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Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability

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In the past ten years, the law of landlord-tenant relations has been completely rewritten. The lease, which was once considered primarily a conveyance of real property, is now regarded principally as a contract. The landlord, who once could let a tumble-down house with impunity, now leases residential property subject to an implied warranty of habitability. The tenant, no longer shackled by the doctrine of independent covenants, can assert the full panoply of contract remedies against the landlord who breaches an express or implied covenant in the lease.

But what of the tenant (or other person on the property with the tenant's consent) who sustains personal injuries or property damage due to a defective or dangerous condition in the premises? What remedies does he have against the landlord? As a general rule, he has none at common law. The landlord is still regarded as the conveyor of an estate in real property who is immune from liability for personal injury or property damage.

It is the thesis of this article that recent developments in the law of landlord-tenant relations necessitate a reexamination of the common law principles governing the tort liability of a landlord. If a lease is a contract containing an implied warranty of habitability, a landlord should at least be held to a duty of reasonable care regarding the condition of the leased premises. Moreover, if he is in the business of leasing, he should be held strictly liable for personal injury or property damage caused by a defect in the premises.

Any change in the law regarding a landlord's tort liability will probably be made by the judiciary. Therefore, this article is written principally for those private practitioners and judges who will become involved in the litigation of negligence or strict liability actions against landlords. It is also addressed to the American Law Institute, which is currently revising the Restatement of Property. The first division of the revised Restatement is devoted to the law of landlord-tenant relations, and will contain a chapter on the tort liability of a landlord. It is hoped that this chapter will not blindly incorporate those sections of the Restatement (Second) of Torts which set forth the common law principles governing the tort liability of a landlord, for they are premised on the notion that a lease is a conveyance. The doctrine of caveat lessee should be reconsidered in the light of the Restatement (Second) of Property's characterization of a lease as a contract.

1. RESTATEMENT (SECOND) OF PROPERTY (Tent. Draft No. 1, 1973); (Tent. Draft No. 2, 1974). The portion dealing with tort liability of landlords will be chapter 21 which is still unpublished as of this writing. For a selective, annotated bibliography on recent developments in landlord-tenant law see Special Project, Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography, 26 VAND. L. REV. 689 (1973).
This article will not only propose specific changes in the law but will also survey the cases and scholarly literature discussing the common law tort liability of landlords and relevant aspects of landlord-tenant relations. It is hoped that such an approach will prove helpful as well as persuasive to those who must decide the future direction of this area of the law. The article consists of five sections. Section one is devoted to the history of landlord-tenant relations, first at common law and then under legislation imposing a duty to repair on the landlord. This section focuses on the tenant’s remedies for economic loss caused by the landlord’s failure to repair and is designed to provide the personal injury lawyer with background information on landlord-tenant law. The second section describes a landlord’s current tort liability for defective premises, with an emphasis on the provisions of the Restatement (Second) of Torts. The third summarizes recent developments in the law of landlord-tenant relations. The fourth and fifth propose the abolition of a landlord’s immunity from tort liability in light of the recent developments outlined in the third section. The fourth section advocates the imposition of a duty of reasonable care while the fifth advances an alternative theory of strict liability for landlords who are in the business of leasing.

I. LANDLORD-TENANT RELATIONS: COMMON LAW AND HOUSING CODES

In the United States, landlords are one of the few classes of defendants who generally remain immune from tort liability. Unlike the manufacturers and distributors of defective products, the lessors of defective goods, and the builder-vendors of defective housing, lessors of defective premises can still invoke the ancient maxim, caveat emptor. To be sure, numerous exceptions to the

2. Restatement (Second) of Torts § 402A (1965).
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maxim have been recognized,6 but they merely attest to the vitality of the general rule. To understand the tenacity of caveat emptor in the law governing the tort liability of lessors of real property, it is necessary to become conversant with the law of landlord-tenant relations. And in order to understand landlord-tenant law,

one must forget the modern urban complex with its towering office buildings, its sprawl of huge apartments, and its teeming slums. The place to start is with the countryside, i.e., the grass, trees and grazing sheep. We are back to the land now, and land is what landlord-tenant law is still all about.7

A. The Nature of a Real Property Lease

It is Dean Lesar's theory that the landlord-tenant relation has moved "from status to contract to property to modern contract."8 The first three stages of this progression will be traced in this subsection because they form the backdrop for the development of caveat lessee in modern tort law.

1. STATUS

Following the Norman Conquest in 1066, William the Conqueror held title to all the lands in England. He divided this property among his subjects, but instead of granting them rights of ownership, he "leased" the land to his immediate followers in exchange for their services.9 Each of these tenants-in-chief subinfeudated some or all of his holdings to a pyramid of subtenants, who held the land in either "free" or "unfree" tenure.10 If the subtenant was obligated to perform definite and certain services, his tenure was classified as "free"; if he was obligated to perform indefinite services (i.e., if he did not know in the evening what his lord would require him to do in the morning), his tenure was "unfree."11 The majority of individuals who performed agricultural and other manual services held their lands in "unfree tenure" and were classified as "villeins."12

6. See note 151 infra and accompanying text.
9. 1 F. Pollock & F. Maitland, The History of English Law 210-11 (1895) [hereinafter cited as Pollock & Maitland].
10. Id. at 211-12, 214-18, 310-12, 325-27; Comment, The Landlord-Tenant Relationship: A New Urban Structure, 18 N.Y.L.F. 725 (1972).
11. 1 Pollock & Maitland, supra note 9, at 337, 353-54; Hicks, The Contractual Nature of Real Property Leases, 24 Baylor L. Rev. 443, 447 (1972); Lesar, supra note 8, at 369.
12. 1 Pollock & Maitland, supra note 9 at 354; Hicks, supra note 11, at 447; Lesar, supra note 8, at 369.
When Dean Lesar suggested that the tenant in early English history had status, but no contractual or property rights, he was referring to the tenant in villeinage.\textsuperscript{13} The freehold tenant, having seisin, possessed property rights, and he was protected in the king's courts against ejectment.\textsuperscript{14} But when the tenant in villeinage was ejected, either by his lord or by a third person, the king's court would not restore him to the land, nor would it give him damages.\textsuperscript{15} In the eyes of the king's court, the tenant in villeinage was a "tenant at the will of the lord."\textsuperscript{16}

In reality, the villein tenant's status was not quite as precarious as suggested above. In addition to the king's courts there were the lord's courts, and in these courts the "custom of the manor" became recognized as law.\textsuperscript{17} According to the custom of the manor, the tenant in villeinage was seised of the land and could protect his interest against all potential ejectors except the lord of the manor, who could not be sued in his own court.\textsuperscript{18} Normally, however, the lord complied with the manorial custom.\textsuperscript{19} Therefore, although the villein tenant had nothing but status under the law, by custom he enjoyed a limited possessory interest in the land.

2. CONTRACT

As the status of the villein tenant became more secure,\textsuperscript{20} social and economic forces were at work which reduced the amount of land held in villein tenure and replaced the villein tenant with a tenant who held the land for a term of years.\textsuperscript{21} This change marked the transition of the landlord-tenant relation from status to contract.

Historically, the tenancy for years was developed to circumvent the church's strict prohibition against usury. A landowner in need of funds would make a lease for a term of years to a tenant in return for a lump sum consideration, payable in advance. The tenant would then recoup his rent, plus a healthy profit, from the use of the land during the term.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{13} Lesar, \textit{supra} note 8, at 369; accord, 1 Pollock & Maitland, \textit{supra} note 9, at 339-40.
\item \textsuperscript{14} 1 Pollock & Maitland, \textit{supra} note 9, at 338-39.
\item \textsuperscript{15} Id. at 340-41.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 342; Hicks, \textit{supra} note 11, at 447-48; Lesar, \textit{supra} note 8, at 369.
\item \textsuperscript{18} Pollock & Maitland, \textit{supra} note 9, at 342.
\item \textsuperscript{19} Id. at 359; Lesar, \textit{supra} note 8, at 369.
\item \textsuperscript{20} Between the thirteenth and seventeenth centuries, the status of the villein tenant improved. First the courts of equity and then the common law courts began to enforce the manorial customs, culminating in the creation of "copyhold tenure" by the common law courts. Hicks, \textit{supra} note 11, at 448; Lesar, \textit{supra} note 8, at 370.
\item \textsuperscript{21} Hicks, \textit{supra} note 11, at 448; Lesar, \textit{supra} note 8, at 370.
\item \textsuperscript{22} This "premium lease" was the predecessor of the modern mortgage. 1 Amer-
After the Black Death of 1348-49, the tenancy for years began to be used in an agricultural context. There was a shortage of labor and an increased amount of land suitable for cultivation. To encourage laborers to engage in agricultural pursuits, the lords began to pay wages and the villein tenancy was replaced by the husbandry lease for a term of years.

When the lessee was a moneylender engaged in sharp business practices, the courts were not inclined to recognize or protect his possessory interest in the land. Instead, the landlord-tenant relation was regarded as purely contractual, and the tenant was denied the benefit of real actions in the king's courts. His only remedies were specific performance against dispossession by his lessor or damages in an action of covenant against his lessor. Not until 1235 was he given an action (quare ejectit infra terminum) to recover possession against an ejector who had purchased from his lessor, and he still had no possessory action against strangers. Despite the fact that these rules had been developed in a commercial setting, initially they governed the lease for a term of years in an agricultural context as well. The villein tenant, who had at least enjoyed a limited possessory interest in the land by custom, now found himself with virtually nothing but contract rights at law.

3. CONVEYANCE OF PROPERTY

With the advent of the husbandry lease, the courts began to look more favorably upon the tenant for years. By the early fourteenth century, he could recover damages against third parties, and in 1499 he was permitted to bring a possessory action against strangers known as the action for ejectment (de ejectione firmae). The development of the action for ejectment marked the end of the era.
in which the lease was considered primarily as a contract. The tenant could now enforce his property rights against any dispossessor by a remedy analogous to the real actions available to the owner of a freehold estate. Although for some purposes the tenant's interest was still classified as a "chattel real," it was primarily an estate in land. In fact, the lease came to be regarded as a conveyance of real estate. The tenant acquired possession of the property for a term (with all the incidents of ownership) in exchange for rent, which was the equivalent of the purchase price.

4. CONTRACT OR CONVEYANCE?

In sixteenth century England, when the lease was first characterized as a conveyance of property, the typical lease involved the transfer of land for agricultural purposes to a tenant who paid the rent from the proceeds of tilling the soil. Often there were no physical structures on the land, and if such improvements were present, they were of secondary importance. Therefore, it was not inconsistent with the nature of the landlord-tenant relation to characterize the lease as a conveyance of property. This designation actually worked to the tenant's advantage, since it permitted him to enforce his legal rights through the real action of ejectment, rather than the contractual action of debt.

