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Strict Tort Liability of Landlords:
*Becker v. IRM Corp.* in Context

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In *Becker v. IRM Corp.* the California Supreme Court held that landlords are subject to strict tort liability. The Becker holding stands in sharp contrast to traditional rules that granted landlords a broad immunity even from negligence liability when tenants or others were injured by defective conditions on the leased premises. As this Article explains, however, Becker is not an unprecedented step into uncharted territory. Rather, it is the culmination of more than a decade of landlord strict liability decisions in California and the logical consequence of broader trends in the common law of tort, property and contract.

**INTRODUCTION**

In April 1985 the California Supreme Court held in *Becker v. IRM Corp.*¹ that landlords are subject to strict tort liability. This holding, coming from the court that has led the courts of this nation in delineating the doctrine of strict products liability,² is sure to gen-

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erate interest and controversy. The purpose of this Article is to place the Becker decision in perspective. The need for this perspective can be easily demonstrated.

Traditionally, special rules granted landlords a broad immunity from negligence liability when tenants or others were injured by dangerously defective conditions on leased premises. Thus, for example, if a defective wall heater in an apartment caused a fire which resulted in personal injury, injured victims would have no tort recovery against the landlord even if the landlord had reason to know of the dangerous condition. The landlord would be immune from tort liability unless the injury was "attributable to (1) a hidden danger in the premises of which the landlord but not the tenant is aware, (2) premises leased for public use, (3) premises retained under the landlord's control, such as common stairways, or (4) premises negligently repaired by the landlord." Thus, the landlord in our example would be immune from negligence liability even if he reasonably should have known of the danger, if in fact he did not know of it. The protection given landlords from tort liability is well illustrated by a unanimous 1931 decision of the New York Court of Appeals. In Cullings v. Goetz, a decision authored by Justice Cardozo, the court held that landlords are immune from liability even when injury is caused by a breach of a covenant to repair the premises. This ruling restricting landlord tort liability is especially striking when juxtaposed with Justice Cardozo's 1916 decision in MacPherson v. Buick exposing manufacturers to tort liability regardless of privity, and his 1931 decision sanctioning strict liability for personal injury caused by defective food products.

Not surprisingly, changes in landlord tort liability have occurred even within the traditional framework. Thus in Putnam v. Stout, the New York Court of Appeals overruled Cullings v. Goetz and joined the "modern trend of decision . . . toward holding the lessor liable . . . where the landlord has breached his covenant to repair

(1965).
6. The decision also noted an exception to its holding: "Liability has been enlarged by statute where an apartment in a tenement house in a city of the first class is the subject of the lease." 256 N.Y. at 298, 176 N.E. at 398.
What is surprising about Putnam is that this decision came only in 1976, and that the “trend” at that late date consisted of only eighteen states.11 Three years prior to Putnam, New Hampshire had gone further than New York, rejecting the entire traditional framework that limited landlord tort liability. In its 1973 Sargent v. Ross12 decision, the New Hampshire Supreme Court ruled that landlords are held to a full duty of due care: “[A] landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.”13 Under Sargent, the landlord in our wall heater example could be liable in tort if, acting reasonably, he should have known of the danger posed by the wall heater—even though he did not covenant to repair the heater and even though he did not, in fact, know of the danger.

Sargent could be viewed as a dramatic rejection of the traditional framework and extension of landlord liability. Indeed, it has been recently reported that “[o]ther states have shown little enthusiasm for this approach and continue to work within and expand upon the traditional exceptions.”14 From this perspective the strict liability decision of the California Supreme Court in Becker could be viewed as an unprecedented and bold step into uncharted territory. Indeed, the California Supreme Court itself had not previously held landlords even to a full duty of due care.15 Under Becker, the landlord in our wall heater example could be liable in tort even though the landlord did not know or have any reason to know of the defect in the wall heater, and even though the defect could not have been discovered by inspection. Contrasted with the traditional rules of landlord liabil-

10. Id. at 616-17, 345 N.E.2d at 325, 381 N.Y.S.2d at 853. A landlord may also be liable in tort when a statute, ordinance, or administrative regulation has been violated. A violation of a housing code is an example. Compare RESTATEMENT (SECOND) OF TORTS §§ 285-288 (1965) with RESTATEMENT (SECOND) OF PROPERTY § 17.6(2) (1977).
11. 38 N.Y.2d at 616-17 n.6, 345 N.E.2d at 325 n.6, 381 N.Y.S.2d at 616-17 n.6. See also M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 181 (3d ed. 1983).
13. Id. at 397, 308 A.2d at 534.
14. M. FRANKLIN & R. RABIN, supra note 11, at 182. Browder, supra note 3, at 155-56, concludes that a number of states—some construing statutes—have adopted a negligence standard.
ity—and even with *Sargent v. Ross*—the application of strict tort liability to landlords could be seen as extraordinary.

Yet something even more unusual was occurring. One year prior to *Sargent v. Ross*, California courts had already imposed strict tort liability on landlords. In 1972, a California court of appeal imposed strict tort liability on a landlord for injuries caused by defective furniture leased with the premises.¹⁶ Three years after *Sargent*, in 1976, another California decision imposed strict liability on a landlord when a defective wall heater—a fixture—had caused injury.¹⁷ Moreover, these developments were reflected in academic commentary. By 1982, it could be concluded that the “generally accepted notion” is that strict liability applies to the personal property of the landlord found in the furnished premises.¹⁸ In 1983, a California court of appeal rendered its decision in the *Becker* case.¹⁹ Because the California Supreme Court subsequently granted a hearing in *Becker*, the court of appeal decision ceased having any precedential value under California law.²⁰ Nonetheless, the court of appeal opinion had suggested that the now decade-old strict landlord liability doctrine would not be confined to products or fixtures.²¹ In 1984, the new edition of the Prosser hornbook, now the Prosser and Keeton hornbook, ²² was issued. Surveying the law of landlord tort liability, the authors wrote that “[t]here seems to be growing support for the position that the nature of a realty lease, especially a lease of residential premises and, even more especially, a lease of an apartment, is not sufficiently different from that of a personal property bailment to justify different rules of liability.”²³ Thus, since strict liability is applied against lessors of products, the authors concluded “strict liability in tort [is] likely to become applicable as against that kind of lessor or landlord who can be regarded as being engaged in the busi-

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¹⁸. Browder, supra note 3, at 122. See infra note 296.
²⁰. Under California law when an appeal is docketed by the California Supreme Court, the court of appeal decision ceases to have precedential value. See Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 438 (1937). Judge Newsom’s opinion for the court of appeal in *Becker* was, however, subsequently adopted nearly verbatim by Chief Justice Bird in her concurring opinion. See *Becker*, 38 Cal. 3d at 470, 698 P.2d at 126, 213 Cal. Rptr. at 223.
²². PROSSER & KEETON, supra note 3.
²³. Id. at 722.
ness of renting apartments and other structures as part of his business as a realtor." The following year the California Supreme Court in Becker adopted the rule of strict landlord tort liability.

Thus, it is understandable that observers might be puzzled. On the one hand, Becker could be viewed as an unprecedented leap into the unknown—far more bold than the Sargent holding that landlords owe a full duty of due care. On the other hand, Becker could be viewed as the culmination of over a decade of common law development and academic commentary, almost reflective of hornbook law. The purpose of this Article is to assist in understanding the doctrine of strict landlord tort liability by placing Becker in context. We first examine contemporary developments in the law of tort and property, and we suggest how these developments point to the doctrine of landlord strict tort liability. We then examine the Becker decision in the context of strict liability law and policy. We conclude 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. Rather, it is a desirable application of strict liability, supported by the decisions of the past two decades.

CONVERGING LINES OF LAW AND POLICY

Strict Products Liability: Law and Policy

An obvious approach to the issue of landlord strict liability is from the perspective of the strict products liability revolution that has swept the courts of this nation during the past quarter century. From this perspective, the question is whether the strict products liability decisions and their underlying policies mandate a rule of landlord strict liability. To understand the implications of existing strict products liability law, one should start with the pioneering decisions.

24. Id.
25. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. See infra text accompanying notes 171-206.
In his 1944 concurrence in *Escola v. Coca Cola Bottling Co.*, proposing the doctrine of strict products liability, Justice Traynor laid the intellectual groundwork for the articulation of the strict liability doctrine. Indeed, in the landmark 1963 *Greenman v. Yuba Power Products, Inc.* decision, Justice Traynor, writing for a unanimous court, felt little need to discuss the basis of the strict products liability rule adopted in that decision, noting with a citation to his *Escola* concurrence that it had previously been fully articulated. Justice Traynor's *Escola* concurrence, as well as subsequent California decisions, clearly establishes the policy rationale for strict products liability. These decisions emphasize the loss spreading policy—that strict liability is desirable because “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” Strict liability is also viewed as an appropriate response when contemporary expectations of product safety are vio-

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30. Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. See Becker, 38 Cal. 3d at 459, 698 P.2d at 118, 213 Cal. Rptr. at 215.

lated by a product defect. Finally, strict liability of manufacturers is seen to create desirable economic incentives for product safety. Decisions emphasize that public policy "demands that responsibility be fixed wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market.

These policy themes have justified the extension of strict products liability to retailers and to lessors of products. Allowing a strict liability cause of action against a retailer can be viewed, for example, as an alternative to manufacturer liability in order to honor expectations of safety. Similarly, the safety incentive rationale has also justified retailer strict liability. Justice Traynor, in the leading


Another justification advanced for strict liability is that, even when present, negligence may be difficult to prove. See, e.g., Escola, 24 Cal. 2d at 467, 150 P.2d at 443 (Traynor, J., concurring). The difficulty of proving negligence may, in turn, be seen to support the safety incentive argument for strict liability. A realistic view of the tort system suggests that a negligence standard often will not result in liability even when negligence, in fact, exists. Thus, in practice, strict liability is better suited to creating incentives for safety. See Calabresi & Hirschoff, supra at 1060; Ursin, Strict Liability for Defective Business Premises: One Step Beyond Rowland and Greenman, 22 UCLA L. Rev. 820, 829-30 (1975). See generally Prosser & Keeton, supra note 3, at 693.

34. Cronin, 8 Cal. 3d at 129, 501 P.2d at 1159, 104 Cal. Rptr. at 439 (quoting Escola, 24 Cal. 2d at 462, 150 P.2d at 440 (Traynor, J., concurring)).


