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# Sticky Bathtubs and Slippery Rules

Roger Bernhardt

*Golden Gate University School of Law*, [rbernhardt@ggu.edu](mailto:rbernhardt@ggu.edu)

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## Sticky Bathtubs and Slippery Rules

Roger Bernhardt

Now that the California Supreme Court in *Peterson v Superior Court* (1995) 10 C4th 1185, 43 CR2d 836 (reported at page 288), has reversed *Becker v IRM Corp.* (1985) 38 C3d 454, 213 CR 213, which imposed strict liability in tort on residential landlords, can attorneys relax the advice they formerly gave to clients? Not much, I think.

At common law, if a tenant complained that the bathtub was slippery or that he or she had slipped and fallen in it (the accident that happened in *Peterson*), it would have been easy to advise just ignoring the complaint. Caveat emptor protected against liability for preexisting defects, and the tenant's current possession did the same for subsequently arising defects, even assuming that a slippery bathtub was a defect. Landlord tort liability arose only when the landlord actually knew about a defect and did not disclose it to the tenant (the "latent defect" situation). Consequently, landlords had no duty to inspect for or to fix defects; liability arose only for known defects, and then because they were undisclosed rather than unrepaired.

*Becker* rejected the common-law rules and held that a landlord is strictly liable in tort for injuries caused by a latent defect existing when the landlord rents the premises to the tenant. But *Becker's* imposition of strict liability overshadowed its alternate holding that landlords also could be liable on simple negligence grounds. *Becker* held that a landlord could be liable, under general negligence principles, for matters that could have been disclosed by a reasonable inspection. The *Becker* holdings made it impossible to give advice that would insulate a landlord from liability; even careful inspections offered no guaranty against strict liability for undiscovered defects. It was still good policy to recommend diligent inspections, because inspections reduced the likelihood of undiscovered defects; but that advice did not offer the kind of safe harbor that landlords and their insurers wanted. No one enjoys being told: "Be careful, but you can be held liable anyway."

*Peterson* returns us to a negligence standard. Landlords now must inspect for preexisting defects, unlike the easy days of the common-law "latent defect" rule. The opinion also indicates that a landlord cannot satisfy the duty of due care merely by warning the tenant; a landlord now must roughen up the bathtub surface rather than just post a sign saying: "Beware of the slippery bathtub." Furthermore, although there is no obligation to inspect later for subsequent defects, a landlord must repair the defects once notified of them by the tenant. Thus, the advice to inspect and repair remains pretty much the same; only the sting resulting from its former futility is gone.

Because these obligations are judge-made rather than statutory law, we don't know much more than what each case actually tells us. Suppose, for instance, the landlord thinks that the smooth surface is not a problem? Can we say anything other than that a jury will later determine if the landlord was right?

We also don't know the effect of this rule on third parties. Earlier this year, a court of appeal held that real estate brokers were not liable to partygoers injured when a balcony collapsed under them, because the partygoers were not in privity with the brokers (*i.e.*, they were neither buyers nor sellers), and that "[a]s suppliers of information in a commercial context, the duty of [the brokers] only extended to 'intended beneficiaries' of the brokers' advice." *FSR Brokerage, Inc. v Superior Court* (1995) 35 CA4th 69, 70, 41 CR2d 404. (*FSR* relied on *Bily v Arthur Young &*

*Co.* (1992) 3 C4th 370, 11 CR2d 51, a case involving economic harm resulting from accountant malpractice. But is that a correct precedent in a case involving physical harm resulting from real estate broker malpractice?). What if the person who slips in the bathtub is not the tenant, but a guest? *FSR*'s privity defense may be inconsistent with *Merrill v Buck* (1962) 58 C2d 552, 25 CR 456 (which held a landlord's broker liable in tort for not informing a prospective tenant about a concealed stairway in the house, despite the observed lack of any privity between the parties). Even if the rental agent is not liable, might not the landlord be liable for nondisclosure of latent defects to visitors as well as tenants? (See discussion of *Donchin v Guerrero* (1995) 34 CA4th 1832, 41 CR2d 192, in *Changing Course—One Bite Is Enough*, 18 CEB RPLR 244 (Aug. 1995)).

Finally, what about the tenant as defendant? As a possessor of land owing a duty of care to visitors (under *Rowland v Christian* (1968) 69 C2d 108, 70 CR 97), does not the tenant have a duty to warn guests about the landlord's failure to make the tub sticky and safe? (And if the tenant does warn the guest, does that admonition insulate the landlord if the guest falls anyway?)

When personal injury questions are involved, real property law remains a rather unsafe harbor.