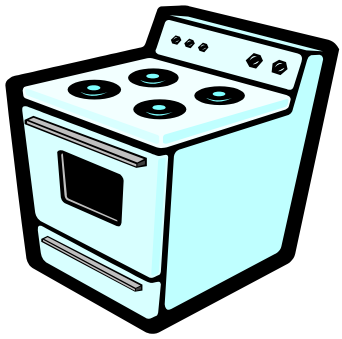
LIABILITY OF LANDLORD AND OTHERS WHEN STOVE TIPPED ON MINOR CHILDREN



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MEMORANDUM RE STOVE TIPPING

[J & G TRUST]

FACTS: The insured is an apartment building owner. He purchased a new Hot Point gas stove from Home Depot on or about August/September 2010, and had Home Depot install it. On December 18, 2010, Plaintiffs two minor children [ages 4 and 1]were playing/roughhousing in front of the stove with the door open when it tipped and boiling hot water came down burning the children.

REPORTS OF STOVE TIPPING HAVE INCREASED SINCE 1980'S:

Reports about tipping stoves first began to surface in the early 1980s, after manufacturers switched from cast iron to lighter materials. In 1991, the nonprofit Underwriters Laboratories created nationally recognized voluntary standards for new ranges and required that they be fitted with anti-tip devices and include a warning in instruction manuals.

In 1990, Underwriter Laboratories published a new standard effective the following year. The new standard mandated a 250 pound tip level. WCI, like other manufacturers, began using a u-shaped bracket bolted to the floor and connected to the oven to satisfy the UL standard. Anti-tip devices became a UL requirement June 3, 1991.

The tipping problem is fairly widespread. In a 1998 peer-reviewed article by three physicians in the Journal of Burn Care & Rehabilitation, a publication of the American Burn Association, electric stoves that are not secured to the floor or wall represent a significant safety hazard, particularly to small children. Gas stoves present less of a hazard because they are typically connected to the floor or wall by a metal gas line.

About 84 injuries and 33 deaths were caused by tipping stoves from 1980 to 2006 and documented by the Consumer Product Safety Commission. All stoves have the potential to tip over. The problem can be prevented with an inexpensive, L-shaped bracket mounted on the back of the range. However, they have only been required by industry standards since 1991, and many older stoves may not have them. Consumer groups contend that even some newer ranges do not have them.

Home Depot spokeswoman Jean Osta Niemi said the home-improvement company attaches anti-tip brackets free when customers request range installation. Buyers can choose between wall and floor mounts, she said.

Verdicts and settlements in these cases can be extremely high. For example, a Los Angeles woman received $20 million from Frigidaire Home Products and a local retailer after her range tipped over and scalded her son and two nephews with a simmering pot of stew. The children suffered third-degree burns over half their bodies.

All GE, Hotpoint and RCA free-standing, slide-in and drop-in ranges manufactured since the Fall of 1988 include an anti-tip device. This bracket is essential to the safe operation of the range. It provides protection when excess force or weight is applied to an open oven door. (The bracket is not needed on hi/low ranges). Hotpoint is an appliance is a company owned by General Electric, manufactures low-end appliances for non-commercial use.

NEGLIGENCE OF LANDLORD

REASONABLE CARE: All landowners, including landlords, must use reasonable care to protect people who come onto their property. (Civ.Code, § 1714; CACI 1000, 1001, 1006.) For landlords, reasonable care ordinarily involves making sure the property is safe at the beginning of the tenancy, and repairing any hazards the landlord learns about later. ***Stone v. Center Trust Retail Properties, Inc.*** (2008) 163 Cal.App.4th 608, 612.

NO STRICT LIABILITY: However, Landlords are not insurers of their tenants' safety (see ***Crane v. Smith*** (1943) 23 Cal.2d 288, 296) and are not required to make their premises absolutely "child proof" by providing every possible safeguard against injury to children on their premises. (See ***Pineda v. Ennabe*** (1998) 61 Cal.App.4th 1403 at p. 1405). Landlords and hotel proprietors lease residential dwellings and rent hotel rooms to the public does not bring them within the class of persons who properly may be held strictly liable under the doctrine of products liability. ***Peterson v. Superior Court*** (1995) 10 Cal.4th 1185, 1190.

