OVERVIEW

The Parties, this Court, and ultimately justice come together following the tragic injury to a young child. On April 1st, 2000, the SHEN family, including six year old TONY SHEN, were moving into a third floor apartment at the SARA-VALE Apartments. During the unpacking, Mr. SHEN, father of TONY, noticed the absence of young TONY and began looking in the small one bedroom apartment. He then noticed the bedroom window open and went to the open window, his heart racing. His worst possible fears were realized as he looked down to his unmoving son, lying in a large pool of blood on the asphalt below. Young TONY barely survived. Even after the best medicine can offer at a cost of nearly a half a million dollars, young TONY SHEN suffers from irreversible brain injury. Here, a simple and inexpensive locking device was broken on the window. The window was capable of opening wide, without restriction. Young TONY slid open the window, leaned against the screen which gave way, and fell three stories.

His fall and resulting traumatic injuries led to this just claim.

His tragedy, and that of his family, have been multiplied by the error of the Superior Court in granting Summary Judgment in favor of the Defendant/Respondents.

As set forth below, the Superior Court misinterpreted the duties of the landlord and the professional property management company citing, among other things, a depublished case. The duty of the landlord includes the well established "single duty of reasonable care in all the circumstances"; "[A] landlord in caring for his property must act toward his tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of injury, the burden of reducing or avoiding the risk, and his degree of control over the risk-creating defect. (citation)" Becker v. IRM Corp., infra. The

standard of care under that duty is not a legal issue, but a factual one to be determined by the trier of fact.

The SHEN family pleads to this Court to exercise its independent judgment, and overturn the error of the Superior Court, setting this claim just course by remanding this matter to the Superior Court with established law of the case.

THE CLAIM OF APPELLANT

Plaintiff TONY SHEN, through his guardian ad litem Zhiyong Shen, as well as his father Zhiyong Shen and his mother Yin Shao, filed this action on January 17, 2001 (CT 2). The operative First Amended Complaint was filed on April 26, 2001 (CT 83). The First Amended Complaint asserts as to the parties to this appeal, a claim of negligence and claims arising under products liability.

SUMMARY JUDGMENT

On March 10th 2002, the Honorable William J. Elfving ordered Summary Judgement against plaintiffs in favor of the Defendant Landlord and their management company, JOSEPH WONG, MEI YIN LIN, and the CAMBRIDGE MANAGEMENT COMPANY (CT 550). Judgment was entered on the summary judgment order on April 22, 2002 (CT 554).

STANDARD OF REVIEW

The Appellate Court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 579, 37 Cal. Rptr. 2d 653.

FACTUAL BACKGROUND

The Parties and Their Relationship

Plaintiff/Appellant TONY SHEN is the son of Plaintiffs/Appellants ZHIYONG SHEN & YIN SHAO SHEN. TONY SHEN was six years old as of the date of the incident (CT 245-247).

After signing a written rental agreement, the incident occurred as the SHEN family was moving into Apt. D-7 of the SARA-VALE Apartments on April 1st, 2000, the first day of their occupancy under the terms of the agreement (CT 258, agreement at CT 402-403).

The rental agreement prohibited the SHEN family from making any alterations or repairs to the apartment. The rental agreement also provided that the landlord was to have access to the apartment for purpose of inspection and repairs (CT 402-403).

The SARA-VALE Apartments were owned by Defendant/Respondent Joseph WONG. Defendant/Respondent WONG employed Defendant/Respondent CAMBRIDGE MANAGEMENT COMPANY, a professional management company to manage, maintain, and repair the apartment complex. Defendant CAMBRIDGE MANAGEMENT COMPANY, in turn, employed Dennis Rawson and Rose Rawson as on-site employees (CT 400-401, 366-367, 218, 295). The Rawsons were employed to perform dual functions; the Rawsons both managed and performed hands on site maintenance, repair and fabrication, although Rose Rawson performed mostly the office function (CT 20, 372, 378-379) The Rawsons had managed the property for seven years prior to the incident (CT 367).

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The Setting

The Apartment and Apartment Complex

At the time of the incident, the SARA-VALE Apartments were over 25 years old and part of a multi-building complex that consisted of 49 units (CT 449, 292).

The SHEN family apartment, D-7, was on the 3rd story, located above a first story parking garage and another apartment (CT 292).

The Window, Window Frame and Window Equipment

The bedroom window was approximately 6 feet wide and 4 feet high. The metal framed window sill was 35 1/4 inches from the floor (CT 433, 292, 433). The window was comprised of two sections; the left (when facing inside -out) being a fixed pane, and the right being a slider pane, The window thus opened by sliding one pane laterally right to left (CT 433-434). When fully opened, an open space of 33 1/4 inches wide, by 45 inches high was created (CT 292). The window was located three stories above a ground level car port, with the sill of the window over 21 feet from the ground below (CT 292).

When working properly, the slider window was regulated by a locking device. The locking device was located on the left vertical frame of the slider window, e.g., in the center of the window when closed, but slides to the left with the slider window as the slider window was opened. (CT 434).

When working properly, the locking device was operated by depressing the latch to unlock the window (CT 434).

When working properly, the locking device locked by "grabbing around," or otherwise overlapping the fixed metal center (the jamb) with the curvature of the locking device itself (CT 436).

The locking device was not working properly, however.

According to expert declarations submitted by Plaintiffs, the locking device, *when working properly* would have prevented TONY from

opening the window.

Instead, the window would not close properly and the locking device appeared to lock in place when, in fact, it did not (CT 434-437, 426).

The window frame was not square, deformed, bent and bowed. There is overwhelming evidence that this condition was long term due to abnormal building stress and, among other things, was readily observable from the carport area in the exterior rear of the building. According to expert declaration testimony, when looking at the window from the exterior at ground level, cracks could be seen radiating from all four (4) corners of the window According to the expert, cracks do occur at the corners of windows in buildings, on occasion. However, it is not normal to experience cracks, even minor cracks, at all four (4) corners of a window. In the case of the Apt. D-7 bedroom window, there are not only cracks at each of the four (4) corners [all large enough to be observable at all four (4) corners from the ground], but additionally the crack in the upper left is of significant size, in width, (estimated to be 1/8" to 1/4"), and also of significant length (from the upper left corner of the window all the way up to the top of the exterior wall at the roof line) (CT 434-437). The glass in the stationary window pane had developed a crack in lower corner (CT 284).

The conditions of the window fixtures leading to the incident were longstanding and should have been discovered by a reasonably diligent landlord (CT 508-509, 472-,473, 434-437, 319, 312).

As a direct result of the conditions, when applying a normal closing force, the bedroom window could be moved into a position where it appeared closed, but was actually not closed nor locked in position. When the window slider was pushed to the right, it would first make contact with the outside edge of the metal (vertical) jamb. At that point, the application of a firm force, actually pushed the window into the pocket, but not all the way. Because of the bowing, pushing of the window into the pocket caused a metal on metal contact with the locking device and made it seem like the window was closed. In order to gain a closed and secure position of the window in the jamb took literally a hard and jamming/slamming force to the right (CT 434-437).

A six (6) year old child would be able to exert a force of seven (7) pounds in the normal course of activity, without strain, and slide the window wide open (CT 437).

It would not be correct to refer to the child as “opening” the window, because it was never properly closed in the first place (CT 439-440).

Because the right side of the window frame (facing the window from inside the bedroom) was tilted up relative to the left side, also rendered the safety feature of being able to slide the locking device up the slider, and out of the reach of a child, unusable because the higher the locking device was slid vertically up the slider the more difficult it becomes to latch the window.

Prior to the incident, the right half of the window (slider window side) was covered by a screen (CT 356). The window screen would likely give way to the weight of a child (CT 474). The screens flimsiness was not apparent from its outward appearance so a child could have a

false sense of security and lean on it (CT 510, 474).

The Incident

The tragic incident occurred on the afternoon of the first day of the SHENs move in. At the time of the fall, the SHENs were opening boxes. TONY's father, Mr. SHEN was in the bedroom which contained two beds, several pieces of furniture and over 25 boxes. TONY's mother, YIN was in the kitchen. A bed was in close proximity to the window, although the bed had been left in that position by the movers and not yet been finally placed. (CT 251-255, 477).

Mr. SHEN, had earlier, briefly opened the bedroom window and then slid it into what he believed to be a closed and locked position. (CT 249-250, 352-360).