37. Shapo, supra note 32, at 1244-45.

38. Prosser & Keeton, supra note 3, at 707.
Vandermark v. Ford Motor Co.\textsuperscript{39} decision, explained that "the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety."\textsuperscript{40} Finally, the loss spreading policy is also served by strict liability. For a variety of reasons, including insolvency or lack of jurisdiction, the manufacturer may not be amenable to suit.\textsuperscript{41} As Justice Traynor pointed out in Vandermark, "the retailer may be the only member of [the overall producing and marketing] enterprise reasonably available to the injured plaintiff."\textsuperscript{42} Thus "[s]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff . . . ."\textsuperscript{43}

The same policy themes have been applied to the issue of strict liability of lessors of products. Expectations of safety are recognized, safety is encouraged, and losses are spread by imposing strict liability on lessors of products.\textsuperscript{44} Thus the California Supreme Court, in Price v. Shell Oil Co.,\textsuperscript{45} concluded that there is "no significant difference between a manufacturer or retailer who places an article on the market by means of a sale and a bailor or lessor who accomplishes the same result by means of a lease."\textsuperscript{46}

The issue of landlord strict liability could be approached by asking whether these products liability holdings and statements of strict liability policies point to such a doctrine. The question could be posed as whether strict liability policies can be confined to products cases and the applications of strict liability spawned by these cases. In other words, do tenant expectations,\textsuperscript{47} and safety incentive\textsuperscript{48} and loss spreading\textsuperscript{49} considerations, point to a rule of landlord strict tort liability, under which tenants or others injured by the dangerously defective condition of leased premises would be awarded compensation

40. \textit{Id.} at 262, 391 P.2d at 171-72, 37 Cal. Rptr. at 899-900.
41. \textit{Id.}; PROSSER & KEETON, \textit{supra} note 3, at 706.
42. Cal. 2d at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.
43. \textit{Id.}
44. In Price v. Shell Oil Co., the court reasoned that lessors "are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an adjustment of the rental." 2 Cal. 3d at 252, 466 P.2d at 726, 85 Cal. Rptr. at 182. Moreover, "the imposition of strict liability upon [the lessor] serves . . . as an incentive to safety." \textit{Id.} at 252, 466 P.2d at 727, 85 Cal. Rptr. at 183. The court concluded that "the paramount policy to be promoted by the [strict products liability] rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them." \textit{Id.} at 251, 466 P.2d at 725-26, 85 Cal. Rptr. at 181-82. \textit{See also} PROSSER & KEETON, \textit{supra} note 3, at 722.
46. 2 Cal. 3d at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183.
47. \textit{See infra} text accompanying notes 143-44.
49. \textit{See infra} text accompanying notes 147 & 199.
even absent proven landlord negligence? Similarly, analogies between strict products liability holdings and landlord cases could be analyzed. If, for example, strict liability applies to retailers and lessors of furniture, does it also apply to a landlord who leases furniture in conjunction with his renting of apartments? If so, the next question would be whether strict liability applies where the defective product is a fixture in the leased apartment. Then, of course, would be the issue of structural defects in the leased premises. It would be a mistake, however, to view the issue of landlord strict liability solely from these strict products liability perspectives. Equally relevant are the law and policies governing the relationship between landlords and tenants.

Landlord and Tenant: Law and Policy

Judicial Reform of the Law of Landlord and Tenant: The Implied Warranty of Habitability

At common law the lease was viewed not as a contract but as a conveyance of property. As a result, the law treated tenants harshly and afforded them few rights in their relationship with landlords. As a conveyance of property, the lease was governed by the doctrine of caveat emptor. The landlord owed no duty to place the leased premises in a habitable condition, and had no obligation to repair the premises. Moreover, even if the lease contained an express or implied covenant to repair, that covenant was independent of the tenant's covenant to pay rent. Thus, even if a landlord expressly covenanted to make repairs, the lessee was not entitled to withhold rent upon breach of the lessor's covenant.

The "balance" which the traditional common law struck between the rights of landlords and the rights of tenants might conceivably have been justified in the context of the agrarian society in which this common law developed—a society in which the land itself was the most important element in a lease transaction. In recent years, however, courts have reconsidered this body of law in the context of

50. See infra text accompanying notes 148-70.
54. Green, 10 Cal. 3d at 622, 517 P.2d at 1172, 111 Cal. Rptr. at 708.
contemporary residential leases. Measured by contemporary values, the traditional rules have proved wanting, and the United States Court of Appeals for the District of Columbia Circuit in 1970 recognized the concept of the implied warranty of habitability in *Javins v. First National Realty Corp.* In 1974, the California Supreme Court—well into its reformation of products liability doctrine—joined the "growing number of courts [that] have begun to reexamine [the] 'settled' common law [landlord-tenant] rules in light of contemporary conditions . . . ." In *Green v. Superior Court,* this reexamination resulted in the conclusion that the traditional common law rules were "a product of an earlier, land-oriented era, which bears no reasonable relation to the social or legal realities of the landlord-tenant relationship of today." Noting that "comprehensive housing codes affirm that . . . public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing in our state . . . ," the court held that a warranty of habitability is implied by law in residential leases.

Under this warranty, "a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease." In addition, the court held that the duty of the tenant to pay rent is dependent upon the landlord's fulfillment of this implied warranty of habitability. Thus, a tenant may raise the breach of an implied warranty of habitability by a landlord as a defense in an unlawful detainer proceeding.

The most striking aspect of the *Green* decision is how strongly it supports the tort doctrine of landlord strict liability. In *Green* the court analogized the modern urban tenant to the consumer of goods, noting that in "most significant respects, the modern urban tenant is in the same position as any other normal consumer of goods." Realistically, the tenant through a residential lease "seeks to purchase 'housing' from his landlord for a specified period of time [and the] landlord 'sells' housing . . . ." A lessor has, as does a manufacturer, "a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building." Moreover, the reasonable expectations of safety associated
with consumers of products\textsuperscript{68} also mark the lessor-lessee relationship.

A tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit \ldots \textsuperscript{69} [and] the tenant may legitimately expect that the premises will be fit for such habitation for the duration of the term of the lease.\textsuperscript{67}

Thus, the court in \textit{Green} wrote that it "is just such reasonable expectations of consumers which the modern 'implied warranty' decisions endow with formal, legal protection."\textsuperscript{68}

\textit{Green}’s analogy of the modern urban tenant to the consumer of goods is sound, as is its protection of tenants by an implied warranty of habitability. The analogy, however, is incomplete. When the modern consumer is injured by a defective product, he or she has a strict tort liability remedy.\textsuperscript{69} By analogizing the tenant to the consumer of goods, the \textit{Green} decision thus suggests a doctrine of strict landlord tort liability, under which persons injured by defective conditions on leased premises would have a strict tort liability cause of action against the landlord. Moreover, the \textit{Green} decision’s emphasis on the capacity of landlords to insure the safety of leased premises and its recognition of expectations of safety are analogous to the concerns that led courts to recognize the doctrine of strict tort liability for defective products. Because manufacturers, retailers and lessors of products have the capacity to insure product safety, and because consumers have reasonable expectations of product safety, strict tort liability has been applied to protect against injuries caused by defects in products.\textsuperscript{70} In the context of leased premises, these safety considerations suggest that persons injured by defective conditions on leased premises, like persons injured by defective products, should be protected by a rule of strict tort liability.

Another interesting aspect of the \textit{Green} decision is found in the court’s discussion of the protection afforded consumers by the implied warranty of fitness and merchantability. The citation of authority by the court for this implied warranty recognizes that a breach of the warranty provides a strict liability cause of action for personal

\textsuperscript{66} See supra note 32.
\textsuperscript{67} \textit{Green}, 10 Cal. 3d at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.
\textsuperscript{68} Id.
\textsuperscript{70} See supra notes 32-34 and accompanying text.
injury. The court cited *Klein v. Duchess Sandwich Co.*, a 1939 decision holding that the implied warranty of fitness extended to the plaintiff who became ill by eating a sandwich which was manufactured by the defendant and subsequently sold through a restaurateur to the plaintiff. It also cited *Peterson v. Lamb Rubber Co.*, a 1960 decision which held a manufacturer liable for personal injury caused by a defective grinding wheel which the manufacturer had sold to the plaintiff's employer. Most telling, the court cited Justice Traynor's *Escola* concurrence, which explained that the warranty decisions were in fact better viewed as strict tort liability. The implied warranty decisions cited in *Green* had in fact been—as the *Green* court knew—the precursors to the doctrine of strict tort liability for defective products. Thus, the reasoning and methodology of the *Green* decision strongly suggest that the implied warranty of habitability should be viewed as the precursor to a doctrine of strict tort liability of landlords. Indeed, a decade prior to *Green* the California Supreme Court had recognized that personal injury presents a more compelling case for legal protection than does pure economic loss. Thus, the economic remedies afforded tenants under *Green*, such as rent withholding, dramatize the desirability of strict landlord tort liability for personal injury caused by defects on the premises.

**Landlord Tort Liability**

The same imbalance between the rights of landlords and the rights of tenants that characterized the pre-*Green* law with respect to the habitability of leased premises also characterized the traditional rules of landlord tort liability. Under traditional tort rules a landlord enjoyed a broad immunity from tort liability. Under traditional tort rules a landlord enjoyed a broad immunity from tort liability. Exceptions to this broad immunity evolved slowly but still left landlords free of a gen-
eral duty to exercise reasonable care to maintain safe premises.79 Just as a tenant at common law could not withhold rent when a landlord failed to maintain the leased premises in habitable condition,80 a tenant would also be unlikely to have a tort cause of action should he be injured by a dangerous defect in the premises.

Justice Cardozo’s opinion in Cullings v. Goetz81 illustrates the conceptual framework employed by courts to justify the traditional rules restricting tort recovery. In ruling that a covenant to repair does not impose tort liability upon a landlord when injury occurs due to the lack of repair, Justice Cardozo took as his starting point that a landlord’s “[l]iability in tort is an incident to occupation and control.”82 He then noted that “occupation and control are not reserved through an agreement that the landlord will repair . . . . The landlord has at most a privilege to enter for the doing of the work . . . .”83

It followed that a landlord remained immune from tort liability despite the breach of a covenant to repair. Alluding to a notion of public policy supporting such a rule, Justice Cardozo wrote that the “tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need.”84 The idea was that the tenant as the land occupier had control over the land and could protect himself from liability by keeping persons away from the dangerous condition or by warning them. This was thought to be untrue of the landlord—even if he had contracted to repair the premises.

