Reducing the Slipperiness of Slip and Fall Litigation: Establishing Strict Liability for Hotels

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COMMENTS

REDUCING THE SLIPPERINESS OF SLIP AND FALL LITIGATION: ESTABLISHING STRICT LIABILITY FOR HOTELS

I. INTRODUCTION

"Slip and fall." To those not involved in the legal field this term may evoke humorous images of a hapless victim in a vaudeville sketch who slips on a banana peel, skids across the stage and is left sprawling in front of the audience—with the only real harm being the injury to his dignity. In real life, however, slip and fall accidents rarely afford such comic relief; injuries are often quite serious and legal relief, if sought, is often difficult to attain.

Although slip and fall accidents involving business premises are among the most frequently recurring premises-liability cases, a plaintiff who decides to bring a tort action against the owner or occupier of business premises must be aware of the difficult hurdles he will encounter in presenting his case. The usual claim in slip and fall cases is based on negligence, which requires an initial determination that the defendant breached his duty of care toward the plaintiff and caused of the plaintiff's injury.

The difficulty with the traditional reliance on the negligence theory of liability in slip and fall claims is the tremendous proof burden involved in establishing such a claim—even assuming a duty on the part of the defendant toward the plaintiff. For instance, in the banana peel example it will not suffice for the plaintiff to merely show that he slipped on the banana peel, fell, and was thereby injured. In most instances, the plaintiff must establish that the defen-

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1. Falls are the second leading cause of accidental death, ranking behind motor vehicle fatalities and ahead of fire and burn fatalities. AMERICAN RED CROSS, STANDARD FIRST AID AND PERSONAL SAFETY 221-22 (2d ed. 1979); PETER ARNOLD, EMERGENCY HANDBOOK 221 (1980).
4. Id. at 385-98.
dant knew of the existence of the banana peel on the floor and neither remedied the situation nor warned the plaintiff. Further, the mere fact that the plaintiff fell will not necessarily prove that a real danger in fact existed. It is usually a question for the fact-finder to determine if the floor, at the time the plaintiff fell, was truly slippery enough to have posed a danger. In short, it is not sufficient for the plaintiff to prove that he fell on a slippery floor; he must prove that the floor was "dangerously" slippery. Finally, under the comparative negligence theory of liability, if the defendant demonstrates that the plaintiff was also contributorily negligent, any recovery the plaintiff may be awarded can be reduced proportionately.11

This comment focuses on one particular category of slip and fall accidents—those occurring in the bathrooms of hotels—and discusses the problems that are inherent in bringing a slip and fall claim based on negligence.12 This category of cases presents situations that justify lessening the plaintiff’s burden of proof. Specifically, in those cases in which the proprietor of a hotel has failed to provide adequate safety features that could have prevented the plaintiff’s fall, this comment proposes that strict liability constitutes the more appropriate theory of recovery.

Bathrooms present a grave risk to users because of the slick surfaces created by the combination of ceramic and water.13 Given this great risk, it is proposed here that a hotel bathroom not equipped with safety features should be deemed a defective product within the strict liability context.14 The relative paucity of cases involving such

6. Id.
7. Id.
8. See J. Page, THE LAW OF PREMISES LIABILITY § 7.3 (1976); see also infra text accompanying notes 36-42.
9. Id.
10. Id.
12. For convenience, only the term "hotel" is used in this comment to encompass the bathrooms of motels and inns as well.
13. The Dep’t of Health, Education, and Welfare estimated in 1968 that there were 125,000 injuries involving bathtubs and showers. In a ranking of 32 consumer product categories based on the absolute frequency of injuries multiplied by their relative severity, as reported by hospital emergency rooms, injuries involving bathtubs and shower structures ranked eighth on the list. NATIONAL SAFETY COMMISSION ON PRODUCT SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 10, 40 (June, 1970). According to the National Safety Council, there were 373 accidental bathtub drownings in 1979. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1983 ed.).
14. The American Red Cross advises the use of safety mats in the bathtub and the installation of handholds as means of preventing falls in the bathroom. AMERICAN RED CROSS, STANDARD FIRST AID AND PERSONAL SAFETY 222 (2d. ed. 1979). Also, the National Com-
slip and fall claims may attest to the notion that in the past, plaintiffs and attorneys have viewed such claims as too difficult to win by relying on negligence law. The vast number of travelers in the United States who utilize temporary lodgings, however, makes the safety standards of hotels a matter of public concern. Imposing strict liability on owners who fail to install adequate safety measures would not only deter such conduct, but would also ensure recovery for the victims.

II. Duty of Care

Prior to 1968, California courts had long held that an owner or occupier of a business establishment had a responsibility to maintain his premises in a reasonably safe condition for those patrons defined as invitees under traditional premises liability theory. That standard of care included the duty to make reasonable inspections, to discover latent defects, and to remedy or warn of those defects; when the existing danger was obvious or patent, however, generally no liability could be attributed to the owner. Under that standard


In addition, in California the floors of public showers and public swimming pools are required to have non-skid surfaces. State Building Code, 24 Cal. Adm. Code tit. 24, § P909 (e) R.68, No. 41 (1968); Public Swimming Pools, 17 & 24 Cal. Adm. Code tit. 17, § T17-7782 R.80, No. 52 (1980). This indicates the State's recognition of the need for some safety features in showers, even though there is no corresponding provision for motels and hotels.