Mr. SHEN testified that as he briefly opened the window, TONY had approached, so he closed the window and directed TONY away. (CT 356-360)

Mr. SHEN had his back turned to the window, and was rustling through boxes when he noticed a silence. After noticing the silence he called to his wife asking where TONY was. As he looked about, he observed the window wide open. Rushing to the window, he looked down to see his son was bleeding on the ground directly. (CT 356, 358-360).

TONY SHEN had pushed the window pane wide open and fallen through the screen (CT 236, 249-360).

Other Information

In addition to cumulative testimony of experts that the minimum standard of practice on the part of a professional property manager includes inspection of above ground locking devices to assure the devices are in working order, professional property manager Rawson testified that it was his standard practice to inspect the devices and to

prevent occupancy of an above ground apartment with a non-functioning locking device (CT 373-377---although his counsel first made every possible effort to coach him into a different answer).

Rawson further testified that his standard practice was to perform a window maintenance check at each time an apartment is "turned" between tenancies (CT 371). His standard practice includes lubricating the window so that it slides easily and checking the locking device by snapping the window shut (CT371-372). He also usually places the locking device, which is capable of sliding up and down, 4-5 inches from the bottom (CT 373). However, Rawson's "turn" notes of 3-21-00 regarding Apt. D-7 do not indicate that he checked the operation of the bedroom window. They do indicate only that he lubricated the window, and he has no recollection of checking the locking device for this particular "turn" (CT 399, 373-375).

The evidence additionally indicates that the screen itself was most likely manufactured by professional property manager Rawson. Rawson regularly manufactured screens, and had manufactured at least 50 to 100 window screens for SARA-VALE Apartments prior to the incident. His manufacturing of the screens included "the whole shooting match," making them and installing them (CT 379, 389-390). His notes indicate he had installed the screen in Apt. D-7 and when viewing a picture of the screen, it reflected his "handiwork" (CT 389-393, 380-383).

Not surprisingly, given that the incident happened on the first day of occupancy, Mr. SHEN had no prior knowledge of any problem in the condition of the window equipment (CT 477). He assumed that since the apartment managers knew he was moving in with his wife and child, and that they advised him that the apartment was ready, the bedroom window as working properly (CT 477). His testimony (and the testimony of expert witnesses) is that his son did not have the knowledge or strength to unlatch the window had it been properly locked, and not

already open and only apparently closed (CT 477-478).

Prior to commencement of the tenancy, the Rawsons were specifically aware that the apartment would be occupied by the SHENs and their six year old child (CT 429-430, 257). No children had occupied Apt. D-7 for at least 17 years prior to the SHENs. (CT 283, 287, 369).

The pre-rental inspection of the apartment with the apartment manager was very brief and did not include any discussion or warnings regarding the condition, operation or characteristics of the bedroom window equipment or related dangers (CT 347, 351).

An expert in apartment management, E. ROBERT MILLER, a certified property manager, declared: 1) The window and screen were in such a defective condition that it was below the standard of care for the apartment managers to allow the SHEN family to move in; 2) That for the apartment to be made rentable, required that the window be fixed so that it would latch properly; 3) The apartment managers should have inspected and discovered the true condition of the window and screen, and revealed that condition to the SHENs before they moved in; 4) Mr. SHEN should have been made aware of the defects and dangers in the window and screen so he could have decided not to move in until the required appropriate remedial action had been taken; 5) Had the property managers met the standard care of their industry by taking the aforementioned appropriate steps to get the apartment rent ready the subject incident would not have happened; 6) The condition of the window was in violation of Calif. Civil Code sect. 1941.3 in that the window did not have a working lock; 7) Calif. Civil Code sect. 1941.3 reflects what is already an existing apartment industry standard that all windows, and especially second story windows covered by flimsy insect screens, have working locks; 8) The property managers should have been aware that tenants place beds and other items next to windows; 9) That there is always a risk that a child will fall out of a window if the

locking device is not operating correctly; and that is why it is important for the managers to have checked the operation of the bedroom window locking device before allowing the SHEN family to move in (CT 318-321).

Expert professional safety engineer Dr. Robert Liptai declared: 1) He essentially agreed with and reiterated what the apartment management expert stated; 2) The condition of the window as so dangerous that it violated section 203 of the Uniform Building Code (UBC) in that it was a dangerous condition, a safety hazard, and a public nuisance that was required to be abated; 3) The window was in violation of Calif. Health & Safety code sect. 17920.3. The window screen was defectively designed in that it should have had an adequate warning and that an ordinary consumer would have expected a window screen that did not contain a warning to be strong enough to prevent a child from falling out of a window; 4) The danger inherent in the current design of the window screen outweighs the benefit of the design; 5) Placing a warning on the screen that informs the public that the screen should only be used in conjunction with a window lock that prevents the window from opening more than 4 inches would have prevented the incident, cost very little and preserved the utility of the screen; 6) The danger of a child falling through a screen is grave and serious; several such incidents happen each year; parents and children are unaware of the danger; and studies show that such incidents can be virtually eliminated by providing proper warnings and window locks as stated above; 7) It was foreseeable to the property managers that a child could lean against the screen and that the screen could be used with a defective window that didn't latch correctly; 8) In light of the foreseeable uses and misuses of the screen the design should have incorporated a proper warning and safety device. (CT 311-317).

Human Factors expert Ralph Haber declared: 1) He was in agreement and reiterated what the other experts had stated; 2) Had the

locking device been working properly it, most probably, would not have allowed six year old TONY SHEN to slide open the window; 3) That had an adequate warning been placed on the screen it would have called the tenant's attention to the danger that the screen will not prevent a child from falling out of the window and warned the tenant to check for the safety lock that would be required (by an adequate warning) to be used in conjunction with the screen; 4) Had such a safety lock and warning been present the subject incident would not have happened. (CT 508-531).

Expert Dr. Stephen Wexler, who has substantial construction defect and building code experience declared: 1) He noted abnormal stucco cracks at all four corners of the exterior of the window indicating weakness and stress which coincided with undetermined structural load issues contained in the City of Sunnyvale's Plan Corrections. He noted that such weaknesses and stress are transmitted to the windows; 2) He reiterated the defects in the window that the other experts mentioned; 3) He felt the window was a hidden trap because it would seem to be latched when in fact it wasn't; 4) The window also violated *Section 104(d) of the 1970 UBC* because it was not maintained in a safe condition; 5) He concurred that the window violated *UBC sect. 203* and *HEALTH & SAFETY CODE SECT. 17920.3*; 6) The defective window was the cause of the incident. (CT 481-505).

Expert James Hinson, a professional engineer, testified that the hazard that lead to the injury of TONY SHEN could have been completely eliminated by a working window lock or other inexpensive safety features. (CT 473-476).

A TRIABLE ISSUE OF FACT EXISTS AS TO WHETHER THE DEFENDANTS/RESPONDENTS BREACHED THE STANDARD OF CARE

The Role of the Courts in Terminating Actions Summarily; In Negligence Cases Courts Ordinarily Determine the Duty, Not its Application

The summary judgment procedure has a limited purpose. Summary judgment is appropriate only where the moving party is entitled to judgment as a matter of law, where no triable issues of material fact are found to exist. Miller v. Bechtel (1983) 33 Cal. 3d 868, 874, 191 Cal. Rptr. 619; Stationers Corp. v. Dun & Bradstreet (1965) 62 Cal. 2d 412, 417, 42 Cal. Rptr. 449; Aguilar v. Atlantic Richfield (2001) 25 Cal. 4th 826,107 Cal. Rptr. 2d 841. The summary judgment procedure is not designed to abrogate the constitutionally mandated right to a jury trial. The Court is to determine only if a dispute in fact exists, not determine the dispute. CCP § 437c(c); Zavala v Arce (1997) 58 Cal. App. 4th 915, 68 Cal. Rptr. 2d 571.

The existence of duty is a legal issue to be determined by the Courts. Thompson v County of Alameda (1980) 27 Cal. 3d 741, 167 Cal. Rptr 70. However, once a duty exists, unlike the issue of duty,

> What constitutes "ordinary care" under the facts of any particular case is usually a question for the jury, which must view the conduct as a whole in the light of all the circumstances. Thus, it is common practice for the jury to determine the standard of conduct to be applied within the compass of the broad rule that the prescribed conduct must conform to that of a "reasonably prudent man under the circumstances." (Citations) In the absence of legislatively or judicially declared standards, the question whether or not the conduct of a party conformed to that of a "reasonably prudent man" is left to the jury's determination when different conclusions may reasonably be drawn from the evidence. (Citations) Laird v. T. W. Mather, Inc. (1958) 51 Cal. 2d 210, 331 P.2d 617.