Almost half a century after Justice Cardozo’s Cullings decision, the New York Court of Appeals in 1976 joined the modern trend and held landlords liable to their tenants where the landlord had breached his covenant to repair.85 In overruling Cullings, the court in Putnam v. Stout surveyed the “various social policy factors [that] must be considered.”86 The court noted that “tenants may often be

80. See, e.g., Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424 (1915), overruled, Green, 10 Cal. 3d at 616, 517 P.2d at 1168, 111 Cal. Rptr. at 704.
82. 256 N.Y. at 290, 176 N.E. at 398.
83. Id.
84. Id.
85. Putnam, 38 N.Y.2d at 616-17, 345 N.E.2d at 325, 381 N.Y.S.2d at 853.
86. Id. at 617-18, 345 N.E.2d at 326, 381 N.Y.S.2d at 854 (citing RESTATEMENT (SECOND) OF TORTS § 357 comment b (1965)).
financially unable to make repairs . . ."87 Furthermore, because "their possession is for a limited term . . . the incentive to make repairs is significantly less than that of a landlord."88 Finally, because he receives "pecuniary benefit from the relationship, the landlord could properly be expected to assume certain obligations with respect to the safety of others . . ."89

The most interesting aspect of Putnam is the shift in the policy perspective of the New York Court of Appeals since its Cullings decision. Just as implied warranty of habitability cases, such as Javins90 and Green,91 had replaced an "estates in land" analysis with a modern contract analysis, so Putnam replaced Cullings' traditional "possession and control" analysis with modern tort analysis. The tort decisions of the past quarter century have emphasized safety considerations and the increased importance of victim compensation, especially where loss spreading is possible.92 In contrast, for the 1931 Cullings court, possession and control had been the central analytical tool in determining a landlord's tort obligations.93 The court was unconcerned with whether the landlord acted reasonably; the dominant policy was to protect from tort liability landlords who, unlike tenants, did not have possession and control and thus could not keep visitors away from dangerous conditions on the premises.94 In its preoccupation with the conceptual framework of occupation and control, the Cullings court ignored the fact that the landlord could best protect both himself and potential accident victims by honoring his covenant to make repairs. The court gave little weight to safety considerations (or victim compensation), focusing instead on protecting landlords who had failed to honor covenants to repair. In contrast, Putnam, in rejecting the Cullings approach, focused on safety. As between landlords and tenants, it is landlords who should be looked to in order to assure the safety of leased premises—both because of their greater financial capacity and because of their long-term interest in the property.95 Tort liability was seen to follow from these safety considerations. Moreover, the increased incidence of victim compensation was seen as not unfair to landlords: because landlords benefit pecuniarily from the landlord-tenant relationship, they can

87. Id.
88. Id. at 618, 345 N.E.2d at 326, 381 N.Y.S.2d at 854.
89. Id.
92. See supra notes 31-34 and accompanying text.
93. 256 N.Y. at 290, 176 N.E. at 398.
94. Id.
95. Putnam, 38 N.Y.2d at 617-18, 345 N.E.2d at 326, 381 N.Y.S.2d at 854.

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properly be expected to assume obligations with respect to the safety of others.\textsuperscript{96}

The shift in \textit{Putnam} from a narrow property focus on possession and control to a tort focus has implications beyond the actual \textit{Putnam} holding. Thus, for example, the safety considerations the \textit{Putnam} court relied on to impose liability for breach of a covenant to repair also suggest the appropriateness of landlord liability for unsafe conditions even absent such a covenant. The landlord has both the greater financial capacity and, because of his long-term interest in the property, the greater incentive to make repairs.\textsuperscript{97} In shifting from property to tort analysis, the \textit{Putnam} court was not unaware of the implications of the shift. It noted that "[i]ndeed, one jurisdiction has even gone further and held that notwithstanding the absence of a covenant to repair or the retention of control over the premises, a landlord may be held liable for the failure to exercise reasonable care to keep the premises in good repair."\textsuperscript{98}

The jurisdiction referred to in \textit{Putnam} was, of course, New Hampshire, which in its 1973 \textit{Sargent v. Ross}\textsuperscript{99} decision had ruled that landlords are to be held to a full duty of due care, thereby rejecting the entire traditional framework of landlord immunity rules. The New Hampshire Supreme Court in \textit{Sargent} expressly repudiated the "orthodox analysis"\textsuperscript{100} of landlord tort liability, which had focused on possession and control. In effect, the court found such a property analysis to be inconsistent with the policy considerations that should govern tort liability—especially considerations of safety. "In fact," the court wrote, "the traditional ‘control’ rule actually discourages a landlord from remedying a dangerous condition since his repairs may be evidence of his control."\textsuperscript{101} More fundamentally, "ordinarily the landlord is best able to remedy dangerous conditions, particularly where a substantial alteration is required."\textsuperscript{102} Abolishing the traditional immunity rules was thus seen as desirable because "the ordinary negligence standard should help insure that a landlord will take whatever precautions are reasonably necessary under the circumstances to reduce the likelihood of injuries from defects in his

\begin{footnotes}
\item 96. \textit{Id.} at 618, 345 N.E.2d at 326, 381 N.Y.S.2d at 854.
\item 97. \textit{Id.}
\item 98. \textit{Id.} at 616-17 n.6, 345 N.E.2d at 325 n.6, 381 N.Y.S.2d at 853-54 n.6 (citing \textit{Sargent v. Ross}, 113 N.H. 388, 308 A.2d 528 (1973)).
\item 99. 113 N.H. 388, 308 A.2d 528 (1973).
\item 100. \textit{Id.} at 394, 308 A.2d at 532.
\item 101. \textit{Id.}
\item 102. \textit{Id.}
\end{footnotes}
The shift from a property focus on possession and control to a tort focus emphasizing safety and expanded compensation in cases such as Putnam and Sargent suggests the necessity of examining the issue of landlord tort liability from a broader tort perspective. To begin with, the tort considerations of safety and compensation have been seen in products liability cases to justify the adoption of strict liability rules. These considerations, by analogy, can also be seen to point beyond negligence liability of landlords to a doctrine of strict landlord tort liability. Indeed, the Sargent decision itself implicitly suggested this. The court concluded its discussion of tort policy by quoting from its prior decision recognizing the implied warranty of habitability in apartment leases: "It is appropriate that the landlord who will retain ownership of the premises and any permanent improvements should bear the cost of repairs necessary to make the premises safe . . . ." In addition, the landlord tort liability cases can be seen, from a tort perspective, as part of broader doctrinal trends. Analyzing landlord tort liability in a broader doctrinal context also suggests a movement toward strict liability.

Viewed from a broader tort perspective, Sargent's holding that landlords owe a full duty of care is hardly surprising. Indeed, when the California Supreme Court considered its 1985 Becker strict liability decision, landlords in California had already been held to a full duty of care, despite the fact that the California Supreme Court had never so held. In California, the abolition of the traditional framework of landlord immunity rules had been accomplished by courts of appeal. In Brennan v. Cockrell Investments, Inc., for example, the court of appeal in 1973 held that a landlord is under a duty to exercise ordinary care in the management of the leased premises in order to avoid exposing persons to an unreasonable risk of harm. Brennan (and, for that matter, Sargent v. Ross) can be seen simply as the application to landlords of the California Supreme Court's holding in its landmark 1968 decision in Rowland v. Christian. Prior to Rowland all landowners and occupiers shared a broad immunity from tort liability. The traditional scheme of tort rules classified plaintiffs as trespassers, licensees, or invitees, and held that a full duty of care was owed only to invitees. Licensees (social guests) and trespassers...
ers (even if "innocent" trespassers) were denied compensation even where a landowner or occupier was admittedly negligent. In Rowland, the California Supreme Court recognized that this traditional scheme was an historical anomaly, reflecting views contrary to contemporary conceptions of sound policy. In its Rowland decision, the California Supreme Court became the first American court to abolish the traditional common law classifications based on the status of the plaintiff when it held that the proper standard to be applied to the landowner or occupier is the negligence test: "whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . . ."

The Brennan court viewed its extension of negligence principles to landlords as a specific application of the Rowland holding and the basic policy of California as recognized in Rowland and expressed in section 1714 of the Civil Code: every person is responsible for injuries caused to others by his failure to use ordinary care or skill in the management of his property or person. In ruling that landlords are held to a duty of ordinary care, the Brennan court rejected the proposition that landlords should be immune from negligence liability simply because they are not in possession of the leased premises. The court wrote that "it is impossible to perceive any legitimate public interest that would be promoted by the creation of a landlord immunity . . . ."

In light of the increased legal obligations of landlords in the warranty of habitability cases and the increased obligations of landowners in Rowland, the Sargent and Brennan holdings should have come as no surprise. Moreover, a broader perspective on these holdings reinforces this conclusion and suggests further implications. The traditional immunity of landlords from tort liability was not merely a specific tort application of landlord and tenant law principles. The tort immunity of landlords was instead part and parcel of the general tort framework developed by nineteenth-century American courts. The defining characteristic of that tort system was immunity from

110. Prosser & Keeton, supra note 3, at 393, 412.
111. 69 Cal. 2d at 113, 117, 443 P.2d at 564-65, 567, 70 Cal. Rptr. 100-01, 103.
112. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. A number of jurisdictions have since followed the Rowland holding. M. Franklin & R. Rabin, supra note 11, at 176-77.
113. 35 Cal. App. 3d at 800, 111 Cal. Rptr. at 125.
115. 35 Cal. App. 3d at 800, 111 Cal. Rptr. at 125.
116. Professor Gary Schwartz, after examining the nineteenth-century tort law of New Hampshire and California, has recently questioned the conventional interpretation of nineteenth-century tort history. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717 (1981). In the conventional view, "no duty" rules limited even the negligence liability of specific activities. *Id.* at 1717 & 1766. Schwartz argues, however, that "[i]f a court were to impose a duty prerequisite to every tort claim, the Courts easily recognized that everyone owes a duty to everyone else to abstain from negligent conduct." *Id.* at 1773. This finding makes all the more dramatic Schwartz's contention that New Hampshire and California courts "expanded on the negligence standard in ways that rendered it ambitious and demanding, narrowing the gap between negligence and strict liability." *Id.*

Despite Schwartz's exhaustive research, we are not persuaded. First, Schwartz acknowledges that important limitations on negligence liability did, in fact, exist. He notes that the landowner cases, with their special no duty rule applicable to trespassers, and the "outright immunity" that was "flaunted" in the area of governmental tort liability, *id.* at 1770, represent exceptions to his generalization that "everyone owes a duty to everyone else to abstain from negligent conduct." *Id.* at 1773. More significantly, he also notes "the serious tort law obstacles that an injured worker faced, especially the well-known trinity of employer defenses: contributory negligence, assumption of the risk, and the fellow-servant rule." *Id.* at 1769. In this regard, he cites "the number and proportion of . . . claims . . . denied [and] the uniqueness and perhaps wrongness of the reasons relied on in those denials . . . ." *Id.* at 1770-71. In assessing the significance of the employee accident cases, one should note the enormous importance, relative to other nineteenth-century tort issues, of employer tort liability (prior to workers' compensation plans)—in terms of the number of persons injured, dollar amounts involved, number of cases litigated, and volume of tort doctrine generated.

