and enlightened view any differentiation between chattels and real structures is without support either in reason or in logic. Pastorelli v. Associated Eng'rs, Inc., 176 F. Supp. 159, 164 (D.R.I. 1959) (builder's negligence).


90. 152 Eng. Rep. 402 (Ex. 1842); see text accompanying note 11 supra.


Unlike the vertical development within the field of products liability, the trend towards strict liability within the builder-vendor field did not continue with a frontal assault on privity. Strict liability came, not through any internal development in the law of real property, but laterally by the adoption of strict liability in tort. The leading case is *Schipper v. Levitt & Sons, Inc.*, where the New Jersey court held that a lessee could recover against the builder-vendor because there are no meaningful distinctions between [defendant's] mass production and sale of homes and the mass production and sale of automobiles . . . [T]he pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field, at least in the aspect dealt with here.

It should be noted that strict liability in tort was superimposed onto the law of real property without reference to the doctrine of merger, which would limit the defendant's liability to the express terms of his deed or conveyance. This leads to the conclusion that none of the basic principles of real property need be changed by the application of strict liability in tort. The builder is liable for commission of a tort—building a defective building that subsequently injures the plaintiff.

This conclusion is strengthened by the factual situation in *Schipper*.

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97. 44 N.J. at 90, 207 A.2d at 325. See note 99 infra.

98. Professor Roberts examined this doctrine and analyzed some of the methods the courts have used in circumventing it in *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 857-62 (1967).

Texas has held that the merger doctrine does not work to destroy implied covenants or warranties, at least in the case of a builder-vendor. *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968).

99. "Eichler . . . argues that the doctrine [of strict liability in tort] cannot be applied to homes or builders. We do not agree. "[T]here are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and . . . the pertinent overriding policy considerations are the same." *Krieger v. Eichler Homes*, Inc., 269 A.C.A. 224, 227-28, 74 Cal. Rptr. 749, 752 (1969). See text accompanying note 97 supra.
Plaintiff was a relative of the lessee, and the landlord was not the original vendee. The court rejected defendant's contention that even if strict liability is to be applied to real estate, there should still be a requirement of privity. If the court had felt that the application of strict liability in tort should be subject to the laws of real property, it could have resorted to a rule of real property, privity of estate, and achieved the same result. Instead, the court stated:

[It seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirements of privity, which is fast disappearing in the comparable products liability field, to preclude a similar right in other occupants likely to be injured by the builder-vendor's default.]

Thus, the holding in Schipper effectively superimposed strict liability in tort onto the previous rules of builder liability and abrogated the traditional immunities of builders derived from caveat emptor.101

A recent California decision has gone even further by extending the builder's liability to the land itself. In Avner v. Longridge Estates,102 the plaintiffs, successors in interest to the original vendee, sought to hold defendants (including the developer and soils engineer) strictly liable for damage resulting from defective construction of the lot pad upon which their home was constructed. The defective pad gave way causing the plaintiffs' house to subside. After an extensive review of the facts and antecedent case law the court held:

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.103

It should be mentioned that the decision did not differentiate between the economic positions of the parties; and since the soils engineer was also held liable, it can hardly be maintained that strict liability in tort, as suggested in Schipper,104 is necessarily restricted to mass developers and builders.

100. 44 N.J. at 95, 207 A.2d at 328.
101. See Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963), which was an action by a homeowner against a builder for negligence. The builder contended that he was protected by the doctrine of caveat emptor as applied to real property. The court did not accept this reasoning: "[S]ince [the builder's] liability is predicated solely upon negligence in the construction of the dwelling, rather than upon alleged misrepresentation or any implied warranty, it does not appear that the doctrine of caveat emptor has any application to the instant action." Id. at 27, 377 P.2d at 893, 27 Cal. Rptr. at 693. This has also been the New Jersey approach. See text accompanying note 97 supra.
103. Id. at 703, 77 Cal. Rptr. at 639. The California Supreme Court has also denied a hearing in Avner.
104. See text accompanying note 96 supra.
Landlord-Tenant

The Vertical Development

The development of the law of landlord-tenant shows a striking similarity to the vertical developments in the builder-vendor and other products liability cases. It too originally began with the same rule of nonliability, and as with its counterparts subsequent decisions have eroded the rule so that it is now replete with exceptions and definitions. This development strongly suggests that the law of landlord-tenant is approaching the point where a landlord is to be held to a standard of reasonable care characteristic of negligence.

In California, for instance, the traditional rule of nonliability has been stated as follows:

[U]nder the common law the general rule is that there 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.

The landlord may also be liable for dangerous conditions under his control if, by the exercise of reasonable care, he could have discovered the defective condition and made it safe.