Accordingly, "the questions of the reasonableness of the risk of harm and the application of the standard of due care to particular facts are mixed questions of law and fact (or questions of 'law application' [citation]) which we have traditionally regarded as better answered by juries," rather than judges. Schwartz v Helms Bakery (1967) 67 Cal. 2d 232, 237, fn. 3, 60 Cal. Rptr. 510.

Substituting the judgment of the court for that of a jury is particularly inappropriate in negligence cases. A jury reflects the personification of the community and has the potential to bring a wider array of practical experience and knowledge to that task than could a single individual such as a judge. A jury, as a reflection of collective wisdom and understanding concerning the conditions and circumstances of everyday life, is also particularly well suited to determine what conduct is reasonable in the application of the reasonable person standard of care. Prosser & Keeton on Torts, 5th ed, § 32, p. 175.

Moreover, in order to defer to juries on the application of the facts under the appropriate standard of care, all evidence must be viewed in the light most favorable to the opposing party only after the moving party has met his or her burden of carrying forward on the motion. Aguilar v Atlantic Richfield, supra. Similarly, the court is expressly prohibited from granting summary judgment on the basis of inferences reasonably deducible from the evidence if those inferences are contradicted by other inferences or evidence which raise a triable issue as to any material fact. Code Civ. Proc. § 437c(c).

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The Defendant/Respondent Landlord Had a Well Established "Single Duty of Care" under General Negligence Principles

The landlord's duty and resulting standard of care towards tenants

under general negligence principles is well established. The landlord has a “single duty of reasonable care in all the circumstances" towards tenants. Brennan v Cockrell Invest (1973) 35 Cal. App. 3d 796, 111 Cal. Rptr. 122; Becker v IRM (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213.

> Civil Code section 1714, subdivision (a) establishes the fundamental principle of negligence liability, providing: "everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary skill in the management of his property or person, . . ."
>
> Rejecting the prior distinctions made by the common law as to invitees, licensees, and trespassers, the landmark case of Rowland v. Christian, supra, 69 Cal.2d 108, 111 et seq. held that the fundamental rule was applicable to the liability of owners and occupiers of land. The fundamental principle is applicable to the landlord's liability to the tenant, and the landlord owes a tenant a duty of reasonable care in providing and maintaining the rented premises in a safe condition. (Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903, 924 [162 Cal.Rptr. 194]; Evans v. Thomason (1977) 72 Cal.App.3d 978, 985 [140 Cal.Rptr. 525]; Golden v. Conway, supra, 55 Cal.App.3d 948, 955; Brennan v. Cockrell Investments, Inc., supra, 35 Cal.App.3d 796, 800-801.)
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> . . . we believe that under the policy standards articulated in Rowland, a due regard for human safety and health compels the imposition on a landlord of a duty of due care in the maintenance of the premises." (Stoiber v.

Honeychuck, supra, 101 Cal. App.3d 903, 924.) Becker v. IRM, supra at 467-468.

The established rule is, then, that a tenant is within the class of persons to whom a property owner owes a duty of care. "[A] landlord in caring for his property must act toward his tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of injury, the burden of reducing or avoiding the risk, and his degree of control over the risk-creating defect. (Citations)" Becker v IRM, supra, at 468.

While the foregoing standard of care is set by the courts, as noted above, its application is, with rare exception, the province of the trier of fact. "Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard." Ramirez v Plough, Inc. (1993) 6 Cal. 4th 539, 546, 25 Cal. Rptr. 2d 97. Indeed, absent the rare exception, there can be no set rule for the application of the standard of conduct to the particular case.

> "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." (Rest.2d Torts, § 282.) Thus, as a general proposition one "is required to exercise the care that a person of ordinary prudence would exercise under the circumstances." n2 (Polk v. City of Los Angeles (1945) 26 Cal.2d 519, 525 [159 P.2d 931]; Rowland v. Christian (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]; see Civ. Code, § 1714, subd. (a).) Because application of this principle is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. (Citations) " 'There are no "degrees" of care, as a matter of law; there are only different amounts of care, as a matter of fact ....' [Citation.]" (Donnelly v. Southern Pacific Co. (1941) 18 Cal.2d 863, 871 [118 P.2d 465].) Flowers v. Torrance

Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685.

Thus, whether a landlord acts with reasonable care ordinarily depends on if the landlord acted toward its tenant as a reasonable person under all of the circumstances, including consideration of the likelihood of injury, the probable seriousness of injury, the burden of reducing or avoiding the risk, and his or her degree of control over the risk-creating defect. Becker v IRM , supra; Evans v Thompson (1977) 72 CA3d 978, 140 Cal. Rptr. 525; Portillo v Aiassa (1994) 27 Cal. App. 4th 1128, 1135, 32 Cal. Rptr. 2d 755; Golden v Conway (1976) 55 Cal. App. 3d 948, 955, 128 Cal. Rptr. 69; Brennan v Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 800-801, 111 Cal. Rptr. 122; Alcaraz

v Vece (1997) 14 Cal. 4th 1149, 1158-1159, 60 Cal. Rptr. 2d 448.

The Single Duty of Care is the Rule; Departure is the Rare Exception

Departure from the general rule of ordinary care is exceedingly rare, and ordinarily requires a finding of a public policy exception.

> . . . the general rule in California is that all persons have a duty to employ ordinary care to prevent others from being injured as a result of their conduct. (Ballard v. Uribe, supra, 41 Cal.3d at p. 572, fn. 6; Lipson v. Superior Court, supra 31 Cal.3d at p. 372; Rowland v. Christian (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].) Thus, any "duty" analysis begins "with the fundamental policy embodied in Civil Code section 1714, providing liability for injuries to another caused by one's failure to exercise ordinary care under the circumstances." (Elam v. College Park Hospital, supra, 132 Cal.App.3d at p. 339.) Liability for negligent conduct is, therefore, the rule. No exception is made unless clearly supported by public policy considerations. (Citations)
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> **********
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> "Any departure from the fundamental principle involves the 'balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]'" (Becker v. IRM (1985) 38 Cal.3d 454, 467 [213 Cal.Rptr. 213, 698 P.2d 116, 48 A.L.R.4th 601], quoting Rowland v. Christian, supra, 69 Cal.2d at pp. 112-113; Ballard v. Uribe,

supra, 41 Cal.3d at p. 572, fn. 6.) Moreover, in determining whether "liability" can be imposed if negligence is proved, the courts are guided by "history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall." (Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40, 46, [123 Cal.Rptr. 468, 539 P.2d 36]; see Elam v. College Park Hospital, supra, 132 Cal.App.3d at p. 340, fn. 9.) Lopez v McDonald's (1987) 193 Cal. App. 3d 495, 238 Cal. Rptr. 436.

The Single Duty of Care under General Negligence Principles Applies to the Window Fall Suffered by Tony Shen under the Circumstances of the Present Case

The Landlord Has an Obligation to Reasonably Anticipate and Prevent Falling

It is well settled that the obligation of landlord extends to the anticipation of, and reasonable prevention of falling.

Brennan v Cockrell Invest. (1973) 35 Cal. App. 3d 796, 111 Cal. Rptr. 122, illustrates the principle,

> In November 1968, William M. Brennan ("Plaintiff") rented a single family residence from Bill D. Cockrell dba Cockrell Investments, Inc. ("Defendant"). . .
>
> On October 25, 1969, while plaintiff was descending the back stairway, the right railing broke and plaintiff fell to the ground, sustaining injuries.
>
> Reduced to the simplest terms, the only issue is whether the court correctly stated the law to the jury.
>
> Historically, the liability of landlords to tenants injured on demised premises has been governed by the principles of law contained in BAJI No. 8.40, which was given by the trial court herein. . .
>
> California departed from the traditional rules governing the liability of the owners and occupiers of land in the case of Rowland v. Christian, 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496], when the court held that

section 1714 of the Civil Code controlled the liability of tenants for injuries to their social guests . . .

". . . [In] the absence of statutory provision declaring an exception to the fundamental principles enunciated by section 1714 . . . no such exception shall be made unless clearly supported by public policy." (Ibid. at p. 112.)

The Rowland court decided that no public policy required that an exception be carved out of the statute for tenants in possession when they were sued by their guests. The question in the case under review is whether one should be made for landlords not in possession when they are sued by their tenants.