With respect to other "no duty" rules, Schwartz writes:

[N]ineteenth-century law in New Hampshire and California was remarkably free of the special no-duty and immunity rules that later cluttered and complicated those states' laws. In the nineteenth century, neither state's law suggested, for example, that charities were immune from claims brought by patients; that vehicle drivers were immune vis-a-vis their social guests; or that family members were immune from suits by other family members. And the only suit brought against a product seller for a product defect led to a victory for the nonprivity product victim. *Id.* at 1766 (footnotes deleted). From this passage one might infer that the "ambitious and demanding," *id.* at 1773, negligence standard resulted in compensation of accident victims in these sorts of cases. Our interpretation of Schwartz's research leads us to doubt this conclusion. With respect to victims of charities, vehicle drivers (as to nonpaying passengers), and family members, Schwartz writes in a footnote that "[i]t is not the case that the Courts were actually imposing liability in those situations; there simply were no suits." *Id.* at 1766 n.364. Since it is totally implausible that no such injuries were negligently caused during the nineteenth century, one must wonder why there were no suits. The reasonable conclusion would seem to be that suits were not brought because attorneys knew, in part by reference to decisions in other jurisdictions, that courts would throw them out. Similarly, although it may be true that "the only suit brought against a product seller for a product defect led to victory for the nonprivity product victim," *id.* at 1766, it would be incorrect to infer that nineteenth-century California case law anticipated Justice Cardozo's landmark 1916 decision in *MacPherson* v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which overturned the well-established privity barrier to negligence liability established by *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). See, e.g., *Loop v. Lichfield*, 42 N.Y. 351 (1870). Schwartz's footnote citation to the California case reveals that it is not a *MacPherson*-type case at all. Schwartz, *supra*, at 1776 n.365. The case, *Lewis v. Terry*, 111 Cal. 39, 43 P. 398 (1896), allowed a tenant to recover against a retailer who had willfully misrepresented the safety of a folding bed to the buyer landlord. Thus it seems likely that California and New Hampshire attorneys knew in nonprivity negligence products cases what they knew in
compensation by traditional tort law that was extolled by its advocates as a "negligence system," when in fact it was a harsh system of immunity rules that denied compensation even when defendant negligence was present. The landlord immunity rules, along with the privity rule in products cases, governmental and other immunities, the contributory negligence rule, the fellow servant rule, the doctrine of assumption of risk and other judicially-created devices, often left plaintiffs without compensation even when defendant negligence was clear. Brennan and Sargent thus resemble previous judicial abrogations of traditional immunity rules, such as MacPherson v. Buick Motor Co., and more recently the leading decisions of the California Supreme Court.

This broadened perspective reinforces the conclusion that the Brennan holding, in which landlords are held to a duty of due care, is unlikely to be the culmination of judicial reform of the law of landlord tort liability. Instead, Brennan is an intermediate step toward a doctrine of strict landlord tort liability. In terms of the evolution of the common law of torts, Brennan is analogous to Justice Cardozo's classic decision in MacPherson v. Buick Motor Co., which recognized the undesirability of privity limitations upon plaintiff recovery in products cases. The result of MacPherson and its progeny was the imposition of a general duty of care on manufacturers, without regard to privity of contract. The pre-MacPherson privity requirement was similar to the pre-Brennan landlord liability rules; each served to insulate a defendant from liability even where the defendant had failed to exercise reasonable care. Brennan's rec-
ognition of a general duty of reasonable care for landlords is analogous to *MacPherson's* recognition of a general duty of reasonable care for manufacturers. However, as Justice Traynor recognized as early as 1944,124 *MacPherson* was merely an intermediate step toward a doctrine of strict liability for defective products. *Brennan* is also merely an intermediate step. By clearing away the traditional rules of landlord immunity in favor of a duty of due care, *Brennan* paved the way for consideration of the next step: strict tort liability of landlords. Thus, the issue became whether the law and policies articulated in the strict products liability cases support such a doctrine.

**Strict Tort Liability of Landlords**

As discussed in the previous section, modern landlord tort liability decisions, including *Sargent's*126 1973 imposition of a duty of due care, could be seen as implicitly posing the question of strict liability of landlords—both because of their embrace of contemporary tort policies and because of their doctrinal similarity to the pre-strict liability products cases. The issue of strict landlord tort liability was, in fact, explicitly raised in California one year prior to *Sargent*. In 1972 a California court of appeal faced the question whether a landlord was strictly liable to a tenant injured by a defective sofa. In *Fakhoury v. Magner*,126 the court concluded that strict liability was compelled by the law and policies of strict products liability.127 Whether that conclusion is correct is the subject of this section of the Article.

**The Analytical and Policy Framework**

In examining the strict liability case law, it is perhaps surprising to discover how analytically easy the step is to landlord strict liability. Strict liability of manufacturers of defective products is, of course, now firmly established in American law.128 It is also hornbook law that this strict liability doctrine extends to retailers of defective products.129 Because of the marked similarity of product lessors and renters to product retailers, New Jersey130 and

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127. *Id.* at 62-64, 101 Cal. Rptr. at 475-77.
128. *See Prosser & Keeton, supra* note 3, at 694.
California, the leading product liability jurisdictions, quickly and easily extended strict liability to such entities. The California Supreme Court's decision in Price v. Shell Oil Co. emphasized the court's desire to "make [it] clear that the [strict liability] doctrine should be made applicable to lessors in the same way as we have made it applicable to sellers." The court also emphasized that it could not see how the risk of harm associated with the use of the chattel can vary with the legal form under which it is held. . . . [Lessors, like manufacturers and retailers,] are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an adjustment of the rental.

The application of strict liability to lessors of products represents hornbook law, with Prosser and Keeton reporting that "[t]his would be the generally accepted view today because there is no visible reason for any distinction between those engaged in the business of renting and those engaged in the business of selling.

New Jersey and California have also applied strict liability to the production and sale of housing, especially by mass developers. In Schipper v. Levitt & Sons, Inc., the New Jersey Supreme Court applied strict liability to the builder-vendor of mass-produced homes, writing that "[t]he public interest dictates that if . . . injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.

In Kriegler v. Eichler Homes, Inc., a California court of appeal reached the same result in a decision subsequently approved of by

132. Id.
133. Id. at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183.
134. Id. at 251-52, 466 P.2d at 726, 85 Cal. Rptr. at 182.
135. PROSSER & KEETON, supra note 3, at 719.
138. 44 N.J. at 70, 207 A.2d at 314.
139. Id. at 91, 207 A.2d at 326.
the California Supreme Court. The Kriegler court concluded that "in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles . . . . [T]he pertinent overriding policy considerations are the same."142

These two lines of authority—the leased product cases and the application of strict liability to housing—point clearly to the application of strict liability to landlords. Because strict liability has been applied to sellers of housing and because courts have made it clear that lessors in the business of leasing are not insulated from strict liability rules that would apply to sellers in the same context, the analytical basis for the recognition of landlord strict tort liability is clear.

The policies articulated in the strict products liability cases also have ready application to the issue of landlord strict liability. Strict products liability has been seen to be justified by consumer expectations of safety and by safety incentive and loss spreading considerations.143 Courts have often recognized that persons entering leased premises have reasonable expectations of safety analogous to persons who encounter manufactured products.144 Similarly, the safety incentives of strict liability are properly directed at landlords. A landlord in the business of leasing has experience with the building and is in a position to discover and cure dangerously defective conditions in the premises.145 Landlords, and their staffs, also make choices which affect the safety of the leased premises. These choices may involve the initial design and equipping of the premises, upkeep and maintenance, or repair and replacement. These choices necessarily involve tradeoffs between cost and safety. Application of a rule of strict tort liability would create a safety incentive for landlords in the construction, equipping, and maintenance of the leased premises, thus promoting safety in a manner analogous to strict liability of manufacturers and retailers.146 Finally, a rule of landlord strict liability would assure that losses due to dangerous defects in leased premises are not an overwhelming misfortune to the injured individual, but instead are spread by the landlord as a cost of doing business.147

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142. 269 Cal. App. 2d at 227, 74 Cal. Rptr. at 752.
143. See supra notes 31-34 and accompanying text.
146. See supra notes 33-34 and accompanying text.
Landlords, like manufacturers, retailers, and lessors of products, can insure and spread liability costs among the public as a cost of doing business. Thus, the loss spreading rationale has clear application in the context of leased premises.

**Landlord Strict Liability Prior to Becker v. IRM Corp.**

Since *Fakhoury v. Magner*, the 1972 court of appeal decision, strict landlord tort liability has been present in California law. The *Fakhoury* case itself demonstrates on a concrete level the difficulty of *not* applying strict liability to landlords, given the state of products liability law. *Fakhoury* involved a lessee of a furnished apartment who was injured when a couch partially collapsed under her. The *Fakhoury* court, in applying strict liability to the landlord, purported not to adopt a rule of strict landlord tort liability as such. Instead, it characterized the landlord as both a lessor of real property and a lessor of furniture, and it held the landlord strictly liable not as a lessor of property, but as a lessor of furniture. It noted that “rental of furniture is an enterprise of its own, falling into a separate category in such places as the yellow pages of the telephone directory.” Noting that “under existing case law . . . the lessor of furniture who supplies it to an empty apartment should be held to strict liability,” the court found no basis for exempting a landlord from strict liability “just because he is also the owner and lessor of real property.”

If strict liability applies to lessors of products, the *Fakhoury* court seems on unassailable ground in refusing to grant a special exemption to lessors of furniture who, at the same time, are landlords. Indeed, one commentator has concluded “the generally accepted notion” is that strict liability applies to the landlord’s personal property found in the furnished premises. Yet, if this is so, then is it possible to preclude further applications of landlord strict liability? This issue faced a California court of appeal in the 1976 case of *Golden v. Conway*. *Golden* involved a fire in the leased premises caused by a defective wall heater that had been installed by a contractor em-

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148. 25 Cal. App. 3d at 58, 101 Cal. Rptr. at 473. For developments outside California, see *infra* note 296.
149. *Id.* at 63, 101 Cal. Rptr. at 476.
150. *Id.*
151. *Id.*
152. *Id.*
153. See Browder, *supra* note 3, at 122.
ployed by the landlord a year or two before the fire. In considering the issue of landlord strict liability, the court recognized that Fakhoury had "purported to distinguish between defective fixtures and defective furniture," but concluded that there is "no reason to distinguish between appliances which are attached to the realty, and appliances or furniture which are not." Thus, the court extended the rule of landlord strict tort liability from defective furniture to defective fixtures.

Golden's application of strict tort liability to a defective fixture (which happened to be a product) raises the question whether landlord strict liability should extend beyond products leased with the premises. One could argue that the analogy to lessors of products becomes too attenuated as one attempts to impose strict liability on landlords beyond cases where the landlord clearly leases a product to the tenant. From this view, the wall heater case might be seen as a "hard" case. Beyond the purview of strict liability would be a defective central heating system that explodes or a defective stairway that collapses. The central heating system is not a product leased to the tenant and the stairway is not a product at all.

Landlord strict liability cannot be limited to products leased to the tenant. It is true that Fakhoury's application of strict liability to leased furniture appeared to be the "easy" case because of the clear analogy to leased products. One should recall, however, that landlord strict liability is also an outgrowth of the law defining landlords' obligations. Suppose the defective stairway was a central stairway and thus in a common area under the landlord's control. The common law traditionally has imposed a greater obligation with respect to defective conditions of common areas than to defects within the leased premises. Thus, if there is strict liability for leased furniture, it would be anomalous not to impose strict liability in the stairway case. The case for strict liability in the central heating example is at least as compelling. As the California Supreme Court emphasized in recognizing an implied warranty of habitability in Green v. Superior Court,

complex heating, electrical and plumbing systems are hidden from view, and the landlord, who has had experience with the building, is certainly in a much better position to discover and to cure dilapidations in the premises. Moreover, in a multiple-unit dwelling repair will frequently require access to equipment and areas solely in the control of the landlord.