These safety features that can be utilized in bathrooms are not intended to comprise an exhaustive list.


Traditional negligence theory uses three categories to determine the status of a person on the premise of another, and in turn, the duty of care owed to him by the occupier of the land. Highest on the legal scale is the "invitee" who enters the premises for business purposes concerning the occupier, such as a patron. The occupier of land is under a duty to protect the patron against dangers that he knows of or should know of. A "licensee" is one who enters the land with the consent of the occupier, but for his own purposes rather than those of the occupier. Reasonable care must be used to protect the licensee against only those dangers of which the occupier is aware. A "trespasser" is one who enters the premises without consent. The traditional rule, modified by some jurisdictions, has been that the occupier is not liable for injury to the trespasser. W. Prosser, Handbook of the Law of Torts 357-98 (4th ed. 1971).


the occupier was not treated as an insurer of such invitees, and the mere occurrence of injury on his premises to an invitee would not create a presumption of negligence on the part of the possessor. The rule was that in order to impose liability on an owner, an invitee needed to show that the owner had knowledge of the condition or that the condition had existed for such a time that it was the duty of the owner to know of it.

With the landmark case of Rowland v. Christian in 1968, California discarded the common law system of determining an owner or occupier's duty towards an entrant according to the individual's classification as either an invitee, licensee or trespasser. In so doing, the California Supreme Court elevated the degree of care traditionally owed licensees to that owed invitees, and thus adopted a single duty of reasonable care for possessors of land. The proper test for determining the liability of the possessor, the court stated, is whether he has acted as a reasonable person in the management of his property in view of the probability of injury to others. The court stated that although the facts giving rise to the plaintiff's status as trespasser, licensee, or invitee "may have some bearing on the question of liability, the status is not determinative." Thus negligence could be found if an occupier of land failed to warn of, or failed to repair a concealed condition that involved an unreasonable risk of harm to those he knew were about to come in contact with it provided the occupier was aware of the concealed condition. Consequently, the standard of "reasonable" care owed business guests by a business proprietor under the old classification system remained unchanged.

An innkeeper's duty of care towards his guests is the same standard as that applied to the owner of any business establishment. It is

20. Id.
22. Id.
23. Id.
24. Id.
25. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.
26. Id.
27. Id. The court also noted that the same result could have been reached by an expansion of the term "invitee" to include all persons invited upon the land. Id. at 120, P.2d at 569, Cal Rptr. at 105.
28. See, e.g., Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914, 918 (1969) (court holding that the traditional legal duties declared to exist in favor of an invitee have not been jettisoned by Rowland).
an innkeeper's duty to exercise reasonable care in maintaining his hotel in a reasonably safe condition, 29 to make reasonable inspections, 30 and to remedy or warn of latent defects. 31 The proprietor of an inn has a corresponding right to assume that his guests will perceive those dangers that should be obvious through ordinary intelligence and experience. 32

III. THE SLIPPERINESS OF SLIP AND FALL LITIGATION

A. Slip and Fall Claims in General

While the duty of care owed by the owner of a business establishment to his guests is a question of law, 33 the more difficult issues are those of fact and are thus determined by a jury. 34 The plaintiff must present substantial evidence on many issues in order to avoid a directed verdict for the defendant. 35 The difficulties presented by these proof requirements under ordinary negligence law are numerous.

The mere fact that the plaintiff slipped on the floor of a business establishment, whether due to a foreign substance on the floor or due to the floor's inherently slippery characteristics, will not suffice to prove that the floor was in fact in a "dangerous condition" at the time of the accident. 36 Additionally, even if a plaintiff is able to prove that the condition of the floor was "dangerous," he must still

32. Most cases have held that an owner is not liable for an injury to an invitee that was due to a patent defect or to a latent defect of which he had no knowledge and could not have discovered by reasonable inspection. See, e.g., Adams v. Dow Hotel, 25 Cal. App. 2d 51, 76 P.2d 210 (1938); Trembley v. Capital Co., 89 Cal. App. 2d 606, 201 P.2d 398 (1949).
35. Id.
36. Id. Those issues include: 1) whether the condition was dangerous, 2) whether the dangerous condition was latent or patent, 3) whether the defendant had knowledge of the dangerous condition, 4) whether the defendant exercised due care in inspecting the premises, in repairing defects that were discovered or should have been discovered, and in warning of latent defects, 5) whether the dangerous condition was the proximate cause of the plaintiff's injury, 6) whether the plaintiff exercised due care in his actions, and 7) the amount of damages, if any, plaintiff should be awarded. Id.
prove that it was dangerous at the time he fell.\textsuperscript{37} When the dangerous condition was caused by an isolated or unexpected danger or defect, evidence may not be readily available because of the transitory nature of the danger or defect. Even if the dangerous condition was an inherent characteristic of the floor, proof of this issue may necessitate expert scientific testimony.\textsuperscript{38}

