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Peterson v. Superior Court: What Happened to the Paramount Policy?

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Peterson v. Superior Court: What Happened to the Paramount Policy?

Anthony A. Babcock*

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Wisdom too often never comes, and so one ought not to reject it merely because it comes late.

—Justice Rutledge¹

I. INTRODUCTION

In 1995, a unanimous California Supreme Court drastically altered the landlord-tenant relationship in California with its decision in *Peterson v. Superior Court (Paribas)*.² Specifically, the *Peterson* court overruled that portion of the holding in *Becker v. IRM Corp.*³ that imposed strict products liability on landlords for injuries to tenants caused by a defect in the premises that the landlord did not create or market.⁴ In sum, the *Peterson* decision is a long and welcomed victory for California's landlords. For over a decade landlords struggled to comprehend the justifications advanced by courts for imposing liability without fault and complained that their insurance premiums skyrocketed as a result of the *Becker* decision.⁵ Conversely, the *Peterson* decision is a defeat for California's tenants. The implications are catastrophic. In some situations, innocent tenants will be forced to absorb the entire cost of personal injuries caused by defects in leased premises.

In *Peterson*, Nadine Peterson, a guest at the Palm Springs Marquis Hotel, sustained serious head injuries while taking a shower when she slipped and fell in the bathtub.⁶ Peterson alleged that the bathtub did not have any safety features such as antiskid surfaces, grab rails, or rubber mats, which made the bottom of the bathtub extremely unsafe when the bathtub bottom was wet and slippery.⁷ Peterson brought

1. *Wolf v. Colorado*, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

3. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), overruled by *Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

4. See *Peterson*, 10 Cal. 4th at 1188-90, 899 P.2d at 906-07, 43 Cal. Rptr. 2d at 837-38 (concluding that under California's products liability doctrine, which provides generally that manufacturers, retailers, and others in the marketing chain of a product are strictly liable in tort for personal injuries caused by a defective product, a residential landlord may no longer be held strictly liable for an injury to a tenant caused by a defect in a leased dwelling).

5. John Flinn, *Landlords Relieved by Ruling on Liability; Defective Product Law Had Been 'Ticking Time Bomb,'* S.F. EXAMINER, Aug. 23, 1995, at B1 (estimating that the strict liability standard increased insurance premiums by 15% to 25%).

6. *Peterson*, 10 Cal. 4th at 1189, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837.

7. *Id.*

a cause of action for strict liability in tort asserting that the bathtub was a defective product.⁸ The plaintiff named as defendants the owners of the hotel, among others.⁹

The trial court granted the defendants' motion to preclude the plaintiff from introducing any evidence or making any reference to an action based on strict products liability against the hotel's owners.¹⁰ As a matter of law, the trial court held that *Becker* did not apply to owners of hotels.¹¹ *Becker*, a controversial 1985 California Supreme Court decision, held 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.¹²

Despite the trial court's ruling, the court of appeal issued an opinion directing the trial court to permit the plaintiff to proceed on her strict liability theory.¹³ The appellate court concluded that *Becker* should be extended to include hotel owners and not limited to just landlords.¹⁴

In 1995, upon petition by the defendants, the California Supreme Court granted review to decide whether the *Becker* decision allowed for the owners of a hotel to be held strictly liable for injuries to their guests caused by defects in the premises.¹⁵ The court held that *Becker* should not be expanded to include hotel owners.¹⁶ More importantly, a unanimous court concluded that the *Becker* decision itself constituted an "unwarranted extension" of the strict products liability doctrine and overruled its central holding.¹⁷ *Peterson*, therefore, held that landlords are not within the class of

8. *Id.*

9. *Id.* The plaintiff named as defendants, among others, the owners of the hotel, Banque Paribas and Palm Springs Marquis, Inc.; the operator of the hotel, Harbaugh Hotel Management Corporation; and the manufacturer of the bathtub, the Kohler Company. *Id.*

10. *Id.* at 1189, 899 P.2d at 906-07, 43 Cal. Rptr. 2d at 838.

11. *Id.* at 1189, 899 P.2d at 907, 43 Cal. Rptr. 2d at 838.

12. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. Commentators have criticized the *Becker* decision. See generally Richard Deeb, Note, *A Bird in the Hand: California Imposes Strict Liability on Landlords in Becker v. IRM Corp.*, 20 LOY. L.A. L. REV. 323, 372-73 (1987) (stating that "*Becker* represents a vast and unwarranted extension in the area of strict liability"); Emily M. Haliday, Comment, *California's Approach to Landlord Liability for Tenant Injuries: Strict Liability Reexamined*, 26 U.C. DAVIS L. REV. 367, 423 (1993) (concluding that the California Supreme Court should overrule *Becker*). But see Virginia E. Nolan & Edmund Ursin, *Strict Tort Liability of Landlords: Becker v. IRM Corp. in Context*, 23 SAN DIEGO L. REV. 125, 129 (1986) (concluding that the *Becker* holding that landlords may be strictly liable for injuries caused by dangerously defective conditions on leased premises is not an unprecedented step into uncharted territory, but rather, it is a desirable application of strict liability, supported by decisions of the past two decades).

13. *Peterson v. Superior Court (Paribas)*, 22 Cal. Rptr. 2d 614, 615 (1993), overruled by 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

14. *Id.* at 615-17.

15. *Peterson*, 10 Cal. 4th at 1190, 899 P.2d at 907, 43 Cal. Rptr. 2d at 838.

16. *Id.*

17. See *id.* at 1188, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837 (stating that "upon reexamining [sic] the basis for *Becker*'s holding with regard to the proper reach of the products liability doctrine, we conclude that we erred in *Becker* in applying the doctrine of strict products liability to a residential landlord that is not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury in question").

persons who may properly be held strictly liable on a products liability theory for injuries caused to their tenants by a defect in the premises.¹⁸

The obvious implication of *Peterson* is that tenants who are injured by a latent defect will not be able to recover for their injuries from their landlords absent a showing of negligence.¹⁹ Less obvious, but of greater concern, is that injured tenants will be forced to absorb the entire cost of their personal injuries in some circumstances.

The following hypothetical is an example of such a situation. The hypothetical plaintiff is a tenant in a two-year-old 200-unit apartment building that was just purchased by a group of investors. The tenant, while enjoying her lunch in the apartment's dining nook, reaches above the table and pulls the chain to engage an overhead ceiling fan. After a few minutes of operation, the ceiling fan's motor and blades break free from the fan's mounting bracket and strike the plaintiff on the back of her neck. The blow to her neck severs the spinal cord's nerve tissue and leaves her paralyzed. The medical bills associated with the accident far exceed the plaintiff's personal medical policy limits. Therefore, she is forced to spend her life's savings of \$50,000 on medical expenses and subsequently files for bankruptcy. Our plaintiff, a single mother of two, is unable to return to her former occupation as a real estate agent because she is confined to a wheelchair.

Upon investigation by experts in the construction industry, it is discovered that the ceiling fan's motor and blades were attached to the mounting bracket with screws, provided by the manufacturer, that were simply too small to support the weight of the ceiling fan. The normal vibrations created by the ceiling fan's motor forced the screws out of the mounting bracket, causing the motor and blades to break free. The screws were located behind a large cover plate that concealed the fan's motor, electrical wiring, and mounting brackets, for aesthetic purposes. Therefore, to have discovered that the screws were too small to support the weight of the fan prior to the accident, the landlord would have had to employ an expert in the construction industry to disassemble the fan and remove the screws holding up the fan's motor and blades. Only then would it have been discovered that the ceiling fan was defective in design because of the inadequacy of the size of the screws provided by the manufacturer.

Under the new rule announced in *Peterson*, the hypothetical plaintiff would have to show that the defendant landlord failed to use reasonable care in providing and

18. *Id.* at 1188-89, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837; *see id.* (holding "that neither landlords nor hotel proprietors are strictly liable on a products liability theory for injuries to their respective tenants and guests caused by a defect in the premises").

19. *Id.* at 1189, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837; *see id.* (stating that the holding does not absolve the hotel operator or landlords "of all potential liability for such injuries"—on the contrary, hotel operators and landlords "that breach the applicable standard of care still may be held liable under general tort principles for injuries resulting from defects in their premises"—and that "the injured tenant or guest retains any strict products liability cause of action that may lie against the manufacturer, distributor, or retailer of a defective product that causes the injury").

maintaining the rented premises in a safe condition in order to recover for her injuries from the landlord.²⁰ Stated differently, the injured tenant must show that a reasonable inspection by the landlord or the landlord's agents would have disclosed the defect in the ceiling fan's design.²¹ Thus, under *Peterson*, landlords are only liable for those injuries that result from defects in the premises that are reasonably foreseeable. In short, it would be difficult for our hypothetical plaintiff to meet this burden since a "reasonable inspection" would probably not require the hypothetical landlord to remove the ceiling fan to determine if the manufacturer supplied adequately sized screws to support the fixture. Therefore, the plaintiff would be unable to recover damages in tort from the landlord.

However, after *Becker* but prior to the *Peterson* decision, an injured tenant could have brought an action based on the doctrine of strict products liability against the landlord. Under *Becker*, a plaintiff was not required to show that the landlord failed to use reasonable care in maintaining the premises or that the defect was reasonably foreseeable. Rather, the plaintiff was compensated for losses by merely showing that a latent defect in the premises caused the plaintiff injuries.²² Under strict products liability principles, knowledge of the hidden defect, the screws in the hypothetical, is simply imputed against the landlord, and the tenant would be able to seek recovery from the landlord.²³

Even after *Peterson*, the hypothetical plaintiff would probably be permitted to bring an action against the builder of the apartment building and could pursue the manufacturer, retailer, or distributor of the fan under a strict products liability theory.²⁴ However, it is not difficult to imagine a situation in which both the builder

20. See *id.* (stating that landlords are liable for negligent conduct); *Becker*, 38 Cal. 3d at 467-68, 698 P.2d at 124-25, 213 Cal. Rptr. at 221-22 (stating that the landlord owes a tenant a duty of reasonable care in providing and maintaining the rented premises in a safe condition).

21. See *Becker*, 38 Cal. 3d at 468-69, 698 P.2d at 125-26, 213 Cal. Rptr. at 222-23 (stating that "in the exercise of ordinary care, the purchaser of rental property may be expected to inspect the premises not only to determine whether they are aesthetically pleasing but also to determine whether they are safe The duty to inspect should charge the defendant only with those matters which would have been disclosed by a reasonable inspection.").

22. *Brown v. Superior Court (Abbott Lab.)*, 44 Cal. 3d 1049, 1056, 751 P.2d 470, 474, 245 Cal. Rptr. 412, 415 (1988) (stating that "[s]trict liability differs from negligence in that it eliminates the necessity for the injured party to prove that the manufacturer of the product which caused injury was negligent. It focuses not on the conduct of the manufacturer but on the product itself, and holds the manufacturer liable if the product was defective.").

23. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 695 (5th ed. 1984) (calling this imputation of knowledge of the defect in strict products liability theory "a far cry" from negligence liability, which requires that the target defendant at least have created or failed to discover the flaw, and noting the principal case on the distinction, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

24. See *Peterson*, 10 Cal. 4th at 1199-200, 899 P.2d at 913-14, 43 Cal. Rptr. 2d at 844-45 (noting that the court expressed no opinion regarding whether, or under what circumstances, strict liability might be imposed upon a landlord or hotel proprietor who participated in the construction of the building or otherwise created the defective product that caused the injury, but also noting that it is clear that those in the chain of distribution are responsible under a strict products liability theory).

and those in the chain of distribution of the defective product are judgment-proof or nonexistent.²⁵

The possibility that an injured tenant, not unlike the hypothetical plaintiff illustrated previously, might be unable to find a solvent defendant motivated the *Becker* court to conclude that the policy justifications underlying the strict products liability doctrine would be furthered by the inclusion of landlords within its scope.²⁶ *Becker*, quoting a previous California Supreme Court, noted that the *paramount policy* to be promoted by the strict products liability doctrine “is the spreading throughout society of the cost of compensating . . . defenseless victims of . . . defects.”²⁷

A decade later, however, the *Peterson* court unanimously disagreed with this *paramount policy* argument, and concluded that an injured tenant should not be permitted to pursue the landlord under the doctrine of strict products liability. Several reasons motivated the court to overrule *Becker*. First and foremost, the *Becker* decision was heavily criticized and received little support in academic commentary.²⁸ In addition, no state aside from California and Louisiana permitted an injured tenant to pursue a tort claim against a landlord based on a theory of strict products liability.²⁹ Further, the *Peterson* court did not believe that the policy considerations that justify imposing strict liability exist in the landlord-tenant relationship.³⁰ The court described both landlords and injured tenants as “innocent victims” in latent

25. For instance, the manufacturer might be a foreign manufacturer without any assets in the United States, essentially forcing the plaintiff to litigate or enforce the money judgment in a foreign country, or in an action against the builder, as time elapses between the construction and the accident, it is more likely that the actual builder will no longer be in business.

26. *Becker*, 38 Cal. 3d at 477, 698 P.2d at 131, 213 Cal. Rptr. at 228 (Bird, C.J., concurring). In a concurring opinion, Chief Justice Bird reasoned that “[p]lacing the economic burden of injuries on those best able to pay for those costs while permitting the transfer of that burden to those most culpable is consistent with the equitable considerations inherent in the resolution of the difficult problems which have been judicially posed.” *Id.* (citation omitted). However, Chief Justice Bird did not state why the landlord in a latent defect case is more culpable. Arguably, the landlord and injured tenant are equally victims of a defect in the premises.

27. *Id.* at 466, 698 P.2d at 123, 231 Cal. Rptr. at 220.

28. See *infra* notes 354-65 and accompanying text (discussing critical commentary of *Becker*).

29. Louisiana’s code provides that:

The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

LA. CIV. CODE ANN. art. 2695 (West 1996); see *Gallager v. Favrot*, 499 So. 2d 1205, 1206 (La. Ct. App. 1986) (discussing a lessor’s liability to his tenant for damages caused by a defect in the leased premises, and noting that the trial court assessed damages at \$10,000, but that the plaintiff tenant was awarded \$2000 because he was assigned 75% of the comparative fault).