155. Id. at 961, 128 Cal. Rptr. at 77.
156. Id. at 961, 128 Cal. Rptr. at 78.
157. Id. at 961-62, 128 Cal. Rptr. at 78.
158. See supra text accompanying notes 51-124.
159. See supra note 4 and accompanying text.
161. Id. at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.
Thus, while the doctrine of landlord strict liability began in *Fakhoury* with the application of strict liability to furniture, this beginning was due to the happenstance of the easy analogy to products liability—specifically, to the retail sale and commercial leasing of furniture where strict liability clearly would apply. From a policy perspective, the progression of landlord strict liability, from furniture to fixtures to defects in the leased structure itself, is anything but anomalous. Indeed, strict liability can be viewed as especially appropriate with respect to structural aspects of leased premises. In 1983, a third California court of appeal decision considered the issue of landlord strict tort liability. *Becker v. IRM Corp.*\(^1\) involved a tenant injured when he fell through a shower door consisting of untempered glass. The court held that strict liability applied, and it suggested a general doctrine of landlord strict tort liability, one not limited to products or fixtures. In the court's view, "it is a reasonable rule that a landlord should be treated as a 'retailer' of rental housing, subject to liability for defects in the premises.\(^3\)"

A decade or so ago, when suggestions that strict liability be extended to landlords first appeared,\(^4\) such proposals might have been seen as mere speculation.\(^5\) The California court of appeal decisions applying strict liability to landlords, however, amount to more than speculation and suggest a trend. Moreover, in the early 1980's, even cautious observers could conclude the "generally accepted notion" is that strict liability applies to the landlord's personal property found in the furnished premises.\(^6\) As we have seen, it is implausible that courts would restrict landlord strict liability to products. Indeed, while the third California court of appeal decision, *Becker v. IRM Corp.*,\(^7\) was being reviewed by the California Supreme Court, the long-awaited new edition of the Prosser hornbook was published in 1984 under the guidance of Dean Page Keeton. In the new edition\(^8\) the authors wrote that "[t]here seems to be growing support for the position that the nature of a realty lease, especially a lease of resi-

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163. 192 Cal. Rptr. at 577. See supra note 20.
164. See Love, supra note 3, at 130-57; Ursin, supra note 33, at 837-38 n.82. See also Note, Products Liability at the Threshold of the Landlord-Lessor, 21 HASTINGS L.J. 458 (1970).
165. See, e.g., Schwartz, supra note 27, at 976.
166. Browder, supra note 3, at 122. See infra note 296.
168. PROSSER & KEETON, supra note 3.
dential premises and, even more specifically, a lease of an apartment, is not sufficiently different from that of a personal property bailment to justify different rules or liability." They concluded that "strict liability in tort [is] 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."

Becker v. IRM Corp.

The Decision of the California Supreme Court

In 1985, the California Supreme Court, which had pioneered in the adoption and elaboration of strict products liability, rendered its decision in Becker v. IRM Corp. The court, in an opinion by Justice Broussard, concluded that strict landlord tort liability was required by the "rationale of the . . . cases . . . establishing the duties of a landlord and the doctrine of strict liability in tort . . . ." Two justices dissented. Chief Justice Bird concurred in an opinion that adopted the Becker court of appeal opinion as her own.

The Becker court recognized, as had the court of appeal decisions of the past decade, that existing strict liability precedents and the case law defining the obligations of landlords pointed to strict tort liability of landlords. The court began by noting that the doctrine of strict tort liability for defective products had evolved from an earlier case law that had "been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff." Quoting the seminal Greenman decision, the court wrote that "the purpose of strict liability in tort is 'to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves.'" The court then noted that California decisions had followed "a stream of commerce approach to strict liability in tort and [had extended] liability to all those who are part of the 'overall producing and marketing enterprise that should bear the cost of injuries from defective prod-

169. Id. at 722.
170. Id.
171. See Ursin, supra note 2. See also supra notes 26-46 and accompanying text.
173. Id. at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
174. Id. at 470, 698 P.2d at 126, 213 Cal. Rptr. at 223. See supra note 20.
175. See supra notes 148-63 and accompanying text.
176. 38 Cal. 3d at 461-64, 698 P.2d at 120-22, 213 Cal. Rptr. at 217-19.
177. Id. at 458, 698 P.2d at 118, 213 Cal. Rptr. at 215 (citation omitted).
178. Id. at 459, 698 P.2d at 118, 213 Cal. Rptr. at 215 (quoting Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)).
ucts.' Thus strict products liability had been applied not only to manufacturers but also to retailers, wholesalers, lessors and bailors, and licensors of personalty. Indeed, the California Supreme Court had previously held that an implied warranty of quality attaches to the sale of new construction. Just as in the products area, however, implied warranty decisions in the real estate area were precursors to the application of strict tort liability. California decisions prior to Becker had held that strict liability in tort is not limited to "those engaged in commerce in personalty but has been applied where appropriate to those engaged in real estate business who impliedly represent the quality of their product." Thus, for example, in Kriegler v. Eichler Homes, Inc. the builder of mass-produced homes was held strictly liable when the heating system placed in a home failed. Paraphrasing a similar New Jersey decision, the Becker court wrote that the "public interest dictates that the cost of injury from defects should be borne by the developer who created the danger and who is in a better economic position to bear the loss rather than the injured party who relied on the developer's skill and implied representation."

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


181. 38 Cal. 3d at 459-60, 698 P.2d at 119, 213 Cal. Rptr. at 216.


184. Becker, 38 Cal. 3d at 460, 698 P.2d at 119, 213 Cal. Rptr. at 217.


187. 38 Cal. 3d at 460-61, 698 P.2d at 120, 213 Cal. Rptr. at 217.
The evolution of the law governing landlords' obligations, culminating in Becker, followed the same path as that governing products and the sale of real estate. In Green v. Superior Court, the California Supreme Court had held that a lease for a dwelling contained an implied warranty of habitability. The court in Becker noted that the Green decision had drawn the analogy between the warranty of merchantability and fitness in products cases and the implied warranty of habitability in residential leases, "[p]ointing out that the modern urban tenant is in the same position as any normal consumer of goods..." Green, however, had not taken the next step—consideration of "whether or to what extent breach of the implied warranty of habitability might provide a basis for recovery of tort damages for injuries caused by the breach." Even prior to Green (and Greenman), however, a line of authority had permitted recovery from landlords of personal injury damages on an implied warranty theory. These cases involved short-term leases of furnished dwellings where the accident occurred shortly after the tenant went into possession and where the defect existed at the beginning of the term. Subsequent to Greenman, the Becker court noted, strict tort liability had been applied to landlords in the previously discussed Fakhoury and Golden cases.

After surveying this impressive array of case law pointing to landlord strict tort liability, the California Supreme Court in Becker concluded that

the rationale of the foregoing cases, establishing the duties of a landlord and the doctrine of strict liability in tort, requires us 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.

The court wrote that it is "clear that landlords are part of the ‘overall producing and marketing enterprise’ that makes housing ac-

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188. Id. at 461, 698 P.2d at 120, 213 Cal. Rptr. at 217.
190. 38 Cal. 3d at 462, 698 P.2d at 121, 213 Cal. Rptr. at 218. See supra text accompanying notes 57-76 for a discussion of Green.
191. Becker, 38 Cal. 3d at 462, 698 P.2d at 121, 213 Cal. Rptr. at 218.
193. See supra cases cited at note 192.
194. See supra text accompanying notes 148-57.
195. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rprt. at 219.
commodations available to renters."\textsuperscript{196} Moreover, "a landlord, like defendant owning numerous units, is not engaged in isolated acts within the enterprise but plays a substantial role."\textsuperscript{197} The court emphasized that the "fact that the enterprise is one involving real estate may not immunize the landlord."\textsuperscript{198}

In support of its holding the court in Becker reiterated the policy themes that had been central to its products liability holdings, finding them also applicable to landlords. Thus, it reemphasized its view that 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."\textsuperscript{199} The court saw strict landlord tort liability to be supported by the considerations that have been central to the development of strict products liability: the recognition of legitimate expectations of safety, promotion of safety, and compensation of accident victims and spreading of accident costs throughout society.\textsuperscript{200} "Absent disclosure of defects," the court wrote, "the landlord in renting the premises makes an implied representation that the premises are fit for use as a dwelling . . . ."\textsuperscript{201} Safety considerations also point to a strict liability rule: "The tenant purchasing housing for a limited period is in no position to inspect for latent defects in the increasingly complex modern apartment buildings or to bear the expense of repair whereas the landlord is in a much better position to inspect for and repair latent defects."\textsuperscript{202} From this realistic perspective, it is clear that the "tenant renting the dwelling is compelled to rely upon the implied assurance of safety made by the landlord."\textsuperscript{203} Finally, compensation of the accident victim is desirable because "the landlord by adjustment of price at the time he acquires the property, by rentals or by insurance is in a better position to bear the costs of injuries due to defects in the premises than the tenants."\textsuperscript{204} Summarizing these perceptions the court, paraphrasing the Greenman formulation,\textsuperscript{205} wrote that

\begin{itemize}
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id. (citation omitted).
\item \textsuperscript{199} Id. at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220 (citation omitted).
\item \textsuperscript{200} See supra notes 31-34 and accompanying text.
\item \textsuperscript{201} 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
\item \textsuperscript{202} Id. (citation omitted).
\item \textsuperscript{203} Id. at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} In Greenman, Justice Traynor, writing for the majority, stated that "the purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather
"strict liability . . . must be applied to insure that the landlord who markets the product bears the cost of injuries resulting from the defects 'rather than the injured persons who are powerless to protect themselves.' ”

The Becker Dissent

Two of the seven members of the California Supreme Court dissented from the Becker strict liability holding. Given the California precedents, the Becker dissenters faced no easy task. As previously discussed, the California Supreme Court had endorsed the application of strict tort liability to sellers of housing; and in its Price decision holding lessors of products to strict liability, it had emphasized, "we make [it] clear that [the strict liability] doctrine should be made applicable to lessors in the same way we have made it applicable to sellers." The analytical basis was thus clear for the recognition of a rule of strict landlord tort liability. Moreover, court of appeal decisions beginning in 1972, including the vacated court of appeal decision in Becker, had already taken this step.