Among the most common slip and fall claims brought are those involving injuries to a plaintiff after slipping on an allegedly overwaxed floor of a business establishment.\textsuperscript{39} Even if evidence is presented that the floor in question was recently waxed prior to the plaintiff's fall, it still remains a question of fact as to the degree of danger.\textsuperscript{40} As the court in \textit{Cagle v. Bakersfield Medical Group}\textsuperscript{41} stated, "[S]lipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe."\textsuperscript{42} This question depends upon jury determination of the facts; therefore, findings can be inconsistent in similar factual situations.

Claims based on the traditional negligence formula also require a determination that the defendant had either actual or constructive knowledge of the dangerous condition of the premises.\textsuperscript{43} Knowledge on the part of the defendant can be proven by evidence indicating that: 1) the defendant \textit{created} the dangerous condition; 2) the defendant \textit{knew} of the creation of the dangerous condition; or 3) the dangerous condition existed long enough that knowledge of its existence could reasonably be imputed to the defendant.\textsuperscript{44} Because evidence of actual knowledge is usually difficult to obtain, plaintiffs will generally attempt to show constructive knowledge. This is an especially difficult hurdle for a plaintiff in a slip and fall action to overcome given the generally temporary nature of the problem.\textsuperscript{45} The plaintiff

\begin{itemize}
\item \textsuperscript{37} Id. at § 7.2 (1976).
\item \textsuperscript{38} Spencer, \textit{Coefficients of Friction in Slip and Fall Accidents}, CTLJ 49 (Fall 1973) (discussion of the necessity of measuring friction coefficients in slip and fall cases).
\item \textsuperscript{40} Id.
\item \textsuperscript{41} 110 Cal. App. 2d 77, 241 P.2d 1013 (1952).
\item \textsuperscript{42} Id. at 81, 241 P.2d at 1015 (quoting Nicola v. P.G.&E. Co., 50 Cal. App. 2d 612, 615-16, 123 P.2d 531, 599 (1942)).
\item \textsuperscript{43} See, e.g., Scott v. Alpha Beta Co., 104 Cal. App. 3d 305, 163 Cal. Rptr. 544 (1980).
\item \textsuperscript{44} Id. See also Douglass, \textit{Torts—Slip and Fall—Theories of Recovery}, 33 J. of Air Law & Commerce 171 (1967).
\item \textsuperscript{45} See supra text following note 37.
\end{itemize}
risks a directed verdict or a nonsuit if he is unable to produce evidence of either actual knowledge, or of facts sufficient to show that knowledge could be imputed.  

Furthermore, because the duty of the proprietor of a business establishment is defined in broad terms of "reasonableness," triers of fact are given the discretion to find that the defendant's conduct was reasonable even if there is evidence of a dangerous condition and of the defendant's knowledge of such a condition. In short, the plaintiff is thus faced with an exceedingly burdensome proof problem in establishing negligence, and the outcome is uncertain and impossible to predict.  

Compounding the severity of the requirements that must be met in building a prima facie case is the variety of defenses available to the defendant. The defendant will in most cases claim that he has exercised reasonable care in the maintenance of his establishment and that the premises are reasonably safe. He may argue that he had no knowledge of the alleged condition or that even if the condition was dangerous it was obvious, and thus the plaintiff's own negligence was the cause of his injury. Moreover, a defendant may claim that even if the alleged condition existed, it was not dangerous nor was it the cause in fact of the plaintiff's injury.

Even if the plaintiff successfully develops his claim of negligence and counteracts all defenses of the defendant, he may still encounter a partial bar to his recovery under the doctrine of comparative negligence. This doctrine, which was adopted by the California Supreme Court in *Li v. Yellow Cab Co.*, attempts to allocate responsibility and liability for the damage among the parties in direct proportion to the respective party's negligence. Thus, although the contributory negligence of a plaintiff in an action for negligence no longer bars his recovery, the amount of damages awarded is diminished in direct proportion to the jury-determined amount of a plain-

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47. See supra text accompanying note 15.  
49. Showing causation is generally less of a problem. If the plaintiff is able to identify a condition that could have caused the slip at a time and place concurrent with plaintiff's fall, it will usually be sufficient to support an inference that the condition was a cause-in-fact of the fall. See J. Pace, THE LAW OF PREMISES LIABILITY § 7.2 (1976).  
52. Id. at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.
tiff’s negligence.

In summary, a slip and fall cause of action based on negligence is difficult to maintain. Problems of proof, the availability of defenses, and the doctrine of comparative negligence all operate as disincentives to bringing such a suit. These problems are compounded when a plaintiff suffers a slip and fall injury in a hotel bathroom.