30. See *Peterson*, 10 Cal. 4th at 1202-10, 899 P.2d at 915-20, 43 Cal. Rptr. 2d at 846-51 (discussing tenant expectations, loss-spreading, and creating a safer product); *infra* Part VI.

defect cases.³¹ Therefore, the court was unwilling to place the entire burden on the innocent landlord to compensate an equally innocent tenant.³² Finally, the court appeared to find it significant that the manufacturer of the defective bathtub was eager to enter into a settlement with the injured hotel guest.³³ In other words, the court was suggesting that because the manufacturer in most circumstances is amenable, it would not be necessary to include the landlord as a potential defendant in a products liability suit.

The purpose of this Casenote is to help explain why the *Peterson* court perceived the *Becker* decision as "an unprecedented leap" and overruled the portion of its holding that imposed strict products liability on landlords. However, to comprehend the policy justifications that motivated the divergent *Becker* and *Peterson* courts, this Casenote presents the seminal cases and legal doctrines that created a transformation in California landlord-tenant relationships. Specifically, Part II provides background information on both the judicial creation of an implied warranty of habitability in residential leases, and the judicial recognition of landlord liability under ordinary negligence principles.³⁴ Part II discusses the evolution of the strict products liability doctrine and also focuses on its early application in the real estate context.³⁵ Part III analyzes the *Becker* decision, and Part IV analyzes the subsequent cases that consistently limited the controversial case to its facts.³⁶ Part V explains why other jurisdictions are unwilling to impose strict products liability against landlords for defective premises.³⁷ Part VI examines the *Peterson* decision,³⁸ concluding that despite the reasoning expressed by a unanimous California Supreme Court, the *Peterson* decision fails to advance the public interest expressed less than a decade earlier.³⁹ Specifically, *Peterson* fails to recognize the paramount policy of compensating otherwise innocent victims of manufacturing defects.⁴⁰ Part VII proposes a legislative solution that would require landlords to carry a catastrophic liability policy that covers tenants who are *seriously* injured by defects in the premises.⁴¹ The proposed

31. *Peterson*, 10 Cal. 4th at 1207, 899 P.2d at 918-19, 43 Cal. Rptr. 2d at 848-50; *see id.* at 1207, 899 P.2d at 919, 43 Cal. Rptr. 2d at 850 (stating that it "would be unjust to hold a hotel operator strictly liable for an injury to a hotel guest caused by a defect in the premises, of which the hotel operator was unaware, and which would not have been disclosed by a reasonable inspection," and pointing out that "[t]he economic consequences could be onerous for the operators, . . . who, through no fault of their own, could be rendered insolvent . . . [by a resulting] judgment that exceeded available insurance coverage").

32. *Id.*

33. *See id.* at 1210, 899 P.2d at 921, 43 Cal. Rptr. 2d at 851. During discovery proceedings, the Kohler Company entered into a settlement with the plaintiff for the sum of \$600,000. *Id.*

34. *See infra* Part II.

35. *See id.*

36. *See infra* Parts III, IV.

37. *See infra* Part V.

38. *See infra* Part VI.

39. *See infra* Part VI.B.

40. *See infra* Part VI.A.

41. *See infra* Part VII.

solution covers only those personal injury claims that are in excess of \$25,000, and requires an injured plaintiff to pursue the manufacturer before any action is taken against the landlord. The proffered solution is consistent with the aspirations of the paramount policy by protecting tenants against catastrophic losses, while reducing the number of suits brought against California's landlords based on a strict products liability theory.

II. THE ROAD TO *BECKER*: BACKGROUND

The *Becker* court's decision to apply the doctrine of strict products liability to landlords was motivated by the judicial expansion of two distinct legal doctrines: the implied warranty of habitability, and strict products liability.⁴² First, the court reasoned that the judicial expansion of tenant rights from caveat emptor to an implied warranty of habitability provided the court with a justification to hold a landlord liable under strict products liability principles.⁴³ In other words, expansion of the strict products liability doctrine into the landlord-tenant relationship was simply a logical step toward ensuring that an injured tenant is compensated.⁴⁴ Second, the court was equally persuaded by the developments in the doctrine of strict products liability, especially the "stream of commerce" approach.⁴⁵ Under the stream of commerce approach, liability extends to all those who are part of the overall producing and marketing enterprise of a defective product.⁴⁶ The majority in *Becker* reasoned that landlords were part of the overall producing and marketing enterprise of the defective premises and, therefore, concluded that strict liability in tort must be extended to include landlords.⁴⁷ The imposition of strict liability for latent defects that exist at the time of renting ensures that the landlord who markets the product "bears the costs" of injuries resulting from the defects, rather than the tenants who are powerless to protect themselves.⁴⁸

However, the *Peterson* court flatly rejected the justifications advanced by the *Becker* court, concluding that neither the implied warranty of habitability nor the doctrine of strict products liability warrant imposing liability without fault in latent

42. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219 (stating that the court was "satisfied that the rationale of the . . . cases establishing [an implied warranty of habitability] and the doctrine of strict liability in tort requires [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").

43. *Id.* at 462-63, 698 P.2d at 121, 213 Cal. Rptr. at 218.

44. *Id.*

45. *Id.* at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216.

46. *Id.*

47. *Id.* at 459-61, 464, 698 P.2d at 119-20, 122, 213 Cal. Rptr. at 216-17, 219.

48. *Id.* at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221; *see id.* (recognizing that "[l]andlords are an integral part of the enterprise of producing and marketing rental housing," and observing that "landlords are essential to the rental business" and "have more than a random or accidental role in the marketing enterprise").

defect cases.⁴⁹ To help comprehend and analyze the conflicting rationales expressed in *Becker* and *Peterson*, background information on both the development of the implied warranty of habitability and the emergence of the doctrine of strict products liability is necessary.⁵⁰ Additionally, because *Peterson* stated that landlords may still be liable under ordinary negligence principles, the landmark cases discussing landlord and tenant liability for negligent conduct are also presented.⁵¹

A. From Caveat Emptor to an Implied Warranty of Habitability

At common law, the real estate lease was considered a "conveyance" of an estate for a term of years.⁵² Therefore, a lease was governed by property law concepts, not contract law.⁵³ Under property law principles, the lease was subject to the ancient doctrine of caveat emptor.⁵⁴ Thus, the landlord was under no duty to provide or maintain the leased premises in a habitable condition.⁵⁵ Rather, the tenant was expected to inspect the premises and negotiate the lease based on the condition of the land and structures.⁵⁶ This "no duty" common law concept was well suited during the Middle Ages because the primary value of the lease was in the agricultural land itself and not in the simple living structures on the land.⁵⁷ Improvements included in the leasehold were regarded as incidental and of secondary importance to the valuable farmland.⁵⁸

49. *Peterson*, 10 Cal. 4th at 1205-09, 899 P.2d at 917-20, 43 Cal. Rptr. 2d at 848-51.

50. See discussion *infra* Part II.A.

51. See discussion *infra* Part II.B.

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

53. See, e.g., *Evans v. Faight*, 231 Cal. App. 2d 698, 42 Cal. Rptr. 133 (1965).

54. *Brewster v. DeFremery*, 33 Cal. 341, 345-46 (1867), *overruled by Green v. Superior Court (Sunski)*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); see BLACK'S LAW DICTIONARY 222 (6th ed. 1990) (noting the phrase literally means "let the buyer beware" in Latin, defining "caveat emptor" as the rule that purchasers must examine, judge, and test for themselves, and noting its applicability more to judicial sales and auctions and the like rather than to sales of consumer goods because modern consumer protection laws protect the consumer-buyer through strict products liability and warranties). See generally Jonathon M. Purver, Annotation, *Modern Status of Rules as Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R. 3d 646 (1971) (presenting a series of decisions that discuss the transition from caveat emptor to an implied warranty of habitability in modern leasing transactions).

55. *Cowen v. Sutherland*, 14 N.E. 117, 118 (Mass. 1887). However, a statutory remedy was available to tenants whose landlords neglected to maintain the premises in a tenantable condition. Section 1941 of the California Civil Code provides that the lessor of a dwelling must, in the absence of a contrary agreement, put it in fit condition for such use, and repair all subsequent dilapidations that render it untenable, except those caused by the tenant's negligence. However, California Civil Code § 1942 makes clear that tenants cannot compel the making of necessary repairs. Rather, tenants can give notice of the dilapidations, and if their landlord does not repair them "within a reasonable time" tenants may elect to make the repairs themselves and deduct the cost from the rent, or abandon the premises and be discharged from the payment of rent or performance of the obligations. CAL. CIV. CODE § 1942 (West 1985).

56. *Cowen*, 14 N.E. at 118.

57. *Green*, 10 Cal. 3d at 622, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

58. *Id.*

Because the actual land was the most important element of the lease transaction and the normal lease duration was extensive, courts treated the lease as a conveyance of an interest in land.⁵⁹ However, as society shifted from agrarian- to industrial-based, the modern residential lessee was not interested in acquiring an interest in the land; rather, the lessee was merely contracting for a place to live.⁶⁰ In 1974, the California Supreme Court, in the seminal case of *Green v. Superior Court*,⁶¹ pointed out that “today’s typical city dweller, who frequently leases an apartment several stories above the actual plot of land on which an apartment building rests, cannot realistically be viewed as acquiring an interest in land.”⁶² Further, the court quoted *Javins v. First National Realty Corp.*,⁶³ which stated that “[w]hen 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.”⁶⁴ Therefore, the *Green* court concluded that the application of contract principles, and not property law, is appropriate in dealing with residential leases of urban dwelling units.⁶⁵

The court, having decided that contract principles provide a more rational framework for determining the responsibilities of the landlord, rejected the common law rule that imposes “no duty” on the landlord to repair or maintain the leased premises in a habitable condition.⁶⁶ Instead, the court recognized a “warranty of habitability,” stating that it was implied in all “contracts” for residential leases.⁶⁷ Under the implied warranty of habitability, a residential landlord agrees to maintain the premises in a habitable state for the duration of the lease.⁶⁸ Further, a tenant’s duty to pay rent, under contract principles, is dependent upon the landlord’s fulfillment of his implied warranty of habitability.⁶⁹ The *Green* opinion makes clear that the implied warranty of habitability does not require a landlord to provide premises in a perfect, aesthetically-pleasing condition.⁷⁰ Nevertheless, the warranty requires that “‘bare living requirements’ . . . be maintained In most cases substantial

59. *Id.* at 622, 517 P.2d at 1171, 111 Cal. Rptr. at 707.

60. *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

61. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

62. *Green*, 10 Cal. 3d at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

63. 428 F.2d 1071 (D.C. Cir. 1970).

64. *Green*, 10 Cal. 3d at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708 (quoting *Javins*, 428 F.2d at 1074) (internal quotation marks omitted) (citations omitted).

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

66. *Id.* at 629, 517 P.2d at 1176, 111 Cal. Rptr. at 712.

67. *Id.*

68. *Id.* at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709; see *id.* (stating that the “holding in this case reflects [the] belief that the application of contract principles, including the mutual dependency of covenants, is particularly appropriate in dealing with residential leases”).

69. *Stoiber v. Honeychuck*, 101 Cal. App. 3d 903, 914, 162 Cal. Rptr. 194, 198 (1980).

70. *Id.*

compliance with . . . applicable housing code[s] . . . will suffice to meet the landlord's obligations under the . . . implied warranty of habitability"⁷¹

The *Green* court followed a number of other jurisdictions that had discarded the traditional doctrine of caveat emptor in favor of an implied warranty of habitability, finding caveat emptor incompatible with contemporary social conditions and modern legal values.⁷² Those jurisdictions that adopted an implied warranty of habitability recognized that modern urbanization has created a factual setting that supports placing a duty on the landlord to maintain the premises in a safe and habitable condition.⁷³ In other words, because present day lessees and contemporary housing is significantly different from the agrarian model, greater protection must be given to today's urban residential tenants.⁷⁴ For instance, modern apartment buildings are mechanically complex, making them difficult and expensive to repair.⁷⁵ Electrical, plumbing, and heating systems are hidden from view, and the landlord is usually in a superior position to discover and repair any problems because of knowledge of these systems.⁷⁶ Additionally, the agrarian lessee was perceived as a "jack-of-all-trades," who possessed the skill and knowledge to detect and repair any defects in the premises.⁷⁷ Today's city dweller, however, generally has a single, specialized skill unrelated to maintenance work.⁷⁸ Furthermore, today's urban tenant is apt to move frequently, and therefore is less willing to make expensive repairs to property in which the tenant has no long-term interest.⁷⁹ Lastly, urbanization and population growth has created a shortage of adequate affordable housing in almost every city.⁸⁰ This shortage of affordable housing has left tenants with little bargaining power with which they might negotiate to obtain warranties of habitability from the landlord.⁸¹ Hence, the mechanism of the "free market" no longer serves as a viable means for fairly allocating the duty to repair leased premises between landlord and tenant.

Another important factor expressed by courts for adopting the rationale that a warranty of habitability is implied in residential leases is "consumer expectations."⁸²

71. *Green*, 10 Cal. 3d at 637, 517 P.2d at 1182-83, 111 Cal. Rptr. at 718-19 (citation omitted).

72. *Id.* at 619-20, 517 P.2d at 1169-70, 111 Cal. Rptr. at 705-06; *see, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Kline v. Burns*, 276 A.2d 248 (N.H. 1971); *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970); *Pines v. Persson*, 111 N.W.2d 409 (Wis. 1961).

73. *Green*, 10 Cal. 3d at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

74. *Id.*

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

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 625, 517 P.2d at 1173-74, 111 Cal. Rptr. at 709-10.

81. *Id.*

82. *Id.* at 626-27, 517 P.2d at 1174-75, 111 Cal. Rptr. at 710-11.

Courts reason that today's tenants are similar to consumers of other goods.⁸³ The tenant, as a consumer of housing, seeks a "package of goods" with the legitimate expectation that "the premises will be fit for . . . habitation for the duration of the term of the lease."⁸⁴ Because the landlord has primary control over the housing, and has greater opportunity, incentive, and financial capacity to make needed repairs in comparison to a short-term tenant, it is reasonable to place an obligation on the landlord to maintain the "package of goods" in a safe and habitable condition.

Finally, courts recognize that the widespread enactment of comprehensive housing codes is an additional factor for imposing upon the landlord the duty to repair and maintain premises in a safe and habitable condition.⁸⁵ The Supreme Court of Wisconsin, in *Pines v. Persson*,⁸⁶ observed that legislatively enacted housing regulations demonstrate that public policy compels landlords to bear the responsibility for maintaining safe, clean, and habitable housing.⁸⁷ In other words, imposing a court-created duty to provide habitable premises in residential leases is consistent with the commitment of the legislature to render the common law rule of caveat emptor obsolete.