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. . . Possession and degree of control over the premises are significant factors to be weighed in determining whether or not the landlord failed to meet the statutory standard of care. Indeed, these considerations go to the very essence of the negligence issue. But it is impossible to perceive any legitimate public interest that would be promoted by the creation of a landlord immunity exception to the code provision. That a landlord must act toward his tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of such injury, the burden of reducing or avoiding the risk, and his degree of control over the risk-creating defect, seems a sound proposition and one that expresses well the principles of justice and reasonableness upon which the law of torts is based. It is no part of fairness and rationality to transform possession and control from mere factors bearing on negligence into barriers to consideration of that issue. (See 2 Harper & James, The Law of Torts (1956) § 27.16 at p. 1509.) As the court said in Rowland, "[To] focus upon the status of the injured party, . . . in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values." (Ibid. at p. 118.) Brennan v Cockrell Invest. (1973) 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (cited with approval in *Peterson v Superior Court*, supra.

Numerous cases apply general rules of negligence in prevention of falls against owner and occupiers of premises, under a panoply of

circumstances, including against landlords**.**

Falls From High Places, Including Windows, Are Not Excepted from the Single Duty of Care

The standard of care to be exercised by the landlord as it pertains to anticipating and guarding against children falling from high places, including windows, is also governed by the well accepted principles of general negligence; e.g. to care for his property as a reasonable person would under all of the circumstances. See Amos v Alpha Prop. Mgmt. (1999) 73 Cal. App. 4th 895, 87 Cal. Rptr. 2d 34. Moreover, there certainly does not appear to be any overriding public policy reason to use a different standard for falls from high places than from low places----nor has any post *Rowland* decision announced one. The factors simply require application based upon the changed circumstances. Again, once the duty is established, the only question is whether there was negligence "in fact". "'There are no "degrees" of care, as a matter of law; there are only different amounts of care, as a matter of fact...' [Citation.]" Flowers v Torrance Memorial Hospital Medical Center, supra.

The determination of whether there was negligence in fact, is not a legal issue but a factual one. The court only intervenes if it is impossible for reasonable minds to differ or a public policy exception has been established.

The Superior Court in this matter misinterpreted a series of cases in California and elsewhere that have addressed the issue of landlord negligence *for not placing window screens* sufficiently sturdy to prevent a child from falling through a window screen in high places. The cases, dating back many decades and commencing in the 1920's, initially split across the country on the issue. See McKenzie v Atlantic Manor (1965) 181 So.2d 554 noting the split. California adopted the rule that there was no liability on the part of a landlord for not installing screens designed to prevent falls in *Schlemmer v Stokes (1941) 47 Cal. App. 2d*

164; 117 P.2d 396 (“It is a matter of common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out”, following the line of cases holding that it was “common sense that screens are to keep insect out not children in”).

Foremost, this Court must recall that when the screen cases developed in California and elsewhere, the duty of California landlords was not the negligence standard and quite different, instead " that, absent fraud or deceit on the part of the landlord in concealing latent defects, or a covenant or statutory- duty to repair, he is not liable for injuries to the tenant caused by defects in leased premises." See Brennan v Cockrell Invest., supra.

More recently, however, the Courts have addressed falls by children from high places including windows by looking to the underling single duty of due care under the circumstances without imposing judicial rules of conduct limited to the purpose of an insect screen. Most often, as in this matter, the purpose of a screen has little bearing on the duty.

Anderson v Sammy Redd & Assc (1994) 278 N.J. Super 50, 650 A.2d 376 provides a sample of this,

> In granting summary judgment, the motion judge concluded that a window screen is not a protective device. He reasoned that window screen's intended purpose is to keep insects out and allow air in. As a result, defendants could not be liable for Steven's death because the window screen, properly installed or not, was not intended to prevent him from falling. The motion judge relied on the following language of Egan v. Krueger, supra, 103 N.J.L. at 46, which reads: "A screen in a window, obviously, and of common knowledge, is not placed there for the purpose of keeping persons from falling out of a window, anymore than in the glass in the window itself is placed there for that purpose. Consequently, it is manifest that his accident was not the result of the failure of the defendant to perform any duty which he owed to the child for her protection." While the motion judge felt constrained to adhere to Efan v. Krueger, landlord-tenant law has evolved substantially and expansively in the past sixty-seven years to impose upon a landlord a duty to provide reasonable safe premises for its tenants, their families and guests. The motion judge's reliance on Egan v. Krueger led to a determination that no duty was owing to Anderson because a window screen is not a protective device.
>
> We read Egan differently. As we understand its holding, the court's rationale was not necessarily that no duty to install screens exists. Rather, the court concluded that a breach of that duty was actionable only in respect of consequences directly related to the purpose for the imposition of the duty. Thus, for example, since the purpose of the duty to install screens was to keep insects out, the landlord would only be responsible for damages resulting from insects getting in. By the same token since the purpose of the duty was not to keep children from falling out the window, the landlord was not responsible if a child actually did fall out of a window either not screened or improperly screened. In sum then, as we understand Egan, what it actually did was to strictly define both foreseeability and proximate cause in terms of the purpose of the duty. Those limitations are, however, no longer in accord with the modern view of landlord liability which holds the landlord

> actionably negligent for any injury resulting from a breach of any duty provided the injury is foreseeable and proximately caused by the breach.
>
> It is axiomatic that a landlord is under a common-law duty to maintain premises under its control. Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140, A.2d 199(1958). This duty requires the exercise of reasonable care to guard against foreseeable dangers arising from the use of the premises. Anderson v Sammy Redd & Assoc., supra.

The issue is not the purpose of a screen, but the obligation of the landlord to anticipate conduct and reasonably guard against danger. Take, for instance, a *low* window, screened or not, in a house with access to a pool. No one would disagree that the owner should anticipate and guard against exit by a small child to a pool. The issue is not the purpose of a screen, but the duty of the owner/occupier to care for controlled property as a reasonable person under all of the circumstances, including consideration of the likelihood of injury, the probable seriousness of injury, the burden of reducing or avoiding the risk, and his or her degree of control over the risk-creating defect; here to prevent a possible drowning.

As with any type of potential fall, a landlord has an obligation to act with reasonable care depending on consideration of the forseeability of

potential harm, likelihood and probable seriousness of that injury, and burden involved in reducing the risk.

Screens may have as their purpose keeping insects out, but the method most often recommended to parents to prevent falls from windows by their children is to lock the windows. Other than tethering their children, this is the plausible alternative and, if anything does, makes “common sense”.

In California, only two published cases have addressed falls by children from high windows post *Rowland*, both by the Second Appellate District, Division Seven.

In *Amos v Alpha Prop.* (1999), supra, the Second Appellate District, Division Seven, addressed a child’s fall from an open window in an apartment building common passageway by applying general negligence principles, to “take reasonable precautions against the foreseeable risk a child could fall from an upper story hall window”.

The *Amos* Court, analyzed the issue based upon the construction of the appropriate “single duty of care” standard after factoring in the existence of control reflected by the occurrence taking place in a common passageway.

The *Amos* Court explained and distinguished it’s earlier decision in *Pineda v Ennabe (1998) 61 Cal. App. 4th 1403, 72 Cal. Rptr. 2d 206,* which addressed also a child’s window related fall.

The *Amos* Court in explaining *Pineda* first made clear that the “single duty of reasonable care under all the circumstances" was the governing rule. The Court explained that in *Pineda* it had sought to avoid creation of any judicial rules of reasonable conduct—in particular, any special duty to prevent children from falling from windows.

> Seizing on our opinion in Pineda v. Ennabe, defendants contend they owed no duty to assure that children do not fall out of second story windows. If by "assure" defendants mean they are not insurers of the safety of their tenants, they are correct. (61 Cal. App. 4th at p. 1409; Schlemmer v. Stokes, supra, 47 Cal. App. 2d at p. 167.) However, neither Pineda, Schlemmer, nor any other case we have found contradicts the fundamental principle that a landlord has a duty to take reasonable precautions to prevent young children such as Carl from suffering injuries in the common areas of their apartment building. (See discussion, ante, at pp. 898-903.) As we explained in Pineda, our intent in that case was to avoid imposing "some new duty of care . . . to prevent children from falling out [windows]." (61 Cal. App. 4th at p. 1408, italics added.) Amos v Alpha Prop., supra at 904-905.