With the shift in population from rural to urban areas during the Industrial Revolution, lessees of both residential and commercial property became increasingly interested in the structural improvements on the premises. Simultaneously, the lease became a more complex transaction. As a result, the typical lease began to look more like a contract than a deed of real estate. The parties would

31. 1 ALP, supra note 22, § 3.1, at 176; Hicks, supra note 11, at 450; Lesar, supra note 8, at 370.
32. For example, the lease continued to be classified as personal property for purposes of testamentary or intestate succession. 1 ALP, supra note 22, § 3.12 (general discussion of situations in which a lease continues to be characterized as personal property). See also 2 Powell, supra note 26, ¶ 221[2], at 185.
33. 1 ALP, supra note 22, § 3.1, at 176-77; Lesar, supra note 8, at 371.
37. 2 Powell, supra note 26, ¶ 221[1], at 178-79; Hicks, supra note 11, at 451-52; Lesar, supra note 8, at 372; Note, Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem, 22 Case W. Res. L. Rev. 739, 740 (1971).
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frequently include express covenants that, for example, placed limitations on the use of the land and the tenant’s right to transfer, governed the time and manner of paying rent, regulated the erection and removal of improvements, fixed or apportioned liability for insurance and taxes, provided for security deposits and options to purchase or renew, and allocated responsibility for repairing defects in the premises.88

As the nature of the lease changed, commentators began to ask whether it was a contract or a conveyance. The typical scholarly response was that it was both:

[It] is idle to speculate whether the land or the promise is the principal element of a lease of an apartment with a promise to furnish heat from a central heating plant or of a lease of space in a modern business building with a promise not to lease other parts of the building to an operator of a competing business. The bargain is for both. If the warp is conveyance, the woof is contract and neither alone makes a whole cloth.89

But the courts persisted in regarding the land as of primary importance. Consequently, the lease continued to be characterized as a conveyance of property, and real property law governed the landlord-tenant relation.40

B. The Development of Caveat Lessee

In sixteenth century England, a purchaser of real property was expected to inspect the premises prior to the sale and, in the absence of express contractual provisions to the contrary, he took the premises “as is.”41 In the words of Lord Coke:

Note, that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express

38. 2 POWELL, supra note 26, ¶ 221[1], at 178-79; Lesar, supra note 8, at 372; Note, Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem, 22 CASE W. RES. L. REV. 739,740 (1971).
39. 1 ALP, supra note 22, § 3.11, at 203. The authors of two leading treatises on contracts agreed that a lease is both a conveyance of property and a bilateral contract. See 3A A. CORBIN, CONTRACTS § 686, at 236 (rev. ed. 1960); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 580-81 (3d ed. 1962) [hereinafter cited as WILLISTON].
40. 2 POWELL, supra note 26, ¶ 220, at 174. Milton R. Friedman, who conducted a careful study of the judicial decisions in New York, observed that a lease is contractual in execution and delivery, but like a conveyance of property with respect to the landlord's duty to deliver possession to the tenant, the independence of lease covenants, and the rules governing reentry, surrender by operation of law, and survival of tenant's liability. Friedman, The Nature of a Lease in New York, 33 CORNELL L. REV. 165 (1947). Consequently, he concluded that “most of the law of leases is based on a lease as a conveyance . . . .” Id. at 194.
41. 2 W. BLACKSTONE, COMMENTARIES 299 (1803).
Thus, as a result of characterizing a lease as a conveyance of real property, the doctrine of \textit{caveat emptor} became applicable to the landlord-tenant relation.\footnote{2 E. COKE, \textit{A COMMENTARY ON LITTLETON} 102(a), c. 7, § 145 (1853 ed.).} Although the landlord covenanted that he had the power to transfer possession to the tenant and that he would leave the tenant in quiet enjoyment of the leasehold,\footnote{1 ALP, \textit{supra} note 22, § 3.45, at 267; 2 POWELL, \textit{supra} note 26, ¶ 225[2][a], at 232; Grimes, \textit{Caveat Lessee}, 2 VALPARAISO U.L. REV. 189, 190, 192 (1968); Note, \textit{Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem}, 22 CASE W. RES. L. REV. 739 (1971).} there was no implied covenant or warranty of the habitability or fitness of the premises for any particular purpose. This meant that the tenant took the premises with whatever defects were present at the time of the lease and that the landlord had no responsibility to maintain the premises in a reasonable state of repair during the term of the lease.

The doctrine of \textit{caveat lessee} was probably of little concern to the agrarian leaseholder of the sixteenth and seventeenth centuries.\footnote{45. 2 POWELL, \textit{supra} note 26, § 225[3], at 232.5-233.} He was capable of inspecting the real estate for defects prior to the inception of the lease, for even if there were improvements on the property, they were relatively simple in design. As for defects arising during the term of the lease, he probably had both the skill and the financial resources to make the necessary repairs.\footnote{43. 1 ALP, \textit{supra} note 22, § 3.46, at 267-72; 2 POWELL, \textit{supra} note 26, ¶ 225[1], at 232.5-233.} However, as the agrarian leaseholder was replaced by the urban tenant, the rule of \textit{caveat emptor} became less and less appropriate to the landlord-tenant relationship. As buildings became more complicated and expensive to repair, and as the tenant population became more mobile, many tenants found themselves occupying dwellings which they had neither the expertise nor funds to repair.\footnote{44. 1 ALP, \textit{supra} note 22, § 3.47, at 271-72; 2 POWELL, \textit{supra} note 26, ¶ 225[2], at 232.5-233.} Yet \textit{caveat emptor} had acquired the inertial force of precedent and it continued to be the general rule in both England\footnote{42.} and the United

\footnote{47. Id. at 1078-79.}

\footnote{48. There is some evidence that the courts did not apply the \textit{caveat emptor} doctrine to leases of dwellings in the early 1800's. In three cases, the tenant was relieved of his obligation to pay rent on the grounds that the premises were unfit for habitation. Edwards v. Etherington, 171 Eng. Rep. 1016 (Q.B. 1840); Collins v. Barrow, 174 Eng. Rep. 38 (Ex. 1831); Salisbury v. Marshall, 172 Eng. Rep. 268 (C.P. 1829). Since none of the cases mentioned the \textit{caveat emptor} doctrine, it was not clear whether they intended to repudiate the rule. Grimes, \textit{supra} note 43, at 194-95. However, in 1843, the English judges firmly reinstated the general principle of \textit{caveat lessee}. Sutton v. Temple, 152 Eng. Rep. 1108 (Ex. 1843) (lease of agricultural land); Hart v. Windsor, 152 Eng. Rep. 1114 (Ex. 1843) (lease of unfurnished
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In recognition of the harsh result wrought by the strict application of caveat lessee in an urban environment, the English courts recognized one exception to the rule: the implied warranty of habitability in the lease of a furnished house or apartment for a short term. The reason given for this departure from the general rule was that the premises were intended for immediate occupancy and thus there was no time for the tenant to make an adequate inspection or to put the premises in a habitable condition. Moreover, it was theoretically more difficult for the tenant to detect defects upon initial inspection of a furnished dwelling. The exception applied regardless of whether the defect was in the furniture or in the property itself, but it only protected the tenant against defects which were present at the beginning of the lease. The English exception was adopted in the United States, although it was strictly construed to apply to the lease of furnished premises for residential house for 3 years. The English courts have continued to adhere to the general doctrine of caveat lessee, although commentators have urged that it be overruled. North, The Liability of a Landlord for Dangerous Premises, 29 CONVEY. (n.s.) 207 (1965); West, Implied Obligations of a Landlord as to the Condition of Premises at the Time of Letting, 25 CONVEY. (n.s.) 184 (1961).

49. The doctrine of caveat lessee was accepted in the United States as part of the common law of England. Grimes, supra note 43, at 198-99. Initially the American courts were reluctant to recognize the rule. Carson v. Godley, 26 Pa. 111, 117-18 (1856); Godley v. Hargerty, 20 Pa. 387 (1853). However, it soon became as firmly entrenched in the United States as it had been in England. 2 Powell, supra note 26, at ¶ 225[2]; see cases cited at note 5 supra.


51. North, supra note 48, at 217-19; West, supra note 48, at 184, 194.


The American courts recognized the exception for the reasons set forth in the English decisions:

One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine caveat emptor, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

56. E.g., Young v. Povich, 121 Me. 141, 116 A. 26 (1922); Davenport v. Squibb,
purposes when a short term when the defect was present at the inception of the lease. Some courts further restricted the exception to defects in the furniture (as opposed to structural defects).

A second exception, closely related to the first, was created by the American courts. They held that there was an implied covenant of fitness when the subject of the lease was a structure to be used for a particular purpose, and the lease was negotiated while the structure was still under construction. In such circumstances, the lessee had little or no opportunity to inspect the premises for final fitness, and therefore, caveat lessee seemed unduly harsh. It has been suggested, however, that this warranty is "implied in the con-

57. When a building is leased for business purposes, the majority of courts refuse to recognize an implied warranty of fitness, even though the building contains equipment and is rented for immediate occupancy. 1 ALP, supra note 22, § 3.45, at 268 n.10; Grimes, supra note 43, at 201. See, e.g., Gade v. National Creamery Co., 324 Mass. 515, 519, 87 N.E.2d 180, 182 (1949): "The renting of a refrigeration room for commercial purposes and for an indefinite time, although the room was needed by the tenant for immediate occupancy, is not within the Ingalls v. Hobbs exception".

58. The warranty of habitability has normally not been recognized in leases for a period of more than one year. Skillern, supra note 55, at 392; Comment, Implied Warranty of Habitability in Lease of Premises for Short Term: Erosion of Caveat Emptor, 3 U. RICHMOND L. REV. 322 (1969). An excellent discussion of the issue appears in Young v. Povich, 121 Me. 141, 144-45, 116 A. 26, 27 (1922) (eight-month lease):

The phrase "short term," as used in the Ingalls Case, comes within the rule of implied warranty. Conversely, the phrase "long term" would come within the rule of caveat emptor. Where, then, between the two, is the line to be drawn . . . ?

It is apparent from the statement of these legal principles that no arbitrary time can be fixed. . . . We are of the opinion, therefore, that this issue must be treated as a question of fact depending upon the circumstances of each particular case. We think that the phrase "for a temporary purpose," instead of the phrase "for a short term," under present methods of demise and occupancy, would more definitely present the question of fact to be determined in this class of cases.


60. E.g., Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888); 1 ALP, supra note 22, § 3.45, at 268.


62. 1 ALP, supra note 22, § 3.45, at 268-69; Skillern, supra note 55, at 393.
tract to construct, and not in the lease agreement." Moreover, the exception was strictly construed to apply only to premises under construction.

A third exception was recognized when the landlord knew of a dangerous condition or defect in the premises and failed to disclose it to the tenant at the time the lease was negotiated. This exception was restricted to defects which were not discoverable by the tenant upon an ordinary inspection of the premises, and in most jurisdictions, was further restricted to those defects about which the lessor had actual (as opposed to constructive) knowledge.

In summary, caveat emptor found its way into the law of landlord-tenant relations because the sixteenth century common law courts characterized a lease as a conveyance of real property. Although it may have been appropriate to the agrarian lessor-lessee relationship, caveat emptor imposed undue hardships on the urban tenant. The courts could have abolished the outmoded maxim, but instead they chose to carve out three exceptions to it: 1) the implied warranty of habitability in leases of furnished dwellings for a short term; 2) the implied warranty of fitness in leases of premises under construction at the time of the lease; and 3) the failure to disclose defects of which the landlord had actual or constructive knowledge. Significantly, none of these exceptions applied to the average tenant residing in an unfurnished dwelling. In retrospect, caveat lessee may have suffered some minor setbacks in the process of being transplanted to America, but clearly it neither withered nor died.

C. Tenant's Remedies Against Landlord

1. INDEPENDENT COVENANTS

The hardships imposed by caveat lessee were compounded by another vestige of real property law—the doctrine of independent covenants. Even if the lessee were lucky enough to benefit from one of the implied warranties regarding the condition of the premises or were able to negotiate an express warranty, his sole remedy for breach of that warranty was an action for damages. He could not vacate the premises or remain in possession and withhold the rent. Another excursion into history is required to explain this anomalous situation.

63. Skillern, supra note 55, at 393.
64. Id.
66. 1 ALP, supra note 22, § 3.45, at 269; Grimes, supra note 43, at 202-04.
a. Landlord's covenant of quiet enjoyment and tenant's covenant to pay rent

Under the agricultural lease of the sixteenth century, the landlord's principal obligation was to convey possession of the land to the tenant in return for which the tenant agreed to pay the rent. There were two implied covenants in any lease: the landlord's covenant to keep the tenant in peaceful possession (the covenant of "quiet enjoyment") and the tenant's covenant to pay the rent. In the absence of a provision making them conditional, these covenants were deemed to be independent of each other. This meant that the tenant who failed to pay his rent could remain in possession of the premises; the landlord's sole remedy was an action for damages as the rent accrued, coupled with a power to distrain the tenant's chattels. Similarly, if the tenant were ejected, his duty to pay the rent was not terminated; his only remedies were an action in ejectment to restore him to possession and an action for damages for breach of the covenant of quiet enjoyment.

The law was clearly not in harmony with the layman's expectations, since rent was commonly regarded as the quid pro quo for possession. As to lessors, the discrepancy was rectified, not by abolishing the doctrine of independent covenants, but rather by enforcing written lease provisions granting the landlord the power to terminate the lease for nonpayment of rent. The legislatures then enacted statutes creating a summary procedure for evicting a tenant who had defaulted in his payment of rent, irrespective of the inclusion of a forfeiture clause in the lease. For all practical purposes, the covenant of quiet enjoyment had become dependent upon the tenant's payment of rent.