The purpose of this section is to briefly introduce the reader to the justifications that motivated courts to recognize an implied warranty of habitability. However, the success of the doctrine is questioned by many academic commentators. In a nutshell, commentators point out that the doctrine has not resulted in the creation of widespread safer housing, and has only worsened the position of the nation's poor by depleting the net stock of affordable housing.⁸⁸

B. Landlord Liability Under the Foreseeability Test

If a landlord breaches the implied warranty of habitability, damages are determined by calculating the percentage of the reduction of habitability or "usability" of the dwelling.⁸⁹ Therefore, the hypothetical tenant described in Part I would not be entitled to significant compensation for breach of the warranty because the difference between the fair market rental value of an apartment with a dining nook ceiling fan and one without the amenity would be nominal. However, the hypothetical tenant may sue her landlord for personal injury resulting from the landlord's failure to keep

83. *Id.* at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711; see U.C.C. § 2-314(1) (1990) (implying generally in all contracts for the sale of goods a warranty that the goods are merchantable); *id.* § 2-315 (implying generally in all contracts for the sale of goods in which the seller has reason to know of the buyer's reliance on the seller's furnishing the goods for a particular purpose a warranty that the goods are fit for such purpose).

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

85. *Pines v. Persson*, 111 N.W.2d 409, 412-13 (Wis. 1961).

86. 111 N.W.2d 409.

87. *Pines*, 111 N.W.2d at 412-13.

88. See, e.g., Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979) (providing a summary of articles both theoretical and empirical that examine landlord-tenant reforms and whether they make tenants better off).

89. *Academy Spires, Inc. v. Brown*, 268 A.2d 556, 562 (N.J. Dist. Ct. 1970).

the premises in a safe and habitable condition under ordinary principles of negligence.⁹⁰

In 1973, a California appellate court, in *Brennan v. Cockrell Investments, Inc.*,⁹¹ held that landlords are under a duty to exercise ordinary care in the management of their premises and must avoid exposing persons to an unreasonable risk of harm.⁹² Under common law prior to *Brennan*, a landlord was generally not liable for injury to a tenant, even if the injury resulted from a dangerous condition that existed at the time the tenant took possession.⁹³ The justification for this "no duty" approach to landlord liability was that the landlord no longer had "possession" or "control" of the property and, therefore, it would be unjust to hold a landlord liable.⁹⁴ In *Brennan*, the tenant-plaintiff fell and was injured while descending the back stairway when a wrought iron railing broke free from the concrete steps.⁹⁵ The lower court refused to instruct the jury that the landlord had a duty to act as a person of ordinary prudence in protecting others from foreseeable risks on the leased premises.⁹⁶ Instead, the lower court instructed the jury that landlords are generally not liable for injuries to tenants that result from a dangerous condition that existed when the tenant took possession.⁹⁷

However, the appellate court stated that the traditional "no duty" rule, adhered to in the majority of jurisdictions, was not consistent with the basic policy of California.⁹⁸ Rather, the *Brennan* court pointed out that California departed from the "no duty" rule in the landmark case of *Rowland v. Christian*.⁹⁹ Therefore, the *Brennan* court concluded that, under *Rowland*, landlords could be liable for their negligent actions.¹⁰⁰

90. See *Brennan v. Cockrell Inv., Inc.*, 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122, 125 (1973) (stating that "it is impossible to perceive any legitimate public interest that would be promoted by the creation of a landlord immunity exception to [California Civil Code § 1714], which requires all persons to act reasonably). Damages may be calculated using a "fair rental value" approach, *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972), or a "percentage reduction of use" approach, *Academy Spires*, 268 A.2d at 562.

91. 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973).

92. *Brennan*, 35 Cal. App. 3d at 800-01, 111 Cal. Rptr. at 125.

93. See *Ayres v. Wright*, 103 Cal. App. 610, 616, 284 P. 1077, 1079-80 (1930); *Farber v. Greenberg*, 98 Cal. App. 675, 680-81, 277 P. 534, 536 (1929); *Rathbun Co. v. Simmons*, 90 Cal. App. 692, 696, 266 P. 369, 371 (1928); RESTATEMENT (SECOND) OF TORTS §§ 355-356 (1965); RESTATEMENT (SECOND) OF PROPERTY, *Landlord and Tenant* § 17 introductory note, at 155-60 (1977).

94. See *Brennan*, 35 Cal. App. 3d at 800, 111 Cal. Rptr. at 125 (rejecting the argument that "as a landlord out of possession, [the defendant] should be held to the lesser standard of the common law rule and should be said to have no duty of ordinary care toward a tenant in possession").

95. *Id.* at 799, 111 Cal. Rptr. at 124.

96. *Id.* at 798-99, 111 Cal. Rptr. at 124.

97. *Id.* at 799, 111 Cal. Rptr. at 124.

98. *Id.* at 800, 111 Cal. Rptr. at 125 (stating that "[t]he basic policy of this state, as contained in [California Civil Code § 1714], is that every person is responsible for injuries caused to others by [the] failure to use ordinary care or skill in the management of . . . property").

99. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

100. *Brennan*, 35 Cal. App. 3d at 801-02, 111 Cal. Rptr. at 125-26.

In 1968, the *Rowland* court repudiated the traditional trespasser-licensee-invitee classifications of duties and adopted the fundamental policy that "all persons are required to use ordinary care to prevent others from being injured as a result of their conduct."¹⁰¹ The plaintiff in *Rowland* was a guest of the defendant.¹⁰² After severely injuring his hand on a cracked porcelain faucet handle in the apartment's bathroom, Rowland brought an action against Christian, the *tenant*, based on negligence.¹⁰³ The court pointed out that, in the past, the general rule was that licensees (social guests) took the premises as they found them, defects and all, and that the possessor of the land owed them only the duty to refrain from inflicting *intentional* injury upon them.¹⁰⁴ The justification for the general rule that limits a tenant's liability to licensees is premised on the idea that guests should not expect special precautions to be made on their account.¹⁰⁵ In other words, if the host does not desire to inspect the premises for hazards and maintain a completely safe environment, a social guest should not expect this to be done simply because that guest is invited on to the property.

However, the *Rowland* court stated that the common law classifications of trespasser, licensee, and invitee, and specifically the historical immunities from liability predicated upon those classifications, did not reflect the "major factors"¹⁰⁶ that determine whether immunity from liability should be conferred upon the possessor of land.¹⁰⁷ The court noted that adherence to the classifications led to injustice, and that the basic policy of California set forth by the legislature was that "every one is responsible for an injury caused to another by . . . want of ordinary care or skill in the management of . . . property."¹⁰⁸ Thus, under *Rowland*, the proper test is whether the possessor of land acted as a reasonable person in the management of the property in view of the probability of injury to others.¹⁰⁹

101. See *Rowland*, 69 Cal. 2d at 111-12, 443 P.2d at 563-64, 70 Cal. Rptr. at 99-100 (stating that under California Civil Code § 1714, "[e]very one is responsible, not only for the result of . . . willful acts, but also for an injury occasioned to another by [the] want of ordinary care or skill in the management of . . . property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself" (quoting California Civil Code § 1714)). Further, the court stated that any "departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *Id.* at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

102. *Id.* at 110, 443 P.2d at 563, 70 Cal. Rptr. at 99.

103. *Id.*

104. *Id.* at 113, 443 P.2d at 565, 70 Cal. Rptr. at 101 (citing *Palmquist v. Mercer*, 43 Cal. 2d 92, 102, 272 P.2d 26, 32 (1954); *Oettinger v. Stewart*, 24 Cal. 2d 133, 137, 148 P.2d 19, 21 (1944)).

105. See 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1477 (1956).

106. See *supra* note 101 (listing the major factors).

107. *Rowland*, 69 Cal. 2d at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

108. *Id.* at 111-12, 117, 443 P.2d at 563-64, 567, 70 Cal. Rptr. at 99-100, 107.

109. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

Although the tenant was being sued in *Rowland*, the *Brennan* court pointed out that the fact that a *landlord* is not in possession or control of the premises is not a legitimate justification for creating landlord immunity from liability.¹¹⁰ Instead, the court stated that possession and degree of control over the premises are significant factors to be weighed in determining whether the landlord acted as a reasonable person under all the circumstances.¹¹¹ While a broad discussion of what constitutes "unreasonableness" is beyond the scope of this Casenote, the accepted principle, commonly referred to as the "Hand Formula," is that conduct is deemed unreasonable if the probability and gravity of injury to third persons exceeds the burden of adequate precautions and the social utility of the defendant's conduct.¹¹²

For instance, in *Peterson*, the plaintiff would probably have been successful in a negligence action against the hotel operators. The plaintiff stated that the bathtub had no safety measures such as antiskid surfaces, grab rails, or rubber mats.¹¹³ Applying the Hand Formula to the facts of *Peterson*, the financial burden associated with equipping each bathtub throughout the hotel with rubber mats and grab rails would not be that great. On the other hand, it would not be unlikely that a hotel guest would slip in a bathtub, especially one with which the guest is not familiar. Furthermore, injuries associated with slipping in a bathtub are often severe and sometimes fatal. Therefore, a jury would likely have found that the hotel operators were unreasonable in failing to equip the bathtub with safety measures because the costs of such precautions would be much less than the likelihood of guests being seriously injured.

C. Emergence of Strict Products Liability

During the period that the courts decided *Green* and *Brennan*, there was growing public and private concern over the quality of the nation's housing stock.¹¹⁴ Local enforcement of state housing codes was woefully inadequate.¹¹⁵ Therefore, the judicially created duty to provide habitable housing and the elimination of landlord immunity from ordinary negligence principles were perceived as necessary to provide consumers with safe and clean places to live. Similarly, beginning in the early 1960s, the California Supreme Court recognized the need to protect consumers from

110. *Brennan*, 35 Cal. App. at 800, 111 Cal. Rptr. at 125.

111. *Id.*

112. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (explaining that reasonableness is influenced by the following formula: if the probability is called P, the magnitude of the loss L, and the burden B, then liability depends on whether B is less than L multiplied by P).

113. See *supra* note 7 and accompanying text.

114. Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 298-99 (1987). The policy behind courts adopting an implied warranty of habitability was to force the rehabilitation of substantially defective slum dwellings, so that the nation's poor could have a safe and healthy place to live. As one commentator stated, dilapidated housing creates filth that spreads to the streets, breeding disease if not crime, and creating an eyesore and a public disgrace. *Id.* at 299.

115. *Id.* at 299.

defective products. In 1963, in the seminal case of *Greenman v. Yuba Power Products, Inc.*,¹¹⁶ the California Supreme Court accepted the doctrine of strict products liability, and held that a manufacturer's liability was absolute for injuries resulting from a defectively dangerous product.¹¹⁷ The *Greenman* court was the first to impose tort liability irrespective of fault.¹¹⁸ In other words, under the doctrine of strict products liability, the seller of a defective product is still liable for the physical harm to the purchaser, even though the seller has exercised all possible care in the preparation and sale of the product.¹¹⁹

1. Justifications for Imposing Strict Products Liability

In *Greenman*, the court stated 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."¹²⁰ The plaintiff in *Greenman* was seriously injured by a defectively designed power tool, and brought an action against both the retailer and the manufacturer.¹²¹ Prior to *Greenman*, a manufacturer's liability for defective products was usually governed by the law of contract warranties.¹²² However, the *Greenman* decision made clear that liability for defective products is now governed by the law of strict liability in tort and not by the intricacies of express sales warranties.¹²³

Justice Traynor, writing for a unanimous court in *Greenman*, stated that the fundamental "purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that [place defective] products on the market[,] rather than by the injured persons who are powerless to protect themselves."¹²⁴ In other words, one who makes the product should be held

116. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

117. *Greenman*, 59 Cal. 2d at 63-64, 377 P.2d at 901-902, 27 Cal. Rptr. at 701-02.

118. *See id.*

119. *Brown v. Superior Court (Abbott Lab.)*, 44 Cal. 3d 1049, 1056, 751 P.2d 470, 474, 245 Cal. Rptr. 412, 415 (1988).

120. *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

121. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698. The power tool was a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. The plaintiff's "expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe [and] . . . that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident." *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

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

123. *Id.*

124. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 402A (1979) (stating that sellers engaged in the business of selling products liable for physical harm for such of their products that are expected to and do reach the consumer without substantial change in the condition in which they were sold and are in a defective condition unreasonably dangerous to the consumer or to the consumer's property); *see also* *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-35, 501 P.2d 1153, 1161-63, 104 Cal. Rptr. 433, 441-43 (1972) (rejecting section 402A's requirement that the product defect be "unreasonably dangerous" on the ground the requirement rings of negligence, and holding that

responsible for the injuries associated with the defects. It should be noted that Justice Traynor's justification is not a "deep pocket" theory, rather it is a "loss-spreading" theory¹²⁵—the manufacturer has the capacity to distribute the loss it incurs as a result of an action based on strict liability for a defectively designed product. The assumption is that the manufacturer can shift the cost of damage awards to the many purchasers of the product in the form of higher prices.¹²⁶

In addition to the "loss-spreading" justification articulated by Justice Traynor, three other important policy justifications have been advanced by courts for imposing liability without fault on manufacturers. First is the "consumer expectation" justification.¹²⁷ In *Escola v. Coca Cola Bottling Co.*,¹²⁸ Justice Traynor, in a concurring opinion, pointed out that handicrafts have been replaced by the mass production of complicated and technical goods, and that the close relationship between the producer and the consumer no longer exists.¹²⁹ Additionally, modern products are often complex and well packaged. Therefore, the average consumer no longer has the skill or means to adequately investigate a product for defects.¹³⁰ Instead, today's consumer simply relies on the reputation and advertising of the manufacturer and *expects* that the product is safe for the uses for which it has been marketed.¹³¹ Justice Traynor reasoned that because manufacturers create expectations of safety through advertising and marketing devices, they should be held strictly liable for injuries caused by their defective products.¹³²

Another policy justification advanced by courts for imposing on manufacturers the strict products liability doctrine is that the burden of proving specific acts of negligence is often impossible.¹³³ Many products today are complicated and would require the plaintiff to hire numerous expert witnesses that are familiar with the engineering and manufacturing process to identify and prove accurately that the

all that need be shown is a product defect that proximately caused injury).