The *Amos* Court, in explaining *Pineda,* distinguished *Amos* from *Pineda* on grounds of forseeability of the particular kind of harm, sometimes known as the “unforeseeable plaintiff “exception. As explained by the California Supreme Court in *Ballard v Uribe (1986), 41 Cal. 3d 564, 224 Cal. Rptr. 664*, the “particular harm” analysis may sometimes lead a public policy exception to the single duty rule,

> The question of "duty" is decided by the court, not the jury. . . In California, the general rule is that all persons have a duty "'to use ordinary care to prevent others being injured as the result of their conduct . . . .'" (Rowland v. Christian

> (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561] (citations omitted); Civ. Code, § 1714.) Rowland enumerates a number of considerations, however, that have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate: "the major [considerations] are *the foreseeability of harm to the plaintiff*, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (Italics added.) (69 Cal.2d at p. 113.) The foreseeability of a particular kind of harm plays a very significant role in this calculus (see Dillon v. Legg, supra, 68 Cal.2d 728, 739), but a court's task -- in determining "duty" -- is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. Id at fn 6 (underlining added, italics in original).

It must be noted, though, that the "particular harm" *exception* is just that, e.g. a departure from the general rule. Absent a public policy purpose in finding the exception, it is the single duly of due care under the circumstances that applies. As the *Amos* Court explained, in *Pineda*, no amount of care could have prevented the type of injury that actually occurred because the window was already open when a child jumping on a bed fell against the screen. A warning on the screen would not have helped, nor a functional locking device have helped because the window was already open,

> Pineda involved a five-and-a-half-year-old child who fell out the second story window of her own apartment, knocking

out the screen as she fell. The undisputed evidence showed the lower edge of the window from which the plaintiff fell was 44 inches from the floor. The plaintiff's mother had placed a bed, consisting of a mattress on a box spring, directly under the window. The plaintiff, playing without adult supervision, was bouncing on the bed. She knocked the window screen out or aside and fell 30 feet to the ground. The plaintiff sued the landlord for negligence claiming the landlord should have placed a warning label on or near the window advising tenants the screen would not keep a person from falling out.

We concluded the landlord "owed no duty of care to prevent the kind of accident which occurred here." (Pineda v. Ennabe, supra, 61 Cal. App. 4th at p. 1408.) We based this conclusion primarily on the ground the accident was not the foreseeable result of failing to put warning labels on windows . . . There was little likelihood that respondent's failure to place warning labels or latches on the window screens would cause an accident of the kind which occurred here, unless the parent was negligent. The degree of certainty that an injury would occur was small, and the connection between the landlord's conduct and any such injury was slight. . . . [P] The policy of preventing future harm would not likely be significantly advanced by imposing a duty here. A parent oblivious to the obvious danger posed by an unsupervised child near an open upper story window would likely be equally oblivious to the warning." (Ibid.)

Pineda broke no new ground in the analysis of a landlord's duty or breach of duty to a tenant. It is well established that while the negligence of a parent is not imputable to the child in an action by the latter for injuries, such negligence may nevertheless be relevant in determining whether a third person is liable for such injuries. (Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 198 [60 Cal. Rptr. 499, 430 P.2d 57].) As our Supreme Court stated in Akins: "[A] person does not act negligently if he cannot be expected to reasonably foresee the existence of an unreasonable risk of harm to another through the intervention of negligence of a third person." (Ibid.) In Pineda, we held the landlord could not be expected to reasonably foresee the parent of a five-year-old child would put what amounted to a trampoline in front of a second story apartment window and allow the

> child to bounce on it unsupervised. n3 In addition, our opinion was consistent with numerous cases which have held when a child falls out of an apartment window the presence or absence of an insect screen on the window is irrelevant in determining a landlord's negligence because the purpose of an insect screen is to keep insects out, not people in. (E.g., Schlemmer v. Stokes, supra, 47 Cal. App. 2d at p. 167; Gustin v. Williams (1967) 255 Cal. App. 2d Supp. 929, 932-933 [62 Cal. Rptr. 838].) (Footnote omitted)
>
> The present case is distinguishable from Pineda in several ways.
>
> Here, it was reasonably foreseeable a toddler would get up from watching television in the living room, open the apartment door, wander out into the hall, be attracted by an open window and fall out. This is not the kind of case in which negligent supervision, if any, affected the landlord's duty of care. (Cf. Akins v. County of Sonoma, supra, 67 Cal. 2d at p. 198; Pineda v. Ennabe, supra, 61 Cal. App. 4th at p. 1408.) The distinction between the present case and Pineda in terms of foreseeability is similar to the distinction between the Brady case, ante, and another case from Louisiana, Yates v. Tessier (1926) 5 La.App. 214. In Brady, it will be recalled, a young child fell out of an apartment window his mother had left open because it was July and the landlord had not repaired the air conditioning. (424 So.2d at p. 1105.) On the issue of duty the court held the window, which was only inches off the floor, created an unreasonable risk of harm to children and that it was reasonably foreseeable a child would enter the window opening. (Id. at p. 1106.) . . .

The *Amos* Court specifically clarified that the effectiveness of locking devices or warnings was an issue of fact not connected to the purpose of a screen.

> Another distinguishing feature is that liability in the present case is not based on the presence or absence of a screen on the hallway window. Even Carl's own expert testified a screen on the hallway window would not have prevented this accident.
>
> **********
>
> . . . our opinion in Pineda does not preclude Carl from

> presenting evidence of the reasonableness of placing some kind of protective device on the hallway window. In Pineda we observed placing bars on the windows might reduce the risk of a child falling out but could pose a new risk of trapping tenants during a fire. (61 Cal. App. 4th at p. 1408.) This was merely dictum--a general observation not based on any specific evidence in the record. In contrast, the record in the present case includes testimony from one of defendants' experts who conceded barring the hallway window would not violate the fire code if the bars were removable from the inside to permit escape and the fire department had other means of access to the second floor such as the interior stairway or through the tenants' apartment windows. Amos v Alpha Prop. Mgmt., supra.

The *Amos* Court also considered the issue of control as the fall in *Amos* occurred in a common area and the fall in *Pineda* did not. Id at 905. Control in this case is addressed in detail below.

While the SHEN case is easily distinguished from *Pineda*, it should nonetheless be considered that *Schlemmer v Stokes*, as discussed above, predates *Rowland* and was thus decided under a different standard of conduct. At best *Schlemmer* is limited to the simple proposition that insect screens are not to keep children in (which could still be true even under the current standard), not to address the appropriateness of working locking devices, safety guards or warning labels under the circumstances.

More significantly, no public policy exception has been found by any post *Rowland* Court that either creates a special duty on the part of landlords to prevent falls from windows, *or conversely*, limits liability on the part of landlords for falls from windows. The standard remains the single duty of care.

Many factors distinguish this case, particularly those factors addressed below as "Circumstances in the Present Case Are Particularly Inappropriate for Creating an Exception From Imposition of the Single Duty of Care."

Moreover, the particular harm suffered by young TONY has nothing in common with *Pinnetta*. Here, if nothing else, TONY's father actually closed the window and believed he had locked it. (CT249-250, 352-360).

The incident occurred the first day of the tenancy, negating any opportunity for discovery of the broken lock through reasonable diligence by the parents (CT 251-255, 477). To the contrary, there is evidence that the landlord should have discovered the broken locking device (CT 508-509, 472-,473, 434-437, 319, 312). There is no evidence TONY was misusing the bed nor that the bed was placed near the window by the parents or that the parents were otherwise negligent (CT 251-255, 477).

In addition to a functioning locking device likely having saved TONY, a warning label may have changed the behavior of TONY or his parents.

Of course, the conduct of the child or parents serves to terminate liability of the landlord only if it could not be anticipated and guarded against by the landlord. See Weirum v RKO General, supra.

Circumstances in the Present Case Are Particularly Inappropriate for Creating an Exception From Imposition of the Single Duty of Care

Initially, it must be recalled that general duty of due care is the rule, *departure is the exception*. Lopez v McDonalds, supra. No post *Rowland* Court has created an exception for landlords as to falls, especially falls from high places, including windows. *Absent an exception, juries decide whether the standard of care has been met.*

The Landlord Maintained the Ultimate in Degree of Control; Complete Control

It is well settled that degree of control is a factor in determining both the duty and whether an alleged tortfeaser met his standard of care under the circumstances. So to for landlords.

> "[A] landlord in caring for his property must act toward his tenant as a reasonable person under all of the circumstances including the likelihood of injury, the probable seriousness of injury, the burden of reducing or avoiding the risk, and *his degree of control* over the risk-creating defect. (Citations). Peterson v. Superior Court, supra (emphasis added).