These statements, however, do not adequately reflect the present law. They have been severely distorted in their definition and application as the courts have struggled to find justice within the traditional framework. For example, the California courts have: (1) permitted a res ipsa loquitur instruction in a case involving a twenty year old, decomposed and creaking common stairway, thus avoiding the question of whether a reasonable inspection could possibly have disclosed the defect and requiring the defendant to prove that he was not negligent or give a satisfactory alternative explanation; (2) held that

106. See, e.g., Coleman v. Steinberg, 54 N.J. 58, 253 A.2d 167 (1969), affirming a reversal for the plaintiff and holding that a common standing radiator may constitute a latent defect where the plaintiff is burned by coming into contact with the input pipe and that it presents a question of fact for the jury; Strothman v. Hougy, 186 Pa. Super. 638, 142 A.2d 769 (1958) (latent defect in design of mantel).
110. Id. at 302-03, 373 P.2d at 866-67, 23 Cal. Rptr. at 778-79 (McComb, J., dissenting).
even though a stairway had been used exclusively by the tenant, the jury, rather than the court, must determine whether it was a common stairway;\(^1\) (3) recognized that a lessor is bound to use a high degree of care for elevators and that this duty cannot be delegated to an independent contractor;\(^2\) (4) held that a new lessee was really an "invitee" rather than a "licensee" in the use of certain common facilities, thus allowing recovery against the landlord;\(^3\) (5) held that it was a question of fact whether a ladder leading to a roof was a common stairway;\(^4\) (6) held that a landlord may be liable for concealing a latent defect even though he does not know the defect exists but only has reason to suspect its existence.\(^5\)

A particularly interesting example of the court's efforts to find grounds for recovery arose when a tenant was injured because of an improperly designed stairway while escaping from a fire. Seemingly, he would have been prevented from recovering because an exculpatory provision in his lease disclaimed liability for injuries resulting from the landlord's failure to disclose a known, latent defect.\(^6\) In allowing recovery the court held that because the landlord's employees had on occasion made repairs in the apartment itself, the apartment fell within the "safe place" provision of the Labor Code. This being true, the only stairway leading to the apartment was also held to be within the Labor Code. Since the stairway was improperly designed, it constituted a defect and was, consequently, in violation of the Labor Code. Since the court also held that the violation of a safety statute could not be disclaimed, the exculpatory provision was ineffective. Thus, the violation created a presumption that the landlord was negligent in maintaining a defective stairway. Although the tenant was not an employee,

114. It would seem that as a matter of law this clearly would not be a common stairway, since the tenant's only justification for use would be to trespass on the landlord's roof. Fantacone v. McQueen, 196 Cal. App. 2d 477, 16 Cal. Rptr. 630 (1961).
115. Anderson v. Shuman, 257 Cal. App. 2d 272, 64 Cal. Rptr. 662 (1967), where the fact that the landlord knew one sink had become loose and three or four others were loose in a 40 unit building constituted actual knowledge that plaintiff's sink was also defective. Such a holding was necessary because constructive knowledge would be insufficient to support a recovery under California law. But see Daulton v. Williams, 81 Cal. App. 2d 70, 72, 183 P.2d 325, 326 (1947): "[T]he fact that other units had broken is not proof that the handle on appellant's bathtub was defective."
116. Haliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (1966). Strict liability in tort was pleaded but rejected by the court. While not willing to make new law, the court was able to provide plaintiff with a recovery. The strict liability holding was questioned in Kriegler v. Eichler Homes, Inc., 269 A.C.A. 224, 74 Cal. Rptr. 749 (1969); accord, Avner v. Longridge Estates, 272 A.C.A. 695, 77 Cal. Rptr. 633 (1969).
the court held that he was nevertheless within the class intended to be protected and could have the advantage of the presumption in proving negligence.  

The net effect of the above decisions has been to distort the meaning and application of the so-called "black letter law." This in itself, however, is not the problem; the problem arises because these distortions eventually recur and require further extensions or definitions.  

Of course, not all cases are decided for the tenant, but an analysis of the cases indicates that the fundamental objective of the courts is to hold the landlord liable on the basis of negligence when his is the greater fault.

Additionally, because the present law does not require the landlord to inspect for latent defects, some courts in their effort to provide a basis for recovery have found an implied warranty of habitability, sometimes called the "furnished house exception." The leading case came from an English court, which reviewed previous defenses to actions for rent and concluded that "[t]he result of the decisions as a whole seems to be that there is an absolute contractual warranty in the nature of a condition by the person who lets a furnished house or lodging to the effect that the premises and furniture are fit for habitation."  

The Wisconsin Supreme Court, in adopting this view and holding that a breach of the implied warranty of habitability constituted a constructive eviction, used even broader language and stated:

117. Such an approach is not unprecedented. See Schumann v. C.R. Riechel Eng'r Co., 187 Cal. App. 2d 309, 9 Cal. Rptr. 486 (1960) and cases cited therein which hold that the General Industry Safety Orders provide a standard of care for employees and tenants. In each case the statute was relied upon to overcome the immunities of owners and occupiers of land.