But what about the tenant whose right to peaceful possession had been disrupted? Was he still obligated to pay rent? Mutual covenants were still regarded as independent and the tenant did not typically have the bargaining power to condition payment of the rent upon his continued peaceful possession of the premises. Therefore, when a tenant was physically ousted from possession, the courts held that his rent obligation was not terminated (since the covenant of quiet enjoyment was independent of the tenant's obligation to pay

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68. Quinn & Phillips, supra note 7, at 228 n.4.
69. 1 ALP, supra note 22, § 3.52, at 283; Quinn & Phillips, supra note 7, at 229 nn. 6 & 7.
71. See, e.g., CAL. CIV. CODE §§ 792, 1946 (West 1954); CAL. CODE CIV. PROC. §§ 1159-79a (West 1972); N.Y. REAL PROP. ACTIONS LAW § 711 (McKinney 1963).
the rent), but was suspended (since there had been a breach of the implied covenant). This rule applied to partial as well as total evictions by the landlord on the theory that the landlord could not "apportion his own wrong." But while the tenant's rent obligation was in theory "suspended," it was in fact terminated, for if the tenant gave up his leasehold interest, he had no obligation to pay the rent. Thus, in reality, the landlord's covenant of quiet enjoyment and the tenant's covenant to pay rent were construed as mutually dependent, although technically they continued to be characterized as independent.

b. Landlord's covenant to repair and tenant's covenant to pay rent

For reasons that were never fully articulated, the courts did not extend their informal construction of lease covenants as mutually dependent beyond the covenants of quiet enjoyment and payment of rent. All other covenants in the lease, whether express or implied, were construed as independent. In the language of the Restatement of Contracts:

Non-performance of a covenant by one party to a lease or other conveyance of land, unless performance of the covenant is

72. 1 ALP, supra note 22, §§ 3.49-50; 3 WILLISTON, supra note 39, § 891, at 636-37; Quinn & Phillips, supra note 7, at 229 n.6; Rapacz, supra note 67, at 72-73.
74. See 1 ALP, supra note 22, at §§ 3.50, 3.52.
75. Williston has suggested several possible reasons for this judicial adherence to the independent covenant doctrine:

[p]artly because a lease is regarded primarily as a conveyance by the common law, partly because the law governing leases has been dealt with in connection with the law of real estate, and became settled before the law of mutually dependent promises was established, and partly no doubt because leases have ordinarily been elaborately written documents in which the parties might be supposed to have expressed their intent with considerable fullness, covenants in leases have been held mutually independent unless in terms expressly conditional.

3 WILLISTON, supra note 39, § 890, at 587-89. Quinn and Phillips have offered another, extremely cogent explanation:

What the law did was to preserve the old landlord-tenant law with its fixation on possession as the crux of the lease, and with rent as the quid pro quo for possession. On this was engrafted a new set of rights and duties (concerning heat, hot water and repairs) which were independent of the possession-rent relationship and considered incidental and unimportant relative to possession. The result was a double set of relationships between the landlord and the tenant, i.e., a two level relationship.

Significantly, the two levels were separate and distinct. A failure to perform on one level generated a remedy on that level, but in no way affected the other level. In technical terms, the covenants on one level were not reciprocal with the covenants on the other.

Quinn & Phillips, supra note 7, at 233-34.
an express condition, does not excuse the other party from per-
forming his covenants further than the law of property governing
the effect of eviction of the grantee or of waste by him pro-
vides.77

Consequently, regardless of whether the landlord violated an ex-
press or implied covenant to repair the premises, the tenant's remedy
was the same: an action for damages.78 The tenant could not re-
main in possession and withhold the rent because a breach of the
landlord's covenant to repair was no defense to an action for rent
or eviction.79 Furthermore, the tenant could not voluntarily vacate
the premises and terminate his rental obligation because his coven-
ant to pay rent was independent of the landlord's covenant to re-
pair.80

Like the maxim "caveat emptor," the application of the doc-
trine of independent covenants to the landlord's obligation to repair
did not work a serious injustice in a rural setting. But as an increas-
ing percentage of the tenant population moved to the city, and as mul-
tiple-dwelling apartments began to dot the skyline, the notion that
a tenant could neither withhold rent nor vacate the premises for a
breach of the landlord's obligation to repair became totally unaccept-
able.

2. CONSTRUCTIVE EVICTION

The courts responded to the inherent injustice of the inde-
pendent covenants doctrine by creating a new concept: constructive
eviction.81 When the lessor had seriously interfered with the les-
see's use and enjoyment of the premises (e.g., by failing to perform
express or implied covenants to heat, repair, or make alterations in
the premises), the tenant was deemed to have been "constructively
evicted." The tenant was entitled to vacate the premises and defend
against an action for rent in the same manner as though he had been

77. RESTATEMENT OF CONTRACTS § 290 (1932).
78. Bennett, The Modern Lease—An Estate in Land or a Contract (Damages for
Anticipatory Breach and Interdependency of Covenants), 16 TEXAS L. REV. 45, 63-
64 (1938); Comment, The Duty of Maintenance of Multiple Dwellings in California,
79. Bennett, supra note 78, at 63-64; Gibbons, Residential Landlord-Tenant Law:
A Survey of Modern Problems with Reference to the Proposed Model Code, 21
HASTINGS L. J. 369, 383 (1970); Loeb, The Low-Income Tenant in California: A
Study in Frustration, 21 HASTINGS L.J. 287, 303 (1970); Quinn & Phillips, supra note
7, at 230, 232-35.
80. Bennett, supra note 78, at 64; Quinn & Phillips, supra note 7, at 230, 235.
81. The first case to recognize the doctrine was Dyett v. Pendleton, 8 Cow. 727
(N.Y. Ct. Err. 1826), rev'd 4 Cow. 581 (N.Y. Sup. Ct. 1825) (tenant allowed to
defend an action for rent by submitting evidence that other parts of the apartment
building were occupied by prostitutes).
physically evicted. Although some courts were initially critical of the doctrine, it was gradually accepted throughout the country. 

By the middle of the twentieth century, it was “by far the most frequent defense offered to suits for rent where tenants quit the premises because of [their] condition . . . .”

The doctrine of constructive eviction was based on the theory that the covenant of quiet enjoyment could be breached not only by an actual physical expulsion, but also by such a substantial interference with the tenant's use and enjoyment of the premises that he was, for all practical purposes, evicted. A tenant who sought to invoke the doctrine had to meet four very stringent criteria.

First, he had to show an act of misfeasance or nonfeasance by the landlord (or someone acting under the landlord's instructions or with his permission). Second, he had to establish a substantial interference with his use and enjoyment of the premises. Typical acts

In terms of Quinn and Phillips' two-level analysis of the landlord-tenant relationship mentioned in note 75 supra, the doctrine of constructive eviction had the following effect:

Beneath the traditional exterior . . . a radically new idea was really at work. What the law was doing was taking an obligation that clearly situated itself on level two, i.e., the landlord's service obligation, and shifting it down to level one. On this level, there was a relationship of dependence between it and the rent . . . . What the law was accomplishing, therefore, was the fusion of the two levels in the limited situation where the failure to provide services was so severe that it shocked the court's conscience.

Quinn & Phillips, supra note 7, at 236.

82. Bennett, supra note 78, at 65. See also Hicks, supra note 11, at 461; Quinn & Phillips, supra note 7, at 235-36.

83. Id. at 69. For a discussion of other defenses which are available to tenants under such circumstances see Rapacz, Theories of Defense When Tenants Abandon the Premises Because of the Condition Thereof, 4 De Paul L. Rev. 173 (1955).

84. 1 ALP, supra note 22, § 3.50, at 278; 2 Powell, supra note 26, at ¶ 225[3]; Hicks, supra note 11, at 461-62; Rapacz, supra note 67, at 73-74.

85. Rapacz, supra note 67, at 75 (The author identifies only three elements, since he combines the first and second elements discussed below in the text). Comment, Constructive Eviction of a Tenant, 13 Baylor L. Rev. 62, 70 (1961); Note, Partial Constructive Eviction: The Common Law Answer in the Tenant's Struggle for Habitability, 21 Hastings L.J. 417, 421-23 (1970). The cases are collected in 1 ALP, supra note 22, § 3.51 and 2 Powell, supra note 26, at ¶ 225[3].

86. Rapacz, supra note 67, at 79-81; Comment, Constructive Eviction of a Tenant, 13 Baylor L. Rev. 62, 64-65 (1961); Note, Partial Constructive Eviction, The Common Law Answer in the Tenant's Struggle for Habitability, 21 Hastings L.J. 417, 421-22 (1970). There are some modern cases which have held that the lessor's failure to stop other tenants from interfering with the lessee's use and enjoyment of the premises constitutes a constructive eviction, but such cases are relatively rare. E.g., Bruckner v. Helfaer, 197 Wis. 582, 222 N.W. 790 (1929); Rapacz, supra note 67, at 80, 82-84.


88. See the following sources for a complete list of acts constituting a constructive
which have been held to constitute a constructive eviction include the breach of express covenants to furnish services (e.g., heat, hot water, elevator service) or to make repairs or improvements, the breach of the implied warranty of habitability in the lease of a dwelling for a short term, and, in some jurisdictions, the failure to remedy defective conditions which the tenant is unable to repair, even though there has been no breach of an express or implied warranty regarding the condition of the premises. Third, the tenant had to establish that the landlord intended to interfere with his quiet possession. And fourth, he had to abandon the premises within a reasonable time after the commission of the act.

Abandonment was required because it seemed contradictory to permit a tenant to claim a constructive "eviction" and remain in possession at the same time. However, the requirement placed the tenant in a terrible dilemma. If he remained in possession, he was deemed to have waived the defects. But if he abandoned the premises, he ran the risk that the courts would subsequently find the landlord's breach "insubstantial," meaning that the tenant was still liable for the rent. The tenant's problems were further compounded dur-

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93. Comment, Constructive Eviction of a Tenant, 13 BAYLOR L. REV. 62, 62-64 (1961); Note, Partial Constructive Eviction: The Common Law Answer in the Tenant's Struggle for Habitability, 21 HASTINGS L.J. 417, 422 (1970). One commentator has suggested, however, that "we have reached the state in the law where intent to evict is merely a technical requirement which might well be abandoned." Rapacz, supra note 67, at 79.

94. What constitutes a reasonable time has been held to depend upon the circumstances of the case. See generally Annot., 91 A.L.R.2d 638 (1963).


If the landlord had no knowledge of the defect, the tenant was also required to notify him of the condition and give him an opportunity to remedy it. Rapacz, supra note 67, at 85.

ing periods when there was a housing shortage. In an effort to ease the tenant's plight, a few courts recognized "constructive eviction without abandonment" or "partial constructive eviction," but these modifications of the doctrine were never widely accepted.

A tenant who was able to bring himself within the doctrine of constructive eviction had two remedies. He could defend an action for eviction or rent, because the constructive eviction suspended his obligation to pay rent. He could also sue for damages, since the landlord had breached the covenant of quiet enjoyment.

Constructive eviction served two important functions. As is widely recognized, it ameliorated the harshness of the independent covenants doctrine by permitting a tenant to vacate the premises for a substantial breach of an express or implied covenant to repair. Moreover, it enabled the courts to carve out a fourth exception to the general rule of caveat lessee. If a tenant in an unfurnished dwelling (or in a furnished dwelling for a long term) could establish that the premises were so uninhabitable as to constitute a breach of the covenant of quiet enjoyment, he could defend an action for rent or eviction and bring an action for damages. Despite its merits, the doctrine still had one significant shortcoming: it was a possession-oriented remedy which required the tenant to abandon the premises. Therefore, the remedy's value became increasingly ephemeral in the modern context of housing shortages and low-income tenants who could not risk an adverse post-abandonment judicial decision.

D. Housing Codes

The common law of landlord-tenant relations can be briefly

100. Quinn & Phillips, supra note 7, at 238.
101. 1 ALP, supra note 22, § 3.52, at 283-84; Rapacz, supra note 67, at 87-88. Rapacz notes that, in reality, the obligation to pay rent is terminated. Id. at 87.
102. 1 ALP, supra note 22, § 3.52, at 284-85; Rapacz, supra note 67, at 88-89. The tenant is entitled to recover damages for the loss of his contractual bargain, the costs and expenses of eviction, and any lost profits he has sustained. Id. at 88.
103. 1 ALP, supra note 22, § 3.51, at 281; 3A A. CORBIN, CONTRACTS § 686, at 242-43 (rev. ed. 1960); Bennett, supra note 78, at 68-69.
104. See text accompanying note 92 supra.
105. Quinn & Phillips, supra note 7, at 236-37; Note, Contract Principles and Leases of Realty, 50 B.U.L. REV. 24, 30-31 (1970); Comment, Implied Warranty of
summarized: 1) The lease was a conveyance of real property; 2) the doctrine of caveat emptor applied to the vast majority of lease transactions; and 3) lease covenants were generally independent covenants. The social and economic forces of the Industrial Revolution, coupled with this "common-law troika" of real property doctrines, produced large urban areas in which low-income tenants lived in tenement houses which were both unsafe and unsanitary. The tenants lacked the economic leverage to improve their living conditions, and there was no recourse in the courts, for the law of landlord-tenant was heavily weighted in favor of the landlord. Since the courts demonstrated no willingness to modify the common law, it became necessary for the legislatures to take corrective action.