LATENT DEFECTS: "[t]here is no duty on the landlord to inspect his tenement with the object of locating latent defects or of repairing them." (***Daulton v. Williams*** (1947) 81 Cal.App.2d 70, 75). There is no liability on the owner for injuries to an invitee from a hidden defect which could not have been discovered, either by reasonable care or reasonable inspection. ***Trembley v. Capital Co.*** (1949) 89 Cal.App.2d 606, 609.

The issue here would be whether or not the presence [or absence] of an anti-tipping device on a stove is one that is concealed and not obvious as to a reasonable landlord engaged in a reasonable inspection

NON-DELEGABLE DUTY: Under this doctrine, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating such duty to an independent contractor. (***Brown v. George Pepperdine Foundation****, supra,* 23 Cal.2d at pp. 259–260; see 6 Witkin, Summary of Cal.Law (9th ed. 1988) Torts § 1020, p. 411.) Simply stated, " '[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]' " (***Brown v. George Pepperdine Foundation****, supra,* 23 Cal.2d at p. 260.) Thus, for example, a landlord's duty to maintain elevators in a safe condition is nondelegable (***Brown v. George Pepperdine Foundation****, supra,* 23 Cal.2d at p. 259), as is the owner's duty to maintain a water heater which is a fixture (***Knell v. Morris*** (1952) 39 Cal.2d 450, 456–457), and the duty to maintain and repair a roof or other portions of the premises over which the landlord retains possession and control. (***Poulsen v. Charlton,*** *supra,* 224 Cal.App.2d at p. 268.) ***Srithong v. Total Investment Co.*** (1994) 23 Cal.App.4th 721, 726.

VICARIOUS LIABILITY: The nondelegable duty rule is a form of vicarious liability [thus, no Proposition 51 apportionment] because it is not based on the personal fault of the landowner who hired the independent contractor. Rather, the party charged with a nondelegable duty is " *held liable for the negligence of his agent,* whether his agent was an employee or an independent contractor." (***Maloney v. Rath****, supra,* 69 Cal.2d at p. 446.) Regardless of " 'how carefully' " the landowner selected the independent

contractor, the landowner " ' *is answerable for harm caused by the negligent failure of his contractor* [.]' " (***Brown v. George Pepperdine Foundation****, supra,* 23 Cal.2d at p. 260. ***Srithong v. Total Investment Co.*** (1994) 23 Cal.App.4th 721, 727. See also: ***Koepnick v. Kashiwa Fudosan America, Inc.*** (2009) 173 Cal.App.4th 32.)

NO COMPARATIVE NEGLIGENCE OF MINOR PLAINTIFFS:

The minor plaintiffs were ages 4 and 1. As a result of their ages they are presumed to be incapable of negligence.

See: BAJI 3.61: "This lawsuit was brought by the plaintiff , a minor, to recover damages for injuries.[A minor under the age of five years is incapable of contributory negligence as a matter of law.][Contributory negligence, if any, on the part of a parent does not bar a recovery of damages for injuries to a minor. However, an award of damages for non-economic losses, past and future, is affected by the negligence of a parent. [You will be instructed further on that matter.] [That issue will be presented for your consideration in the special verdict form.] [However, as the USE NOTES following BAJI 3.61 point out: The parents' contributory fault must be considered in any award for general damages. (***DaFonte v. Up-Right, Inc.*** (1992) 2 Cal.4th 593)].

NEGLIGENCE AND STRICT LIABILITY OF STOVE MANUFACTURER:

Depending on what is on the stove [or not on the stove as the case may be] as to warnings and available "anti-tipping" devices a claim for negligence and strict products liability can be stated against the stove manufacturer [as well as the distributor/retailer, HOME DEPOT].

See: ***Leary ex rel. Debold v. Syracuse Model Neighborhood Corp.***, 9 Misc. 3d 292, 799 N.Y.S.2d 867 (Sup 2005) (Child was injured when a frying pan containing cooking oil fell from the surface of a stove that did not contain an anti-tip device. The retailer/ installer of the stove moved for summary judgment. The court denied the retailers motion, ruling that defendant failed to prove that the stove without the anti-tip device was safe or that it acted reasonably in placing the stove into the stream of commerce.)