The question for the dissent was whether it could avoid the obvious implications of these cases, or whether it would argue that one or more of these decisions should be repudiated. The dissent, for example, could have argued that the extension of strict liability to lessors of products had been a mistake. Or it could have argued that the lessor cases should not have been extended to landlords who also lease products with the premises. Or it could have argued that once one moves beyond landlords who lease products with the premises, strict liability is inappropriate because we are now in the realm of "landlord" as opposed to "products" liability. As we have previously discussed, each of these positions would have been difficult to maintain in light of the case law and policies of strict tort liability. But each of these positions would have attempted to draw a line that would separate products liability from landlord (and, perhaps, less-

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206. 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.
209. 2 Cal. 3d at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183.
210. See supra text accompanying notes 128-47.
212. See supra notes 26-50 & 148-70 and accompanying text.
The dissent took none of these positions. Instead, it adopted a position that would impose a broad strict tort liability on some landlords but not on others. The dissent chose to adopt and elaborate upon the position proposed by defendant IRM Corporation\textsuperscript{213} that would impose strict liability on a landlord who is the original owner of a building, but not on a landlord, such as IRM Corporation, who purchases an existing building which is not new—"an already 'produced' [apartment complex]."\textsuperscript{214} For the dissent, strict liability is appropriate for a landlord who furnishes a product that he has purchased from a manufacturer or retailer but not for "landlords of used property [who] have no special position with regard to original manufacturers and sellers . . . ."\textsuperscript{215} The crucial distinction is "between a party actually selecting, installing, constructing and buying the defective product and a party who plays no such role and therefore has no connection with anyone up the ladder of distribution . . . ."\textsuperscript{216}

For the dissenters, the appeal of that position apparently was that it avoided the necessity of urging the overruling of previous applications of strict liability, including the court of appeal landlord decisions,\textsuperscript{217} while allowing them to reject strict liability in \textit{Becker}. On analysis, however, the dissent’s position appears untenable. The case law and policies of strict liability do not support the distinction proposed by the dissent. Analysis of the dissent, in fact, demonstrates the strength of the strict liability precedents relied upon by the majority to support its holding.

The dissent purports to derive its position from existing strict liability case law, including \textit{Vandermark v. Ford Motor Co.}\textsuperscript{218} and

\begin{itemize}
\item \textsuperscript{213} See \textit{Becker}, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.
\item \textsuperscript{214} \textit{Id.} at 481, 698 P.2d at 134, 213 Cal. Rptr. at 231.
\item \textsuperscript{215} \textit{Id.} at 487, 698 P.2d at 138-39, 213 Cal. Rptr. at 235-36.
\item \textsuperscript{216} \textit{Id.} at 481, 698 P.2d at 134, 213 Cal. Rptr. at 231 (emphasis deleted).
\item \textsuperscript{217} Thus, strict liability was appropriate in \textit{Fakhoury} because the landlord had purchased and installed the defective couch, 25 Cal. App. 3d at 61-62, 101 Cal. Rptr. at 475, and in \textit{Golden}, because the landlord had equipped the apartment with the defective wall heater. 55 Cal. App. 3d at 951-53, 12 Cal. Rptr. at 71-72. In contrast, "IRM Corporation had purchased an already-produced [apartment complex] . . . . [T]he shower doors had not been purchased by defendant." \textit{Becker}, 38 Cal. 3d at 481, 698 P.2d at 134, 213 Cal. Rptr. at 231. Thus, unlike the landlords in \textit{Fakhoury} and \textit{Golden}, IRM Corporation had no connection with a retailer or manufacturer, entities "up the ladder of distribution" of the shower doors. \textit{Id.} See supra notes 148-61 and accompanying text for a discussion of these cases.
\item \textsuperscript{218} 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
\end{itemize}
Price v. Shell Oil Co.219 In Vandermark the California Supreme Court had referred to the fact that retailers and manufacturers are in a “continuing business relationship”220 and thus can “adjust the costs . . . between them in the course of their continuing business relationship.”221 The dissent also points to language in Price, which had extended strict liability to lessors. Price had spoken of “the necessity for a continuing course of business as a condition for the application of [strict liability].”222 As an initial matter, this Price language does not support the dissent’s position. The court in Price was concerned that the lessor be engaged in a “continuing course of business,” namely “the business of leasing.”223 The court was not focusing on whether the lessor had a continuing business relationship with a manufacturer of the vehicles it leased. Similarly, strict liability would seem applicable to a commercial lessor of vehicles regardless of how and from whom it acquired the vehicles and whether it acquired them new or used.

A flaw in the dissent’s attempt to distinguish landlords who originally own and equip the leased premises from landlords who acquire used rental property can also be seen by examining the dissent’s treatment of the successor corporation cases. In the leading case of Ray v. Alad Corp.,224 the California Supreme Court held, in part

220. Becker, 38 Cal. 3d at 480, 698 P.2d at 134, 213 Cal. Rptr. at 231 (quoting Vandermark, 61 Cal. 3d at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900).
221. Id. (emphasis deleted). The defendant in Becker had argued that strict liability was inappropriate because it had “never been in a business relationship with the builder and [because] purchasers of used rental properties do not have a continuing business relationship with builders permitting adjustments of the costs of protecting tenants.” 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220. The court found this argument unpersuasive. It emphasized that a continuing business relationship is not essential to the imposition of strict liability. The court noted that, even absent a continuing business relationship with manufacturers or others, landlords might often be able to recoup any losses by seeking equitable indemnity. Id. at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221. More importantly, the “unavailability of the manufacturer is not a factor militating against liability of others engaged in the enterprise.” Id. at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220. This conclusion was compelled because 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.” Id. Thus, contrary to the defendant’s argument, “[i]f anything, the unavailability of the manufacturer is a factor militating in favor of liability of persons engaged in the enterprise who can spread the cost of compensation.” Id. The court concluded that, “[i]f the unavailability of the manufacturer does not mitigate against liability,” so “the absence of a continuing business relationship between builder and landlord is not a factor warranting denial of strict liability of the landlord.” Id. at 466, 698 P.2d at 123-24, 213 Cal. Rptr. at 220-21. When injury is caused by latent defects existing at the time of the lease, landlords “should bear the cost . . . rather than the injured persons who are powerless to protect themselves.” Id. at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221.
222. Price, 2 Cal. 3d at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183 (citing Vandermark, 61 Cal. 2d at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900).
223. Id.
based on the loss spreading policy,\footnote{226} that a corporation that acquired all the assets of the manufacturer of a defective product and continued to run the business in a manner almost identical to its original form could be held strictly liable for defects in a product manufactured by the predecessor corporation.\footnote{226} In the dissent’s view, the crucial factor in \textit{Alad} was the “almost complete overlap of the corporate entities,”\footnote{227} and this was said to be untrue of the “relationship between the landlord . . . and any party participating in the original manufacture and distribution of the shower door.”\footnote{229} On the dissent’s own terms, this reasoning seems flawed. If, as the dissent assumes, strict liability is appropriate with respect to a landlord who originally owns and equips leased premises,\footnote{229} then \textit{Alad} indicates it is also appropriate for a successor landlord who, to paraphrase \textit{Alad}, acquires all the assets of the original landlord and continues to run the business in a manner almost identical to its original form.\footnote{230}

More fundamentally, the policy considerations that have dominated the evolution of strict liability (and that the \textit{Becker} court, as well as the previous court of appeal decisions, saw supporting landlord strict liability) do not support the dissent’s position. Certainly, the need for compensation and the capacity of landlords to spread accident costs do not vary depending on whether a tenant is injured in an apartment building owned by the original owner rather than a landlord who purchased the building from another. Thus the loss spreading policy, long central to strict liability,\footnote{231} does not support the dissent’s distinction between landlords of new and used property;\footnote{232} indeed, the dissent concedes this.\footnote{233}

Similarly, the safety incentives of strict liability would seem properly directed to landlords of new or used property. It is true that an original owner \textit{may} play a role in the design of a building whereas the landlord who purchases a used building will not have played such a role. Nevertheless, the “used property” landlord plays an integral role in assuring the safety of the leased premises by inspection, repair and replacement policies. Cases such as the California Supreme

\footnote{225} Id. at 30-31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80.\footnote{226} Id. at 33-34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82.\footnote{227} \textit{Becker}, 38 Cal. 3d at 484, 698 P.2d at 137, 213 Cal. Rptr. at 234.\footnote{228} Id.\footnote{229} Id. at 487, 698 P.2d at 138, 213 Cal. Rptr. at 235.\footnote{230} \textit{Alad}, 19 Cal. 3d at 33-34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82.\footnote{231} See supra note 31.\footnote{232} \textit{Becker}, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.\footnote{233} Id. at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232.
Court's *Vandermark* decision that have imposed strict liability on retailers have noted that "the retailer himself may play a substantial part in insuring that the product is safe . . ."234 It should be obvious that landlords of used property may play a substantial part in insuring that the leased premises are safe.235 Landlords do—and have a duty to236—inspect, maintain and repair the leased premises. The California Supreme Court had previously emphasized the public policy that "landlords . . . bear the primary responsibility for maintaining safe, clean, and habitable housing . . ."237 Indeed, the landlord is, on this ground, an easier case for strict liability than many retailers. With respect to many products—such as products sold in sealed containers—retailers can do little or nothing to increase product safety.238 In contrast, landlords of new or used rental properties play an integral role in assuring the continued safety of leased premises.

Finally, it would seem that tenant expectations of safety are also independent of the distinction the dissent seeks to draw between landlords of new and used property. A tenant will have the same expectations of safety with respect to furniture, heaters, and shower doors when he leases from the landlord who originally owned the building as when he leases from a successor landlord. Indeed, the tenant is unlikely to know which situation he or she is in. Thus if safety expectations justify strict liability as to the former, they would also justify strict liability as to the latter. The retailer cases, with their well-settled strict liability rule239 (which the dissent accepts),240

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234. 61 Cal. 2d at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.
235. The Becker dissent ignored this aspect of *Vandermark*'s safety incentive argument. It focused solely on another aspect of *Vandermark*'s safety incentive argument—that retailers may exert pressure for safety on manufacturers. *Vandermark*, 61 Cal. 2d at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899. The Becker dissent argued that landlords of used property, unlike retailers, "have no special position with regard to original manufacturers and sellers and thus have no influence to wield in order to improve product safety." 38 Cal. 3d at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232. This, of course, assumes that original landlords have such influence, which is not at all clear. Moreover, as both the court and dissent recognize, landlords may in appropriate cases be able to recoup any losses by actions against manufacturers or others responsible for defective conditions on the premises. *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220 (Broussard, J.); *id.* at 489 n.6, 698 P.2d at 139 n.6, 213 Cal. Rptr. at 236 n.6 (Lucas, J., concurring and dissenting). Thus, strict liability of landlords of new or used property arguably creates pressure for safety by exposing manufacturers and others to potential liability to landlords seeking to recover for liability imposed upon them.
237. *Id.* at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.
238. Indeed, Justice Traynor in his *Escola* concurring opinion wrote that "[c]ertainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he himself is not able to test." 24 Cal. 2d at 468, 150 P.2d at 444 (Traynor, J., concurring). See R. Epstein, Modern Products Liability Law 62 (1980).
239. Prosser & Keeton, supra note 3, at 692.
240. Becker, 38 Cal. 3d at 481, 698 P.2d at 134, 213 Cal. Rptr. at 231.
again suggest that strict liability is appropriate for landlords of new or used property. When one purchases a product from a retailer, expectations of safety exist. These expectations, however, derive from the perception that manufacturers create safe products. Often consumers have no expectation that retailers will take independent steps to assure product safety. Thus, the application of strict liability to retailers can be seen as a recognition of safety expectations, but liability is imposed on an enterprise that may not play a direct role in assuring product safety. From this perspective, the retailer cases strongly support the doctrine of landlord strict liability. Not only do tenants have expectations of safety with respect to leased premises, but unlike many types of retailers landlords can be expected to take steps to insure the safety of the leased premises.