It would have been possible to have enacted legislation abrogating all three components of the "common law troika." Such legislation would have decreed that a lease is a contract composed of mutually dependent covenants, including an implied covenant to put the premises in good repair and to maintain them in such condition during the term of the lease. A violation of the statutory covenant to repair would have entitled the tenant to refuse to pay all or a portion of the rent. Instead of following this course of action, however, legislatures in the United States focused their attention on the doctrine of caveat lessee and enacted housing codes imposing on the landlord a statutory duty to repair.

1. STATUTORY DUTY TO REPAIR

The typical housing code is a municipal ordinance enacted pursuant to state enabling legislation, which makes a violation of its provisions a misdemeanor. Liability is imposed without proof of criminal intent. A housing code normally 1) requires the installation of certain facilities, such as bathroom and kitchen facilities, electricity, heating, lighting, solid and liquid waste disposal, and ventilation; 2) establishes standards for the continued maintenance of the structural facilities and for the elimination of unsanitary conditions, such as rodents, vermin, and dampness; and 3) regulates the

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106. See note 388 infra.

107. F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 7 (National Commission on Urban Problems, Research Report No. 14, 1968) [hereinafter cited as GRAD]. The enabling legislation frequently establishes the manner in which the housing code may be enforced, and therefore it should be consulted in addition to the ordinance. Some states have enacted state housing codes. Id.

108. It is relatively simple to prove an offense, since it is necessary to establish only two elements: the existence of a condition in a dwelling which violates the housing code and the defendant's ownership of the dwelling at the time of the violation. Id. at 22.
density of occupancy by prescribing the minimum size of dwelling units for given numbers of occupants.109 Initially, housing codes covered only multiple-unit dwellings occupied by three or more families.110 Because these tended to be concentrated in large, urban areas, no more than 56 housing codes had been enacted as of 1954.111 In that year, federal legislation was passed requiring local communities to enact housing codes in order to become eligible for the receipt of urban renewal funds.112 Today, in response to federal prodding, more than 5,000 communities have enacted housing codes, many of which cover all residential dwellings.113

Although housing codes serve the salutary function of imposing a duty to repair, they have been criticized114 for setting standards that are too low to assure “a decent home and suitable living environment for every American family.”115 Since housing codes are


110. The ancestry of the modern housing code goes back to the tenement house laws enacted in the latter half of the nineteenth century to cope with the problems created when conventional housing resources in urban areas were overburdened by the immigration of large numbers of people from Europe. The early laws proved inadequate, and a movement favoring more stringent regulations, spearheaded by Lawrence Veiller, culminated in the enactment of the New York Tenement House Act of 1901. Ch. 334 [1901] N.Y. Sess. Laws. The New York Act became a model for other jurisdictions, and by 1910, over one-fourth of the states had passed similar legislation.

Following World War I, there was a shift away from tenement house laws to multiple dwelling codes. Again, New York was in the forefront with its Multiple Dwelling Law of 1929, which covered all buildings inhabited by three or more families. Ch. 713 [1929] N.Y. Sess. Laws. This time, however, there was no rush to follow New York's example. In the 1930’s, reformers were generally disillusioned with housing codes and had directed their attention to public housing. See generally L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 25-55 (1968); Mood, supra note 109, at 6-8; Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254, 1259-60 (1966); Comment, Building Codes, Housing Codes and Conservation of Chicago's Housing Supply, 31 U. CHI. L. REV. 180 (1963).

111. BUILDING THE AMERICAN CITY, supra note 109, at 277.

112. The Housing Act of 1954 required all communities receiving urban renewal funds to have a “workable program . . . to eliminate and prevent the development or spread of slums and urban blight.” Housing Act of 1954, ch. 649, § 303, 68 Stat. 623 (1954), as amended 42 U.S.C. § 1451 (1970). The enactment of a local housing code was a prerequisite to the certification of a “workable program.” At first the requirement was administrative; now it is statutory. Id.; L. FRIEDMAN, supra note 110, at 49-50; Gribetz & Grad, supra note 110, at 1260 n.19; Note, Federal Aids for Enforcement of Housing Codes, 40 N.Y.U.L. REV. 948, 958-68 (1965).

113. BUILDING THE AMERICAN CITY, supra note 109, at 277.

114. Id. at 274; Mood, supra note 109, at 13.

normally local legislation, the standards also lack uniformity. In an
effort to combat this latter problem, at least four model codes have
been promulgated by health groups and building official groups.
However, there is no uniformity among the model codes either.
Those drafted by health groups tend to use short, general phrases,
such as "sound condition," "good repair," "safe to use and capable
of supporting the loads," and "constructed and installed in conformance
with applicable state and local laws." Those issued by building
official groups often refer to specific sections in the companion
model building code, thereby encouraging local governmental enti-
ties to adopt the housing code which is tied to their building
code.117

The inadequate standards and lack of uniformity in today's housing
codes have prompted scholars and governmental commissions to call
for the development of a "new generation of model housing codes
using a common set of standards based on the specific national objective
of achieving a decent home for every American family."
Meanwhile, there has been some movement toward the enactment
of comprehensive, statewide housing codes.119 Such codes would

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116. United States Public Health Service, APHA-PHS Recommended Hous-
ing Maintenance and Occupancy Ordinance (1971); The Building Officials'
Conference of America, The BOCA Basic Housing Code (2d ed. 1970) (promi-
nent in the east and north central parts of the United States); The International
Conference of Building Officials, Uniform Building Code: Housing (Vol. III)
(1973) (most influential in the west); Southern Building Code Congress, Sout-
ern Standard Housing Code (1969) (dominant in the south). The APHA-PHS
code was drafted by mental health officers; the other three are the product of build-
ing officials' organizations, which have also promulgated model building codes gov-
erning the construction of new buildings.

Housing codes are to be distinguished from building codes. Building codes set
construction standards; housing codes establish use-and-occupancy standards. Mood,
supra note 109, at 3.

For a general analysis and evaluation of building and housing codes, with recom-
endations for improvement see Building the American City, supra note 109, at
254-307; Mood, supra note 109, at 11-38. For an analysis of the APHA-PHS Code,
see Polatsek, The New Model—An Analysis of the APHA-PHS Recommended Hous-

117. Building the American City, supra note 109, 279.

118. Id. at 306; accord Mood, supra note 109, at 35-38.

119. New Jersey, for example, has recently instituted a statewide system of code
enforcement under the Commissioner of the Department of Community Affairs, who
has authority to promulgate standards for both new construction and subsequent
standards are embodied in administrative regulations, they have the potential for be-
ing more current and flexible than statutory standards. Metzger, Statewide Code En-
The regulations are enforced by the Bureau of Housing Inspection, an agency fi-
nanced through the assessment of registration and inspection fees. Id. at 659-64,
667-68. A large percentage of the cases are settled informally, but where the owner
refuses to comply, the Bureau is authorized to impose monetary penalties through an
administrative procedure. Id. at 668-71. The case does not go to court unless the
owner refuses to pay the fine, in which case there is a summary procedure for reduc-
ing the penalty to a judgment. Id. at 669 & n.71, 672. It is "somewhat early to
certainly promote uniformity and facilitate the imposition of a rigorous statutory duty to repair.

2. CRIMINAL SANCTIONS

As originally conceived, housing codes were to be enforced by public officials imposing criminal sanctions. This method of enforcement did not disrupt the common law landlord-tenant relation for it gave the tenant no direct right of action against the landlord. Instead, housing inspectors were to inspect residential dwellings, either in response to a specific complaint or as a routine inspection. The inspector was then to notify the responsible party of the existence of any housing code violation. If the violation was not removed within a reasonable period of time, increasingly coercive pressures (first administrative, and then judicial) were to be used to persuade or compel the responsible party to comply.

For several reasons, this system of enforcement has never been implemented successfully. Code enforcement agencies are typically understaffed, resulting in selective enforcement at the administrative level. This pattern is continued at the judicial

make conclusive statements about the Bureau's impact on the New Jersey housing scene," but other jurisdictions will be watching New Jersey's program with interest. Id. at 674.

120. Gribetz & Grad, supra note 110, at 1263. See statutes cited note 257 infra.
121. GRAD, supra note 107, at 3-4.
122. For a comprehensive assessment of the reasons for the ineffectiveness of housing code enforcement and suggested recommendations see BUILDING THE AMERICAN CITY, supra note 109, at 503-09.
124. Castrataro, Housing Code Enforcement: A Century of Frustration in New York City, 14 N.Y.L.F. 60, 67-68 (1968); Dick & Pfarr, supra note 123, at 73-74;
level$^{125}$ and compounded by prolonged delays.$^{126}$ At the end of the process, if a conviction is obtained, jail sentences are almost never imposed and the typical fine is $15$ to $30,^{127}$ although the maximum allowable fines range from $50$ to $500$ for a first offense, and most ordinances permit the imposition of at least a 30-day jail sentence.$^{128}$ The reluctance of the judiciary to impose stiff penalties$^{129}$ has made the criminal process a system of licensing, rather than an effective deterrent.$^{130}$

3. CIVIL SANCTIONS

Once it became apparent that a housing code enforced solely by criminal sanctions was a paper tiger, legislatures began to authorize the imposition of civil sanctions. It was thought that civil sanctions would be more effective than criminal sanctions because

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Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 811-13 (1965). Enforcement is also discretionary and subjective, partly because the standards are broad (e.g., "shall be kept clean" or "shall be kept in good repair") and partly because it is impossible to inspect all dwellings (dwelling units outnumber inspectors on a ratio of roughly 20,000 to 1). Burke, Redrafting Municipal Housing Codes, 48 J. Urban L. 933, 934 (1971).

125. Quinn & Phillips, supra note 7, at 239-40.

126. Tietz & Rosenthal, Housing Code Enforcement in New York, in Housing in America: Problems and Perspectives 486-87 (1973); Castrataro, supra note 124, at 71-73; Gribetz & Grad, supra note 110, at 1277-78; Loeb, supra note 79, at 294; Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 824 (1965).

127. Daniels, Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia, 59 Geo. L.J. 909, 913-16 (1971); Dick & Pfarr, supra note 123, at 75-76 (average fine in Detroit in 1966 was $29); Gribetz & Grad, supra note 110, at 1276 (average fine in New York City in 1964 was $16.86); Loeb, supra note 79, at 294; Quinn & Phillips, supra note 7, at 240.

128. Grad, supra note 107, at 22, 26; Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 824-25 (1965).

129. The explanations for this judicial leniency are as varied as the persons offering them. Some say that it is the fault of the prosecutors, who are neither sufficiently aggressive nor well-prepared. Grad, supra note 107, at 23-26; Castrataro, supra note 124, at 69-70; Lieberman, The Administrative Process-Housing Code Enforcement, 3 Urban Lawyer 551, 552-54 (1971); Loeb, supra note 79, at 293-94. Others say that judges are unwilling to impose criminal sanctions on middle-class businessmen. Note, Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem, 22 Case W. Res. L. Rev. 739, 756 (1971); Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Cal. L. Rev. 304, 319 (1965). A closely related explanation is that courts are reluctant to impose criminal sanctions for "social welfare offenses," which are punishable regardless of criminal intent. Gribetz & Grad, supra note 110, at 1279-80. Perhaps practicality is the principal consideration. A landlord faced with the alternatives of making extensive repairs or suffering harsh criminal sanctions will often either raise the rent substantially or vacate the building, thereby adding to the already severe housing shortage. Burke, Redrafting Municipal Housing Codes, 48 J. Urban L. 933, 935 (1971).