B. Slip and Fall Injuries Occurring in Hotel Bathrooms

1. Claims Based on Negligence

Several factors peculiar to slip and fall claims involving motel or hotel bathrooms render recovery additionally difficult under ordinary negligence law. The most important distinction relates to the fact that these accidents often occur before few, if any, witnesses. This tends to make it extremely difficult for the plaintiff to prove that the dangerous condition actually existed, or that it existed for such an extended period of time that constructive notice should be imputed to the defendant. It is also likely that the defendant will claim that the plaintiff created the dangerous condition himself.

Falls in the bathroom are often the result of a person slipping on a wet area such as the floor, the bathtub, or the shower. As wetness is an inherent characteristic of bathrooms, defendants may claim that such a danger was apparent and therefore the ensuing injury was the result of the plaintiff’s own negligence. The intrinsic logic of such an argument may overshadow other equally plausible arguments. In spite of the many injuries every year, the dangerous nature of bathrooms arguably may not be readily obvious as many people use them every day without injury. Alternatively, if the danger is obvious, a negligence claim supports the proposition that hotel bathrooms should be required to have adequate safety features because hotel patrons are usually not familiar with the hotel bathrooms prior to using them and may be less aware of the extent of the particular

53. Id.
54. See generally Annot., 93 A.L.R. 3d 258 (discussion regarding the proof problems of cases involving hotel defects).
55. See supra text accompanying notes 36-42.
56. See supra text accompanying notes 43-46.
57. See, e.g., Miller v. Shull, 48 So. 2d 521 (Fla. 1950). See also text accompanying notes 50-53 regarding comparative negligence.
58. See Lincoln Operating Co. v. Gillis, 114 N.E.2d 873, 876 (Ind. 1953) (stating that “[w]hile it is a matter of common experience that water makes an enamel or porcelain tub more slippery than a dry tub, it is also a matter of common experience that millions of people take baths in such tubs without ever falling or injuring themselves.”).
risks.

The difficulties in proving a claim based on negligence have resulted in some seemingly inconsistent outcomes in cases involving hotel bathrooms. In one case, the owner of a hotel was found not liable for injuries sustained by the plaintiff when the porcelain handle of the bathroom hot water faucet broke in his hand, even though the court acknowledged that the bathroom had not been maintained in a reasonably safe condition.\textsuperscript{59} In a similar case, however, a hotel owner was found liable for injuries suffered by a patron who fell in the shower after being hit by a spray of water when the faucet assembly came off the wall.\textsuperscript{60}

The many hurdles a plaintiff must confront in any slip and fall action thus become virtually insurmountable barriers when the claim results from a fall suffered in a hotel bathroom. It may be surmised that attorneys often advise plaintiffs injured in these kinds of situations to forego pursuing their claims or to expect less than adequate compensation. However, such discouragement should not be accepted as the natural consequence of a person's attempt to seek relief for a genuine claim. A better alternative lies in urging the court to utilize a more appropriate formula for determining fault.

2. \textit{Claims Based on Statutory Violation}

The enactment of legislation requiring that hotels install non-skid flooring, safety bars, and handholds would not alone obviate the difficulties that a slip and fall plaintiff encounters in proving his case. Although a hotel owner would be presumed to have failed to exercise due care if he violated such a statute, ordinance, or regulation,\textsuperscript{61} his liability is not deemed absolute\textsuperscript{62} but rather negligence per se.\textsuperscript{63} Consequently, the defenses ordinarily available in negligence

\textsuperscript{59} Adams v. Dow Hotel, 25 Cal. App. 2d 51, 76 P.2d 210 (1938). The court held that the defendant had nevertheless exercised due care in inspecting for defects. \textit{Id.}

\textsuperscript{60} Wallace v. Speir, 60 Cal. App. 2d 387, 140 P.2d 900 (1943) (court found that the defect amounted to a lack of repair and distinguished the case from \textit{Adams}).

\textsuperscript{61} \textsc{Cal. Evid. Code} § 669 (a)(1) (Deering 1967). A plaintiff basing his tort claim on a hotel owner's violation of a safety statute would need to show that the statute was enacted to protect a class of persons, of which he is a member, against the type of harm that he suffered as a result of a violation. \textit{See, e.g.}, Veseley v. Sager, 5 Cal. 3d 153, 496 P.2d 151, 95 Cal. Rptr. 623 (1971).


\textsuperscript{63} Casey by Casey v. Russell, 138 Cal. App. 3d 319, 188 Cal. Rptr. 18 (1982); Levels v. Growers Ammonia Supply Co., 121 Cal. App. 3d 443, 121 Cal. Rptr. 779 (1975) (negligence per se is a rebuttable presumption of duty and breach of duty only).
suits of comparative negligence and assumption of the risk are still available to the defendant, and the plaintiff is still faced with the difficult proof problems of most slip and fall suits as discussed above.