118. Compare Fisher v. Pennington, 116 Cal. App. 248, 2 P.2d 518 (1931), with Forrester v. Hoover Hotel & Inv. Co., 87 Cal. App. 2d 226, 196 P.2d 825 (1948), and Lee v. Giosso, 237 Cal. App. 2d 246, 46 Cal. Rptr. 803 (1965), where the plaintiffs were injured by falling wall beds and sued on an implied warranty of personalty even though the beds were affixed permanently to the realty. The cases are distinguishable by the different length of the tenancies, Lee v. Giosso, supra.

119. The definition of a "latent" defect, for instance, is a perplexing one; see Merrill v. Buck, 58 Cal. 2d 552, 375 P.2d 304, 25 Cal. Rptr. 456 (1962), and cases cited therein; Couch v. Pacific Gas & Elec. Co., 80 Cal. App. 2d 837, 183 P.2d 91 (1947) (exposed electrical wires that were known to plaintiffs).

120. "Significantly, almost all reported decisions favorable to landlords involved situations where the tenant was either aware or could have discovered the dangerous condition." Fleming, supra note 84, at 449; see Cummings v. Prater, 95 Ariz. 20, 386 P.2d 27 (1963); Wilcox v. Hines, 100 Tenn. 538, 46 S.W. 297 (1898).


123. Id. at 620; accord, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

124. Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); accord, Reste
To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners. 128

Obviously this rationale closely parallels that used in the early development of implied warranties in the vertical development of the products liability case. 129 Of course, once the warranty is recognized, it can support a claim for personal injury. 127

Courts have also circumvented the common law rule by finding violations of statutes, 128 ordinances, 129 and building codes 130 that may come within the doctrine of negligence per se. 131 California, by statute, has imposed a requirement that the premises be habitable and has established a specific duty to repair; 132 however, it was narrowly construed at an early date to prohibit recovery for personal injury. 133

It should be noted that in England, where the rule of nonliability originated, the contemporary view has been convincing; and in most


126. See text accompanying notes 10-18 supra.


131. The majority view is contra; violations are considered to be irrelevant in determining liability. See F. Grad, Legal Remedies for Housing Code Violations 115 (The National Comm'n on Urban Problems, Research Report No. 14, 1968), and cases cited therein.


cases, recovery for personal injury is assured. The Housing Act of 1957, the scope of which is much more comprehensive than tort liability, provides that for housing rented for up to 80 pounds in the Administrative County of London and 52 pounds elsewhere "there shall, notwithstanding any stipulation to the contrary, be implied a condition [in the leasing contract] that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, fit for human habitation." If this warranty is breached by the landlord and injury results, the tenant can recover damages. Thus England is neither burdened with the need for torturing fact situations into exceptions to the rule of nonliability nor burdened with the necessity for implying warranties between contracting parties.

All of these departures, particularly the negligence and implied warranty decisions, clearly illustrate both the vertical development from the original rule of nonliability and the close parallel to the corresponding developments that preceded the application of strict liability to the manufacturer of chattels and to the builder-vendor. As the courts continue evaluating new fact situations in landlord-tenant cases, it can be expected that they will turn more often to the products liability decisions and their rationales. The question is whether the courts will continue this vertical development of the law of landlord-tenant by recognizing the existence of a broad doctrine of negligence as in *MacPherson*, or whether they will skip over this phase of the vertical development and recognize that the doctrine of products liability should be superimposed onto the law of landlord-tenant, as it was onto that of the builder-vendor.

Negligence?

From the foregoing discussion it is obvious that California is close to answering this question and that it can reasonably be argued that a negligence rule is in fact the existing law, at least in the area of latent defects. This argument is based on the examples of the courts' interpretations cited above and is substantially strengthened by the supreme court's landmark decision in *Rowland v. Christian*. In that case the court overthrew the previous distinctions between licensees, invitees,

134. 5 & 6 Eliz. 2, c. 56, at 770.
135. Id. § 6(2), at 780.
137. See text accompanying note 97 supra.
138. See *Wilcox v. Hines*, 100 Tenn. 538, 557, 46 S.W. 297, 302 (1898) (landlord's duty of reasonable care and diligence in discovering defects).
and social guests as anachronisms of the law of real property ill-suited to a modern, urban society. In holding that negligence was the proper rule for occupiers of land, the court faced problems similar to the ones concerning the landlord-tenant relationship. The law pertaining to occupiers of land had also been subjected to varying interpretations similar to the examples discussed above. Rather than recognize one more variation, the court in Rowland v. Christian held that section 1714 of the California Civil Code applied; and unlike the common law, which recognizes only certain relationships as creating a duty of care, this section imposes a general duty on all men. It is suggested that this is equally true of the landlord. Thus, the court's decision to adopt a negligence rule in California could rest either on section 1714 or upon the argument that the common law has evolved such a duty with respect to latent defects.