130. See also Tietz & Rosenthal, supra note 126, at 486-87; Levi, Focal Leverage Points in Problems Relating to Real Property, 66 Colum. L. Rev. 275, 277 (1966); Quinn & Phillips, supra note 7, at 240-41.
a penalty could be imposed which created an economic incentive to comply with the law—the cost of noncompliance could be set to exceed the cost of compliance.\textsuperscript{131}

At first it was principally public officials who were empowered to invoke civil sanctions. Thus, over the years, enforcement agencies have been authorized: 1) to order that a building be vacated until such time as the necessary repairs have been made to restore it to code standards;\textsuperscript{132} 2) to obtain a prohibitive or mandatory injunction requiring compliance with the code;\textsuperscript{133} 3) to request the appointment of a receiver to collect the rents and use them to make the necessary repairs;\textsuperscript{134} 4) to make repairs at the owner's expense,

\textsuperscript{131} With the development of civil as well as criminal sanctions, some jurisdictions have created housing courts with both civil and criminal jurisdiction. \textsc{grad}, supra note 107, at 75-76. New York City now has a housing court with the power to impose the full panoply of civil sanctions discussed in this subsection. \textsc{n.y.c. civil ct. act \textsection 110, 203, 204} (McKinney Supp. 1973). The proposal for New York City's housing court was advanced by Gribetz and \textsc{grad}, supra note 107, at 43-48; Gribetz & \textsc{grad}, supra note 110, at 1281-90. It has been described in detail in \textsc{note}, \textit{the new york city housing court: consolidation of old and new remedies}, 47 \textsc{st. john's l. rev.} 483 (1973).

\textsuperscript{132} \textsc{grad}, supra note 107, at 56-58; \textsc{indritz}, \textit{the tenants' rights movement}, 1 \textsc{n.m.l. rev.} 1, 54-55 (1971); \textsc{note}, \textit{enforcement of municipal housing codes}, 78 \textsc{harv. l. rev.} 801, 833-34 (1965).

Under this remedy, an administrative official makes a finding that a building is unsafe or unfit for habitation, and then summarily orders that the building be vacated. The remedy may be used alone or in conjunction with an order to demolish the building if it is not repaired. The vacate order was an extremely effective enforcement mechanism in the early 1900's, when there was a substantial vacancy ratio. Gribetz & \textsc{grad}, supra note 110, at 1261. But in the context of today's housing shortage, it has fallen into disuse. Daniels, supra note 127, at 917-19; Gribetz & \textsc{grad}, supra note 110, at 1261; \textsc{indritz}, supra, at 54-55 (1971).

\textsuperscript{133} The injunction may be issued on the basis of statutory authority or under the court's common law power to abate a nuisance. The court may issue a prohibitive injunction forbidding the defendant from operating his building until he has brought it into compliance with the code. It may also issue a mandatory injunction requiring the defendant to repair or vacate the building, with a failure to comply resulting in a civil contempt citation, the demolition of the building, or the appointment of a receiver. \textsc{grad}, supra note 107, at 40-42; \textsc{indritz}, supra note 132, at 54-55; \textsc{moses}, \textit{the enforcement process—housing codes}, 3 \textsc{urban lawyer} 559 (1971); \textsc{note}, \textit{enforcement of municipal housing codes}, 78 \textsc{harv. l. rev.} 801, 827 (1965); \textsc{comment}, \textit{the duty of maintenance of multiple dwellings in california}, 18 \textsc{stan. l. rev.} 1397, 1401-02 (1966); \textsc{comment}, \textit{building codes, housing codes, and the conservation of chicago housing supply}, 31 \textsc{u. chi. l. rev.} 180, 189-90 (1963). The principal drawbacks to the injunction are its procedural complexities and the fact that the prohibitive injunction may simply lead to the abandonment of the building. \textsc{levi}, supra note 130, at 279-80.

\textsuperscript{134} \textsc{grad}, supra note 107, at 42-55 (excellent descriptions of the New York and Chicago experience); Gribetz & \textsc{grad}, supra note 110, at 1272-74 (New York); \textsc{indritz}, supra note 132, at 55-60; \textsc{marco} & \textsc{mancino}, \textit{housing code enforcement—a new approach}, 18 \textsc{clev.-mar. l. rev.} 368, 376-83 (1969) (Cleveland); \textsc{comment}, \textit{pennsylvania housing legislation: proposals for reform}, 30 \textsc{u. pitt. l. rev.} 95, 104-06 (1968) (proposed Pennsylvania legislation); \textsc{note}, \textit{enforcement of municipal housing codes}, 78 \textsc{harv. l. rev.} 801, 828-30 (1965); \textsc{comment}, \textit{the new michi-
secured by a priority lien on the property;\textsuperscript{185} and 5) to impose a cumulative civil fine for serious violations of a housing code.\textsuperscript{186} But it was unrealistic to expect the understaffed code enforcement agencies to employ these civil sanctions much more effectively than they had used criminal sanctions in enforcing the statutory duty to repair. What was needed was a means by which tenants could act as private attorneys general in enforcing the provisions of a housing code.\textsuperscript{187}


The receivership is an effective tool for preserving and improving slum housing because it poses a significant threat to owners who do not maintain their property in habitable condition and, if the threat fails, it provides a viable means for making the necessary repairs. However, there are some disadvantages: the procedure is complex, there is disagreement as to which buildings should be placed in receivership, it is difficult to obtain financing, and when the municipality serves as the receiver, it becomes involved in managing an enormous number of privately-owned buildings. L. Friedman, supra note 110, at 67-68; Grad, supra note 107, at 46-48; Gribetz & Grad, supra note 110, at 1273; Indritz, supra note 132, at 58-60; Comment, Rent Receivership: An Evaluation of its Effectiveness as a Housing Code Enforcement Tool in Connecticut Cities, 2 CONN. L. REV. 687 (1970); Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 828-29 (1965); Comment, Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 311, 330-53 (1968) (excellent discussion of how to avoid these problems through the enactment of carefully-drafted legislation).

135. The repair remedy is authorized by statute in most jurisdictions, but has rarely been exercised due to lack of funds and the reluctance of local governments to take on the additional burden of serving as a repairman for low-income tenants. Grad, supra note 107, at 62-63, 68-69; Gribetz & Grad, supra note 110, at 1274-75; Daniels, supra note 127, at 919-20; Indritz, supra note 132, at 60-62; Loeb, supra note 79, at 295; Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 834-36 (1965).

136. N.Y.C. ADMINISTRATIVE CODE §§ D26-51.01, .03, .05 (Supp. 1974); Note, New York City, Civil Housing Court: Consolidation of Old and New Remedies, 47 ST. JOHN'S L. REV. 483, 494-99 (1973). The following schedule per violation has been established by §§ D26-51.01(a):

<table>
<thead>
<tr>
<th>VIOLATION</th>
<th>CIVIL PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hazardous</td>
<td>$25 to $100, plus up to $10 per day</td>
</tr>
<tr>
<td>Immediately hazardous</td>
<td>$25 per day</td>
</tr>
<tr>
<td>Nonhazardous</td>
<td>$10 to $50</td>
</tr>
</tbody>
</table>

Criminal sanctions have been abolished, except for defendants who willfully or recklessly violate provisions of the Code. They may be convicted of a misdemeanor.

N.Y.C. ADMINISTRATIVE CODE § D26-52.01.

The cumulative civil fine has the potential for being an extremely effective remedy, since the sanction becomes more severe as the number of violations or the duration of a single violation increases. Grad, supra note 107, at 36-39; Gribetz & Grad, supra note 108, at 1281-86.

137. Traditionally, private citizens have not been allowed to file criminal complaints when public officials have been authorized to enforce an ordinance. \textit{E.g.}, City of New Rochelle v. Beckwith, 268 N.Y. 315, 197 N.E. 295 (1935) (zoning ordinance); Indritz, supra note 132, at 52. Recent efforts have been made to use mandamus proceedings to compel public officials to enforce housing codes, but they have been largely unsuccessful. Gribetz, Housing Code Enforcement in 1970—An Overview, 3 URBAN LAWYER 525, 529-32 (1971).

Private citizens have also been denied standing to bring an action for injunctive relief or the appointment of a receiver. \textit{E.g.}, City Bank Farmers Trust v. Short, 203
In the 1930's, some tenants sought to enforce housing code provisions by contending that a housing code created an implied covenant to repair in a lease. They further contended that a violation of a code provision constituted a breach of the covenant, thereby entitling them to "repair and deduct" or remain in possession and defend a summary dispossession action. Since the courts insisted upon characterizing a lease as a conveyance, however, the tenant's contentions were rejected.\(^{138}\) The only private remedy available at common law was the familiar defense of constructive eviction, with its onerous requirement that the tenant abandon the premises as a condition to invoking the doctrine.\(^{139}\)

In response to the rigidity of the common law and the ineffectiveness of traditional public enforcement techniques, several states enacted rent impairment legislation\(^ {140}\) authorizing a tenant 1)

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\(^{139}\) Annot., 63 A.L.R. 432 (1929).

\(^{140}\) Throughout this article, "rent impairment" is a general term used to refer to all remedies which affect the tenant's obligation to pay rent. The terminology of the Restatement (Second) of Property will be used to refer to specific rent impairment remedies.

Approximately eighteen states have some form of rent impairing legislation. Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of landlord-Tenant?*, 40 FORDHAM L. REV. 123, 130 n.79 (1971). It can be anticipated that the Model Residential Landlord Tenant Code and the Uniform Residential Landlord and Tenant Act (URLTA) will stimulate further legislative activity in this area.

to repair any conditions which make the premises "untentable" and to deduct the cost of such repairs from the rent if the landlord fails to make the requested repairs within a reasonable time after receiving notice from the tenant;\(^2\) to withhold rental payments if the landlord fails to make the requested repairs within a reasonable time after receiving notice of a violation certified by a code enforcement agency;\(^3\) or 3) to suspend rental payments as long as a serious code


The Uniform Act was endorsed by the National Conference of Commissioners on Uniform State Laws in August, 1972. It permits the tenant to obtain injunctive relief, creates a repair and deduct remedy for minor defects, and authorizes both rent withholding and rent suspension. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.101-107. It has been analyzed by several commentators, particularly in conjunction with the Act’s introduction as proposed legislation in a given jurisdiction.


Most statutes require the tenant to pay the withheld rent into an escrow account. Once the repairs have been made, the entire amount of money withheld is payable to the landlord. E.g., N.Y. REAL PROP. ACTIONS § 755 (McKinney Supp. 1973); GRAD, supra note 107, at 123-27; Daniels, supra note 127, at 924-25; Indriz, supra note 132, at 72-78; Quinn & Phillips, supra note 7, at 245-46; Annot., 40 A.L.R.3d 821 (1971). There are two problems with this type of statute. First of all, it requires action by the code enforcement agency and by the courts as a condi-

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violation exists after a code enforcement agency has notified the landlord and given him a substantial period of time in which to make the necessary repairs.\^143 Rent impairment legislation enables the tenant to remain in possession of the premises and to exert economic

\^143 E.g., N.Y. MULT. DWELL. LAW § 302(a) (McKinney Supp. 1973). GRAD, supra note 107, at 127-28; Daniels, supra note 127, at 925; Comment, Tenant Remedies for a Denial of Essential Services and for Harrassment—The New York Approach, 1 FORDHAM URBAN L.J. 66, 71-72 (1972). Rent suspension is a meaningful economic sanction, but it tends to be blunted by the long period of time (e.g., six months) which the tenant must wait before he is entitled to cease making rental payments. Quinn & Phillips, supra note 7, at 247; Note, Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem, 22 CASE W. RES. L. REV. 739, 763 (1971); Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 847 (1965).
pressure on the landlord to maintain them in good repair. In this respect, it has eroded the common law doctrine that a lease is a conveyance of property composed of independent covenants. The independent covenants rule has not been totally obliterated, however. The tenant who withholds rent, for example, must pay all the withheld rent to the landlord once the premises are brought into compliance with the housing code because the covenant to pay rent is not dependent upon the landlord's statutory duty to repair.

In conclusion, the enactment of housing codes imposing a statutory duty to repair enforced by criminal sanctions helped to improve tenants' living conditions by abolishing the doctrine of caveat emptor in residential leases. Further advances were made when public enforcement agencies and private individuals were authorized to initiate the imposition of civil sanctions for a landlord's violation of a housing code. But rent impairment legislation did not abrogate the common law characterization of a lease as a conveyance of property composed of independent covenants. It merely created an economic sanction which the tenant could exert against the landlord while remaining in possession of the premises.

II. LANDLORD'S LIABILITY FOR DEFECTIVE PREMISES: COMMON LAW

A. General Rule: Immunity from Liability

The common law characterization of the lease as a conveyance of property became the cornerstone of the legal framework governing the landlord's liability for defective premises. Like the vendor of real property, the lessor wore the cloak of immunity created by the doctrine of caveat emptor. Since the tenant had an opport

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144. Landlords used to retaliate against the invocation of rent-impairing remedies by evicting the troublemaker. However, recent legislation and court decisions have provided increased protection against such retaliatory acts. See, e.g., CAL. CIV. CODE § 1942.5 (West Supp. 1974); N.Y. UNCONSOL. LAWS § 8590 (McKinney 1974); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971) (action for damages); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970); MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407 (Tent. Draft 1969); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101; Annot., 40 A.L.R.3d 753 (1971).