125. KEETON ET AL., *supra* note 23, § 98, at 693.

126. *Id.*

127. Justice Traynor had earlier stated that the "consumer no longer has means or skill enough to investigate for himself the soundness of a product, . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks [sic]. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark." *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring) (citations omitted).

128. 24 Cal. 2d 453, 150 P.2d 436 (1944).

129. *Escola*, 24 Cal. 2d at 467, 150 P.2d at 443 (Traynor, J., concurring).

130. *Id.*

131. *Phipps v. General Motors Corp.*, 363 A.2d 955, 958 (Md. 1976).

132. *Escola*, 24 Cal. 2d at 467-68, 150 P.2d at 443-44 (Traynor, J., concurring). Justice Traynor believed that "the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases [involving defective products]. . . . [I]t should now be recognized that a manufacturer incurs absolute liability when an article that he has placed on the market, knowing that it 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). The California Supreme Court, in *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), eventually adopted Justice Traynor's classic concurring opinion.

133. *Phipps*, 363 A.2d at 958.

manufacturer was negligent.¹³⁴ Unfortunately, the added litigation costs associated with proving specific facts of negligence, if possible, would make it difficult for the average consumer to prevail in an action against the manufacturer of a defective product.

A final justification advanced by courts is that the imposition of strict liability in tort will result in "safer products." In *Phillips v. Kimwood Machine Co.*,¹³⁵ the Supreme Court of Oregon stated that "in the final analysis, the imposition of liability has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give."¹³⁶ The theory is that requiring manufacturers to bear the cost of injuries creates an incentive to produce safer products.¹³⁷ However, some commentators argue that imposing strict liability will not induce any greater care than liability based on negligence because manufacturers simply pass the added cost of insuring against lawsuits to the consumer in the form of higher prices.¹³⁸ In addition, the development of innovative products might actually be inhibited, because manufacturers might fear the possibility of being haled into court, despite their exercise of reasonable care in producing a new product.¹³⁹

2. Expanding the Applicability of Strict Products Liability

Less than a year after the celebrated *Greenman* decision, the California Supreme Court began to expand the use of the doctrine by applying strict products liability to other entities involved in the distribution of a defective product. For instance, in *Vandermark v. Ford Motor Co.*,¹⁴⁰ the court concluded that policy considerations warranted the imposition of strict liability in tort upon retailers who distribute injury-causing, defective products to the public.¹⁴¹ In *Vandermark*, the plaintiff seriously injured himself as a result of defective brakes that caused his car to swerve off the freeway and collide with a light post.¹⁴² In addition to Ford Motor Company, the plaintiff brought suit against Maywood Bell Ford, an authorized dealer.¹⁴³ Writing for the court, Justice Traynor harkened back to the justifications first presented in *Escola*, and concluded that retailers, like manufacturers, should be liable regardless of fault.¹⁴⁴ Additionally, Justice Traynor pointed out that Maywood Bell Ford, as an authorized dealer, was an integral part of the overall distribution system of the

134. See *id.*

135. 525 P.2d 1033 (Or. 1974).

136. *Phillips*, 525 P.2d at 1042.

137. *Id.* at 1041-42.

138. KEETON ET AL., *supra* note 23, § 98, at 693.

139. *Id.*

140. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

141. *Vandermark*, 61 Cal. 2d at 263, 391 P.2d at 172, 37 Cal. Rptr. at 900.

142. *Id.* at 258, 391 P.2d at 169, 37 Cal. Rptr. at 897.

143. *Id.*

144. *Id.* at 261, 263, 391 P.2d at 170, 172, 37 Cal. Rptr. at 898, 900.

defective automobile. Therefore, it should bear the cost of injuries resulting from marketing the automobile also.¹⁴⁵ Additionally, *Vandermark* recognized that in some cases the retailers might be the only members in the chain of distribution that are amenable.¹⁴⁶ Furthermore, the court believed that retailers could exert pressure on the manufacturers to produce safer products.¹⁴⁷ The court suggested that retailers would do business only with those manufacturers that consistently produced safe products because this would relieve the retailer of the fear of lawsuits.¹⁴⁸ Lastly, the court reasoned that imposing strict tort liability upon both the retailer and the manufacturer afforded maximum protection to the injured plaintiff and worked no injustice on the defendants because they could adjust the costs associated with the loss between them in the course of their continuing business relationship.¹⁴⁹

Strict liability has also been applied to lessors of personal property. In *Price v. Shell Oil Co.*,¹⁵⁰ Flying Tiger Airline leased from Shell Oil Company a gasoline truck used for refueling aircraft.¹⁵¹ The plaintiff, an employee of Flying Tiger, injured himself when he fell from a defective ladder mounted on the gasoline truck.¹⁵² The ladder was installed under Shell's direction, and both Shell and Flying Tiger inspected it.¹⁵³ The injured aircraft mechanic brought an action against Shell alone.¹⁵⁴ *Price* concluded that there was "no substantial difference between [s]ellers of personal property and non-sellers [sic], such as . . . lessors."¹⁵⁵ The court pointed out that "in each instance, the seller or non-seller [sic] places the product on the market, knowing that it is to be used without inspection for defects."¹⁵⁶ Furthermore, the court sought to promote the policy of protecting victims of manufacturing defects. Thus, "it should make no difference that the party distributing the [product] has retained title to it."¹⁵⁷ Lastly, the court reasoned that the leasing company could spread the loss of compensating injuries by an adjustment in the price of the rental equipment.¹⁵⁸

145. *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.

146. *Id.*

147. *Id.*

148. *Id.*

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

150. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

151. *Price*, 2 Cal. 3d at 248, 466 P.2d at 723, 85 Cal. Rptr. at 179.

152. *Id.* at 248-49, 466 P.2d at 724, 85 Cal. Rptr. at 180.

153. *Id.* at 248, 466 P.2d at 724, 85 Cal. Rptr. at 180.

154. *Id.* at 249, 466 P.2d at 724, 85 Cal. Rptr. at 180.

155. *Id.* at 251, 466 P.2d at 726, 85 Cal. Rptr. at 182.

156. *Id.* (citations omitted).

157. *Id.* at 251, 466 P.2d at 726, 85 Cal. Rptr. at 182.

158. *Id.*

3. *Strict Products Liability Applied in the Real Estate Context*

a. *Mass-Produced Homes*

California's lower courts, armed with the policy justifications presented in both the *Greenman* and *Vandermark* decisions, rapidly expanded the application of strict liability in tort. In *Kreigler v. Eichler Homes*,¹⁵⁹ a California appellate court held that a homeowner could recover against the builder of mass-produced homes on the basis of strict products liability for a defective radiant heating system.¹⁶⁰ Prior to *Kreigler*, liability without fault had only been applied in cases involving personal property, not real property.¹⁶¹ However, the court reasoned that no meaningful distinction existed between Eichler Homes's mass production of housing and the mass production of other goods, such as automobiles.¹⁶²

The *Kreigler* court was motivated by the recent developments in the field of strict products liability and suggested that the judiciary was actually obligated to extend the doctrine into other areas beyond the traditional product setting, like mass-produced homes.¹⁶³ The *Kreigler* court stated an "exceptionally able and well thought out opinion of the Supreme Court of New Jersey" inspired the decision to hold builders strictly liable in tort.¹⁶⁴ In *Schipper v. Levitt & Sons*,¹⁶⁵ scalding hot water drawn from a defective faucet installed by the builder burned a child.¹⁶⁶ The New Jersey Supreme Court concluded that public interest required a developer of mass-produced homes to bear the costs that result from defective construction, rather than the injured party, for two fundamental reasons.¹⁶⁷ First, the builder was in the better economic position to absorb the costs associated with the injury.¹⁶⁸ Second, the injured party justifiably relied on the builder's implied representation that the advertised model was free from construction defects.¹⁶⁹

The *Kreigler* court believed that the plaintiff relied on the skill and reputation of the builder, and concluded that Eichler Homes should be held strictly liable for the defective heating system.¹⁷⁰ Apparently, other pertinent policy considerations also

159. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

160. *Kreigler*, 269 Cal. App. at 228-29, 74 Cal. Rptr. at 753.

161. *Id.* at 227, 74 Cal. Rptr. at 752.

162. *Id.*

163. *Id.*

164. *Id.* at 227-28, 74 Cal. Rptr. at 752 (citing *Schipper v. Levitt & Sons*, 207 A.2d 314 (N.J. 1965)).

165. 207 A.2d 314 (N.J. 1965).

166. *Schipper*, 207 A.2d at 317-18.

167. *Id.* at 325-26.

168. *Id.*

169. *Id.*

170. *Kreigler*, 269 Cal. App. 2d at 228-29, 74 Cal. Rptr. at 753.

compelled the court—in particular, the economic ability of the builder to bear the cost associated with the defective construction.¹⁷¹

However, in *Oliver v. Superior Court (Regis Builders, Inc.)*,¹⁷² another California appellate court limited the application of the strict products liability doctrine to builders of mass-produced homes.¹⁷³ The court held that the justifications articulated in the *Kreigler* decision did not provide a basis for extending the doctrine of strict liability to a contractor who had only built two homes.¹⁷⁴ Likewise, in *La Jolla Village Homeowners Ass'n v. Superior Court (Quality Roofing, Inc.)*,¹⁷⁵ another California appellate court precluded a strict liability action against a subcontractor.¹⁷⁶ The court reasoned that extending the doctrine to include subcontractors would result in higher housing costs.¹⁷⁷ The additional costs to the subcontractor for insurance premiums would be passed on to the developer of the mass-produced homes, who in turn would pass it on to the home-buying public.¹⁷⁸ Furthermore, a plaintiff is already protected because the developer is strictly liable for the negligence of subcontractors.¹⁷⁹

b. Residential Lots

Less than five months after the *Kreigler* court concluded that builders of mass-produced homes are strictly liable for defective construction, California's strict products liability evolution advanced yet another step. In *Avner v. Longridge Estates*,¹⁸⁰ an appellate court held that a developer of residential lots is strictly liable for the defective preparation of the soil.¹⁸¹ Longridge Estates developed a tract of hillside residential lots sometime prior to 1960.¹⁸² In 1965, the lot settled due to inadequate grading, insufficient compacting, and poor drainage.¹⁸³ Relying on the recent holding in *Kreigler*, the plaintiffs asserted a claim based on strict products liability, and argued that the developer manufactured the product, here the lot, by grading, filling, and cutting the soil.¹⁸⁴ The defendants argued that although a land developer improves the lot, the developer "does not alter the basic characteristics of the soil and

171. *Id.* at 227-28, 74 Cal. Rptr. at 752-53 (accepting the rationale of the *Schipper* court that addressed the loss-spreading justification).

172. 211 Cal. App. 3d 86, 259 Cal. Rptr. 160 (1989).

173. *Oliver*, 211 Cal. App. 3d at 89, 74 Cal. Rptr. at 162.

174. *Id.*

175. 212 Cal. App. 3d 1131, 261 Cal. Rptr. 146 (1989).

176. *La Jolla Village Homeowners Ass'n*, 212 Cal. App. 3d at 1145, 261 Cal. Rptr. at 154.

177. *Id.* at 1145-46, 261 Cal. Rptr. at 154-55.

178. *Id.*

179. *Id.* at 1144, 261 Cal. Rptr. at 153.

180. 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969).

181. *Avner*, 272 Cal. App. 2d at 615, 77 Cal. Rptr. at 639.

182. *Id.* at 608, 77 Cal. Rptr. at 635.

183. *Id.* at 609, 77 Cal. Rptr. at 635.

184. *Id.*

must contend with the various natural and latent conditions that exist in the soil.”¹⁸⁵ The defendants noted that neither the builder of mass-produced homes nor the manufacturer of personal property was forced to contend with this burden.¹⁸⁶

Referring to the *Kreigler* decision, the *Avner* court stated that it was unable to distinguish the obligation of a builder to the buyer of a home with a defective heating system from the obligation of a developer to the owners of a failing lot.¹⁸⁷ *Avner* reasoned that a contrary ruling would require purchasers of lots to employ soil engineers to investigate for defects that are located several feet beneath ground.¹⁸⁸ To relieve lay persons of this expensive undertaking, the court favored imposing liability without fault upon the developers of residential lots.¹⁸⁹

4. *Strict Products Liability Applied to Landlords*

In 1972, California expanded the doctrine of strict liability in tort into the landlord-tenant relationship. In *Fakhoury v. Magner*,¹⁹⁰ the court held that a landlord, who leases a “furnished” apartment, is strictly liable for injuries that result from the apartment’s defective furniture.¹⁹¹ In *Fakhoury*, the tenant was injured when the sofa, provided as part of the lease, collapsed.¹⁹² The court articulated the “loss-spreading” justification presented by Justice Traynor in *Escola* as the primary reason for holding the landlord of a furnished apartment strictly liable.¹⁹³ *Fakhoury* was a case involving “defective furniture,” not “defective premises.”¹⁹⁴ Thus, the court applied the doctrine of strict products liability to the landlord, not as the lessor of real property, but as the lessor of furniture.¹⁹⁵ The landlord in *Fakhoury* furnished five apartment units with identical sofas that he personally purchased from the manufacturer.¹⁹⁶ Most significantly, the court insisted that the landlord was engaged in the enterprise of leasing furniture, in addition to the enterprise of leasing apartments.¹⁹⁷ For this additional enterprise he received increased rents.¹⁹⁸ Relying on the holding of *Price*, the *Fakhoury* court concluded that a landlord was strictly liable for leasing defective

185. *Id.* at 611, 77 Cal. Rptr. at 637.

186. *Id.*

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

188. *Id.*

189. *Id.*

190. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

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

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

193. *Id.* at 64, 101 Cal. Rptr. at 477; *see id.* (stating that the lessor can recover the cost of protection by charging for the costs in the lessor’s business).

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

195. *Id.*

196. *Id.* at 64, 101 Cal. Rptr. at 476.

197. *Id.* at 63-64, 101 Cal. Rptr. at 476.