The *existence* of control is, in fact, an issue of "major importance" in imposing liability on landlords. Alcaraz v Vece (1997) 14 Cal. 4th 1149, 1158, 60 Cal. Rptr. 2d 448. *Degree* of control, however, ordinarily presents a question of fact. Id.

It is clear that the duty applies to conditions existing at the time of turnover of the premises to the tenant.

> As Becker makes clear, a "landlord at time of letting may be expected to inspect an apartment to determine whether it is safe," and will be subject to liability for "those matters which would have been disclosed by a reasonable inspection." (Citations) Brantley v Pisaro (1996) 42 Cal. App. 4th 1591,50 Cal. Rptr. 2d 431.

After occupancy is commenced, liability continues, depending

upon proof of continuing control, including,

> such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he or she fails to disclose them to the tenant, where a nuisance exists on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common areas. (Uccello v. Laudenslayer, supra, 44 Cal. App. 3d at p. 511; Rest.2d Torts, § 357, 360-362.) A "common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury." (citation) Id.

The existence of control in the present case is a significant factor in common with *Amos v Alpha Prop.*, supra. In fact, in both *Amos* and the present case, control was exclusively in the hands of the landlord.

Here, the landlord exercised the ultimate degree of control, e.g. complete control to utter exclusion of the tenant in several ways.

As this Court is certainly aware, leases seem to be increasing in length exponentially.

From a tenancy being a complete leasehold estate with exclusive right of possession, the evolution of time brought such things as common areas and the addition of a continuing right of access during the term of the tenancy. The Courts recognized this change in application of general negligence principles.

> To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises (Scholey v. Steele, 59 Cal.App.2d 402, 405 [138 P.2d 733]; Minolletti v. Sabini, 27 Cal.App.3d 321, 324 [103 Cal.Rptr. 528]), where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant (Shotwell v. Bloom, 60 Cal.App.2d 303, 309-310 [140 P.2d 728]), where there is a nuisance existing on the property at the time the lease is made or renewed (Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 453-454 [164 P.2d 897]), when a safety law has been violated (Grant v. Hipscher, 257 Cal.App.2d 375, 382-383 [64 Cal.Rptr. 892]), or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators or roof (Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 400 [170 P.2d 5]).
>
> A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act. (Cf. Brennan v. Cockrell Investments, Inc., 35 Cal.App.3d 796 [111 Cal. Rptr. 122].) Uccello v Laudenslayer (1975) 44 Cal. App. 3d 504, 118 Cal Rptr. 741.

This Court must now address the evolution of leases to the next level. Here the landlord not only provided a right of continuing access, but *prohibited* the tenant from from making any alterations or repairs to the apartment. (CT 402-403).

This amounts to *complete* control.

Nor can the tenant even look to the protection of *Civil Code Section 1941.1,* which permits self help by tenants for habitability violations irrespective of lease restrictions. As discussed below, locks and locking devices were intentionally excluded from self repair under habitability rules by the legislature.

This leads to potentially bizarre result if there is no duty of care on the part of the landlord----if screens are to keep insects out, and a tenant is prohibited from installing, modifying or maintaining any device to protect their children from falling from windows----the only alternative is to let them fall out. This can't possibly be the result. Having *assumed complete control and excluded* the tenant from any level of participation *whatsoever* in adjusting his own environment, the landlord necessarily has created a new and different kind of relationship than addressed by prior courts in accessing the duty of the landlord in child window fall cases.

In fact, this landlord has created a situation far less like the traditional landlord-tenant (leasehold) relationship, and far more similar to that of common carriers, innkeepers, or others for which a special relationship is created due to "circumstances which deprive the other of normal opportunity of protection." See Restatement 2d, Section 314A. Indeed, common carriers face an "utmost duty of care", as opposed to mere negligence, because the passenger has turned essentially complete control of his safely over to the common carrier.

Even prior to *Rowland*, the Courts imposed a duty of care on landlords who denied to their tenants the right and corresponding responsibility over care of the premises. Stowe v Fritzie Hotels (1955) 44 Cal. 2d 416, 282 P2d 890.

This situation is then compounded by the occurrence of the fall within hours of the commencement of the tenancy thereby imputing all

control over the then existing conditions to the landlord.

At the time of the fall, the control over the apartment fixtures, including the broken locking device, was with the landlord both in law and in fact.

The Property Was Managed as a Business by a Professional Management Company

This case also distinguishes itself on issues surrounding the nature of the enterprise of the Defendants/Respondents in at least three separate and distinct ways.

This particular landlord turned over the entire operation of the apartment complex over to a professional management company.

It is well settled that the standard of care is judged based upon the conduct of the *particular actor* in comparison to *like actors*, e.g. the risk apparent to this particular actor within this particular class of actors, the capacity to meet the risk of this particular actor within this particular class of actors, and the particular circumstances under which this particular actor must act.

It is the well established rule that a member of a profession or trade required to exercise the skill and knowledge normally possessed by members to the same trade or profession. Restatement 2d, Section 314A, Allred v Benkins (1975) 45 Cal. App. 3d 984, 120 Cal. Rptr. 259; Hollingsworth v Commercial Union Ins. Co (1989) 208 Cal. App. 3d 800, 256 Cal. Rptr. 357.

> . . . as a general proposition one "is required to exercise the care that a person of ordinary prudence would exercise under the circumstances." n2 (Polk v. City of Los Angeles (1945) 26 Cal.2d 519, 525 [159 P.2d 931]; Rowland v. Christian (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]; see Civ. Code, § 1714, subd. (a).) Because application of this principle is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care

> commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. (Citations) " 'There are no "degrees" of care, as a matter of law; there are only different amounts of care, as a matter of fact ....' [Citation.]" (Donnelly v. Southern Pacific Co. (1941) 18 Cal.2d 863, 871 [118 P.2d 465].). . .
>
> With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances" relevant to an overall assessment of what constitutes "ordinary prudence" in a particular situation. Thus, the standard for professionals is articulated in terms of exercising "the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing ...." (Prosser & Keeton, Torts (5th ed. 1984) . . . Flowers v Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 996, 35 Cal. Rptr. 2d 685.

Of course, the standard of care within a given profession or trade is generally a question of fact and reserved to the opinions of like professionals. See, for instance, Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal.3d 689, 692-693, 106 Cal. Rptr. 1. Here, like professionals opined that the professional managers, in turn employees of a professional management company, failed to meet the standard of care (CT 318-320, 311-313).

Additionally, in the present case the use of professional management company is overlaid over a large commercial business as opposed to a casual or occasional landlord. Apartment complexes are generally recognized as a form of mercantile enterprise. See California Real Estate 3rd, Miller & Starr, Section 19.9. This simple fact is quite evident here, if by nothing else, the adoption and use of a fictitious name for the enterprise, "the SARA-VALE Apartments".

Finally, the professional management company hired by the landlord to manage, maintain, and repair the commercial enterprise, in turn, directly hired several employees to work on the job site. These employees both managed and performed hands-on site maintenance, repair and fabrication. (CT 20, 372, 378-379)

Of some interest, because this landlord hired an independent company, neither the management company nor the employee would be eligible for an exemption to perform construction work without a licence. See California B& P Code Sections 7044, 7044.1.

Any professionally managed business establishment in the business of offering facilities for residential living would be expected to know the risks of children falling from high window absent the ability of parents to lock the windows. Any professionally managed business establishment in the business of offering facilities for residential living and manufacturing its own fixtures would be expected to the standards of companies manufacturing the same fixtures, or defer to those companies. Here, a triable issue exists as to whether the Defendant/Respondent Landlord should have placed warnings on screens readily available within the industry or maintained the locking devices in working condition. Defendant/Respondent landlord is in the business of offering its facilities, in exchange for money, for rent to families. Defendant/Respondent landlord is expected to reasonably anticipate and guard against injures from foreseeable activities in the

manner of a commercial enterprise operated by a professional management company; in this case specifically planned for occupancy of dwellings.

Of course, a consumer is not expected to know the minium standards for a particular industry, but has every right to assume that a business soliciting money from the public does. Most of us don't have any idea what the standard size of a pool table is, what the standard size of a basketball court is, how hard a baseball is supposed to be, what level of co-efficient of friction is proper for tires, shoes, floors, or even why glass is clear. However, those taking money from us for that purpose are expected to.