145. See note 142 supra.

146. 4D L. FRUMER & M. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 1.01(1), at 258-65 (rev. ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.16, at 1506 (1956); 2 POWELL, supra note 26, § 233, at 300; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63, at 399-400 (4th ed. 1971); Eldredge, Landlord's Tort Liability for Disrepair, 84 U. PA. L. REV. 467, 472 (1936); Grimes, Caveat Lessee, 2 VALPARAISO U.L. REV. 189, 209 (1968); Harkrider, Tort Liability of a Landlord, 26 MICH. L. REV. 260, 260-63 (1928); Note, Lessor's Duty to Re-
tunity to inspect the premises before leasing them, he was deemed to have assumed the risk of any personal injury or property damage caused by a defect present at the beginning of the lease;\(^{147}\) and once the tenant acquired control of the premises, the landlord was no longer liable to third parties for such defects.\(^{148}\) Furthermore, since it was the tenant's duty to repair the premises after he took control, the landlord was immune from liability to the tenant and third persons alike for defects arising during the term of the lease.\(^{149}\) In the language of a leading English decision:

> [I]t is well established that no duty is, at law, cast on a landlord not to let his house in a dangerous and dilapidated condition, and further, that if he does let it while in such a condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his (the tenant's) servants, guests, customers or others invited by him to enter the premises by reason of this defective condition.\(^{150}\)

**B. Exceptions to the General Rule**

With the shift of the tenant population from the country to the city, the resultant trend toward multiple dwellings, and the enactment of housing codes, the courts were placed under increasing pressure to shift the responsibility for repairs and the liability for personal injuries or property damages to the landlord. However, instead of adopting a fundamentally different theory of lessor liability, the court responded to this pressure by creating a number of exceptions to the rule of *caveat emptor.*\(^{151}\)

This was understandable in light of the law of landlord-tenant relations. As long as the lease continued to be viewed as a conveyance, it was difficult for the courts to depart from the general rule of immunity associated with the doctrine of *caveat emptor.* Thus

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\(^{148}\) Harkrider, *supra* note 146, at 263; Schlegel, *supra* note 147, at 328.

\(^{149}\) Restatement (Second) of Torts § 355 (1965); Harkrider, *supra* note 146, at 383.


the courts felt free to impose liability only when such action could be harmonized with the rules governing the liability of a vendor of real property, or when the characterization of a lease as a conveyance was so contrary to social and economic realities that justice required the creation of an exception to the general rule.

In the early days, when a lease was used to transfer possession of a single-family dwelling or of property to be used for agricultural or business purposes, the landlord typically relinquished control over the entire premises. Such leases often bore a strong resemblance to a conveyance of property. Nevertheless, the courts recognized five exceptions to the general rule of nonliability. The landlord was held liable for damages caused by undisclosed latent defects; defects in premises leased for admission of the public; a breach of the implied warranty of habitability or merchantability in a short-term lease of furnished premises; a breach of a covenant to repair; and negligent repairs. With the development of multiple-unit dwellings and office buildings, the landlord ceased to convey all his property to the tenant, and a sixth exception was recognized for damage caused by defects in “common areas” under the landlord’s control. Finally, the enactment of housing codes prompted some courts to create a seventh exception for damage caused by a violation of a provision of such a code. Each of these seven exceptions will now be examined in greater detail.

1. UNDISCLOSED LATENT DEFECTS KNOWN TO LESSOR

One of the first exceptions recognized by the common law courts was for damage caused by a latent defect in the premises which was known to the lessor at the time of leasing, but which he failed to disclose to the lessee. This exception is completely

152. Restatement (Second) of Torts §§ 357-59, 362 (1965); 2 Powell, supra note 26, ¶ 234(2), at 332-333. Although the implied warranty of fitness in premises under construction could provide the basis for a sixth exception, no cases have been found imposing liability for personal injuries or property damage caused by a breach of the warranty. See text accompanying notes 61-64 supra.

153. Restatement (Second) of Torts §§ 360-61 (1965).

154. 4D L. Frumer & M. Friedman, supra note 146, at § 1.06(1); 2 Powell, supra note 26, ¶ 233(2).

155. When a landlord has a duty to maintain the premises in a reasonably safe condition, the modern majority rule characterizes it as a “nondelegable duty,” and consequently a landlord is liable for the negligence of either an independent contractor or an employee hired to make the necessary repairs. 4D L. Frumer & M. Friedman, supra note 146, at § 1.01(5)(a); W. Prosser, supra note 146, § 63, at 411-12; Restatement (Second) of Torts § 362, Comment g (1965).

156. 4D L. Frumer & M. Friedman, supra note 146, § 1.02(1), at 324. The exception was first suggested in the following passage from Robbins v. Jones, [1863] 15 C.B. (n.s.) 221, 240 (emphasis added):

A landlord who lets a house in a dangerous state is not liable to the tenant’s
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compatible with the characterization of the lease as a conveyance because liability is imposed on vendors of real property under analogous circumstances. The exception is also consistent with the doctrine of *caveat emptor*, since it leaves the burden on the tenant to inspect the premises and discover any defects discernible by a reasonable inspection. The landlord is liable on the theory that non-disclosure of known, latent defects constitutes fraud or actionable negligence.

Originally, a majority of the courts imposed liability only when the landlord had actual knowledge of the defect. Tennessee went to the opposite extreme, imposing liability whenever the landlord negligently failed to discover a defect. Many courts today have adopted an intermediate position, holding the landlord liable if "he has knowledge of facts that would lead a reasonable man to suspect that defects actually exist." This position has been incorporated into section 358 of the Restatement (Second) of Torts:

(1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if

(a) the lessee does not know or have reason to know of the condition or the risk involved, and

For a discussion of the development of fraud as an exception to the *caveat lessee* doctrine, permitting a tenant to defend an action for the payment of rent see text accompanying notes 65-66 supra.

157. *Restatement (Second) of Torts* § 353 (1965); W. Prosser, supra note 146, § 63, at 401.


159. 2 F. Harper & F. James, supra note 146, § 27.16, at 1507-08; Schlegel, supra note 147, at 329. For an extensive comparison of fraud and negligence as alternative theories of liability and a suggestion that negligence is the better theory see Harkrider, supra note 146, at 270-75.


the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

(2) If the lessor actively conceals the condition, the liability stated in Subsection (1) continues until the lessee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise, the liability continues only until the lessee has had reasonable opportunity to discover the condition and to take such precautions.\footnote{163}

Although the "latent defect" exception may be invoked by either the tenant or a third person on the premises with the consent of the tenant,\footnote{164} a third party is barred from recovery if notice of the defect has been given to the tenant.\footnote{165} While this is consistent with the notion that a lease is a conveyance of property, putting the tenant in the best position to repair a dangerous condition or to warn third persons of its existence, it is nevertheless a rather arbitrary limitation on liability.\footnote{166} There is also a second limitation on this theory of recovery: it is difficult for the plaintiff to show that the lessor had reason to know of the defective condition without simultaneously establishing facts evidencing the plaintiff's contributory fault.\footnote{167} Therefore, although this is one of the oldest exceptions to the general rule of nonliability, it is one of the least utilized, and it tends to be most successful when the plaintiff is proceeding on the theory that the lessor had actual knowledge of the dangerous condition.\footnote{168}

\footnote{163}{RESTATEMENT (SECOND) OF TORTS § 358 (1965). It has been suggested that a higher duty should be imposed on a landlord who also constructed the buildings on the leased premises. See Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Harkrider, supra note 146, at 276-77.}

\footnote{164}{2 POWELL, supra note 26, ¶ 234[3][a], at 351-52; W. PROSSER, supra note 146, § 63, at 401; Annot., 17 A.L.R.3d 422, § 4 (1968); Annot., 25 A.L.R.2d 598, § 7 (1952).}

\footnote{165}{2 F. HARPER & F. JAMES, supra note 146, at ¶ 27.16, at 1509.}

\footnote{166}{Id. at 1509-10: [The rule] is sometimes justified by pointing to the relinquishment of possession and control, the impossibility of standing guard so as to warn those who will visit during the term of the lease, and the burden on landlords of putting premises in reasonably safe condition. Yet it is no part of the general law of negligence to exonerate a defendant simply because the condition attributable to his negligence has passed beyond his control before it causes injury (if the injury was foreseeable at the time and defendant still had control). Nor is the duty of care to A generally satisfied (as a matter of law) by warning B of a latent defect.}

\footnote{167}{Noel, supra note 147, at 379-80. The Tennessee Supreme Court has solved the plaintiff's dilemma in the following manner:
From the very nature of the case, the same degree of care and diligence exercised by each would in many, if not all cases, enable the landlord to know more than the tenant.

\footnote{168}{2 POWELL, supra note 26, ¶ 234[2][a], at 334.}
2. PREMISES LEASED FOR ADMISSION OF PUBLIC

The second exception was born of the tension between real property concepts and the public's expectations regarding the condition of leased premises. Under the "latent defect" doctrine discussed in the preceding subsection, a landlord could immunize himself from liability to the public by notifying the tenant of the dangerous condition prior to the commencement of the lease. The landlord had no duty to warn third persons of the defect. Dissatisfaction with this rule of real property law led to the development of the "public use" exception, now set forth in section 359 of the Restatement:

A lessor who leases land for a purpose which involves the admission of the public is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession, if the lessor
(a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and
(b) has reason to expect that the lessee will admit them before the land is put in safe condition for their reception, and
(c) fails to exercise reasonable care to discover or to remedy the condition, or otherwise to protect such persons against it.

Although the early cases premised the public use exception on a nuisance theory, it is now generally agreed that negligence is the proper theory of liability. The increased responsibility of the landlord in this situation is based "partly on the concept that the landlord, as well as the tenant, has 'invited' the public on the premises," and partly on the notion that "where a public . . . danger is involved, the landlord should not be allowed to shift the responsibility to a tenant, except when the tenant has expressly assumed it, and is likely to carry out his agreement."

The exception imposes a duty of reasonable care on the landlord, but under very limited circumstances. A minority of jurisdictions restrict the doctrine to places of amusement intended for exten-
The majority hold that the exception applies whenever the premises are open to the public, regardless of the specific use or the number of people expected to enter at one time. All jurisdictions limit the landlord's liability to damages sustained on that portion of the premises open to the public and by those persons who enter for a reason related to the purpose for which the public is admitted.

The public use exception, although noteworthy because it illustrates a situation in which the courts have imposed a duty of reasonable care on landlords, is also significant in that it does not appreciably alter the landlord-tenant relation. The exception creates liability only for defects in existence prior to the transfer of possession and protects only members of the public—not the tenant.

3. IMPLIED WARRANTY OF HABITABILITY OR MERCHANTABILITY IN FURNISHED DWELLINGS FOR A SHORT TERM

To provide a greater measure of protection to the tenant against defects existing at the commencement of the term, a few courts have permitted recovery for personal injury or property damage under the implied warranty of habitability in a short-term lease of a furnished dwelling. This third exception to the doctrine of caveat emptor originated in, and is based on the same rationale as, those cases which held that a tenant in a furnished dwelling for a short term could assert the uninhabitable condition of the premises as a defense in an action by the landlord for rent.

Permitting recovery for personal injury or property damage caused by a breach of the implied warranty of habitability is clearly

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174. 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.03[2], at 354-58; Grimes, supra note 146, at 219; Annot., 17 A.L.R.3d 873, §§ 3-4 (1968).
175. 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.03[2], at 358-59. Typical types of premises to which the exception has been applied include amusement parks, sports arenas, theaters, restaurants, public garages and parking spaces, hotels, boarding houses, beauty shops and doctors' offices. 2 POWELL, supra note 26, ¶ 234[3][b], at 362-63; W. PROSSER, supra note 146, § 63, at 403-05; Annot., 17 A.L.R.3d 873, §§ 8-19 (1968).
176. 4D L. FRUMER & M. FRIEDMAN, supra note 146, at § 1.03[3], [4]; W. PROSSER, supra note 146, § 63, at 405; Annot., 17 A.L.R.3d 873, § 6 (1968).
178. See text accompanying notes 50-60 supra.
a minority rule. Although it has been adopted in a few states, it has been rejected in several jurisdictions and was not incorporated into the Restatement (Second) of Torts. Even in Massachusetts, where the exception has been most readily accepted, it has been narrowly circumscribed. Liability is imposed only for latent defects in fully furnished dwellings leased for a short term when the defect was present at the commencement of the tenancy. However, if the exception is applicable, the landlord will be held strictly liable, since the action is for breach of an implied contractual obligation.