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

furniture.¹⁹⁹ As mentioned previously, *Price* held that strict products liability was applicable to lessors of personal property.²⁰⁰ Simply put, the *Fakhoury* court was not willing to exempt the defendant from the holding in *Price* just because he was the owner of the apartment in addition to being the lessor of a defective sofa.²⁰¹

The *Fakhoury* decision can be viewed as the first case to stretch the application of the doctrine of strict products liability beyond its intended practicality. The court made some attempt to narrow the holding by suggesting that a casual or isolated lease transaction would not bring the doctrine into play.²⁰² Nevertheless, the court believed that furnishing five apartments was not casual or isolated, and this satisfied the newly created threshold. Remember the court, relying on *Price*, applied the doctrine to the defendant for his participation in the enterprise of leasing furniture, not for leasing a dwelling.²⁰³ However, in *Price*, the defendant was Shell Oil Company, who leased gasoline trucks that refueled aircraft.²⁰⁴ In other words, *Price* involved a true leasing enterprise and is thus easily distinguished from the facts of *Fakhoury*. It is difficult to accept the idea that the landlord was engaged in the separate enterprise of leasing furniture by simply furnishing five apartments. Additionally, the "loss-spreading" justification articulated by the *Fakhoury* court is questionable. Clearly, Shell Oil Company had the ability to spread the loss of compensating victims of defective equipment among its many customers. However, a lessor who provides furniture to only a total of five tenants probably lacks this ability. A landlord who leases a furnished apartment can recover the cost of insuring against a loss by simply charging tenants an increased rate, but this is markedly different than the "loss-spreading" theory first articulated by Justice Traynor in *Escola*.²⁰⁵

Whatever distinctions the *Fakhoury* court was purporting to establish between defective furniture and defective premises became less clear four years later in *Golden v. Conway*.²⁰⁶ In *Golden*, the tenant sought to recover for damages to his inventory caused by a fire that resulted from an improperly installed wall heater.²⁰⁷ The landlord had purchased the heater a year or two before the fire.²⁰⁸ The tenant leased the building for commercial use, but the premises featured a kitchen and bathroom, and the landlord was aware that the tenant's employee was living on the premises.²⁰⁹

199. *Id.*

200. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 251-52, 466 P.2d 722, 726, 85 Cal. Rptr. 178, 182 (1970).

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

202. *Id.* at 64, 101 Cal. Rptr. at 476.

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

204. *Price*, 2 Cal. 3d at 248, 466 P.2d at 723, 85 Cal. Rptr. at 179.

205. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (stating that "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business").

206. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

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

208. *Id.* at 953, 128 Cal. Rptr. at 71.

209. *Id.* at 962, 128 Cal. Rptr. at 78.

The court concluded that a lessor of real property who is engaged in the business of leasing commercial buildings with attached living quarters and who “equips” the premises with defective appliances, is strictly liable in tort.²¹⁰ The fact that the landlord had actually purchased the heating unit apparently moved the court.²¹¹ Prior to *Golden*, a court permitted a tenant to bring an action under the doctrine of strict liability for injuries that resulted from defective furniture, but not from defective appliances that were part of the apartment’s original construction.²¹² Arguably, the court would not have imposed strict liability if a wall heater that a prior owner purchased and installed caused the accident. The *Golden* court stated that it saw no reason to distinguish between appliances that are attached to the realty and furniture that is not.²¹³

Under the holding in *Golden*, the *Fakhoury* court’s requirement of a “separate enterprise” was no longer necessary.²¹⁴ The *Golden* court simply applied strict liability to the landlord as a lessor of real property, not as a lessor of an attached wall heater. Rather than discussing *Fakhoury*’s requirement of a “separate enterprise,” the court presented the three policy considerations articulated by the *Price* court to support the decision to impose liability without fault upon landlords. In particular, the *Golden* court pointed out that tenants are “virtually powerless” to protect themselves against defective appliances.²¹⁵ Additionally, the landlord can recover the added cost of protecting tenants by increasing rents to offset higher insurance premiums.²¹⁶ Lastly, the landlord has a better opportunity than does the injured tenant to recoup from the party primarily responsible for the defect that causes the injury.²¹⁷

III. THE PARAMOUNT POLICY: *BECKER V. IRM CORP.*

California’s strict products liability evolution reached its pinnacle in 1985 as a result of the California Supreme Court’s decision in *Becker*. *Becker* held that a landlord engaged in the business of leasing apartments is strictly liable in tort for injuries resulting from a latent defect in the premises.²¹⁸ Prior to *Becker*, landlords were liable only for those injuries that resulted from their negligent conduct.²¹⁹

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

211. *Id.*

212. See *supra* notes 190-205 and accompanying text (discussing *Fakhoury*).

213. *Golden*, 55 Cal. App. 3d at 961, 128 Cal. Rptr. at 77.

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

215. *Id.* at 961, 128 Cal. Rptr. at 78 (quoting *Fakhoury*, 25 Cal. App. 3d at 64, 101 Cal. Rptr. at 476).

216. *Id.* (quoting *Fakhoury*, 25 Cal. App. 3d at 64, 101 Cal. Rptr. at 476).

217. *Id.* (quoting *Fakhoury*, 25 Cal. App. 3d at 64, 101 Cal. Rptr. at 476).

218. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 464, 698 P.2d 116, 122, 213 Cal. Rptr. 213, 219 (1985), *overruled* by *Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

219. See *Brennan v. Cockrell Invs., Inc.*, 35 Cal. App. 3d 796, 801-02, 111 Cal. Rptr. 122, 126 (1973); *supra* notes 91-99 and accompanying text (examining the *Brennan* decision).

In *Becker*, the plaintiff slipped while in the shower and fell through the shower's glass door.²²⁰ As a result of the fall, he severely lacerated his arm.²²¹ The plaintiff argued that the shower door was defective, and brought an action against the landlord for his personal injuries, based on strict products liability.²²² The manufacturer fabricated the shower door with untempered glass, although tempered glass was available at the time of the accident.²²³ The use of tempered glass would have substantially reduced the tenant's injuries.²²⁴

Unlike *Fakhoury*, which involved the separate enterprise of leasing furniture, and *Golden*, which involved an appliance that the landlord had purchased, *Becker* involved a product that the previous owners of the building did not purchase or install.²²⁵ Although the defendant-landlord was not involved with any phase of the construction process, a majority of the court was convinced that the doctrine of strict products liability should be extended to include landlords who purchase buildings that have pre-existing defects that cause injuries.²²⁶

A. Imposing Strict Products Liability

Writing for the majority of the court, Justice Broussard relied on what can be called the "paramount policy" justification, and concluded that the doctrine of strict products liability was applicable to landlords.²²⁷ The "paramount policy" is "the spreading throughout society of the cost of compensating otherwise defenseless victims [of defective products]."²²⁸ The court first introduced this policy in *Escola* but did not term it the paramount policy. Rather, the court introduced it as simply one of a number of policy considerations that supported imposing liability without fault.²²⁹ However, twenty-six years later in *Price*, the California Supreme Court suggested that the "loss-spreading" form of compensating victims was actually the paramount purpose of the doctrine.²³⁰ Justice Broussard, in the majority opinion in *Becker*, simply referred to the justification as the "paramount policy."²³¹ The other

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

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 457-58, 698 P.2d at 117-18, 213 Cal. Rptr. at 214-15.

226. *Id.* at 465-67, 698 P.2d at 123-24, 213 Cal. Rptr. at 220-21.

227. *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220-21.

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

229. *See Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (recognizing that "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business").

230. *See Price v. Shell Oil Co.*, 2 Cal. 3d 245, 251-52, 466 P.2d 722, 725-26, 85 Cal. Rptr. 178, 181-82 (1970).

231. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220; *see Price*, 2 Cal. 3d at 251, 466 P.2d at 725-26, 85 Cal. Rptr. at 181-82 (stating that "[e]ssentially the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the

justifications advanced in earlier cases, such as creating safer products, consumer expectations, and the costly burden of litigation, no longer appeared to influence the court equally. In fact, the *Becker* majority opinion only touched on the other policy considerations in relation to the facts of the case.²³² The majority never reasoned that by imposing strict liability apartments would become safer, or that tenants truly rely on landlords to protect them from *unforeseeable* defects in the premises. Rather, the court focused its decision on the need to compensate the victims of latent defects.

In addition to focusing on the "paramount policy," the majority reasoned that the continued judicial expansion of strict products liability, coupled with the court's recognition of an implied warranty of habitability, supported the court's decision to extend the doctrine into the landlord-tenant setting.²³³ Stated differently, the court reasoned that imposing liability without fault on landlords was simply a logical step in the natural progression of the law in California.²³⁴ This natural progression of the law argument is not surprising since legal commentators predicted that strict liability in tort would eventually become applicable to residential landlords. For example, in 1977, Harry Miller and Marvin Starr stated that there was a strong probability that landlords would be held strictly liable in tort to all persons injured regardless of the landlord's negligence.²³⁵ Further, Miller and Starr pointed out that "[t]he application of the doctrine of strict liability to a lessor of residential premises is a natural and logical extension of the present judicial development of the tort."²³⁶ Additionally, in 1984, a year prior to the *Becker* decision, Professor Keeton hinted that apartment landlords would eventually face imposition of the strict products liability doctrine upon them.²³⁷

An apartment building is significantly different than the typical product produced by the manufacturer and marketed by the retailer and distributor. It is generally older, composed of countless complex fixtures and appliances, and several tradespeople have constructed it. The majority sidestepped the unique nature of the apartment building by recognizing that *Kreigler* and *Avner* had used the doctrine in the real estate context.²³⁸ Thus, the majority simply considered the apartment a product similar to a mass-produced home or a manufactured residential lot. Justice Broussard pointed out that California extended liability to all those who were part of the

cost of compensating them").

232. *Becker*, 38 Cal. 3d at 463-67, 698 P.2d at 121-24, 213 Cal. Rptr. at 218-21.

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

234. *Id.* at 466, 698 P.2d at 123-24, 213 Cal. Rptr. at 220-21.

235. HARRY D. MILLER & MARVIN B. STARR, 4 CURRENT LAW OF CALIFORNIA REAL ESTATE § 27:77, at 380 (1977); see *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219 (discussing the implied warranty of habitability and concluding that the case law that establishes the duties of a landlord and the doctrine of strict liability in tort requires the imposition of strict liability upon landlords).

236. MILLER & STARR, *supra* note 235, § 27:77, at 380 (original emphasis omitted).

237. KEETON ET AL., *supra* note 23, § 104A, at 722 ("[A]ll the rules related to . . . strict liability in tort are likely to become applicable as against that kind of lessor or landlord who can be regarded as being engaged in the business of renting apartments and other structures as part of his business as a realtor.").

238. *Becker*, 38 Cal. 3d at 460-61, 698 P.2d at 119-20, 213 Cal. Rptr. at 216-17.

“overall producing and marketing enterprise of a defective product.”²³⁹ The court observed that, although the landlord was not engaged in the distribution of the product in the same manner as a manufacturer, retailer, or lessor, the landlord did provide the product to the public, and therefore played a substantial role in the overall enterprise that made housing available to the renters.²⁴⁰ Therefore, the landlord should be strictly liable.²⁴¹

B. Absence of the Continuing Business Relationship

The defendant in *Becker* argued “that a landlord who purchases an existing building which is not new should be exempt from strict liability in tort for latent defects because, like dealers in used personalty, [landlords are] not part of the manufacturing and marketing enterprise.”²⁴² The defendant relied on *Vandermark*, in which the court suggested that no “injustice” would result by holding a retailer strictly liable because the retailer could, in the course of the continuing business relationship with the manufacturer, adjust the costs of insuring against being held strictly liable between themselves.²⁴³ The landlord in *Becker* correctly pointed out that it had never had a business relationship with the builder, and therefore would not be able to adjust the insurance costs associated with protecting tenants.²⁴⁴ Rather, the landlord would have to absorb all the costs of insuring against defects in the premises.²⁴⁵ Nevertheless, the court stated that “a continuing business relationship is not essential to imposition of strict liability,” and “[t]he unavailability of the manufacturer is not a factor militating against liability of others engaged in the enterprise.”²⁴⁶ Instead the court reasoned that the “paramount policy” of the rule remained the spreading throughout society of the costs of compensating defenseless victims.²⁴⁷

The *Becker* court’s decision to overlook² the absence of a continuing business relationship was surprising in light of *Tauber-Arons Auctioneers Co. v. Superior Court (Perez)*,²⁴⁸ decided by an appellate court five years earlier. *Tauber-Arons Auctioneers* held that a dealer of used machinery is not strictly liable, primarily because the underlying rationale of *Vandermark* was not applicable to dealers of used

239. *Id.* at 459, 464, 698 P.2d at 119, 122, 213 Cal. Rptr. at 216, 219 (quoting *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).

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

241. *Id.*

242. *Id.* at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.

243. *Id.*

244. *Id.*

245. *See id.*

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

247. *Id.*

248. 101 Cal. App. 3d 268, 161 Cal. Rptr. 789 (1980).

goods.²⁴⁹ In particular, the court refused to impose strict liability in tort because the used machinery dealer did not have the requisite continuing business relationship with the manufacturer.²⁵⁰ Similarly, buyers of used rental properties do not have continuing business relationships with builders.²⁵¹ However, the court ignored this argument, and decided to hold the landlord strictly liable.

C. *An Unusual and Unjust Burden*

Justice Lucas, joined by Justice Mosk, accused the majority of taking an “unprecedented leap,” and imposing “‘an unusual and unjust burden’ on property owners.”²⁵² Justice Lucas was troubled by the imminent adverse economic effects of the majority’s decision.²⁵³ He noted that, by imposing strict liability, landlords would be faced with liability for every injury resulting from any defect in the entire building, whether it was reasonably foreseeable or not.²⁵⁴ Ultimately, the dissenting opinion concluded that the imposition of absolute liability would result in an increase in the price of rental housing, in large part because of the increased cost of insurance.²⁵⁵

In addition to the economic implications of the majority’s opinion, Justice Lucas was disturbed that the majority’s opinion gave no meaningful consideration to the requirement of a continuing business relationship with the defective product’s manufacturer.²⁵⁶ He reasoned that, unlike retailers and lessors, or others in the original chain of distribution of the product, landlords could not adjust the costs of insuring against the losses associated with defects in the premises.²⁵⁷ Rather, a landlord could

249. *Tauber-Arons Auctioneers*, 101 Cal. App. 3d at 283, 161 Cal. Rptr. at 798; *see id.* (stating that “the ordinary used machinery dealer has no continuing business relationship with the manufacturer in the course of which he can adjust the cost of protection from strict liability[, and thus] the rationale which underlies *Vandermark* simply is inapplicable to such a dealer”).