The difficulty the dissent has in defending its position derives from the fact that the thrust of the case law of the past quarter century has been to establish and expand the reach of strict liability. In so doing, this case law inevitably pointed in the direction of landlord strict liability. Indeed, in search of case law to support its position, the dissent is forced to rely on cases refusing to apply strict liability to the sale of used machinery. On their face, these cases offer weak support. Landlords seem more similar to lessors of products than they do to auctioneers of used cranes. In addition, it may be that the weight of authority in used machinery cases approves of a strict liability rule, although different standards of defectiveness may be applied to used, as opposed to new, products. Moreover, an examination of the reasoning in the used products cases that have refused to apply a strict liability rule supports the Becker court’s strict landlord liability rule.

Courts that have been reluctant to impose strict liability on sellers of used machinery have emphasized the unique nature of markets for used machinery—the apparent understanding [is] that the

241. See supra note 238.
242. Ursin, supra note 33, at 837-38 n.82.
243. Becker, 38 Cal. 3d at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232.
244. The Becker court flatly rejected the defendant’s analogy of landlords to dealers in used machinery. 38 Cal. 3d at 466, 698 P.2d at 124, Cal. Rptr. at 221. Landlords, unlike dealers in used machinery, “have a continuing relationship to the property following renting...” Id. Unlike the used machinery dealer, the landlord “makes representations of habitability and safety.” Id.
246. Id. at 761, 176 Cal. Rptr. at 236.
seller, even though he is in the business of selling such goods, makes no particular representation about their quality.”247 If buyers of used machinery want assurance of quality, they bargain for it or seek a dealer who offers it.248 Generally, however, buyers “are concerned primarily with price and . . . their expectations as to the quality [including safety] are consciously reduced.”249 Moreover, used machinery cases involve auctioneers “who did not perform any maintenance or repair on the equipment, did not inspect it, and sold it ‘as is’. . . . ”250

Courts that have refused to apply strict liability in the used machinery cases have been careful to explain how these cases are different from cases involving the leasing of products.261 These differences also explain why the machinery cases support landlord strict liability. It has been noted that expectations of safety exist in the case of leased products that do not exist in the sale of used machinery.282 The “fact that [the lessor of products] offers them repeatedly . . . may constitute a representation as to their quality.”263 Similarly, the “lessor chooses the products which he offers in a significantly different way than does the typical dealer in used goods . . . .”264 These observations, of course, also distinguish landlords from used machinery dealers. Finally, unlike used machinery dealers, landlords have a duty to inspect, maintain and repair the leased premises, and they have the primary responsibility for the maintenance of safe, clean and habitable housing.285

Issues for Future Consideration

The California Supreme Court in Becker did not limit its holding, as it might have, to defective products on the leased premises. The court of appeal decisions of the previous decade—as well as the logic of strict tort liability—made it clear that landlord strict liability could not be confined to products. On the other hand, the court’s decision was quite cautious in other respects. The court’s precise holding was that “a landlord engaged in the business of leasing

248. Id.
249. La Rosa, 122 Cal. App. 3d at 758, 176 Cal. Rptr. at 234.
250. Becker, 38 Cal. 3d at 482, 698 P.2d at 135, 213 Cal. Rptr. at 232 (Lucas, J., concurring and dissenting).
253. Id.
254. Id.
255. Green, 10 Cal. 3d at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.
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." This holding, as well as other aspects of the Becker decision, raises a number of issues that will have to be resolved in future decisions.

As an initial matter, it might be noted that Becker involved injury to a tenant. The question thus might be raised whether landlords are strictly liable to persons other than tenants who are injured by the defective condition of the leased premises. It appears clear that the Becker strict liability holding will not be for the benefit of tenants only. First, the court’s own statement of its holding does not limit its reach to tenants. In addition, previous decisions by the California Supreme Court support this conclusion. In Rowland v. Christian the court held that the rights of a person injured by an owner or occupier of land are not determined by the injured person’s classification as an invitee, licensee or trespasser. Rowland thus established a single duty of care, and it is unlikely that the court would consider resurrecting a classificatory scheme for plaintiffs under a regime of landlord strict liability. Finally, in the strict products liability context, the court found the case for bystander recovery compelling. In Elmore v. American Motors Corp., it wrote:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

By analogy, it would seem that the case for extending the benefits of strict landlord liability beyond tenants to others injured by the defective condition of the leased premises is compelling.

The Becker court applied strict liability to landlords “engaged in the business of leasing dwellings.” Future decisions will have to define the concept of “in the business of leasing.” Becker itself in-

256. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 220.
257. Id.
260. Id.
261. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 220.
volved a landlord that owned a thirty-six unit apartment complex. It might be argued that the owner of a single rental unit, such as a condominium, who regularly leases the unit but owns no other rental property, is not in the business of leasing in the same sense that the IRM Corporation is. On the other hand, because the condominium owner has made a business judgment as to how to maximize his investment prospects, receives rent and tax advantages, and may realize appreciation in the value of the property, he might well be seen as in the business of owning and renting housing. Considerations of safety and compensation, especially given the availability of liability insurance, suggest the appropriateness of strict liability. One notes also that the renter of a single unit, such as an apartment connected with the landlord's home, will often expect that the landlord himself has assured the safety of the unit. Furthermore, the burden on the landlord of safety precautions will be less onerous when only one unit is involved. Less likely to be found in the business of leasing would be the homeowner who, for example, occasionally leases his or her home when taking vacations. In determining which landlords are "engaged in the business of leasing dwellings," courts will be able to draw analogies from products cases that have given content to the concept of lessors "in the business of leasing products."

The court in Becker held that strict liability is applicable to the case of a "latent defect in the premises when the defect existed at the time the premises were let to the tenant." This statement raises several issues. One issue is whether strict liability applies to patent defects, especially where such defects are expressly disclosed by the landlord at the outset of the lease. In this regard, the court noted that it did "not determine whether strict liability would apply to a disclosed defect." The argument against the application of strict liability in this situation would center on the absence of tenant safety expectations. The court in Becker wrote that "[a]bsent disclosure of defects, the landlord makes an implied representation that the premises are fit for use as a dwelling . . . ." It might be argued that disclosure would negate any implied representation and thus any tenant expectations of safety regarding the disclosed defect. Strict tort liability, it could be argued, is accordingly inappropriate. On the other hand, safety incentive considerations can be seen to

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262. See Love, supra note 3, at 134-35 n.661. It is possible that courts might simply draw an arbitrary line identifying the number of units required for strict liability to apply, perhaps by analogy to legislative enactments.

263. See supra notes 31-34.


265. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

266. Id. n.4.

267. Id. at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
support strict tort liability. As courts have noted, "tenants may often be financially unable to make repairs . . ." and because "their possession is for a limited term . . . the incentive to make repairs is significantly less than that of a landlord."\textsuperscript{268} Compensation and loss spreading considerations obviously also support strict liability. Moreover, various lines of authority suggest that landlords will not be excused from strict liability in cases of patent and disclosed defects. Courts have looked with disfavor at attempts of landlords and others to immunize themselves from judicially-imposed liability. Disclaimers in strict products liability cases have met with disfavor,\textsuperscript{269} as have lease provisions attempting to exculpate landlords from negligence liability\textsuperscript{270} or from duties imposed by the implied warranty of habitability in residential leases.\textsuperscript{271} These lines of authority suggest that mere disclosure of a dangerous defect will not negate landlord strict tort liability. (They also suggest, of course, that attempts by landlords to avoid strict liability by exculpatory clauses will be looked upon unfavorably by courts.)\textsuperscript{272} Finally, the issue of disclosed and patent defects in a regime of landlord strict liability can be seen to resemble the issue of patent defects in strict products liability; courts have rejected efforts to limit strict products liability to latent, as opposed to patent, defects.\textsuperscript{273} The products liability analogy also suggests, however, that patency and disclosure of defects do have a bearing on the ultimate issue of landlord liability. While the cause of action would remain strict liability, a properly circumscribed doctrine of assumption of the risk might provide a defense for landlords, and the tenant’s damages might be reduced under comparative fault principles.\textsuperscript{274}

Another issue, raised by the \textit{Becker} court’s statement of its holding, stems from the court’s reference to defects that “existed at the

\textsuperscript{268} Putnam v. Stout, 38 N.Y.2d 607, 618, 345 N.E.2d 319, 325, 381 (1965) N.Y.S.2d 848, 854 (1976) (citing \textit{Restatement (Second) of Torts} \textsection{357 comment b).}


\textsuperscript{271} \textit{See}, e.g., Green v. Superior Ct., 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 904 (1974).

\textsuperscript{272} \textit{See} Browder, \textit{supra} note 3, at 143; Love, \textit{supra} note 3, at 154.

\textsuperscript{273} \textit{See}, e.g., Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

\textsuperscript{274} \textit{See} Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (comparative fault applicable to strict liability). \textit{See also} Love, \textit{supra} note 3, at 155-56.
time the premises were let to the tenant. In this regard, the court expressly noted that "it is unnecessary to determine whether the landlord is strictly liable for defects in the property which develop after the property is leased." With respect to latent defects that develop subsequent to the lease, it is unlikely that courts would have difficulty applying strict liability; there seems no reason to treat this situation differently from one involving a pre-existing latent defect. The difficult case is posed by the patent defect that develops subsequent to the lease. The case against strict liability in this situation is suggested by the "specter" of applying strict liability to a landlord who was unaware of a defect, where a tenant was aware of the defect and failed to alert the landlord to the condition. "Can a tenant who sees a defect . . . ," it is asked, "be permitted to keep it to himself and later claim damages . . .?"

This line of argument against strict liability is unpersuasive. It is, in fact, merely a variant of the general argument that landlords who are not in possession and control should not be subject to strict liability. As we have seen, modern landlord tort and warranty of habitability decisions have rejected this conceptual framework. Becker's strict liability rule recognizes that landlords can be liable absent notice of a defect, and lack of knowledge of a defect on the part of a plaintiff is not necessary for strict tort liability. Moreover, the specter of the tenant who knows of a danger, keeps it to himself, and later claims damages loses much of its argumentative force when those who suggest it concede that, in the real world, tenants have "never been reluctant" to communicate complaints of defects to landlords. Similarly, the argument against strict liability is weakened when it is recognized that landlords commonly retain under the lease a right to enter to repair. More fundamentally, the specter, when analyzed, suggests not that strict liability is undesirable for patent defects arising after the premises are let, but rather that defenses might exist to the doctrine of strict landlord tort liability.

275. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
276. Id. at 467 n.5, 698 P.2d at 124 n.5, 213 Cal. Rptr. at 221 n.5.
277. See Browder, supra note 3, at 137-38 (proposing strict liability for defect unknown to both landlord and tenant; not distinguishing defects arising after lease).
278. Id. at 136-37.
279. Id. at 136.
280. Id. See supra text accompanying notes 81-98.
281. See supra text accompanying notes 55-76 & 90-124.
284. A related specter is that of the tenant not only knowing of the dangerous condition but creating it by his or her own reckless conduct. Strict liability might be seen as inappropriate and thus held inapplicable in such cases. Cf. Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971) (implied warranty of habitability). Or a defense to strict liability could be recognized, as suggested infra notes 285-88 and accompanying
Thus, a failure to give notice to a landlord of a known defect might bar a tenant’s tort cause of action.\textsuperscript{285} The basis of liability—if notice was actually given, if reasonable attempts to give notice were made, or if others injured by the defect brought suit—would properly remain strict liability.\textsuperscript{286} Moreover, by analogy to products liability decisions, failure to give notice should not in itself be a complete bar to a tenant’s recovery. At most, a tenant’s knowledge of a defect (and lack of notice to the landlord) might suggest the presence of assumption of the risk and might serve merely to reduce the plaintiff’s damages through comparative fault.\textsuperscript{287} The approach to defenses in strict products liability actions could be easily adapted to the landlord context:

Defendant’s liability for injuries . . . remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff’s recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury. The cost of compensating the victim . . . albeit proportionally reduced, remains on defendant . . . and will, through him, be “spread among society.”\textsuperscript{288}

\textit{Becker} also speaks only of strict liability of landlords who lease “dwellings.”\textsuperscript{289} Thus, yet to be decided is the issue of whether strict liability extends to the lessor of commercial premises, such as an office building or store. One could argue that strict liability of lessors of commercial premises necessarily follows from \textit{Becker}’s application of strict liability to lessors of dwellings. The commercial landlord is clearly in the business of leasing, and the safety incentive and loss spreading policies would seem clearly applicable. Yet the commercial lease situation is arguably unlike residential leases in ways that cut against strict liability. To begin with, the commercial landlord and tenant are more likely to be in a position of equal bargaining power than in the residential situation.\textsuperscript{289} Expectations of the parties may thus also differ significantly. Moreover, a commercial lease—more often than a residential lease—may have a long term, extending five, ten or more years, with the consequence that landlords have fewer routine opportunities for inspection. The commer-

\textsuperscript{285} Love, \textit{supra} note 3, at 150-53.
\textsuperscript{286} Id.
\textsuperscript{287} \textit{Daly}, 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.
\textsuperscript{288} Id. at 737, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87 (emphasis in original).
\textsuperscript{289} 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
cial tenant may also engage in extensive reconstruction of the premises to fit its particular needs. Where the defective condition arises because of this reconstruction, the landlord could argue that the defective condition has not arisen out of the "premises" he leased. Nevertheless, when injury does arise out of a defect in the leased premises, the case for strict liability is appealing. This is especially true when innocent third parties are injured. As between the innocent third party injured by the defective condition on the premises and the landlord, the landlord should bear the loss. Application of strict liability to lessors of commercial property would work little hardship on such landlords. Liability to third parties and the cost of acquiring appropriate insurance coverage could be allocated by the lease between the landlord and tenant.

Neither the majority nor the dissent focuses on an important issue raised by the adoption of strict landlord tort liability: the definition of "defectiveness" to be used in landlord cases. In some ways this is not a new issue at all. Courts for the past two decades have been giving content to the defect concept in strict products liability cases. These products liability decisions can be adapted to the leased premises context when injury is caused by a product that is a part of the leased premises. That approach to defectiveness can also be adapted to accidents caused by the physical structure of the premises itself, just as it would be in the application of strict tort liability to the sellers of mass-produced homes. Some cases which have applied strict liability to the sale of used machinery have suggested that a different standard of defectiveness should be applied to used, as opposed to new, machinery. That approach has questionable validity in the context of leased housing. As the used machinery cases recognize, a lessor of a product "chooses the product he leases in a significantly different way than does the typical dealer in used goods [and] the fact that [the lessor] offers [the product] repeatedly may constitute a representation as to . . . quality . . . ." Similar observations apply to landlords and leased dwellings, suggesting the inappropriateness of a relaxed standard of defectiveness.

CONCLUSION

The recognition in Becker v. IRM Corp. of the doctrine of landlord strict tort liability should have been no surprise. More than a decade of decisions foreshadowed the California Supreme Court's decision, and academic commentary had increasingly recognized the likelihood of this development. The doctrine of landlord strict tort liability appears surprising only if one focuses narrowly on the issue of landlord tort liability. Against the backdrop of the traditional law of landlord and tenant, which so strongly favored landlords, even the holding in Sargent v. Ross that landlords owed tenants and others a full duty of due care seemed a dramatic departure from the past. Yet this narrow focus distorted reality. The rules of landlord tort liability are merely one aspect of a multifaceted common law of contract, tort, and property that specifies when one who is injured by another may receive compensation.

A quarter century prior to Becker, many were surprised when courts announced the doctrine of strict tort liability for defective products. Too often, observers had focused narrowly on "tort" law

295. 38 Cal. 3d at 464-65, 698 P.2d at 122, 213 Cal. Rptr. at 219.


297. See, e.g., PROSSER & KEETON, supra note 3, at 722; Love, supra note 3, at 130-57; Ursin, supra note 33, at 837-38 n.82.
299. See Ursin, supra note 2, at 299. Prior to the landmark decisions in Henning-
and had seen tort law through the 1950’s as virtually synonymous with the negligence rule. A broader focus, however, would have revealed that contract law had allowed a warranty cause of action for personal injury damages in food products cases for some time. This “warranty” law proved in the 1960’s to be a precursor to strict tort liability for food and other products. A narrow focus on doctrinal categories impeded understanding of these developments.

Similarly, strict products liability is not a unique and isolated doctrinal development. It is part of a complex web of common law doctrines evolving side-by-side to reflect contemporary conditions and values. Traditional tort, contract and property law reflected the “felt necessities” of the nineteenth century, as perceived by the judges of that era. Holmes in The Common Law could confidently proclaim that the “general principle of our law is that [the] loss from accident must lie where it falls . . . .” Today, however, we are not content with this simple solution to the complex problem of injuries in our industrial society. Strict products liability is simply one example of the evolution of the common law toward increased protection of individuals from unexpected risks and hazards. Indeed, as Grant Gilmore has demonstrated, “the expansion of [products liability] is by no means an isolated development . . . ; a comparable expansion of liability has been going on, notably since 1900, over the whole spectrum of our law of civil obligations, alike in contract and tort.”

sen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), and Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. (1963), commentators had frequently simply assumed that strict liability would not apply generally in products cases. See, e.g., Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401, 442-43 (1959). This assumption enabled commentators to avoid discussing the merits of strict products liability. Id. It also precluded them from sensing the monumental changes that were about to occur in products liability. Id. In a 1957 symposium discussing whether strict liability should extend beyond food, only Fleming James argued for such an extension. See James, General Products—Should Manufacturers Be Liable Without Negligence?, 24 Tenn. L. Rev. 923, 926 (1957). For contrary views, see Green, Should the Manufacturer of General Products Be Liable Without Negligence?, 24 Tenn. L. Rev. 928, 984 (1957); Plant, Strict Liability of Manufacturers For Injuries Caused By Defects in Products—An Opposing View, 24 Tenn. L. Rev. 938, 940 (1957); Noel,Manufacturers of Products—The Drift Toward Strict Liability, 24 Tenn. L. Rev. 963, 1017-18 (1957). In 1960, Prosser approved of the extension beyond food. See Prosser, Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1124 (1960). He wrote, however, that extension beyond products for bodily use “is likely to proceed . . . slowly . . . . After many . . . accretions, we may arrive at a ‘general rule’ of strict liability for all products, with certain specified exceptions; but these things are still of the uncertain and indefinite future.” Id. at 1139-40.

300. See e.g., Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 85 (1942); Seavey, supra note 117, at 375.
302. See supra notes 299-300.
303. O.W. Holmes, supra note 117, at 5.
304. Id. at 76.
305. Gilmore, Products Liability: A Commentary, 38 U. Chi. L. Rev. 103, 111
During this period, "the legal rules and doctrines which successfully immunized actors or enterprisers from liability have been in the process of breakdown."\textsuperscript{306}

These common law developments obviously have not occurred in a vacuum. Rather, they mirror broader societal changes. During the nineteenth century, economic conditions, the perceived needs of industrialization, and the values of individualism\textsuperscript{307} may have supported the view that losses from accidents must lie where they fall.\textsuperscript{308} During the twentieth century, in contrast, we have increasingly become a society that seeks to protect its members from unexpected catastrophes. This century has seen a proliferation of programs and plans aimed at affording this protection. Various forms of health, disability, liability and other insurance have bloomed. Similarly, legislative enactments, dating back to the turn of the century, have included workers' compensation, social security, compulsory automobile liability insurance, Medicare, and no-fault automobile plans. Although hardly a comprehensive system, these programs demonstrate a commitment to provide compensation to protect individuals from the overwhelming economic loss that may be occasioned by vicissitudes of life such as accident, old age, sickness and unemployment.\textsuperscript{309} The growth of strict liability, as well as the expansion of tort and civil liability generally, is "part and parcel of [this] great shift" in societal values.\textsuperscript{310}

Landlords have been unable to escape this process of modernization by taking refuge behind once sacrosanct rules of property law. Indeed, tenants were first afforded greater rights by the judicial application of principles of modern contract law to leases—most nota-

\textsuperscript{306} Id. at 112.
\textsuperscript{307} See L. Friedman, A History of American Law 410 (1973); M. Horwitz, The Transformation of America 1760-1860, at 85-99 (1977). See also W. Nelson, Americanization of the Common Law 1760-1830, at 144 (1975). Some scholars have emphasized the link between industrialization and tort law less than others. See, e.g., E. White, Tort Law in America 3 (1980). While it is clear that goals other than economic growth also shaped the development of nineteenth-century tort law, the perceived desirability of economic growth was a dominant value of that era and was reflected in the law. See J.W. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States 19 (1956). For a recent contribution to the literature, see Rabin, The Historical Interpretation of the Fault Principle: A Reinterpretation, 15 Ga. L. Rev. 925 (1981). See also supra note 116.
\textsuperscript{308} O.W. Holmes, supra note 117, at 76.
\textsuperscript{309} See 2 F. Harper & F. James, supra note 31, at 759.
bly in the recognition of the implied warranty of habitability. Yet these same contract principles of warranty law had already been transformed by courts into the doctrine of strict tort liability when personal injury was caused by a defective product. That this strict liability rule might eventually be applied to landlords was clearly implied by the warranty of habitability cases which had emphasized that "public policy compels landlords to bear the primary responsibility for maintaining safe, clean, and habitable housing . . . ." Writing two decades ago—just two years after his court's landmark adoption of strict products liability—Chief Justice Traynor clearly stated his view of the future of tort law: "The development of strict liability for defective products . . . presages the abandonment of long standing concepts of fault in accident cases. The significant innovations in products liability may well be carried over to such cases." Becker's application of strict tort liability to landlords confirms the accuracy of Justice Traynor's prediction and is a logical consequence of the evolution of the law of tort, contract, and property over the past decades.

311. Green, 10 Cal. 3d at 629, 517 P.2d at 1176, 111 Cal. Rptr. at 712.
313. Green, 10 Cal. 3d at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.
315. Traynor, supra note 310, at 375.