Under California law, " 'A *manufacturer* is *strictly liable* in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.' [Citation.] '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 than by the injured persons who are powerless to protect themselves." [Citations.]' [Citations.] Under the stream of commerce approach followed in California, 'strict liability in tort has been applied not only to manufacturers but to the various links in the commercial marketing chain' including retailers, wholesale-retail distributors, personal property lessors and bailors, and licensors of personalty. [Citations.]" (***Ortiz v. HPM Corp.*** (1991) 234 Cal.App.3d 178, 187). ***Garcia v. Becker Bros. Steel Co.*** (2011) 194 Cal.App.4th 474, 482.

"Strict liability has been invoked for three types of defects-manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (***Anderson v. Owens-Corning Fiberglas Corp.*** (1991) 53 Cal.3d 987, 995.)

"Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (***Lambert v. General Motors*** (1998) 67 Cal.App.4th 1179, 1185.) This is because strict liability in tort for a design defect in a manufactured product is analogous, in a practical sense, to a standard of care not being met. (***DeLeon v. Commercial Manufacturing & Supply Co.*** (1983) 148 Cal.App.3d 336, 348; see also 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1431, pp. 856-857.

NEGLIGENCE AND STRICT LIABILITY OF HOME DEPOT

It appears that HOME DEPOT installed the stove but I don't know if they used an outside installer or not. The fact that anti-tipping devices have been available since the early 1990's and HOME DEPOT has publicly stated they install them on all of their stoves makes it clear that HOME DEPOT [and their installer] shares liability. See above.

However, the installer [if an outside company retained by HOME DEPOT] may not be held strictly liable on the claim that by installing the stove it was providing a *service*, not a "product".

The rule of "strict liability" does not apply to consumers or persons or entities who merely furnish services to the public rather than products. Thus, in ***Ferrari v. Grand Canyon Dories*** (1995) 32 Cal.App.4th 248, 259, the court held that the conductor of a commercial raft trip, as the provider of a recreational service, was not subject to a product liability claim for an alleged defect in the design of a raft. The plaintiff in that case was a participant in a raft trip sponsored by defendant and was injured when she hit her head on a metal rail in the raft. (See also ***Ontiveros v. 24 Hour Fitness USA, Inc.*** (2008) 169 Cal.App.4th 424, 434–435 [dominant purpose of plaintiff's membership agreement was to provide fitness services; therefore, defendant not liable under products liability theory where plaintiff injured herself on an exercise machine with an allegedly defective component part]; and see ***Haynes v. National R.R. Passenger Corp.*** (C.D.Cal.2006) 423 F.Supp.2d 1073, 1085 [Amtrak not liable under products liability theory because it provided transportation services and use of a seat was incidental to those services]; see also ***Murphy v. E.R. Squibb & Sons, Inc.*** (1985) 40 Cal.3d 672, 678–679 [pharmacist who supplied defective drugs could not be held liable under strict products liability theory because he provided a service, even though he sold the drugs as part of providing that service].) See also: ***Gagne v. Bertran*** (1954) 43 Cal.2d 481, 487 [those who sell services not liable in absence of negligence or intentional misconduct]; ***Pierson v. Sharp Memorial Hospital, Inc.*** (1989) 216 Cal.App.3d 340, 345 [law of negligence, not strict liability, governs services]; Rest.3d Torts, Products Liability, § 19, subd. (b) ["Services, even when provided commercially, are not products"].) ***Jimenez v. Superior Court*** (2002) 29 Cal.4th 473, 479.

CONCLUSION:

It would appear that there will be liability as against the Landlord/Insured for the stove which was installed without an anti-tipping device.

The Landlord will be held liable on a non-delegable duty theory, which will preclude any apportionment under Proposition 51 with the installer/Home Depot.

Home Depot may be held strictly liable for the sale and distribution of the stove and GE [the maker of the Hot Point stove] will also be held strictly liable under a products

liability theory [failure to warn, and defective for failing to install anti-tipping device or making one available].

Finally, while the children are too young to be held comparatively negligent, one must consider a cross-complaint as against the minors' parents for negligence in failing to properly supervise the minors.