Plaintiffs have been permitted to recover for damages caused by defects of which the landlord had neither actual nor constructive knowledge. Although the question has not been explicitly resolved, the opinions suggest that the implied contractual obligation creates a tort duty which would permit third parties to recover for a breach of the warranty.

179. E.g., Minton v. Hardinger, 438 S.W.2d 3 (Mo. App. 1968); 4D. L. FRUMER & M. FRIEDMAN, supra note 146, § 1.01[2][a], at 268 n.1. Other jurisdictions have recognized the doctrine, but in fact situations which did not involve personal injury or property damage. See notes 55-60 supra.

180. 4D. L. FRUMER & M. FRIEDMAN, supra note 146, § 1.01[2][a], at 271.


182. Bolieu v. Traiser, 253 Mass. 346, 148 N.E. 809 (1925) (doctrine does not apply to partially furnished house). However, if the tenant brings a few furnishings, such as two chairs for a minor child, this will not bar recovery. Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942).


185. Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E.2d 418 (1946); Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942). Although strict liability is imposed, this does not make the landlord an insurer. The plaintiff must still prove the existence of a defect. For example, in Legere v. Asselta, 342 Mass. 178, 179, 172 N.E.2d 685, 686 (1961), the plaintiff slipped on an accumulation of ice which had formed on the steps of a furnished bungalow due to the construction of the bungalow's roof. The court held:

It is a matter of common knowledge that the type of roof described is one which is frequently used in small dwellings, especially in rural areas. This is no defect. . . . The house was fit for habitation when the plaintiff took possession. That is the extent of the defendants' warranty. It cannot be extended to mean that nothing will happen to the lessee even if the forces of nature operate seasonally in their usual way, such as converting water to ice.

186. Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E.2d 418 (1946) (evidence did not permit a finding that defendant knew porch railing had rotted at both ends); Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942) (there was no evidence that defendant knew of defect in way angle irons were screwed to ladder which plaintiff used to gain access to upper berth of bed); Bolieu v. Traiser, 253 Mass. 346, 148 N.E. 809 (1925) (implied warranty of habitability imposes duty to inspect) (dictum).

Some of the states which have refused to allow recovery for personal injury or property damage under an implied warranty of habitability have developed an alternative theory of liability based on the premise that a lease of a furnished apartment is a lease of both real and personal property. In these jurisdictions, although the courts refuse to recognize an implied warranty of habitability covering structural defects, they do recognize an implied warranty of merchantability covering the furniture. As a theory of recovery against a landlord, the implied warranty of merchantability is not as well-developed as the implied warranty of habitability, but an analysis of the cases suggests that the scope of the implied warranty of merchantability is similarly limited to latent defects in furnished dwellings leased for a short term when the defect was present in the furnishings at the inception of the lease. It is not clear whether the older cases were applying a standard of negligence or strict liability. However the most recent California decision clearly imposes strict liability.

Thus far, only tenants have invoked the

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188. For a discussion of this theory see Harkrider, supra note 146, at 283-84.

190. Fakhoury v. Magner, 25 Cal. App. 3d 62, 101 Cal. Rptr. 473 (1972) (recovery allowed; injury caused by defective couch; plaintiff had rented apartment approximately four months); Lee v. Gioioso, 237 Cal. App. 2d 246, 46 Cal. Rptr. 803 (1965) (recovery denied; injury caused by defective wall bed; plaintiff had rented apartment over five years); Hunter v. Freeman, 105 Cal. App. 2d 129, 233 P.2d 65 (1951) (plaintiff stated cause of action; injury caused by defective gas heater; plaintiff had rented apartment 13 days); Forrester v. Hoover Hotel & Inv. Co., 87 Cal. App. 2d 226, 196 P.2d 825 (1948) (recovery denied; injury caused by defective wall bed; plaintiff had rented apartment 14 months, and defect probably arose after commencement of lease); Charleville v. Metropolitan Trust Co., 136 Cal. App. 349, 29 P.2d 241 (1934) (plaintiff stated cause of action; injury caused by defective wall bed; plaintiff had rented apartment 3 1/2 months); Fisher v. Pennington, 116 Cal. App. 248, 2 P.2d 518 (1931) (recovery allowed; injury caused by defective wall bed; plaintiff had rented apartment for period of one month); Toole v. Franklin Inv. Co., 158 Wash. 696, 291 P. 1101 (1930) (new trial granted for plaintiff; injury caused by defective steel folding bed; plaintiff had rented apartment 3 months).

doctrine, although there is nothing in the opinions to suggest that third parties could not also recover. The principal impediment encountered by the courts in applying the rule is the necessity of distinguishing between personality and realty, thereby raising all the problems inherent in the law of fixtures. 192

The implied warranty of habitability and its offshoot, the implied warranty of merchantability, have been adopted primarily in those jurisdictions which require actual knowledge as a condition to imposing liability under the “latent defect” exception. 193 This may help to explain both the development of the two doctrines and their continued status as minority rules. The two doctrines are unique in that they impose a standard of strict liability on the landlord, albeit only under carefully circumscribed circumstances. They are designed to protect lessees of furnished dwellings for a short term—those tenants who have the least in common with the agrarian leaseholders of the sixteenth century.

4. COVENANT TO REPAIR

The three exceptions discussed above apply only to defects in existence at the commencement of the lease. Depending upon the facts of the case, the remaining exceptions may encompass defects arising after the tenant has taken possession, as well as those defects present at the time of the lease.

The courts have been sharply divided on the question of whether to impose liability in tort for personal injuries or property damage caused by the breach of a landlord’s covenant to repair. 194


194. 1 ALP, supra note 22, § 3.79, at 352-53; 4D L. FruMer & M. FriedMaN, suprA noTe 146, at § 1.05[2]; 2 F. HarPeR & F. JaMeS, suprA noTe 146, § 27.16, at 1514; 2 PowelL, suprA noTe 26, ¶ 234[2][d], at 344-48; W. PrOsseR, suprA noTe 146, § 63, at 408-09; Button, Covenant to Repair as Evidence of Landlord’s Control, 16 CleV.-Mar. L. Rev. 319 (1967); Grimes, suprA noTe 146, at 216-17; Harkrider, suprA noTe 146, at 392-400; Note, Landlord’s Liability for Defective Premises, 29 Geo. L.J. 1046, 1056-62 (1941); Note, Lessor’s Duty to Repair: Tort Liability to Persons Injured on the Premises, 62 Harv. L. Rev. 669, 672-74 (1949); Note, Personal Injuries to the Tenant: The Landlord’s Liability in Tort Therefor, 10 S.C.L.Q. 307, 317 (1958); Comment, Landlord & Tenant—Tort Liability of Landlord on a Covenant to Repair, 1 Washburn L.J. 605, 606-09 (1962); Annot., 78 A.L.R.2d 1238, § 2 (1961); Annot., 163 A.L.R. 300, §§ 2-3 (1946). The English courts originally held that a covenant to repair created only a contractual obligation to the tenant. Blundell, suprA noTe 177, at 163-67. Under § 4 of the Occupiers’ Liability Act of 1957,
Originally, a majority of courts held that when a landlord breached his covenant to repair, the tenant's only remedy was a cause of action for contract damages. This normally limited the tenant's measure of recovery to the cost of repair or the loss of rental value of the property, on the theory that personal injuries or property damage were not within the contemplation of the parties at the time they entered into the agreement. A minority of courts, however, was willing to impose liability in tort, thereby permitting both the tenant and third parties to recover for personal injury or property damage resulting from a breach of the landlord's covenant to repair.

Today, the positions are reversed. In 1934, advocates of liability won a notable adherent in the American Law Institute, and section 357 of the Restatement (Second) of Torts now represents the new majority view:

A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

(a) the lessor, as such, has contracted by a convenant in the lease or otherwise to keep the land in repair, and

(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and

(c) the lessor fails to exercise reasonable care to perform his contract.

A substantial minority of courts, however, still adheres to the position that the breach of a covenant to repair creates no liability in tort. The minority position is premised on the notion that tort liability can be imposed only on the person in occupation or control of real property. Since a lease (as a conveyance) transfers the

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however, an express contract to repair imposes a tort duty of reasonable care to both the tenant and his visitors or their goods, provided they are lawfully upon the premises. W. Prosser, supra note 146, § 63, at 408.

195. W. Prosser, supra note 146, § 63, at 408.

196. E.g., Jordan v. Miller, 179 N.C. 73, 75, 101 S.E. 550, 551-52 (1919) (discussing the reason for the rule); Cooper v. Roose, 151 Ohio St. 316, 321, 85 N.E.2d 545, 548 (1949); W. Prosser, supra note 146, § 63, at 408-09; Harkrider, supra note 146, at 392; Schlegel, supra note 147, at 325-26; Note, Landlord's Liability for Defective Premises, 29 Geo. L.J. 1046, 1058-59 (1941).

197. E.g., Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 195, 186 S.W. 87, 89 (1916); Harkrider, supra note 146, at 397-400.

198. RESTATEMENT (SECOND) OF TORTS § 357 (1965). See also 4D L. Frumer & M. Friedman, supra note 146, § 1.05[2], at 463; W. Prosser, supra note 146, § 63, at 409.

199. Liability in tort is an incident to occupation or control . . . . By preponderant opinion, occupation and control are not reserved through an agreement that the landlord will repair . . . . The tenant and no one else may keep
exclusive right of possession to the tenant, it is normally the tenant
who has occupation and control of the premises. Under the minority
view, a contract to repair is not sufficient to transfer control back
to the landlord. Therefore, the only remedy for breach of a
covenant to repair is a contract action for damages. Such an ac-
tion can be brought only by the tenant, as third parties are not in
privity of contract with the landlord. And the tenant can recover
only those damages which were within the contemplation of the par-
ties at the time of the agreement. This ordinarily does not in-
clude damages for personal injury or property damage, although
where the contract is one to make specific repairs or to make repairs
directly related to the tenant’s personal safety, recovery of such dam-
ages may be permitted.

Although a covenant to repair, standing alone, is not sufficient
to establish the requisite control for the imposition of tort liability
under the minority view, such control may be established by showing
“something more” than the right or liability to repair the premises.

In Massachusetts, for example, tort liability will be imposed for the
breach of a covenant to “maintain the premises in a condition of
safety” under which the landlord “assumes the duty of looking after
the premises as to safety and retains so far as necessary to that
end the possession thereof and the right to enter upon them at all
times.”

Visitors away till the danger is abated, or adapt the warning to the need. The
landlord has at most a privilege to enter for the doing of the work, and at
times not even that if the occupant protests.

Cullings v. Goetz, 256 N.Y. 287, 290, 176 N.E. 397, 398 (1931) (action by third
closest injured on leased premises against lessor who had agreed to make specific re-

200. Id.; Moskowitz, Landlord’s Retention of Power to Control Premises, 15
CLEV.-MAR. L. REV. 579, 584-85 (1966); Comment, Tort Liability of a Landlord to
His Tenant, 10 DRAKE L. REV. 132, 134-35 (1961); Note, Landlord’s Liability for

201.See note 196 supra.

202. W. PROSSER, supra note 146, § 63, at 409; Annot., 163 A.L.R. 300 § 2(a)
(2), (3) (1946). It has been suggested that third parties should be permitted to re-
cover against the landlord to avoid circuitry of action. Schlegel, supra note 147, at
326-28.

203. Annot., 78 A.L.R.2d 1238, § 7 (1961); Annot., 163 A.L.R. 300, § 4(b)(2)
(1946).

204. E.g., Moldenhauer v. Krynski, 62 Ill. App. 2d 382, 210 N.E.2d 809 (1965);

added); 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.05(2[), at 419-20.