IV. THE DOCTRINE OF STRICT LIABILITY

A. The Purposes of Strict Liability

The most common application of the doctrine of strict liability to premises-liability cases are those instances in which the entrants were injured as a result of either "ultrahazardous" or "abnormally dangerous" activities conducted on the premises. Although an argument could be made that one's use of a bathroom in a hotel that has not been equipped with adequate safety features constitutes an "ultrahazardous" or "abnormally dangerous activity," this argument is most likely untenable.

In spite of the limitations imposed by the traditional applications of strict liability to premises-liability cases, an owner of a hotel should still be held strictly liable if a guest is injured in a fall in the bathroom that could have been prevented if particular safety devices had been provided. The liability theory that should be applied in these cases is strict liability in tort under a products liability analysis.

The doctrine of strict products liability in California provides that manufacturers and other persons in the chain of distribution...

65. See generally J. Page, THE LAW OF PREMISES LIABILITY §§ 170-77, 8.10-8.19 (1976); W. Prosser, HANDBOOK OF THE LAW OF TORTS 492-540 (4th ed. 1971). Strict liability is also applied if the entrant was injured by a wild or domestic animal on the premises. Id. at 496-503.

In the line of cases involving ultrahazardous or abnormally dangerous activities, two rules of liability have emerged. One rule is that a possessor of land is held liable when "he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in light of the character of that place and its surroundings." W. Prosser at 508. The other rule limits the application of strict liability for a possessor of land to those cases which involve "ultrahazardous" activities, that is, those activities which "necessarily involve a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care," and are "not a matter of common usage." Id. at 512. The usual examples cited as abnormally dangerous or ultrahazardous activities include blasting and the storage of explosives. Id. at 512-13.

66. Such features might include non-skid surfacing on the floor, non-skid surfacing in the shower or tub, and handrails for the shower or tub. See supra note 14.
67. Common sense indicates that most courts would be unlikely to find a parallel between blasting and bathing. See supra note 65.
68. The following cases found that entities other than manufacturers were integral components of the enterprises that placed the alleged defective products on the market and thus were within the doctrine of strict liability: Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970) (a licensee); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal.
are liable without regard to fault when they place an article on the market which they know is to be used without inspection for defects, and the product proves to have a defect that causes injury. It is also required that the product was being used in the manner in which it was intended when the injury occurred. Therefore, if a vendor is in the business of selling a product and that product is in a defective condition and causes physical harm to a user, the vendor is held strictly liable for the resulting injuries. Most importantly, the application of the doctrine does not require either the transfer of title to the goods or an actual sale.

The justifications for imposing strict liability are to encourage manufacturers to provide safer products and to insure that the costs of injuries are borne by manufacturers and vendors rather than the injured persons. This latter objective is based on the rationale that those who place the product into the stream of commerce are better able to absorb the cost, discover defects, reduce the hazards inherent in the product, and to allocate the risks through insurance.


73. See generally W. Prosser, Handbook of the Law of Torts 641-62 (4th ed. 1971). See also Restatement (Second) of Torts § 402A, Comment c (1965), which states as follows:

On whatever theory, the justification for strict products liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id.
B. Appropriateness of Using Strict Liability in Hotel Bathroom Cases

Products liability case law unequivocally permits a plaintiff to recover damages when his injury results from a defendant's failure to provide an appropriate safety device for his product. A strict liability action is particularly appropriate when the injury that occurred is precisely the sort of injury that a safety device can be designed to prevent. Applying this analysis, it can be strongly argued that when a hotel proprietor leases a room without adequate safeguards in the bathroom, he is leasing a "defective product."76

In California, the scope of the strict products liability doctrine has been expanded to include all those engaged in the business of distributing a good to the public as an integral part of the overall producing and marketing enterprise. Following this approach, landlords who are in the business of leasing apartments have been found within the scope of the doctrine as lessors of defective furniture and appliances. Most recently, in _Becker v. IRM Corporation_ the court held that a landlord should be held strictly liable for the injuries of a tenant that were caused by a latent defect on the premises that existed at the time when the premises were let.80

The California Supreme Court had previously formulated this concept in _Green v. Superior Court_, stating that in most significant respects, the modern urban tenant is in the same position as any

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74. See, e.g., Campbell v. General Motors Corp., 32 Cal. 3d 112, 649 P.2d 224, 184 Cal Rptr. 891 (1982) (bus manufacturer found liable because city bus lacked guardrail); Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972) (liability found because lawn mower had unguarded opening to blade); Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970) (motel found liable because swimming pool had neither lifeguard nor warning); McNeil v. Yellow Cab Co., 85 Cal. App. 3d 116, 147 Cal. Rptr. 733 (1978) (taxi company could be liable because seat belt not visible to passenger).