Strict Liability?

The doctrine of strict liability in tort, however, has developed beyond negligence, and all of the reasons the courts have advanced in its development are equally applicable to the landlord-tenant relationship. The application, however, need not depend on the risk distribution rationale of Elmore but can rest upon the same reasons that generated the original products liability decisions—an implied representation of safety to a person who cannot make, or be expected to make, a meaningful inspection.

For example, many of the potential defendants closely parallel the status of the Hertz Leasing Company and are engaged in the enter-


141. Compare the court's discussion of the "trap" exception, i.e., a dangerous condition known to the occupier and unknown to the licensee, with text accompanying notes 111-19 supra.

142. "Everyone 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 . . . ." This is not an unusual statute. See, e.g., S.D. Comp. Laws § 20-9-1 (1967).

143. Professor Fleming arrives at the same conclusion but argues that since the lessor is presently held liable for "active negligence" after the commencement of the lease, fairness and reason alike demand no lesser obligation in relation to the lessor's activities that create dangers before the term began. Fleming, supra note 84, at 405-06.

144. See note 50 supra. As to other corporations who have become landlords see Beaton, Corporate Investments in Real Estate, The Real Estate Appraiser, July-Aug., 1969, at 37 (listing inter alia, Gulf Oil, Westinghouse, Chrysler, Chase Manhattan Bank); Cross, The House the Janitors Built, Fortune, Nov., 1962, at 152. (Marina City in Chicago, 18 floors of parking, 896 apartments, $36 million development owned by a labor union).
prise of leasing realty, presumably because such a business will return a greater net profit. Their advertising claims in the mass media emphasize the convenience of renting, central locations, luxurious surroundings, recreational facilities and "carefree living." In the leasing negotiations every attempt is made to lure the prospective tenant

145. The net profit is twice that of common stocks. Other investment advantages are "tax-free" income under depreciation allowances, possible equity appreciation, and the availability of leverage for increasing the yield. See E. LUNDBERG, REAL ESTATE PRACTICE IN CALIFORNIA 206-43 (1965); M. UNGER, REAL ESTATE PRINCIPLES AND PRACTICES 3-45, 501-22 (1964). This is particularly true for those lessors who maintain the greatest number of defective premises for, as Sax and Heistand note: "It is not without relevance that observers quite uniformly find the slum housing business to be quite a profitable one. To be sure, quite another story is told by landlords, but on examination one sees that the landlords ordinarily measure profitability only by contrasting income and expenses over a given period, failing to consider that slum housing is often an investment where the real profits may be made through sales which take advantage of such tax devices as depreciation. Alternatively, the management of the slum dwelling may be a holding operation through which the owner keeps his head above water while he waits for land values to rise and bring him his profit. [One authority] found that slum properties are sometimes part of a falling real estate market, but this simply intensifies the pressure for rental profits, generally through reduced maintenance. Moreover, it is not a cause for sympathy that some buyers of slum properties, through lack of experience or through ignorance, find themselves losing money; like the small speculator in the stock market who finds himself overwhelmed by bigger sharks, the losing slum owner may simply be the victim of his own greed. The potential defendants in these cases are not those who invest in limited dividend low-cost housing enterprises, seeking a very modest return on their money, but rather they are those who seek, and often get, large profits. While it may be true that many slum owners are themselves 'little fellows' rather than tycoons with thousands of properties, this hardly seems a basis for sympathetic treatment. It is a common and unfortunate fact that the dirtiest work of exploitation is frequently left to small-timers, with the owners of great capital able to make satisfactory profits in more respectable investments. This simply proves that one with a million dollars can invest in bonds and make a comfortable living clipping coupons, while the fellow with a few thousand dollars must get his hands dirty if he wants to produce a satisfactory income from his capital. But it is well to remember that not all small investors find themselves compelled to get rich quickly, and it remains to be shown why those who have such desires ought to be permitted to fulfill them at the expense of the poorest people in society." Sax & Heistand, Slumlordism as a Tort, 65 Mich. L. Rev. 869, 892-93 n.93 (1967) (extensive citation omitted).

146. See the rental property advertisements in any metropolitan newspaper. For example, without emphasizing different type sizes, the following excerpts from advertisements appearing in the San Francisco Examiner—Chronicle, September 28, 1969 (Want Ad Section), at 19, col. 2, 4, promise: "Air-conditioning, patios, balconies, Hotpoint kitchens, fireplaces, pools, club houses, saunas, tennis courts, assigned parking, small pets allowed, 1-2-3 bedrooms for adult living from $215"; "garden apartments, a [developer's name deleted] development in Marin County's most distinctive area with views of wooded hills, Mt. Tamalpais and the Bay. Carefree living only minutes North of the Golden Gate Bridge. Completely maintained gardens and landscaped areas. Two swim pools, one Olympic size, and tennis courts. Units furnished or unfurnished" (emphasis added).
into accepting the premises at face value, and even assuming the tenant is competent to do so, it is unrealistic to presume that he ever makes a meaningful inspection either of the premises or the central facilities, such as hot water heaters, furnaces, or air conditioning systems. A prospective tenant's inspection, as the advertisements suggest, is for suitability—size, location, and livability. Further, building code requirements and violations are made known to the lessor, not to the lessee; the lessee reasonably assumes that the landlord is in the leasing business because of his superior knowledge and ability and that the premises are safe for occupancy by those seeking the "carefree life." Therefore, where the injured tenant has justifiably relied on the lessor's skill and his implied representation that the premises are habitable, the public interest is best served when the lessor is held liable for breach of his warranty.