For example , if a consumer joins a health club with a pool, the consumer is unlikely to know what the appropriately safe ph. level is supposed to be. The consumer does, however, expect that when money is paid for such a product or service, that the selling company does. Further, the consumer would expect that the provider also knows what the particular ph. level is for the particular pool being offered before the consumer uses it. Finally, it the person responsible for knowing the appropriate ph. level, and testing it, also has some further degree of expertise beyond the ordinary, such as the indicia of harmful bacteria, that person would be expected to use that particular knowledge or skill in reasonablely preventing a foreseeable injury.

The Landlord in this Case Was Required to Maintain the Window Locking Devices by Statute

Where the landlord violates a safety statute, ordinance, or regulation, a death or injury results from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent, and the violation proximately causes injury to the class of persons intended for protection, a presumption of negligence (negligence per se) will arise. Evidence Code § 669(a); Stoiber v Honeychuck (1980) 101 Cal. App.3d

903, 162 Cal. Rptr 194; Grant v Hipsher (1967) 257 Cal. App.2d 375, 64 Cal. Rptr 892; McNalloy v Ward (1961) 192 CA2d 871, 14 Cal. Rptr 267; Halliday v Green (1966) 244 Cal. App. 2d 482, 53 Cal. Rptr 892. " Whether the death or injury involved in an action resulted from an occurrence of the nature which the statute. . . was designed to prevent . . . and whether the plaintiff was one of the class of persons for whose protection the statute . . . was adopted are questions of law." Victor v Hedges (1999) 77 Cal. App. 4th 229, 91 Cal. Rptr. 2d 466.

California has several overlapping provisions requiring landlords to maintain buildings, generally, and equipment, specifically, in "good" and "safe" condition. Without question, tenants are within the class of persons intended for protection under these sections. Under these sections, all of the mechanical equipment of the building must not only be maintained as "good and safe", but must also be "working properly".

Health and Safety Code Section 17920.3 provides in pertinent part:

> Any building or portion thereof including any dwelling unit, guestroom or suite of rooms, or the premises on which the same is located, in which there exists any of the following listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof shall be deemed and hereby is declared to be a substandard building:
>
> * * * * * *
>
> (f) All mechanical equipment . . . except equipment that . . . conformed with all applicable laws in effect at the time of installation and that has been maintained in good and safe condition, or that may not have conformed with all applicable laws in effect at the time of installation but is currently in good and safe condition and working properly.

Uniform Building Code Section 203 provides in pertinent part:

> All buildings or structures regulated by this code which are structurally unsafe ... or are otherwise dangerous to human life are, for the purpose of this section, unsafe. Any use of

> buildings or structures constituting a hazard to safety, health, or public welfare by reason of inadequate maintenance, [or] dilapidation, is, for the purpose of this section, an unsafe use ... All such unsafe buildings, ... are hereby declared to be public nuisances and shall be abated ...

A New York Court had cause to address a case involving a child failing from a window after being able to open the window due to a defective lock in Rubino v Reilly *(1974) 353 N.Y.S.2d 781, 44 A.D.2d 592.* The *Rubino* Court looked to *New York Multiple Residence law Section 174* which requires that an "owner shall keep all and every part of a dwelling .. . In good repair" in concluding that liability arises where the child's fall is causally connected to the broken lock.

There should be no other possible result. If screens are to keep insects out, not children in, *there must be some available method to keep children in*. As expert testimony in this case noted, children can not be tethered to their parents (CT 439). Numerous sources are advising parents that upstairs windows are to be locked *as the primary method of protecting their children* from falls.

Still further*, Calif. Civil Code Section 1941.3* provides in pertinent part:

> (A) . . . the landlord, or his or her agent, of a building intended for human habitation shall do all of the following: ... (2) Install and maintain operable window security or locking devices for windows that are designed to be opened ... *all windows more than 12 feet vertically ... from the ground, ... or any other platform are excluded from this subdivision,*. . . (emphasis added)

In construing statutes, the fundamental goal of the court is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." People v Jenkins (1995) 10 Cal.4th 234, 246, 893 P.2d 1224, 40 Cal. Rptr. 2d 903. To find intent, the court first turns to the words of the statute. Viewing them in context and in light of the nature and

purpose of the statute, the court gives the words their plain, everyday, commonsense meaning. However, because legislative intent ultimately prevails over statutory language, the court does not adopt the literal meaning of words if it would lead to absurd results. Rather, the court will, if possible, read the words so as to conform to the spirit of the statute. People v Murphy (2001) 25 Cal.4th 136, 142, 105 Cal. Rptr. 2d 387; People v Pieters (1991) 52 Cal.3d 894, 898-899, 276 Cal. Rptr. 918.

Section 1941.3, by its terms requires that where required, "window security or locking devices for windows" must be "Install(ed) and maintain(ed) in "operable" condition. This, of course, is classic use of the conjunctive; the devices must be present *and maintained*.

On the other hand, in defining an exclusion from the required placement, the legislature chose the classic disjunctive "or" in the use of "all windows more than 12 feet vertically ... from the ground, ... *or any other platform* are excluded from this subdivision".

Windows high above the "ground" *or* a "platform" are excluded." It immediately becomes obvious is the legislature intended that a "platform" be something other than the "ground" as otherwise the use of "or platform" would be rendered meaningless, e.g. it must be something above ground. The legislature also chose not to include any terms as modifiers of the terms "platform" or "ground", such as size or location, e.g. "interior" or "exterior."

Finally, the legislature chose not to include an particularized statutory definition of "platform" or "security or locking devices " for use in the section. However, *B&P Section 6980(m)* provides an apparently relevant definition of a "lock". "'Lock' means any mechanical, electromechanical, electronic, or electromagnetic device, or similar device, including any peripheral hardware, that is designed to control access from one area to another, or that is designed to control the use of a device." *Section 6980(m)* includes in the term "lock" any device that

controls access from “one area to another”. As with use of the term “platform” in *Section 1941.3*, no modifier is used for the term “area” such as “interior” or “exterior”, and, in particular, which direction access is being controlled.

The legislative history of *Section 1941.3* is enlightening. As originally proposed, *Section 1941.1* was to be amended inserting the lock provisions in among the items identified as minimum habitability requirements, allowing for self help. Also, as originally proposed, the provisions would have required “security locks on all windows. . . accessible from the dwelling’s exterior”. The legislature moved the requirements from the habitability section. The legislature also dropped the requirement that the covered windows be “accessible from the dwelling’s exterior.” The legislature also expanded the definition from “security locks” to the disjunctive “window security or locking devices”. See Senate Bill No 548.

Expert declaration testimony indicated that the apartment floor should be considered a “platform” for purposes of that statute and that the statute merely codified long standing apartment industry practice of maintaining the locks to prevent falls by children (CT311, 318, 508).

The Landlord in this Case Was Subject to Yet Additional Knowledge of the Nature of the Tenancy

This Defendant/Respondent is subject to yet additional circumstances, not the least of which is advance knowledge that the apartment was to be occupied by a child (CT 429-430, 257). Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate their ordinary behavior. The fact that children usually do not exercise the same degree of prudence for their own safety as adults, or that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result. Schwartz v Helms Bakery (1967) 67 Cal.2d 232, 240, 60 Cal.Rptr. 510; see BAJI 3.38. The relative age of the parties goes to whether a general duty should be recognized in connection with this incident. Wattenbarger v Cincinnati Reds, Inc. (1994) 28 Cal. App.4th 746, at p. 751, fn. 3, 33 Cal. Rptr.2d 732.

This Defendant/respondent Landlord Is Subject to Yet Additional Factors Inconsistent with Creating an Exception to the Single Duty of Care.

Not only does this case present a high degree of control by a commercial enterprise managed by a professional management company, with advance knowledge of the presence of a child, other circumstances do not favor an exception to the general rule of submitting the matter to jury under the single duty of due care.

The most basic of circumstances present nothing in favor of an exception, much less a “clear” basis for such an exception.

Plaintiff are not strangers to the Defendants/Respondents. The relationship is as close as it gets; privity among the parties.

The cost of installation and/or repair of locking devices at issue and/or warning labels are inexpensive, particularly when balanced against the risk involved. The failure of the locking device was directly related to the cause of the injury. The evidence is that the landlord should have been aware of the broken locking device and that the agent for the landlord understood his obligation to include fixing such devices if broken.