76. See infra text accompanying notes 104-111 (discussion of "product" and "defect").


80. The plaintiff was injured by a defective shower door; the California Supreme Court found that the defendant was in the business of leasing apartments and thus was an integral part of the marketing enterprise by which the shower door in question reached the user. _Id._ at 464. (The court specifically refused to address the issue of whether strict liability would apply to a disclosed defect. _Id._ at 469 n.4).

other normal consumer of goods in that a tenant seeks to "purchase" housing from a landlord for a specific period of time. The court noted that the landlord who "sells" housing enjoys a much greater opportunity, incentive and capacity to inspect and maintain the condition of his apartment building than does a tenant. The court found, therefore, that a tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, i.e., as a living unit.82

The analysis articulated by the court in Green and followed in Becker provides a sound basis for treating the proprietor of a hotel as a "retailer" who should be subject to liability for defects in the rented premises. Just as an apartment landlord is in the business of leasing apartments, appliances, and furniture for furnished apartments, a hotel owner is in the business of leasing rooms and furnishings. Like the apartment landlord, the hotel owner is a vital link in the commercial chain, directly profits from the consumer's use of products provided as part of the rental unit,83 and is an integral part of the marketing enterprise by which those products reach the public.84

The policy considerations advanced in support of strict products liability are also applicable to cases involving falls that occur in hotel bathrooms that are not equipped with recognized and readily available safety features.85 The owner of the hotel is best able to absorb the cost of injury to a guest as he may purchase insurance to protect himself from such a loss.86 Furthermore, the owner is the one who can, and should, remedy the defect by installing safety devices because the consumer has neither the opportunity nor the authority to do so.87 Finally, because the owner should know that the bathroom is to be used by guests without inspection, he should be under an obligation to provide a bathroom equipped with proper safeguards.88

Strict liability does not confer absolute liability upon a defen-
dant, and the defendant does not necessarily become the insurer of the safety of the product. The plaintiff must still demonstrate that a defect in the product proximately caused the injury. Nevertheless, the use of the doctrine provides many sound legal advantages over the use of ordinary negligence law in slip and fall claims involving hotel bathrooms. The major benefit of utilizing the strict liability doctrine in these claims is that, in line with the purpose of the doctrine, the injured plaintiff is relieved of "many of the onerous evidentiary burdens inherent in a negligence cause of action." Negligence of the defendant need not be proven and the defendant's proof of due care will not absolve him of liability if the product was defective and the plaintiff was injured by it. Another extremely important benefit is that in some cases, once the plaintiff makes a prima facie showing of proximate causation, the burden of proof will shift to the defendant to prove the product was not defective. In addition, the use of the doctrine is not limited to latent product defects, but also extends to patent defects.

C. Application of Strict Liability

1. Identification of the "Product"

The plaintiff bringing a claim based on strict liability must be able to identify the product and the defect that caused the injury. Because the rule of product liability law in California is not confined to products that are inherently or unreasonably dangerous, arguably the "product" named in a products liability case involving a fall in a hotel bathroom could be a fixture within the bathroom or it could be the bathroom as a unit. A bathroom fixture is a "product" just as

89. See Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 384 (1978).
90. Id. See also Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161-62 104 Cal. Rptr. 433, 441-42 (1972).
91. Id. at 130, 501 P.2d at 1160, 104 Cal. Rptr. at 440.
94. Id.
95. Id.
98. Whereas the applications of strict liability in tort to premises liability cases generally involve only activities that are "abnormally dangerous" or "ultrahazardous," strict liability as
defective furniture and appliances have previously been deemed to be "products." Alternatively, the bathroom as a whole can be considered a product because products liability law has been extended to encompass articles other than chattels. This extension has included buildings and parts of buildings that contain defective components. In *Kriegler v. Eichler Homes, Inc.*, the court held that a homeowner was entitled to recover on the basis of strict liability for damage caused by the failure of a radiant heating system in a home constructed by the defendants. The court noted that the defendants were engaged in the mass production and sale of homes and that the plaintiff had relied on the defendant's skill in producing a home with a heating system that was reasonably fit for its intended purpose. An analogy can thus be drawn between defective bathrooms and their fixtures, and the defective furniture, appliances, and components of apartments and homes.

2. *Proving the "Defect"*

California cases have articulated three different tests for establishing whether a product was in a defective condition within the strict liability framework. If any one of the tests is met, the product is deemed "defective." First, a product may be found to be defective if an error occurred in the manufacturing process. Second, a product may be found to have a defect in design if it failed to perform as intended or if it was unreasonably dangerous to the user or consumer. A product is defective if it is in a hazardous condition at the time it leaves the seller's control. Furthermore, products liability law has supplanted the old distinctions drawn between a product and the container in which it is sold, with the view that such a product is sold as an integrated whole. W. Prosser, *Handbook of the Law of Torts* § 99 (4th ed. 1971). Therefore, a bathroom should be considered as an integrated unit.
safely as an ordinary consumer would expect when used in a reasonably foreseeable manner. Finally, a product may be found to have a defect in design, even if it satisfies ordinary consumer expectations, if the jury determines that the product's design embodies "excessive preventable danger." Under the last test, once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden shifts to the defendant to prove that the product is not defective. In applying those tests to slip and fall claims in the hotel bathroom context, an attorney must analyze the facts of each case to determine the most appropriate test under which to argue that a defective product exists.