An additional reason, particularly pertinent since Elmore, is derived from the risk distribution rationale. The lessor's business depends on one of man's basic needs—shelter; and where a defect creates a risk of injury, "the financial burden is best placed upon the landlord, who receives a benefit from the transaction in the form of

147. "When you go with the prospective tenant to the building, it is just common sense to have warned the janitor [i.e., the resident manager] beforehand to try to make things look as spruce as possible. Have the lease in your hand, made out in duplicate and all ready for signature. It is a good idea to whip people through the empty apartment and then go to the janitor's apartment where it is more comfortable to do your bargaining. This makes certain that the bargaining is done by the tenant with only the memory of the apartment in his mind, not the actuality before his eyes. As soon as you can make your bargain, do not delay but get the lease signed in duplicate before witnesses, and get a cash payment for all or part of the first month's rent." J. Brown, The Intelligent Investor's Guide to Real Estate 231 (1964).


150. "It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or discover them. A prospective lessee ... cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor..." Reste Realty Co. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969); cf. Anderson v. Shuman, 257 Cal. App. 2d 272, 64 Cal. Rptr. 662 (1967).

rent. As Justice Traynor has explained:

[T]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . Against such a risk there should be a general and constant protection, and the manufacturer is best suited to afford such protection.

In the area of chattels, this liability has been properly extended to the lessor since he may be the only member of that enterprise reasonably available to the injured plaintiff, . . . and the imposition of strict liability upon him serves, as in the case of the retailer, as an incentive to safety. This will afford maximum protection to the injured plaintiff while working no injustice upon the lessor: the latter can recover the cost of protection by charging for it in his business.

These factors lead to the conclusion that since builder-developers are strictly liable for defective realty, lessors of realty should also be strictly liable.

The Application of the Doctrine

As noted before, the doctrine of strict liability in tort is not universally applied within the field of chattels. For example, not all sales are subject to the doctrine, only those where the seller is engaged in the business of selling the product. With the expansion of the doctrine to

152. Anderson v. Shuman, 257 Cal. App. 2d 272, 275, 64 Cal. Rptr. 662, 665 (1967) (holding lessor liable for failure to disclose a latent defect). In a footnote the court elaborated: "This reasoning is not dissimilar to the rationale expressed motivating the modern rule of liability in the products liability cases." Id. at 275 n.3, 64 Cal. Rptr. 662 n.3 (citing Greenman).


155. This argument has already been presented to two New Jersey courts, both of which found for the plaintiff on other grounds. In Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 234 A.2d 415 (App. Div. 1967) it was not applicable because the lease was an "isolated transaction." Apparently the defendant was not in the leasing business. Perhaps this result was due to a failure in the plaintiff's proof because the corporate nature of the defendant would suggest that it was "in the business" of leasing houses. See text accompanying note 158 infra. The second case, Ellis v. Caprice, 96 N.J. Super. 539, 233 A.2d 654 (App. Div. 1967), held the doctrine could not be applied because it had not been pleaded in the complaint or set up as an issue in the pretrial order. "Aside from this, we are not persuaded that the facts of this case [a six year old child playing with matches] bring it within the ambit of the Cintron-Schipper rationale." Id. at 556, 233 A.2d at 663.

156. RESTATEMENT (SECOND) OF TORTS § 402A (1965); see text accompanying note 69 supra.
lessors this phraseology might present some difficulty since it could be argued that, since he receives a consideration, every lessor is, prima facie, "in the business" of leasing. The limitation, however, is based on the notion that a point can be reached where the number of transactions do not warrant application of the doctrine. Thus, if an individual were to sell his home the doctrine would not apply.\textsuperscript{157} The same result should obtain if the individual were to lease his home, because like the sale of a single home, there is no undertaking to the public in general nor a justified reliance on such an undertaking by the ultimate lessee.\textsuperscript{158} The application, therefore, would exclude those lessors who were not "in the business." Such a limitation would be determined by the courts just as "in the scope of" is determined in respondeat superior, and "arising out of and in the course of" is determined in workmen's compensation. Indeed, one court has already held that the lessor of a two unit dwelling is not "in the business."\textsuperscript{160}

Once it is established that a lessor is "in the business," the economic stature or size of his business would not provide a basis for limiting liability. This too is only logical since, as noted previously,\textsuperscript{160} there is no such limitation in the products liability decisions. It must be emphasized that the rationale of the tort does not rest on the financial strength or bargaining power of the parties to the particular transaction; it rests on the risk distribution theory as defined in Greenman.\textsuperscript{161} Thus the economic basis of the doctrine, particularly with the bystander refinement added by Elmore, would be equally applicable to the small landlord who is in the same business as his larger competitor.