250. *Id.*

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

252. *Id.* at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., concurring and dissenting) (quoting *Dwyer v. Skyline Apartments Inc.*, 301 A.2d 463, 467 (N.J. App. Ct. 1973)).

253. *Id.* at 485-86, 487 n.6, 698 P.2d at 137-38, 139 n.6, 213 Cal. Rptr. at 234-35, 236 n.6 (Lucas, J., concurring and dissenting). Justice Lucas wrote:

The majority never considers the economic effect of its holding. The only logical result is that the price of rental housing will increase because of the increased cost of insurance, assuming insurance can be obtained for this purpose. Even if landlords can sue participants in the original line of manufacture and marketing, the litigation costs involved will likely also have an effect on the price of rental housing. Arguably, instead of risk distribution, the majority’s conclusion will result in a general increased cost attributable to the risks involved without a concurrent benefit. Someone will have to pay for the additional litigation today’s decision is likely to create.

Id. at 487 n.6, 698 P.2d at 139 n.6, 213 Cal. Rptr. at 236 n.6 (Lucas, J., concurring and dissenting).

254. *Id.* at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., concurring and dissenting) (citing *Dwyer*, 301 A.2d at 467).

255. *Id.* at 487 n.6, 698 P.2d at 139 n.6, 213 Cal. Rptr. at 236 n.6 (Lucas, J., concurring and dissenting).

256. *Id.* at 483-86, 698 P.2d at 136-38, 213 Cal. Rptr. at 233-35 (Lucas, J., concurring and dissenting).

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

only adjust the costs down the chain of distribution, namely by charging tenants higher rents.²⁵⁸

Justice Lucas never fully discussed the societal detriment of only adjusting the costs of insuring against strict liability actions down the chain of distribution. However, he probably suggested that the overall costs associated with protecting the consumer should be borne by those profiting from the enterprise, not by the consumer. Justice Lucas's desire to keep California's tenants from bearing the costs of insuring against strict products liability actions, in the form of higher rents, was admirable but problematic for two reasons. First, Justice Lucas appeared to be suggesting that, in the typical consumer product setting, all the members in the chain of distribution share in the costs of insuring against the risks of products liability actions. However, it is doubtful that any member of the chain of distribution actually forfeits any profits to insure against these risks. In other words, the cost of insurance is always passed on to the consumer in the form of higher prices for the product. Justice Traynor, in the classic *Escola* concurrence, states that "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."²⁵⁹ Thus, whether up or down the chain of distribution, the consumer inevitably bears the cost of insurance. Second, Justice Lucas's concern about forcing California's tenants to absorb the cost of insuring against actions failed to recognize the trade-off. Specifically, under *Becker*, tenants were protected against injuries that were not compensable under traditional negligence principles.

Finally, in addition to the absence of a continuing business relationship and the economic implications of strict liability, Justice Lucas reasoned that imposing strict liability on landlords would not result in safer housing for California's tenants.²⁶⁰ One of the hallmark justifications for adopting the strict products liability doctrine was the notion that it would inevitably result in safer products reaching the market.²⁶¹ Justice Lucas pointed out that, because landlords generally do not have a continuing relationship with the suppliers and manufacturers of the many products within the building, landlords really have no influence over design safety.²⁶² On the other hand, a retailer who has a continuing relationship with the manufacturer can relay important concerns about product safety, and may ultimately refuse to market the products of a manufacturer that has produced defective products in the past. Justice Lucas reasoned that the ability of a retailer or distributor to exert this fiscal pressure on the

258. *Id.* (Lucas, J., concurring and dissenting).

259. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

260. *Becker*, 38 Cal. 3d at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232 (Lucas, J., concurring and dissenting); *see id.* (accusing the majority of ignoring "the fact that landlords of used property have no special position with regard to original manufacturers and sellers and thus have no influence to wield in order to improve product safety").

261. *See supra* note 137 and accompanying text.

262. *Becker*, 38 Cal. 3d at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232 (Lucas, J., concurring and dissenting).

manufacturer was the foundation of liability without fault.²⁶³ In sum, he concluded that safer housing would not result from the use of the doctrine. Therefore, bringing landlords within the class of potential defendants in an action based on strict liability in tort was simply unwarranted.²⁶⁴

IV. HOLDING *BECKER* TO ITS FACTS

A. *Patent Defects and Landlords with Only One Rental*

Five years after California's Supreme Court extended the doctrine of strict liability in tort to include landlords, an appellate court, in *Vaerst v. Tanzman*,²⁶⁵ was forced to define the parameters of the *Becker* decision. At least two questions were left unanswered under the majority's opinion in *Becker*. The first question was whether the doctrine was to be imposed in only those cases involving *latent* defects. The second question was whether *Becker* was limited to only those landlords that owned multiple units.

In *Vaerst*, the defendant rented out his primary residence after his employer transferred him to a different state.²⁶⁶ The plaintiff, a woman in her late 80s, was a dinner guest of the defendant's tenants.²⁶⁷ Following dinner, as the plaintiff walked down a flight of stairs, she believed she was at the end of the stairway because the handrail stopped.²⁶⁸ Unfortunately, the plaintiff had only reached a landing, and the staircase descended one more step.²⁶⁹ She turned to enter the hallway, fell over the remaining step, and sustained injuries including a broken hip.²⁷⁰

The lower court refused to instruct the jury on the theory of strict products liability.²⁷¹ The plaintiff appealed and argued that, under *Becker*, landlords are strictly liable for the injuries resulting from defects in leased premises.²⁷² Ultimately, the appellate court affirmed the lower court's decision, and concluded that the holding in *Becker* was inapplicable to the facts presented in *Vaerst*.²⁷³ The court pointed out that in the present case the defendant only leased his own family residence to the tenants on a temporary basis, and was not engaged in the "business" of providing housing to the public, unlike like the landlord in *Becker* who owned a thirty-six-unit

263. *Id.*

264. *Id.* at 487, 698 P.2d at 139, 213 Cal. Rptr. at 236 (Lucas, J., concurring and dissenting); *see id.* (stating that the imposition of strict liability amounts, in effect, to insurance for tenants, because it does nothing to aid in the goals of deterrence or product safety).

265. 222 Cal. App. 3d 1535, 272 Cal. Rptr. 503 (1990).

266. *Vaerst*, 222 Cal. App. 3d at 1538, 272 Cal. Rptr. at 504.

267. *Id.*

268. *Id.*

269. *Id.* at 1538, 1543, 272 Cal. Rptr. at 504, 508.

270. *Id.* at 1538, 272 Cal. Rptr. at 504.

271. *Id.*

272. *Id.* at 1539, 272 Cal. Rptr. at 505.

273. *Id.* at 1541, 272 Cal. Rptr. at 506.

building.²⁷⁴ *Becker* appeared to require some showing of entrepreneurial undertaking by holding that "a landlord engaged in the *business* of leasing dwellings is strictly liable."²⁷⁵ The *Vaerst* court noted that it "has been repeatedly held that liability without fault applies only to mass producers or mass lessors who play more than a random or accidental role in the overall marketing enterprise."²⁷⁶ What is required is that the landlord play a "substantial role" within the rental enterprise.²⁷⁷ In other words, an isolated act of leasing out the family home did not warrant the imposition of liability without fault.²⁷⁸ The court never articulated what constituted being in the "business" of providing housing or what playing a "substantial role" meant. Nevertheless, the point is moot today in light of *Peterson*.

In addition to refusing to impose strict products liability against a landlord who was not engaged in the rental business, *Vaerst* held that the *Becker* decision was not applicable to injury-causing defects that were obvious or visible.²⁷⁹ Rather, *Vaerst* held that *Becker* was applicable only in those cases that involved latent defects in the premises.²⁸⁰ The *Vaerst* majority concluded that the actual injury-causing defect was the absence of a handrail on the particular section of the stairway on which the plaintiff fell.²⁸¹ They held that this defect was patent, visible, and easily detectable by the tenants, whose knowledge was imputable to their house guest.²⁸² Therefore, *Becker* was inapplicable to the facts of *Vaerst*.²⁸³

In reaching its decision, the *Vaerst* majority failed to discuss the fourth footnote in the *Becker* decision, which reads: "We do not determine whether strict liability would apply to a *disclosed* defect."²⁸⁴ Thus, *Becker* expressly left open the question whether strict liability would also be imposed in patent defect cases. On the other hand, the ultimate holding of *Becker* states that "a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a *latent* defect."²⁸⁵ The conflict between the footnote and *Becker*'s ultimate holding that specifically uses the word "latent" did not concern the state's highest court. Three months after the *Vaerst* decision, the California Supreme Court denied the plaintiff's

274. *Id.* at 1539-40, 272 Cal. Rptr. at 505.

275. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219 (emphasis added).

276. *Vaerst*, 222 Cal. App. 3d at 1540, 272 Cal. Rptr. at 506; *see, e.g.*, *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); *Tauber-Arons Auctioneers Co. v. Superior Court (Perez)*, 101 Cal. App. 3d 268, 161 Cal. Rptr. 789 (1980); *Garcia v. Haslett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

277. *Vaerst*, 222 Cal. App. 3d at 1540, 272 Cal. Rptr. at 506.

278. *See id.* at 1541, 272 Cal. Rptr. at 506 ("*Becker* must be limited to its facts; that strict tort liability thereunder may not be extended to instances where the lease of a house involves only an isolated act").

279. *Id.* at 1540, 272 Cal. Rptr. at 505.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 1541, 272 Cal. Rptr. at 506.

284. *Becker*, 38 Cal. 3d at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4 (emphasis added).

285. *Id.*

petition for review.²⁸⁶ Thus, *Vaerst* made clear that the doctrine was applicable only in those cases involving latent defects.

Nevertheless, the court's classification of the defect as patent turns on its own assumptions, and is troubling for a number of reasons. First, the court concluded that the *absence* of a safety feature, the handrail, makes the defect patent or obvious.²⁸⁷ However, people generally prepare themselves for a potentially hazardous situation when they see the use of safety features, like handrails, guardrails on a roadway, rubber mats, or metal shields around the blades of power tools. The use of such safety features serves to put people on notice that a potentially dangerous situation exists. On the other hand, the absence of safety features lulls people into believing that they need not be overly cautious or weary of danger. Second, the court focused on the absence of the handrail, rather than on the entire staircase. Perhaps if the court were to recognize the overall design of the staircase as the actual defect, they might have concluded that the staircase in its entirety was a latent defect. Finally, the court never suggested that the determination whether a defect is patent or latent should be a question for the trier of fact. Rather, it believed that this was a question for the court.²⁸⁸ The question whether a product is actually defective is one of fact, and is for the jury's determination.²⁸⁹ Therefore, it is surprising that the *Vaerst* court did not believe that the determination of a defect as patent or latent should be a question for the jury. If it had, the defect might have been found to be latent.

B. *Commercial Landlords*

Shortly after *Becker*, an appellate court concluded that the policy justifications advanced in *Becker* did not require extension of the doctrine to include commercial landlords.²⁹⁰ In *Muro v. Superior Court*,²⁹¹ the plaintiff injured herself when she slipped and fell on the stairs in a commercial building.²⁹² The plaintiff argued that the premises were defective because the stairway was slippery and had no floor mat to prevent people from slipping.²⁹³ The plaintiff filed a complaint stating a cause of action under both negligence and strict liability in tort.²⁹⁴

286. The California Supreme Court denied the appellant's petition for review on November 20, 1990. *Vaerst*, 222 Cal. App. 3d at 1535, 272 Cal. Rptr. at 503. Justice Mosk was of the opinion that the petition should be granted.

287. *Id.* at 1540, 272 Cal. Rptr. at 505.

288. *See id.*

289. *See generally* *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978) (setting out proper jury instructions to aid in the determination whether a product is defective in design).

290. *See Muro v. Superior Court* (Anjac Fashion Bldg., Inc.), 184 Cal. App. 3d 1089, 1093, 229 Cal. Rptr. 383, 385 (1986).

291. 184 Cal. App. 3d 1089, 229 Cal. Rptr. 383 (1986).

292. *Muro*, 184 Cal. App. 3d at 1091, 229 Cal. Rptr. at 384.

293. *Id.*

294. *Id.*

The *Muro* court reasoned that neither the language nor the rationale of *Becker* indicated any intent to extend the doctrine of strict products liability to include commercial landlords.²⁹⁵ The court concluded that the fundamental policy underlying *Becker* was the need to insure safe housing for *residential* tenants, who are powerless to protect themselves.²⁹⁶ In other words, the *Muro* court reasoned that *Becker* was attempting to put teeth into the implied warranty of habitability, a doctrine that is applicable only to residential landlords in California.²⁹⁷ Legal commentators had predicted that courts would eventually impose liability without fault to residential landlords before *Becker*.²⁹⁸ However, no such prediction was made for *commercial* landlords.²⁹⁹

Green and *Becker* perceived residential tenants as ordinary consumers who are unable to protect themselves against injury-causing defects.³⁰⁰ Therefore, the responsibility of protecting these ordinary consumers is placed on the landlord, who is in a better position to bear the business expense of providing safe and habitable housing.³⁰¹ However, commercial tenants are more sophisticated and have a bargaining position more equal to that of the landlord.³⁰² Furthermore, the contents of the lease, including the obligation of maintenance, are negotiated between the commercial landlord and tenant.³⁰³ Simply put, commercial tenants are not powerless, ordinary consumers. Rather, commercial tenants can insure against the risk of defects in the leased premises because of their financial position.³⁰⁴ Therefore, the *Muro* court concluded, public policy simply did not warrant extending *Becker* to include commercial landlords.³⁰⁵

V. OTHER JURISDICTIONS

The fact that other jurisdictions had steadfastly refused to apply the doctrine of strict products liability to the landlord-tenant relationship also influenced the

295. *Id.* at 1093, 229 Cal. Rptr. at 385.

296. *Id.*; *see id.* (stating that the *Becker* analysis "focuse[d] on the development of the duties of a landlord in the business of providing 'housing accommodations' to renters against the background of a need for safe and adequate housing where the modern urban residential tenant, like the ordinary consumer, is powerless to protect himself").

297. *See id.*

298. MILLER & STARR, *supra* note 235, § 27:77, at 380.

299. *Muro*, 184 Cal. App. 3d at 1097, 229 Cal. Rptr. at 388.