If the product was designed to include a safety feature which was negligently omitted in the manufacturing process, it would appear that there is a clear "defect" under the first test outlined. For example, if a shower stall was designed to have non-skid surfacing which was omitted in the manufacturing process, or if a safety mat had suction cups that were improperly manufactured and thus failed to grip properly, those would constitute "defects."

It may also be argued in other instances that the bathroom was defectively designed because it failed to perform as safely as an ordinary consumer would expect. That argument is based on the contention that an ordinary consumer would expect that a hotel bathroom would be equipped with safety features that could adequately prevent falls. An argument may also be made that the bathroom,


See also Campbell v. General Motors Corp., 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982), wherein the court stated that "the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." Id. at 126 n.6, 649 P.2d at 233 n.6, 184 Cal. Rptr. at 900 n.6. This standard reflects a warranty analysis and is based on the theory that when a manufacturer places a product on the market, a representation is impliedly made that the product is safe for the tasks it was designed to accomplish. Id. at 118, 649 P.2d at 227, 184 Cal. Rptr. at 894.

105. "Excessive preventable danger" is found when the risk of danger inherent in the challenged design outweighs the benefit of such design. Campbell v. General Motors Corp., 32 Cal. 3d 112, 118, 649 P.2d 224, 227, 184 Cal. Rptr. 891, 894 (1982).

106. Id. at 119, 649 P.2d at 228, 184 Cal. Rptr. at 895. The jury may take into consideration the gravity of the danger posed by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer alternative design; the financial cost of an improved design; and, the adverse consequences to the product and to the consumer that would result from an alternative design. Southern Cal. Edison Co. v. Harnischfeger Corp., 120 Cal. App. 3d 842, 854, 175 Cal. Rptr. 67, 74 (1981) (quoting Barker, 20 Cal. 3d at 420, 143 Cal. Rptr. at 237, 573 P.2d at 455).

107. See supra text accompanying note 103.

108. See supra text accompanying note 104.
HOTEL STRICT LIABILITY

even if it satifies ordinary consumer expectations, is defective because the benefits of the bathroom as is do not outweigh the preventable dangers. Although an owner is likely to advance the argument that it is better to provide the hotel bathroom without additional safety devices than to increase the rental rates, an opposing argument can be made that the installation of adequate safety devices works to the economic advantage of the owner, if one considers that he may be able to reduce the cost of insurance by reducing the likelihood of accidents. Additionally, the costs of installing the safety features could be spread over a period of time. It would, therefore, appear that the risk of danger inherent in bathrooms without safety devices in most cases would far outweigh the costs and minor difficulties involved in installing safety features.

3. **The Causation Factor**

The California Supreme Court has stated that a defective product claim based on the lack of a safety device presents a factual issue which is merely the projection of our habit of expecting certain consequences to follow certain antecedents; a plaintiff in a strict liability action is not required to disprove every possible alternative explanation of the cause of the injury in order to have the case submitted to the jury. Consequently, in a strict liability claim one would not need to prove with certainty that the presence of a particular safety feature in a hotel bathroom would have prevented the plaintiff's fall, nor would the plaintiff be required to disprove all other possible explanations for his accident. Common knowledge and experience should afford a sufficient basis for concluding that it is more likely than not that the absence of a safety feature played a

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110. Reducing the likelihood of accidents could also work to increase the proprietor's goodwill among his customers.

111. In addition to proving that the product was defective, the plaintiff must also establish that the defective condition was in existence at the time the motel or hotel room was rented. See Priessman v. Ford Motor Co., 1 Cal. App. 3d 841, 852, 82 Cal. Rptr. 108, 114 (1969); Tresham v. Ford Motor Co., 275 Cal. App. 2d 403, 410, 79 Cal. Rptr. 883, 887 (1969); Erickson v. Sears Roebuck & Co., 240 Cal. App. 2d 793, 798, 50 Cal. Rptr. 143, 146 (1966). In the case of removable safety devices, then, the plaintiff would need to show that they were never provided by the proprietor so as to refute any charges that the plaintiff removed them prior to his accident.


113. Id. at 121, 649 P.2d at 229, 184 Cal. Rptr. at 896.
significant part in the accident.\textsuperscript{114}

It is incumbent upon the plaintiff in a strict liability action, however, to prove that he was injured while using the product in the manner in which it was intended to be used.\textsuperscript{115} Nevertheless, the defendant is required to anticipate "usual uses," misuses, and abuses of the product which are reasonably foreseeable,\textsuperscript{116} and to take reasonable precautions to either minimize the harm that may result from such misuse,\textsuperscript{117} or to warn against anticipated "unusual" uses.\textsuperscript{118} In applying those standards to a slip and fall claim that occurred in the bathroom of a motel or hotel that lacked adequate safety features, the plaintiff would need to prove only that he was injured while using the bathroom in a reasonably foreseeable manner,\textsuperscript{119} and that his injury was proximately caused by the lack of certain safety devices.\textsuperscript{120}

4. \textit{Implications of a Warning}

It has been found in some cases that no liability should be imputed to the defendant if he has given a warning or directions that, if heeded, would have defused the dangerousness of the product.\textsuperscript{121} Do these cases suggest that a motel or hotel proprietor need only post a sign stating, for instance, that the bathtub is dangerously slippery

\textsuperscript{114} Id. at 120, 649 P.2d at 229, 184 Cal. Rptr. at 896 (1982). Because the use of bathrooms is within the common experience of consumers, it will probably suffice if the plaintiff provides evidence concerning his use of the bathroom, the circumstances surrounding the slip and fall, and the objective features of the bathroom that are relevant to an evaluation of its safety; expert testimony would probably not be required. See id at 120-22, 649 P.2d at 229-31, 184 Cal. Rptr. at 896-98.