While none of the products liability decisions rest on the ground that the defendant is insured or insurable, they do specifically mention insurance as a vehicle for spreading the risk.\textsuperscript{162} In effect the courts are recognizing that if physical harm cannot be avoided,

\begin{itemize}
\item \textsuperscript{157} Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 807 (S.D. 1967) (dictum).
\item \textsuperscript{158} See Restatement (Second) of Torts § 402A, comment f at 350 (1965); Prosser, The Consumer, supra note 10, at 28.
\item \textsuperscript{159} Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 234 A.2d 415 (App. Div. 1967). While reversing in favor of the lessee, the court held that a lessee in a two unit dwelling could not recover on principles of strict liability against the landlord because the doctrine was not to be applied to cases involving isolated sales or leases.
\item \textsuperscript{160} See text accompanying note 61 supra.
\item \textsuperscript{161} Seely v. White Motor Co., 63 Cal. 2d 9, 18-19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).
\item \textsuperscript{162} Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965): "[P]ublic policy demands that the burden of accidental injuries . . . be treated as a cost of production against which liability insurance can be obtained . . . ." Id. at 87, 207 A.2d at 323. See Restatement (Second) of Torts § 402A, comment c at 350 (1965); text accompanying notes 153-54, supra.
\end{itemize}
at least the shock effect of the loss can be minimized by spreading the consequences among a large number of people through insurance and resulting price increases. Moreover, the courts have undoubtably realized not only that the vast majority of individual victims could not spread this as well as the defendants but also that the victims could not bear it at all.\footnote{163}

It could be argued that strict liability for defects should not be imposed since some landlords, particularly those maintaining tenements in ghetto areas, would have difficulty in obtaining insurance at competitive rates. This argument fails for two reasons: (1) Regardless of insurability, there is no overriding social or economic justification for protecting landlords who maintain defective premises as opposed to the policy enunciated in the products liability decisions of protecting the faultless plaintiff.\footnote{164} (2) Products liability insurance rates are determined on the anticipated number of losses among the broad base of insureds.\footnote{165}

If one group of insureds maintain their premises in such a condition that insurance rates are prohibitive, they should be compelled to control the number of defects and to bring the premises up to an acceptable standard for insurability. This would, of course, have the effect of diminishing the risk of injury and, consequently, the insurance rates. This element of control by the lessor is identical to that of the manufacturer in the products liability decisions; it does not seem unjust to compel the lessor to exercise his control to protect lives and property.

An agreement between the parties would not prevent the application of the doctrine of products liability because the liability does not arise from the agreement.\footnote{166} That is to say, liability arises from the delivery of defective premises and would not be affected by the agreement or its contractual provisions\footnote{167} even though it is a conveyance of real property.\footnote{168}

The lease may, however, attempt to regulate the parties' liability in the form of a disclaimer or an indemnification agreement. Such clauses would not prevent the application of strict liability in tort since liability is not created by the contract but is imposed by law.\footnote{169} Once a defect

\footnotetext{163}{Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases, 18 STAN. L. REV. 974, 1009 (1966).}
\footnotetext{164}{See text accompanying note 209 infra.}
\footnotetext{165}{See Morris, Enterprise Liability and the Actuarial Process-The Insignificance of Foresight, 70 YALE L.J. 554, 570 (1961).}
\footnotetext{166}{Restriction of contractual liability is immaterial. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).}
\footnotetext{167}{See id.; Read v. Safeway Stores, Inc., 264 Cal. App. 2d 404, 70 Cal. Rptr. 454 (1968).}
\footnotetext{168}{See text accompanying notes 96-97 supra.}
\footnotetext{169}{See, e.g., Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 860, 32 Cal. Rptr. 754, 757 (1963).}
causes injury, liability arises.\textsuperscript{170} It is at that point, however, that the contractual agreement might become pertinent, and its effect evaluated by the court.\textsuperscript{171} It is clear that liability for personal injury cannot be disclaimed; one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by defective products.\textsuperscript{172} While indemnification agreements have not been adequately evaluated in products liability decisions,\textsuperscript{173} it seems probable that such clauses would be effective\textsuperscript{174} unless voided under public policy as adhesive.\textsuperscript{175}