300. *Id.* at 1093, 229 Cal. Rptr. at 384; *see Becker v. IRM Corp.*, 38 Cal. 3d 454, 465, 698 P.2d 116, 123, 213 Cal. Rptr. 213, 220 (1985), *overruled by Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995); *Green v. Superior Court (Sunki)*, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1174, 111 Cal. Rptr. 704, 710 (1974).

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

302. *Muro*, 184 Cal. App. 3d at 1097, 229 Cal. Rptr. at 388.

303. *Id.*

304. *Id.*

305. *Id.* at 1098, 229 Cal. Rptr. at 389.

Peterson court.³⁰⁶ Prior to *Peterson*, California and Louisiana were the only states that permitted an injured tenant to recover for injuries without proving that the landlord's conduct was unreasonable.³⁰⁷

A. *Louisiana's Statutory Imposition*

Today, in light of the *Peterson* decision, Louisiana remains the only state that does not require an injured tenant to bring an action under general negligence principles. Louisiana's Civil Code provides that a landlord guarantees the tenant against all defects in the leased premises.³⁰⁸ If any loss results from a defect in the premises, the landlord is liable.³⁰⁹ Therefore, the plaintiff does not have to prove that the landlord knew or should have known of the defects.³¹⁰ Rather, the landlord is held strictly liable.³¹¹

However, if the tenant actually creates the defect, the landlord is no longer liable under the statute.³¹² In addition, if the injured tenant knew of the defective condition, and with the use of reasonable care the tenant could have avoided the injury, the principles of comparative negligence apply.³¹³ For instance, in *Gallagher v. Favrot*,³¹⁴ the tenant-plaintiff stepped out the front door of his apartment building, fell, and suffered injuries amounting to \$10,000.³¹⁵ At the time of the accident, the landlord was renovating the building, and the construction company had just removed the concrete steps and sidewalk at the foot of the front door.³¹⁶ The jury assigned a portion of the fault to the injured tenant, and reduced the award to \$2000.³¹⁷ The jury was convinced that the tenant acted unreasonable and contributed to his injuries.³¹⁸

B. *Dwyer v. Skyline Apartments, Inc.*

As mentioned in subpart II.C.4., the appellate court in *Fakhoury* held that the doctrine of strict products liability was applicable to landlords.³¹⁹ Shortly after the *Fakhoury* decision, a number of courts throughout the nation were forced to deter-

306. *Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 1193-95, 899 P.2d 905, 909-10, 43 Cal. Rptr. 2d 836, 840-41 (1995).

307. *Id.* at 1194, 899 P.2d at 909-10, 43 Cal. Rptr. 2d at 840-41.

308. LA. CIV. CODE ANN. art. 2695 (West 1996).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. See *Gallagher v. Favrot*, 499 So. 2d 1205, 1206 (La. Ct. App. 1986).

314. 499 So. 2d 1205 (La. Ct. App. 1986).

315. *Gallagher*, 499 So. 2d at 1206-07.

316. *Id.*

317. *Id.* at 1206.

318. *Id.*

319. See *Fakhoury v. Magner*, 25 Cal. App. 3d 58, 63, 101 Cal. Rptr. 473, 476 (1972); *supra* Part II.C.4.

mine whether to apply the doctrine of strict products liability to the landlord-tenant relationship.

In 1973, in *Dwyer v. Skyline Apartments, Inc.*,³²⁰ a New Jersey intermediate appellate court refused to impose liability without fault on a landlord, and concluded that a landlord's duty is not to ensure the safety of tenants, but only to exercise reasonable care.³²¹ Several other jurisdictions have adopted the reasoning articulated in *Dwyer*, and the California Supreme Court relied on it in *Peterson*.³²²

In *Dwyer*, the plaintiff, while in the bathtub of her apartment, burned herself with scalding water when a corroded hot water fixture came off the wall.³²³ The New Jersey court advanced several reasons for refusing to impose strict liability on landlords. First, the *Dwyer* opinion reasoned that the doctrine's underlying policy justifications did not apply to the landlord of a multiple family dwelling.³²⁴ Unlike the manufacturer, distributor, and retailer, landlords are not engaged in mass production whereby they place their product, the apartment, in the stream of commerce, and expose it to a large number of consumers.³²⁵ Because the landlord has not created the product, the actual defect is not preventable at the time of design or manufacture.³²⁶ Furthermore, a landlord does not possess the expertise to ascertain and correct the defective condition.³²⁷ A product manufacturer, however, has the capacity to investigate the cause of the defect and quickly correct the design or assembly problem.³²⁸

Additionally, *Dwyer* pointed out that an apartment is a commodity wholly unlike the typical consumer product.³²⁹ An apartment involves several rooms with many facilities that numerous tradespeople have constructed.³³⁰ Further, an apartment is subject to constant use and continual deterioration.³³¹ Due to these fundamental differences, the court suggested that tenants do not expect that an apartment will be in perfect condition for their entire occupancy.³³² In other words, tenants do not rely on landlords for assurances of safety in the same manner as do consumers of mass-

320. 301 A.2d 463 (N.J. App. 1973).

321. *Dwyer*, 301 A.2d at 465; see *id.* (explaining that the landlord's duty is "not to insure the safety of tenants but only to exercise reasonable care, a landlord is liable for injurious consequences to a tenant by reason of defects of which [the landlord] has knowledge or of defects which have existed for so long a time that . . . [the landlord] had both an opportunity to discover and to remedy") (quoting *Francisco v. Miller*, 81 A.2d 803, 806 (N.J. App. 1951)) (internal quotation marks omitted).

322. *Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 1194-95, 899 P.2d 905, 909-10, 43 Cal. Rptr. 2d 836, 840-41 (1995).

323. *Dwyer*, 301 A.2d at 464.

324. *Id.* at 466-67.

325. *Id.* at 467.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

produced goods. Rather, a tenant expects only that in the event anything goes wrong with the apartment, the landlord will repair the problem when the landlord knows or should know of its existence.³³³

The court stated that the imposition of strict liability upon landlords would therefore create “an unusual and unjust burden on property owners.”³³⁴ A landlord would be saddled with liability for every injury claim resulting from any portion of the building, whether reasonably foreseeable or not.³³⁵ The New Jersey court concluded that it would be unfair to hold landlords strictly liable for a latent defect that the landlord could not have possibly detected, and thus could not have repaired.³³⁶ Therefore, *Dwyer* held that a tenant must prove that the landlord acted unreasonably in the maintenance of the apartment to recover for personal injuries caused by defects in the premises.³³⁷ In summary, in light of the *Peterson* decision, Louisiana remains the only state that applies the doctrine of strict liability to a landlord-tenant relationship.

VI. DEATH OF THE PARAMOUNT POLICY: *PETERSON V. SUPERIOR COURT*

In 1985, the *Becker* majority stated that the “paramount policy” of protecting defenseless tenants from manufacturing defects is best promoted by imposing strict liability on landlords.³³⁸ However, a decade later a unanimous California Supreme Court flatly rejected this “paramount policy” argument, and overruled *Becker*.³³⁹ Simply put, the *Peterson* court perceived the *Becker* decision as an unwarranted extension of the doctrine of strict products liability.³⁴⁰

This Casenote’s introduction presented the pertinent facts and procedural history of *Peterson*.³⁴¹ Additionally, Part I illustrated the harsh implications of *Peterson* through the use of a hypothetical tenant injured by a defective ceiling fan.³⁴² Therefore, neither the background nor the implications of the holding will be discussed in this portion. Rather, the purpose of this Part is to analyze the reasoning that persuaded a unanimous court to overrule the controversial holding of *Becker*.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 465-67.

338. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 466, 698 P.2d 116, 123, 213 Cal. Rptr. 213, 220 (1985), overruled by *Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

339. *Peterson*, 10 Cal. 4th at 1188, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837.

340. *Id.*

341. See *supra* notes 6-15 and accompanying text.

342. See *supra* notes 19-21 and accompanying text.

A. A Chilly Reception!

Several reasons motivated the *Peterson* court to overrule *Becker*. First and foremost, the court pointed out that the *Becker* decision had received a "chilly reception."³⁴³ In fact, Justice Lucas's opinion in *Becker* was the first of many attacks against the majority's rationale.³⁴⁴ Additionally, California's appellate courts did not openly embrace *Becker*'s rationale.³⁴⁵ At the very least, the appellate courts in both *Vaerst* and *Muro* were convinced that *Becker* should be limited to its facts.³⁴⁶ Significantly, the *Vaerst* court observed that *Becker* represented a minority view which Justice Lucas and Justice Mosk had vigorously criticized in the dissenting opinion.³⁴⁷ Justice Lucas's disagreement with the majority also guided the appellate court in *Vaerst*, and the *Vaerst* court reasoned that *Becker* constituted an unjust burden on California's landlords.³⁴⁸

In addition to Justice Lucas's dissent and the appellate court decisions that limited *Becker* to its facts, the practice of other jurisdictions motivated the *Peterson* court.³⁴⁹ Aside from Louisiana, no other state had accepted the rationale of *Becker*.³⁵⁰ In essence, the California Supreme Court argued that the holding in *Becker* could not possibly be equitable, since other jurisdictions had steadfastly refused to adopt the rationale.³⁵¹ Although this argument does not attack the doctrinal merit of liability without fault in the landlord-tenant relationship, it certainly is understandable. The court reasoned that there was something unsettling about holding landlords absolutely liable for tenant injuries from latent defects simply because they choose to undertake their enterprise in California.³⁵²

A variety of articles discussing and criticizing *Becker* influenced the *Peterson* decision also.³⁵³ For instance, one theme that several commentators brought to light was that imposing strict liability was inequitable because landlords cannot adequately

343. *Peterson*, 10 Cal. 4th at 1192, 899 P.2d at 909, 43 Cal. Rptr. 2d at 840.

344. See *Becker*, 38 Cal. 3d at 479-87, 698 P.2d at 133-39, 213 Cal. Rptr. at 230-36 (Lucas, J., concurring and dissenting).

345. See, e.g., *Vaerst v. Tanzman*, 222 Cal. App. 3d 1535, 272 Cal. Rptr. 503 (1990); *Muro v. Superior Court (Anjac Fashion Bldg., Inc.)*, 184 Cal. App. 3d 1089, 229 Cal. Rptr. 383 (1986).

346. *Vaerst*, 222 Cal. App. 3d at 1541, 272 Cal. Rptr. at 506; *Muro*, 184 Cal. App. 3d at 1098, 229 Cal. Rptr. at 389.

347. *Vaerst*, 222 Cal. App. 3d at 1541 & n.2, 272 Cal. Rptr. at 506 & n.2; see *id.* (arguing that *Becker* should be limited to its facts, and that other jurisdictions have refused to adopt the rationale).

348. *Id.* at 1541, 272 Cal. Rptr. at 506.

349. *Peterson*, 10 Cal. 4th at 1193-95, 899 P.2d at 909-10, 43 Cal. Rptr. 2d at 840-41.

350. *Id.* at 1194, 899 P.2d at 909-10, 43 Cal. Rptr. 2d at 840-41.

351. *Id.* at 1193-95, 899 P.2d at 909-10, 43 Cal. Rptr. 2d at 840-41.

352. *Id.*

353. *Id.* at 1193, 899 P.2d at 909, 43 Cal. Rptr. 2d at 840; see *id.* (listing several articles discussing the *Becker* decision).

defend products liability actions.³⁵⁴ Under the test announced in *Barker v. Lull Engineering Co.*,³⁵⁵ a defendant will prevail in a products liability action by establishing that “the *benefits* of the challenged design outweigh the *risk* of danger inherent in the design.”³⁵⁶ In making the risk and benefit determination, the fact finder may consider

the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.³⁵⁷

Most of these factors involve technical matters peculiarly within the knowledge of the manufacturer.³⁵⁸

Commentators point out that landlords, unlike manufacturers or retailers, might not possess the technical knowledge, or generally have adequate access to information about the origin and formulation of a particular design.³⁵⁹ This lack of expert knowledge seriously impairs a landlord’s ability to prevail under *Barker*’s risk and benefit test.³⁶⁰

Another article discussing the economic implications of *Becker* also moved the *Peterson* court. This article explored the “risky business” of engaging in leasing residential property in California.³⁶¹ The commentator presented a hypothetical that involved a tenant winning a large judgment against a landlord based on a theory of strict liability. Unfortunately, the landlord’s liability policy was not sufficient to cover the judgment.³⁶² Ultimately, the landlord was forced to sell the landlord’s personal residence and rental properties to satisfy the judgment.³⁶³ The *Peterson* court agreed that the onerous consequences associated with policy limits were a reality, and feared that under *Becker* many small operators, would be rendered financially insolvent.³⁶⁴

354. See, e.g., Deeb, *supra* note 12, at 356; Rachel Leigh Yosha, Note, *Landlord-Tenant: Landlords Strict Liability for Personal Injury Arising from Latent Defects in Premises—Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), 1986 ARIZ. ST. L.J. 561, 582.

355. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

356. *Barker*, 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238 (emphasis added).

357. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

358. *Id.*

359. See, e.g., Deeb, *supra* note 12, at 356; Jeanne L. Early, Note, *Let the Landlord Beware, California Imposes Strict Liability on Lessors of Rental Housing*, 51 MO. L. REV. 899, 908 (1986).

360. *Peterson*, 10 Cal. 4th at 1209-10, 899 P.2d at 920, 43 Cal. Rptr. 2d at 851.

361. Haliday, *supra* note 12, at 371.

362. *Id.*

363. *Id.*

364. *Peterson*, 10 Cal. 4th at 1207, 899 P.2d at 918-19, 43 Cal. Rptr. 2d at 849-50.

While it is true that insurance policies do have limits, those limits are determined by the landlord's business judgment and budget. Landlords generally have the option of purchasing as much insurance as they desire, and predicate their decision based on industry standards. Of course increased insurance costs will inevitably result in higher rents. Nevertheless, the tenant will be safeguarded against the type of catastrophic losses that are possible under the *Peterson* decision. Further, the landlord will be protected against an overwhelming judgment, while recouping the added insurance expenses from tenants.

Despite the ability of landlords to increase their liability coverage, the *Peterson* opinion concluded that it would be unjust to subject landlords to the financial perils of policy limits by holding them liable for defects that would not have been discovered by a reasonable inspection.³⁶⁵ The *Peterson* court perceived landlords as innocent parties in latent defect cases and, therefore, was unwilling to place the entire burden of compensating an equally innocent tenant on the landlord.³⁶⁶ Labeling the landlord as "innocent" is fair in latent defect cases because the landlord's conduct is not at issue and, in many circumstances, the landlord has acted reasonably.