\textsuperscript{118} Luque v. McLean, 8 Cal. 3d 136, 139, 501 P.2d 1163, 1165, 104 Cal. Rptr. 443, 445 (1972); Bucary v. General Motors Corp., 60 Cal. App. 3d 533, 542, 132 Cal. Rptr. 605, 610 (1976). The plaintiff need not demonstrate that he was unaware of the defect that caused his injury at the time of the accident; that is, the defect need not be determined to have been latent. Id.

\textsuperscript{119} See supra text accompanying notes 115-17.

\textsuperscript{120} See supra text accompanying note 114.

when wet in order to be shielded from any liability should a guest be
injured in a fall in the tub? The position taken here is that warnings
alone should not be considered sufficient to protect the proprietor
from liability if the injury could have been prevented or lessened by
available safety devices.

A defendant should not be allowed to avoid liability merely by
giving a warning when he has reason to believe that a user will not
heed such a warning.122 It is foreseeable that hotels will have some
guests who are unable to read the warning, including young children
and non-English speaking persons. These guests should, nonetheless,
be provided protection. Moreover, a warning alone does nothing to
alleviate the dangerousness of the situation. For instance, if a person
begins to fall in a bathtub, an available handrail could prevent or
lessen the severity of the injury. In such a situation, the absence or
presence of a warning would be of no benefit once a person is in
peril. Finally, if a hotel owner is permitted to avoid liability merely
by providing a warning, this could act as a disincentive to providing
any safety features.

5. Comparative Fault and Strict Liability Claims

The doctrine of comparative fault has been applied to strict lia-
bility actions, as well as those concerning mere negligence. A plain-
tiff's recovery in strict liability may, therefore, be reduced to the ex-
tent that his own lack of reasonable care contributed to his injury.123
A plaintiff who was injured in a fall in a hotel bathroom due to the
lack of safety features may develop several lines of arguments in an-
ticipation of defenses that are likely to be raised.

The plaintiff may claim that at the time of the injury he was
using the bathroom, or its fixtures, in an intended or anticipated
manner.124 This position might be taken, for instance, if the defen-
dant argued that the fall occurred because the plaintiff had left a
soap film in the tub in which he fell. The plaintiff could respond
that even if this were true, his use of soap in the tub was an intended
use and therefore his actions should not serve to reduce recovery.

In addition, a plaintiff may argue that even if his use of the
bathroom or its fixture were a misuse, it was still a reasonably fore-
seeable use. This argument might be appropriate, for example, if the plaintiff had splashed a great deal of water onto the tile floor of the bathroom, upon which he later slipped. In this situation, he would argue that the defendant was completely at fault in not providing a hotel bathroom floor with non-skid surfacing; therefore any possible misuse should not reduce his recovery.

The plaintiff may also claim that even if his use of the bathroom or its fixture were not reasonably foreseeable, the "product" was nonetheless defective because he was not aware of the inherent danger of the "product" at the time he was using it. This position might be appropriate if, for example, the plaintiff had been doing exercises in the bathroom when he slipped. The plaintiff could argue that the floor was per se defective because of the lack of non-skid surfacing and therefore he should be entitled to full recovery.

V. CONCLUSION

The slipperiness of slip and fall litigation is the result of the traditionally onerous proof requirements imposed upon plaintiffs who bring claims based upon a negligence theory of liability. As a consequence, defendants who should be accountable for their negligence are often absolved of liability, and injured parties are forced to suffer the resulting inequities.

In the area of slip and fall claims which involve hotel bathrooms, strict liability should be imposed upon the proprietors if they have failed to provide adequate safety features which could have prevented the plaintiff's injuries. A plaintiff would, therefore, only be required to demonstrate that a defect existed and that such a defect caused the injury.

The application of strict liability would provide an incentive to hotel proprietors to take adequate measures to protect their guests from injury. It would also insure that such proprietors are held responsible for injuries to guests that are caused by an owner's negligent failure to maintain his establishment in a safe condition. The application of this doctrine would be both appropriate and just and

125. See supra text accompanying note 116.
127. See supra text accompanying notes 35-49.
128. See supra text accompanying notes 68-72 and 119-20.
129. See supra text accompanying note 73.
should work toward reducing the slipperiness of slip and fall litigation.\textsuperscript{130}

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