**Practical Limitations on the Landlord's Liability**

It is clear from the products liability decisions that the defendant is not an insurer of the consumer's safety.\textsuperscript{176} The tenant's injury would have to result from a defect\textsuperscript{177} and his recovery would be subject to the definitions and defenses developed in products liability decisions.\textsuperscript{178} The test is not perfection, it is reasonableness. This means that the building or premises would have to be reasonably safe for the purposes for which they are sold or leased.\textsuperscript{179}

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\textsuperscript{173} The issue is presently before the California Supreme Court in a case involving a lessor's strict liability in tort for a defective ladder and an indemnification agreement that provides: "Lessees shall indemnify Shell [Oil Company] against any and all claims and liability for injury or death of persons or damage to property caused by or happening in connection with the equipment or the condition, maintenance, possession, or operation or use thereof." Price v. Shell Oil Co., 274 A.C.A. 599, 608, 79 Cal. Rptr. 342, 349 (1969) (hearing granted).


\textsuperscript{178} See Prosser, The Consumer, supra note 10, at 20-21.

Additionally, there are certain practical limitations to the landlord's potential liability that would arise where he had recourse against the original builder or manufacturer either for his own injury\textsuperscript{180} or indemnity.\textsuperscript{181} These practical limitations are illustrated by the builder cases where the defects originated in the construction process and existed upon delivery of the premises. Liability, however, arose only when the defect caused injury. This would mean that the lessor's recourse against the builder could extend over a considerable length of time. For example, in Kriegler\textsuperscript{182} a radiant heating system began to corrode before the end of its normal service life, causing the plaintiff's injury eight years after it was installed. In Avner\textsuperscript{183} the defect causing the subsidence of the lot was not wholly apparent for six years, and in Schipper\textsuperscript{184} the failure to properly design a hot water mixing valve caused the severe scalding of a lessee two years after the house was built. These cases lead to the conclusion that the builder's liability is quite extensive at least with respect to time\textsuperscript{185} and although none of the structures above could be expected to be eternal, his liability is a function of the service life of the individual components of the premises.\textsuperscript{186} Where one is defective and causes injury, the landlord's recourse against the builder or manufacturer would extend for the same period of time.\textsuperscript{187}

An additional factor limiting the lessor's potential liability is that time will also tend to increase the available defenses, particularly the defense akin to contributory negligence or assumption of risk.\textsuperscript{188} In


\textsuperscript{183} Avner v. Longridge Estates, 272 A.C.A. 695, 77 Cal. Rptr. 633 (1969); see text accompanying note 102 supra.

\textsuperscript{184} Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); see text accompanying note 96 supra.

\textsuperscript{185} Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948) (builder's negligence, twenty years is not a limitation for a wooden railing).


\textsuperscript{187} See text accompanying notes 180-81 supra.

\textsuperscript{188} This defense is identified and explained in Cintrone v. Hertz Leasing & Rental Serv., 45 N.J. 434, 456-58, 212 A.2d 769, 782 (1965).
Schipper the plaintiff did not know, nor could he predict, that turning on the hot water would result in the emission of what amounted to live steam. Assuming, however, that no injury had ensued and that the plaintiff was old enough to appreciate the danger,\footnote{189} he would have realized that the hot water system was defective. This knowledge would be a defense against any subsequent injury caused by that defect\footnote{190} and thus operate as a practical limitation on the landlord's liability. Since it can be anticipated that the tenant in any leasehold will discover potentially hazardous conditions during his tenancy, the passage of time will tend to decrease the landlord's potential liability.

It would be tempting to limit the landlord's liability to defects that were in existence at the time of delivery, but the language in Cintrone is persuasive; the landlord should be liable for defects causing injury throughout the term of the lease,\footnote{191} subject to the products liability defenses discussed previously.\footnote{192} The landlord is in a better position to detect and remedy defects because of his greater knowledge and familiarity with the leasehold; he is also in a better position to bear the loss. However, a distinction is justified where the parties contemplate a longer term than the service life of the premises, as in a long-term lease. In such a case the lessor's liability should be treated as if the transaction were a sale of the premises. Making such a distinction seemingly requires an arbitrary limitation. The limitation, however, is based on what the parties would have anticipated the service life to be, and whether they intended the lease to have the character of a sale. The result would be to limit the lessor's liability to defects existing at the time of delivery.

It is apparent that the age of the premises will also tend to increase the lessor's individual liability, particularly where he continues to relet the premises and permit defects to develop because of dilapidation. Under these circumstances the lessor would be strictly liable to the tenant without recourse to another party. In such a case liability would be foreseeable, and the lessor could effectively limit his liability by inspecting and communicating to the tenant what specific defects had arisen.\footnote{193} For example, if the plaintiff in Schipper had known of the

\footnote{189} This assumption is made for the purpose of simplification. In Schipper, the injured plaintiff was an infant whose parents had occupied the premises for two days.  
\footnote{191} See text accompanying note 52 supra.  
\footnote{192} See note 53 supra.  
\footnote{193} A general warning concerning possible hazards would be insufficient since its effect would be the same as a disclaimer. See text accompanying note 166 supra. Where the landlord does know of a specific defect, however, and repairs cannot be commenced immediately, effective communication would limit his liability in the interim. But, if the landlord does not repair, such a defect could amount to a constructive eviction.
defective hot water system, the landlord would have had a defense against strict liability in tort.