That children fall, including from high places such as balconies and windows is not only a matter of common public knowledge, but a matter of increasing public concern. Even Rawson was aware of such occurrences in his life experience (CT 395).

There is no lack of availability of insurance for the risk involved to landlords.

That reasonable minds could differ in application of the circumstances, is evidenced by an ever increasing public discourse on the topic, and even songs of rock stars.

One would suppose that if the courts intervened years ago in the then existing problem (and now largely resolved) of children suffocating in abandoned refrigerators with similar logic as the Superior Court did in this case, we would have seen the statement that it was “common sense” that refrigerator doors were to keep the cold in, not let children out. It probably could have even been rationalized as the fault of the parents in many cases. However, it would not correctly have defined the duty under *Civil Code Section 1714* and we would have had a lot more dead and injured children.

THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER THE WINDOW SCREEN WAS DEFECTIVE FOR FAILURE TO INCLUDE A WARNING LABEL

Any business with a participatory connection to placing the defective product in, or moving it along, in the stream of commerce, "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." Greenman v. Yuba Power Prod., Inc. (1963) 59 Cal. 2d 57, 62, 63, 27 Cal. Rptr. 697; Bay Summit Community Association v Shell Oil (1995) 51 Cal. App. 4th 762, 59 Cal. Rptr. 2d 322.

Included among those held to have had a participatory connection are: Retailers, Elmore v. American Motors (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84; Wholesalers and distributors, Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 337, 79 Cal. Rptr. 194; Bailors, McClaflin v. Bayshore Equip. Rental Co. (1969) 274 Cal. App. 2d 446, 452, 79 Cal. Rptr. 337 (defective stepladder); Manufacturer-repairers of products when the defect results from the repair, Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535; Licensors of personal property, Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 324-326, 82 Cal. Rptr. 420; Lessors of personal property, Westyle v. Look Sports (1993) 17 Cal. App. 4th 1715, 1741-1742, 22 Cal. Rptr. 2d 781; Manufacturers of building lots (manufactured by cutting, filling, grading, compacting, and the like), GEM Developers v. Hallcraft Homes of San Diego (1989) 213 Cal. App. 3d 419, 431, 261 Cal. Rptr. 626; Sellers of mass-produced homes, Kriegler v. Eichler Homes (1969) 269 Cal. App. 2d 224, 227-229, 74 Cal. Rptr. 749 (defective heating system); Real estate developers, Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 810-811, 110 Cal. Rptr. 543; Developers of multiple-unit, residential, planned development

complex, Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 911, 913, 176 Cal. Rptr. 886.

The issue of a landlord's responsibly in strict liability as supplier of products provided as component part of the dwelling unit was addressed by the California Supreme Court in *Becker v IRM*, supra, then readdressed again in *Peterson v Superior Court*, supra.

In readdressing the issue, the *Peterson* Court held that "Upon reexamining the basis for Becker's holding with regard to the proper reach of the products liability doctrine, we conclude that we erred in Becker in applying the doctrine of strict products liability to a residential landlord *that is not a part of the manufacturing or marketing enterprise of the allegedly defective product* that caused the injury in question." Peterson v Superior Court at 1188 (emphasis added).

In the re-examination, the *Peterson* Court considered a landlord that did not meet any of the traditional criteria for imposition of strict liability.

Among the criteria missing in the case of a traditional landlord was participation in production and lack or availability for presentation of claims by and injured consumer to other entities responsible for the manufacturing and involved in the chain of distribution. Also missing in the case of a traditional landlord was a "continuing business relationship" with the manufacturer of the defective product. Still further, "Generally, landlords neither design nor manufacture the products they supply. Therefore, unlike manufacturers, landlords have limited control over safety of design and workmanship. Holding landlords strictly liable when defects beyond their control injure tenants is unfair." Id.

As such, the *Peterson* Court overruled *Becker* only to the extent that the landlord did not cause of create the defective product.

None or the traditional criteria is missing in the case of a landlord who contracts with professional management company that, in turn,

employs personnel *who engage in production of products*. These Defendants/Respondents directly built and installed the window screen at issue.

A landlord is not exempt "just because he is also the owner and lessor of real property." Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 101 Cal. Rptr. 473.

> It is not necessary that the seller be engaged solely in the business of selling such products. The only group of persons exempted from the rule is the occasional seller who is not engaged in that activity as part of his business, like a housewife who, on occasion, sells to her neighbor a jar of jam or a pound of sugar. The Restatement comment further points out that the basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products that may endanger the safety of their persons and property and the forced reliance on that undertaking on the part of those who purchase such goods."Jenkins v. T&N PLC (1996) 45 Cal. App. 4th 1224, 53 Cal. Rptr. 2d 642.

Stated another way, in order to except itself as occasional seller, the Defendants/Respondents must have placed products into the stream of commere, but "not as a part of his business." Jenkins v. T&N PLC (1996) 45 Cal. App. 4th 1224, 53 Cal. Rptr. 2d 642; Ortiz v. HPM Corp. (1991) 285 Cal. Rptr. 728, 234 Cal. App. 3d 178.

A one time seller or hobbyist is clearly exempt. Id. Similarly, building a product for internal use, such as when a manufacturer builds a piece of equipment to assist in its own process, is also exempt. Id.

The true analysis lies in due consideration of the policy behind strict liability for products.

The public policy consistently expressed by California Courts is that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reaches consumers and where it is evident that the participant can anticipate

some hazards and guard against the recurrence of others, as the public cannot. Escola v. Coca Cola Bottling Co. (1944) 24 Cal. 2d 453, 462, 150 P.2d 436 (concurring opinion); Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 129, 104 Cal. Rptr. 433, 501 P.2d 1153; Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535.

That is hardly the case here.

These Defendants/Respondents, in their particular business, regularly and consistently engaged in production of window screens.

In fact, the number of screens manufactured was not slight, the Defendants/Respondents received financial benefit from manufacturing the enterprise to the exclusion of competitor in the same enterprise, the screens are directly traceable to the manufacture who is in privity with the Plaintiff/Appellant, and the injury suffered was of a type likely to occur without inspection of the screen. As to these particular Defendants/Respondents, the manufacturing process was a routine "part of the business."

The testimony of experts indicated that the subject window screen was defectively designed and that it was the defect in design that was a concurring cause of TONY's fall. The experts opined that the window screen failed to perform as safely as an ordinary consumer would expect in that a consumer would never expect a child to fall through a window screen that contained no warning of such a danger. The experts indicate that studies show that the dangers inherent in the window screen are not common knowledge which is why numerous similar accidents occur. The experts further indicated that the risk of danger inherent in the design of the screen far outweighs the benefits of the design in light of the reasonable and cost effective alternative designs available. One alternative design is to place a warning on the screen indicating that it will not prevent a child from falling out of the window and further indicating that the screen should only be used in conjunction with a

working window lock that prevents the window from opening more than 4 inches. Such alternative design would cost less than a dollar, would prevent the type of accident that occurred in this case, and would preserve the utility of the window screen.

The experts opined that such accidents can be virtually eliminated by use of warnings and window locking devices as aforementioned.

California cases have held that a product can be found defective where it lacked a simple safety device or adequate warning. Garcia v. Haslet (1970) 3 Cal. App. 3d 319 (failure to provide safety device); Anderson v. Owens Corning Fiberglas (1991) 53 Cal. 3d 987,1004 (failure to warn). The experts further indicated that the type of accident that occurred to TONY SHEN is foreseeable in that property managers and landlords should foresee that young children intermeddle with windows and may climb upon some piece of furniture and lean against such a window screen. It is also foreseeable that the subject window screen may be used in conjunction with a window that doesn't latch properly. The dangers involved in the foreseeable uses or even misuses of the product give rise to a duty to adequately warn the Consumer. Persons v. Salomon North America (1990) 217 Cal App. 3d 168, 175; Daly v. General Motor Corp. (1978) 20 Cal 3d 725, 746.

The Screen Manufacturers Association themselves promote and make available written warnings. Such warnings give rise to the judicially approved inference that a hazard exists with respect to the subject window screen that is an unreasonable risk of harm absent an adequate warning. Burke v. Almaden Vineyards (1978) 86 Cal App 3d 768, 773.

Whether a product is defective is a factual issue to be determined by the trier of fact . Brooks v. Eugene Burger Management Corp. (1989) 215 Cal. App. 3d 1611, 1626, 264 Cal. Rptr. 756. The evidence put forth by Plaintiffs is sufficient for a jury to conclude that Plaintiffs were injured

by a defectively designed window screen.