B. Three Factors

In *Becker*, the defendant argued that a landlord who purchases a building that is not new should be exempt from strict liability in tort for latent defects because, like "dealers in used machinery," the landlord is not part of the overall marketing enterprise that provided the injury-causing product to the consumer.³⁶⁷ The landlord-defendant relied on the appellate court's rationale articulated in *Tauber-Arons Auctioneers*, which held that an auctioneer is not strictly liable in tort for injuries caused by defects in used machinery.³⁶⁸ *Tauber-Arons Auctioneers* set forth three policy considerations that would have justified the imposition of strict liability: (1) Impetus to manufacture a safer product, (2) implied representation of safety, and (3) loss-spreading.³⁶⁹ Unlike *Becker*, the *Peterson* court accepted the idea that landlords are analogous to dealers of used goods.³⁷⁰ *Peterson* relied on these three factors to support its conclusion that landlords and hotel operators should not be held strictly liable in tort for latent defects in the premises.³⁷¹

365. *Id.* at 1188-89, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837.

366. *Id.* at 1207, 899 P.2d at 919, 43 Cal. Rptr. 2d at 849.

367. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 465, 698 P.2d 116, 123, 213 Cal. Rptr. 213, 220 (1985), *overruled by Peterson v. Superior Court (Paribas)*, 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

368. *Tauber-Arons Auctioneers Co. v. Superior Court (Perez)*, 101 Cal. App. 3d 268, 284, 161 Cal. Rptr. 789, 798 (1980).

369. *Id.* at 279, 161 Cal. Rptr. at 796 (citing *Tillman v. Vance Equipment Co.*, 596 P.2d 1299, 1303-04 (Or. 1979) and *Fulbright v. Klamath Gas Co.*, 533 P.2d 316, 321 (Or. 1975)).

370. *Peterson*, 10 Cal. 4th at 1201-02, 899 P.2d at 914-15, 43 Cal. Rptr. 2d at 845-46.

371. *Id.* at 1201-07, 899 P.2d at 914-19, 43 Cal. Rptr. 2d at 845-50.

Regarding the first factor, impetus to manufacture a safer product, the *Peterson* opinion echoed the reasoning of *Tauber-Arons Auctioneers*. Typically, the manufacturer, distributor, and retailer exchange information about liability claims or particular products that are potentially dangerous.³⁷² Thus, when a court imposes strict liability in tort upon the retailer or distributor, the manufacturer is put on notice about the defect and generally indemnifies those members of the chain of distribution that were held strictly liable.³⁷³ Imposing strict liability results in safer products for two reasons. First, because retailers and distributors will refuse to market products that subject them to absolute liability, they will drop those manufacturers that have a poor track record for safety. Second, the manufacturer will become aware of the defect and remedy the problem in order to maintain the continuing business relationship with members of the original chain of distribution. However, *Peterson* pointed out that defects in apartments and hotels may have been created by the builder, a subcontractor, a manufacturer of the building supplies or fixtures, a previous owner of the building, a previous tenant of the apartment, or a guest of the hotel.³⁷⁴ Since the current landlord or hotel operator normally does not have a continuing business relationship or other ready channel of communication with any of these entities, imposing strict liability in tort will not accomplish the goal of creating an impetus to manufacture safer products.³⁷⁵ Rather, the landlord will pay the claim and the party responsible for the defect will remain uninformed of the dangerous condition.

As to the second factor, an implied representation of safety, *Peterson* reasoned that a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and that would not have been disclosed by a reasonable inspection.³⁷⁶ The court suggested that the expectations of tenants are substantially different than the expectations of purchasers of consumer goods.³⁷⁷ *Peterson*, citing *Green*, pointed out that the implied warranty of habitability does not require that landlords ensure that the leased premises are in perfect condition, but it does mean that landlords must maintain bare living requirements.³⁷⁸ In other words, tenants only *expect* landlords to correct those defects that would render the dwelling uninhabitable. Additionally, *Peterson* stated that a tenant expects that the landlord will maintain the property in a habitable condition, by repairing promptly those dangerous conditions of which the landlord has actual or constructive notice.³⁷⁹ However, a tenant cannot reasonably expect that the owner will correct

372. *Id.* at 1202, 899 P.2d at 915, 43 Cal. Rptr. 2d at 846.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 1206, 899 P.2d at 918, 43 Cal. Rptr. 2d at 849.

377. *Id.* at 1204-05, 899 P.2d at 916-17, 43 Cal. Rptr. 2d at 847-48.

378. *Id.* at 1203-04, 899 P.2d at 916, 43 Cal. Rptr. 2d at 847.

379. *Id.* at 1205, 899 P.2d at 917, 43 Cal. Rptr. 2d at 848.

defects of which the owner is unaware and that cannot be discovered by a reasonable inspection.³⁸⁰ Therefore, imposing liability without fault would be unwarranted.

The court's conclusion that a tenant's expectations do not favor imposing strict liability was probably inaccurate. The problem is that the court focused on the wrong expectation of today's tenant. In typical product cases, the court imposes strict liability because consumers need some assurance that the products are safe. Consumers cannot fully inspect the products they wish to purchase because many products are complex and well packaged. Not only do consumers expect to purchase a safe product, but they expect to be compensated if they are injured by a defective product. This is equally true in the landlord-tenant relationship. *Peterson* states that a tenant expects that a landlord will eliminate only those defects that would be disclosed by a reasonable inspection.³⁸¹ A tenant expects a landlord to provide a safe apartment. However, tenants also expect to be compensated whenever they are injured by any defect in their apartment, whether latent or patent. The court appeared to be suggesting that tenants, unlike consumers of other products, recognize that the complexity of an older apartment warrants the assurance of safety for only those defects that are open and obvious. However, this assumes too much. If anything, California tenants expect that the law will always protect an innocent person that is injured by a defect in the premises. Furthermore, today's tenant expects the landlord to have insurance that will cover most injuries that occur on the property.

Another problem with the court's reasoning under this second factor is that it suggests that the "implied warranty of habitability" is analogous to *Tauber-Arons Auctioneers'* "implied representation of safety."³⁸² The court reasons that tenants expect to be safeguarded only to the extent that the implied warranty of habitability provides. Stated differently, the court believes that the warranty of habitability doctrine creates the ceiling for the implied representation of safety in the landlord-tenant relationship. Unfortunately, the court overlooks the fact that the average tenant is not familiar with the implied warranty of habitability. Therefore, the doctrine could not possibly be the ceiling for consumer expectations. Again, the probable expectation of tenants is that they will be compensated by someone if they suffer injury regardless of whether the defect was latent or obvious.

The third *Tauber-Arons Auctioneers* factor discussed was loss-spreading.³⁸³ *Peterson* pointed out that *Becker* relied upon this factor almost exclusively.³⁸⁴ *Becker* stated: "The paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects."³⁸⁵ In sum, *Peterson* reasoned that it was unjust to

380. *Id.* at 1206, 899 P.2d at 918, 43 Cal. Rptr. 2d at 849.

381. *Id.* at 1205, 899 P.2d at 917, 43 Cal. Rptr. 2d at 848.

382. *Tauber-Arons Auctioneers*, 101 Cal. App. 3d at 281-82, 161 Cal. Rptr. at 796-97.

383. *Peterson*, 10 Cal. 4th at 1206-07, 899 P.2d at 918-19, 43 Cal. Rptr. 2d at 849-50.

384. *Id.* at 1206, 899 P.2d at 918, 43 Cal. Rptr. 2d at 849.

385. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220 (emphasis added).

abandon all other considerations and focus on the loss-spreading justification when imposing absolute liability as *Becker* did.³⁸⁶ *Peterson* relied on *Brown v. Superior Court*,³⁸⁷ a 1988 California Supreme Court decision that stated loss-spreading is not the sole consideration in determining whether to impose strict liability for injuries resulting from a defective product.³⁸⁸ Three years after *Brown*, the California Supreme Court, in *Anderson v. Owens-Corning Fiberglass Corp.*,³⁸⁹ reiterated the point that the function of loss-spreading should not be the exclusive criterion upon which to premise strict liability.³⁹⁰ The *Peterson* Court was convinced that relying exclusively upon the loss-spreading factor to justify imposing liability without fault was creating a judicially imposed insurance system.³⁹¹ The problem with focusing on loss-spreading in isolation is that this reasoning could be used to impose strict liability in any situation in which the defendant is in a superior financial position to bear and distribute the loss suffered by the plaintiff.³⁹²

C. Final Point on Peterson

The supreme court might have decided *Peterson* differently if one fact were changed. Since Kohler, the bathtub's manufacturer, was amenable and willing to settle the case for \$600,000, Nadine Peterson was guaranteed compensation for her personal injuries.³⁹³ However, if her injuries were caused by a defective product that was produced by a judgment-proof defendant, the court might have been less willing to overrule the *Becker* decision. Recall the hypothetical tenant presented in Part I of this Casenote and the harsh financial implications associated with the *Peterson* decision—specifically, the hardship that results when the manufacturer is insolvent or nonexistent. Had the manufacturer been insolvent in *Peterson*, the court might have at the very least devoted attention to discussing the financial implications of its holding. Instead, the court sidestepped the potential for catastrophic losses by pointing out that injured tenants or hotel guests could still bring an action based on negligence against their landlord or hotel operator.³⁹⁴ However, in rare circumstances not unlike the Part I hypothetical, injured tenants will simply be unable to prove that the landlord's conduct was unreasonable, and therefore would be forced to absorb the entire costs associated with their injuries.

386. *Peterson*, 10 Cal. 4th at 1207-08, 899 P.2d at 918-19, 43 Cal. Rptr. 2d at 849-50.

387. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

388. *Peterson*, 10 Cal. 4th at 1207-08, 899 P.2d at 919, 43 Cal. Rptr. 2d at 850.

389. 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991).

390. *Peterson*, 10 Cal. 4th at 1208, 899 P.2d at 919, 43 Cal. Rptr. 2d at 850; see *Anderson*, 53 Cal. 3d at 994, 810 P.2d at 552, 281 Cal. Rptr. at 531.

391. *Peterson*, 10 Cal. 4th at 1208, 899 P.2d at 919, 43 Cal. Rptr. 2d at 850.

392. *Id.*

393. *Id.* at 1210, 899 P.2d at 920-21, 43 Cal. Rptr. 2d at 851-52.

394. *Id.*

VII. PROPOSED LEGISLATIVE SOLUTION

In discussing the policy of *stare decisis*, the *Peterson* opinion quotes Justice Rutledge: "Wisdom too often never comes, so one ought not to reject it merely if it comes late."³⁹⁵ Does the *Peterson* decision constitute wisdom? The answer hinges on whether the factor of "spreading throughout society the cost of compensating defenseless victims of manufacturing defects" is actually the *paramount policy* of the strict products liability doctrine (the position of *Becker*), or whether this loss-spreading factor is merely one of many justifications that must be considered (the position of *Peterson*). Notwithstanding the question of wisdom, *Peterson* constitutes the current state of the law. Unfortunately, as was explained in Part I, the new rule has harsh financial implications for some injured tenants.³⁹⁶ Therefore, this Casenote proposes that the state's legislature fashion a law that embraces the concerns expressed by *Peterson*, yet provides protection to *seriously* injured tenants by creating a mandatory catastrophic insurance system.

The general framework of the proposed catastrophic insurance system avoids the great bulk of potential suits, which worried insurance carriers and landlords before *Peterson*,³⁹⁷ by covering only those personal injury claims that are in excess of \$25,000. In other words, tenants that are injured by latent defects whose total claim for compensatory damages is less than \$25,000 would not be permitted to pursue reimbursement through the landlord's catastrophic liability policy under a strict products liability theory. Additionally, the proposed solution would require the plaintiff to pursue the manufacturer of the defective product before initiating a claim against the landlord's catastrophic liability policy. Lastly, the system would force both plaintiff's and defense counsel to value the claim in good faith. An independent valuation of the claim would be conducted by an arbitrator when the case's worth is disputed. However, to promote good faith between counsel, the arbitrator would award attorney's fees to the prevailing party for the cost associated with deciding whether the claim met the requisite \$25,000 threshold.

Clearly the proposed legislative solution does not provide tenants with the same level of protection as did *Becker*. Those tenants with claims under \$25,000, who cannot show negligence, will be forced either to absorb the loss or pursue the manufacturer of the defective product. However, the solution is equitable to both landlords and tenants. Specifically, the solution accomplishes the aspirations of the paramount policy by compensating those innocent victims that are seriously injured. It also serves to protect equally innocent landlords from the perils of the *Becker* decision.

Prior to *Peterson*, landlords complained that they were forced to bear the costs, in the form of increased premiums, for what they perceived as nuisance suits.

395. *Id.* at 1196, 899 P.2d at 911, 43 Cal. Rptr. 2d at 842 (quoting *Wolf v. Colorado*, 338 U.S. 25, 47 (1949)).

396. *See supra* notes 19-20 and accompanying text.

397. The fear of liability caused landlords to seek greater insurance and insurance premiums to rise. *See supra* note 5 and accompanying text (discussing a 15% to 25% rise in insurance premiums for landlords).

Establishing a \$25,000 threshold, however, will eliminate the vast bulk of cases against landlords under a strict products liability theory. Therefore, premiums for the catastrophic liability policy will be substantially lower than liability premiums during the *Becker* era.³⁹⁸ The proposed solution offers additional relief to landlords by requiring the injured tenant to pursue the manufacturer of the defective product. Forcing the manufacturer to defend the suit is consistent with the reasoning expressed in *Peterson* and with the strict liability doctrine in general.

In sum, the proposed solution requires tenants and landlords to share in the risk of latent defects. Under the proposed solution, the possibility remains that an injured tenant will not be able to show negligence or pursue the manufacturer of the defective product. But those tenants that are seriously injured³⁹⁹ and need compensation most would be protected against the harsh financial implications of the *Peterson* decision. Hence, the paramount policy of protecting defenseless victims is preserved, but should be understood to protect only those defenseless victims that are *seriously* injured.

398. See *supra* note 5 and accompanying text (reporting a 15% to 25% increase in insurance premiums).

399. For the purposes of this Casenote, "seriously injured" tenants are those who have claims over \$25,000.