It follows, therefore, that if the landlord elects to inspect and repair, his practical liability may again decrease. For example, if the preventive repairs entail replacement of a hot water heater and the replacement proves defective, a third party cause of action in products liability would arise against the manufacturer, wholesaler, retailer and installer of the defective heater. Although the lessee could recover against these defendants as a user or bystander, here again the rationale of Vandermark should prevail and the injured lessee should be permitted to recover against the landlord-lessee. This is particularly true where the repairs preceded the tenant's lease since the lessee may not have known that a new furnace had been installed or who the responsible parties were. It has been suggested that the plaintiff should remain ignorant of possible defendants because it permits the defendant to limit his practical liability by hiding behind the modern methods of marketing. Such a position is untenable, particularly since the entire impact of the Vandermark decision was to prevent such bewilderment and allow the plaintiff to recover against the party who delivered possession of the defective product.

In the alternative, the landlord may disregard the normal service life of the premises and permit certain dilapidations to go unremedied thereby creating a risk of injury for the unsuspecting tenant. Where the landlord does so with knowledge of the potential harm, the courts in most cases would hold him liable even under the present law.

194. See text accompanying note 172 supra.
198. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), cert. denied, 386 U.S. 912 (1967) (building contractor strictly liable for defective installation of hot water heater); cf. Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (installer of defective tire held strictly liable in tort, but distinguishable on the ground that the installer and the manufacturer were closely related).
199. See text at note 62 supra.
201. See text accompanying note 63 supra.
202. See text accompanying note 107 supra.
In all other situations strict liability in tort will increase the landlord's liability, but as has been shown, this liability is not absolute. The landlord is not an insurer. His liability can be effectively limited by four factors: (1) inspection, (2) recourse against the manufacturer or builder, (3) defenses developed in the products liability cases, and (4) the requirement that a defect cause the tenant's injury.

Additional Considerations

What will be the social effect if the doctrine of products liability is applied to the landlord-tenant relationship? Residential tenants as a class of citizenry are composed primarily of America's poor. They do not have the ability, either financially or educationally, to protest the continued existence of defective housing. Unfortunately, increasing urbanization resulting from the industrial revolution is making this situation more acute each day. Its severity is inescapable, and as the United States Supreme Court has recognized:

The need to maintain minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has amounted to a major concern of American government.

Although strict liability in tort would certainly tend to decrease the number of substandard units, it is not suggested as a complete solution to the problem of slum housing. It is merely a single step toward acceptable living conditions.

Admittedly, the imposition of strict liability on the landlord requires a radical departure from the traditional rules applicable to owners of property. Nevertheless, it is not the most radical. In addition to resting on a strong theoretical foundation, strict liability in tort as applied to the landlord-lessee would share the decisional law that has made the doctrine of products liability workable in the fields of chattels and real estate.

The most popular argument against the application of strict liability is similar to that which resisted its adoption and extension in other fields of products liability: It will impose a tremendous financial bur-

205. See Housing Needs, supra note 2; note 2 supra.
206. For example, Sax and Hiestand would recognize the rental of substandard housing as an intentional tort akin to the intentional infliction of emotional distress. Sax & Hiestand, Slumlordism as a Tort, 65 Mich. L. Rev. 869 (1967). See also Blum & Durham, Slumlordism as a Tort—A Dissenting View, 66 Mich. L. Rev. 451 (1968).
den on the defendant. This has not been the case in the law of chattels and there appears no reason why it should be any more valid in the law of real property.207 As a matter of logic, the antithesis of the argument suggests the answer: What public policy condones the denial of compensation to an injured tenant as opposed to protection of the landlord who maintains defective premises?208

Conclusion

Strict liability in tort is a refinement of the doctrine of products liability and is firmly grounded upon two rationales: the principles of implied warranty and risk distribution. It has been extended throughout the manufacturing and leasing industries, and since the same socio-economic factors are involved, it has been superimposed onto the law of real property.

The law of landlord-tenant, on the other hand, has been inadequate in its development. Although the lessee of a ladder can recover for injury on the basis of strict liability in tort, the lessee of a house injured by a defective staircase may have no remedy.

The courts must recognize that the business of leasing housing involves the same health and safety considerations that led to the application of products liability to the lessors of trucks,209 ice machines,210 and ladders.211 Such an application does not reach into vast, unexplored areas of liability, because, as Chief Justice Traynor noted before,212 there is a wealth of analogy to be drawn from the products liability decisions. They contain for tomorrow the answer to some of the problems that face us today.

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212. Traynor, supra note 1, at 376.
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