206. Fiorntino v. Mason, 233 Mass. 451, 453, 124 N.E. 283, 283-84 (1919); ac-
cord, Crowe v. Bixby, 237 Mass. 249, 129 N.E. 433 (1921) (applying rule set forth in
(1955) (refusing to apply Fiorntino rule and noting that Crowe is the only case in
which it has been applied). The distinction drawn in Massachusetts between a cove-
nant to repair and a covenant to maintain the premises in safe condition has been
lish "something more." The New York Court of Appeals has imposed tort liability on one landlord who covenanted to make repairs on notice and "retained a general supervision over the premises" for purposes of making repairs, and on another who had a right to enter to make repairs, notice of the defective condition, and who actually did make the necessary repairs immediately after the accident. Thus even in the minority jurisdictions, it is possible for the plaintiff to recover on a tort theory, but only upon a showing of facts which demonstrate that the landlord had control over the premises and not merely upon proof of a covenant to repair.

In the majority of jurisdictions, on the other hand, a contract to repair is sufficient to impose tort liability on the landlord. The contractual duty to repair creates and defines the tort duty of care. Both the tenant and third parties can recover for either personal injury or property damage. The courts have had difficulty articulating the reasons which justify this exception. Some courts have sought to reconcile the exception with the real property doctrine that a lease is a conveyance by theorizing that the landlord has retained control over the premises as a result of his covenant to repair. This rationalization is obviously fictitious, however, for the tenant who is in possession actually has control. Other courts have

210. E.g., Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959); 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.05[2], at 415-16; 2 POWELL, supra note 26, ¶ 234[3][a], at 358-60; W. PROSSER, supra note 146, § 63, at 409; RESTATEMENT (SECOND) OF TORTS § 357, comment c (1965); Annot., 78 A.L.R.2d 1238, § 5 (1961).
211. Flood v. Pabst Brewing Co., 158 Wis. 626, 633, 149 N.W. 489, 491 (1914), is illustrative of this line of reasoning:
Where a landlord agrees to keep leased premises in repair, his right to enter and have possession of the premises for such purpose is necessarily implied, and his duties and liabilities in that regard are in some respects similar to those of an owner and occupant.
emphasized policy considerations, such as the tenant's justifiable reliance on the landlord's covenant and the landlord's superior ability to make repairs.\textsuperscript{213} These courts have sought to avoid a conflict with the characterization of a lease as a conveyance by emphasizing the voluntary nature of the conduct which gives rise to the tort duty of care. If the landlord chooses to enter into a contract to make repairs, he cannot avoid the operation of the ordinary principles of negligence law which impose liability in tort for breach of a contractual obligation.\textsuperscript{214}

The contract which forms the basis for imposing tort liability may be a covenant in the lease or one made after the tenant has taken possession,\textsuperscript{215} and may be written or verbal,\textsuperscript{216} but with respect to a subsequent promise to repair the courts agree that it must be supported by consideration.\textsuperscript{217} To date, the courts have refused to impose liability on the basis of a gratuitous promise to repair plus reliance by the plaintiff, although this position has been criticized by commentators.\textsuperscript{218} Liability will be imposed only for breach of a contract to repair; a clause in the lease reserving the privilege to enter and make optional repairs is not sufficient to create a duty in tort.\textsuperscript{219}

The lessor's duty under a contract to repair is to exercise rea-

\textsuperscript{213} L.Q. 199, 201 (1969). The American Law Institute has recognized that the lessor retains no control over the premises, but does justify the imposition of tort liability on the grounds that "the lessor retains a reversionary interest in the land, and so by his contract may properly be regarded as resuming the duty and responsibility of keeping his own premises in safe condition, to the extent of his undertaking." \textit{Restatement (Second) of Torts} § 357, comment b(3) (1965).

\textsuperscript{214} See, e.g., Reitmeyer v. Sprecher, 431 Pa. 284, 288-89, 243 A.2d 395, 397 (1968); Flood v. Pabst Brewing Co., 158 Wis. 626, 634, 149 N.W. 489, 492 (1914) (concurring opinion); \textit{Restatement (Second) of Torts} § 357, Comment b(2), (4) (1965).

\textsuperscript{215} Harkrider, \textit{supra} note 146, at 397-400; Comment, \textit{Landlord's Liability for Injuries Caused by Defect in Premises Which He Promised but Failed to Repair}, 42 \textit{Temp. L.Q.} 199, 201-03 (1969).

\textsuperscript{216} \textit{Restatement (Second) of Torts} § 357(a) (1965).

\textsuperscript{217} 4D L. FRUMER \& M. FRIEDMAN, \textit{supra} note 146, § 1.05[2], at 413-14.

\textsuperscript{218} E.g., Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963); 4D L. FRUMER \& M. FRIEDMAN, \textit{supra} note 146, § 1.05[2], at 414; W. PROSSER, \textit{supra} note 146, § 63, at 410; \textit{Restatement (Second) of Torts} § 357, comment b(1) (1965); Annot., 78 A.L.R.2d 1238, § 4(d) (1961).

\textsuperscript{219} Seavey, \textit{Reliance Upon Gratuitous Promises or Other Conduct}, 64 \textit{Harv. L. Rev.} 913, 918 (1951); Note, \textit{Landlord Liability for "Gratuitous" Promises to Repair}, 2 \textit{Cal. W.L. Rev.} 126 (1966). In the first place, tort liability has been imposed in other fact situations where the plaintiff has been injured as the result of relying on a gratuitous promise. 2 F. HARPER \& F. JAMES, \textit{supra} note 146, § 18.6, at 1045. And secondly, since the tenant's reliance on a contract supported by consideration is one of the reasons for imposing tort liability for breach of a covenant to repair, it seems somewhat incongruous that reliance on a gratuitous promise should not similarly support tort liability. \textit{See} W. PROSSER, \textit{supra} note 146, § 63, at 410.

\textsuperscript{219} \textit{Restatement (Second) of Torts} § 357, comment b(1) (1965).
The specific nature of the duty is dependent upon the terms of the contract. If the contract is to keep the premises in good repair, the courts have construed the undertaking as an obligation to repair only within a reasonable time after the landlord has received notice or acquired knowledge of the dangerous or defective condition. When the agreement is made before the tenant enters into possession, the landlord has a duty to inspect the premises before transferring them to the tenant. But once the tenant has taken possession, he is required to give the landlord notice because, by virtue of his right to exclusive possession, he is in the best position to discover a dangerous or defective condition. If, on the other hand, the contract expressly or implicitly provides that the lessor will not only repair the premises, but will also inspect them periodically to determine the need for repairs, he will then be held liable for any defects which would have been discoverable by a reasonable inspection. He is still not strictly liable, however. The plaintiff

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220. Asheim v. Fahey, 170 Ore. 330, 133 P.2d 246 (1943); Restatement (Second) of Torts § 357, Comments c-d (1965).


cannot recover for latent defects which are not discoverable by a reasonable inspection. The courts have indicated that "a landlord may covenant in such stringent terms as to make himself the insurer of the safety of the tenant," but not surprisingly, no case has been reported in which a landlord was so foolish.

It should be emphasized that the tort liability imposed for breach of a covenant to repair is one which a landlord can easily avoid. He can reserve the right to inspect and make optional repairs without incurring any potential tort liability. If he does covenant to make repairs, he can limit his tort liability by agreeing to repair only upon notice of a defect from the tenant. This exception to the general rule of nonliability is therefore of limited practical importance. From a scholarly perspective, however, it is fascinating. Instead of being held strictly liable, as in the case of a landlord who breaches the implied warranty of habitability or merchantability in a lease of a furnished dwelling, the landlord who contracts to make repairs is merely required to exercise reasonable care in the performance of his contractual obligation. The reason for the distinction is in part attributable to the concept of a lease as a conveyance. Under an implied warranty of habitability or merchantability, the landlord is liable only for those defects which were in existence at the time of the lease. But, under a contract to repair, he can be held liable for defects arising after the tenant has acquired possession and control of the premises. Therefore, the courts have imposed a lower standard of care in the latter situation.

5. NEGLIGENCE

Unlike the preceding exception, which imposes liability for nonfeasance, the negligent repairs exception premises liability on misfeasance. If a landlord makes repairs and does so negligently, he is liable for any resulting personal injury or property damage, regardless of whether the repairs were made gratuitously or pursuant to a covenant to repair. The courts have reconciled the imposi-

226. Id. at 337, 133 P.2d at 249.
227. 4D L. FUMER & M. FRIEDMAN, supra note 146, at § 1.05(3); 2 F. HARPER & F. JAMES, supra note 146, § 27.16, at 1514; 2 Powell, supra note 26, ¶ 234(2), at 342-44; W. PROSSER, supra note 146, § 63, at 410-12; Harkrider, supra note 146, at 404-09; Grimes, supra note 146, at 216-17; Note, Landlord's Liability for Defective Premises, 29 GEO. L.J. 1046, 1054-55 (1941); Note, Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises, 62 HARV. L. REV. 669, 670 (1949); Annot., 78 A.L.R.2d 1238, § 5 (1961); Annot., 163 A.L.R. 300, § 3 (1946); Annot., 150 A.L.R. 1373 (1944). In Massachusetts, the failure to make gratuitous repairs subjects the landlord to liability only to the tenant, and only for gross negligence. Bergeron v. Forest, 233 Mass. 392, 124 N.E. 74 (1919); Bohlen, Landlord and Ten-
tion of liability pursuant to this exception with the doctrine of *caveat emptor* by emphasizing that liability is imposed, not because of the landlord-tenant relation, but because the landlord has breached his general duty to avoid creating an unreasonable risk of harm to others through his affirmative conduct.\(^{228}\)

There is a split of authority regarding the circumstances under which the landlord will be held liable. Section 362 of the Restatement of Torts expresses what now appears to be the minority view:

A lessor of land who, by purporting to make repairs on the land while it is in the possession of his lessee, or by the negligent manner in which he makes such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use or given it a deceptive appearance of safety, is subject to liability for physical harm caused by the condition to the lessee or to others upon the land with the consent of the lessee or sublessee.\(^{228}\)

Both the courts\(^{229}\) and the commentators\(^{230}\) have been critical of the

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ant, 35 Harv. L. Rev. 633 (1922); Annot., 150 A.L.R. 1373, § 2(e) (1944); Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 Harv. L. Rev. 669, 670 n.12 (1949). It has also been held that a landlord can only be liable for gratuitous repairs made during the term of the lease, since the tenant cannot be said to have relied on the making of a repair of which he had no knowledge. Hutchins v. Pick, 164 So. 173 (La. App. 1935); Annot., 150 A.L.R. 1373, § 2(c) (1944). Both of these limitations on liability are subject to the criticism that they impose contract limitations on tort liability. If the basis for holding the landlord liable is his act of misfeasance, it should be immaterial that the improper repairs were done under a gratuitous undertaking, rather than a contractual agreement. Bohlen, *Landlord and Tenant*, 35 Harv. L. Rev. 633, 656-37 (1922).

England has also recognized liability for negligent repairs, at least if they were made after the commencement of the lease. J. Fleming, *Law of Torts* 414 (4th ed. 1971).


\(^{229}\) Restatement (Second) of Torts § 362 (1965). *Accord*, Sherrard v. Lidoff, 108 Cal. App. 2d 325, 239 P.2d 28 (1952) (plaintiff barred from recovery by knowledge that board used to repair stairs had split since its installation by defendant); Golden v. Peters, 249 Wis. 39, 23 N.W.2d 458 (1946) (plaintiff barred from recovery because there was no evidence that cover over heating vent gave "false appearance of security").

\(^{230}\) Bartlett v. Taylor, 351 Mo. 1060, 1068, 174 S.W.2d 844, 849 (1943) is one of the most forceful criticisms of the Restatement of Torts:

> The landlord, it seems to us, has all the protection needed for he is not obligated . . . to undertake repairs—it is only when he volunteers or otherwise undertakes to repair that the duty arises. Not only is there no apparent reason for further limiting his liability . . . but these requirements in themselves could only lead to confusion. There is the problem of what and when is the condition "more dangerous." It is possible that the repairs may change the physical condition of the premises for the better and yet the danger would be greater . . .

\(^{231}\) W. Prosser, *supra* note 146, § 63, at 411.
Landlord's Liability for Defective Premises

Restatement on the grounds that it has unduly permitted the law of landlord-tenant to influence the law of negligence. Today, the majority of courts take the position that the landlord's obligation is to exercise due care under the circumstances, with none of the limitations set forth in the Restatement. It has been noted, however, that this may merely necessitate a warning of the danger to those on the premises. Since the landlord's duty is one of reasonable care, liability has been extended to anyone who is lawfully on the premises. Under the majority view, third persons are not barred by the tenant's knowledge of the dangerous condition (as they would be under the "latent defect" exception).

The negligent repairs doctrine is one of the more frequently utilized theories of liability. The courts which refuse to impose liability for the breach of a promise to repair are often willing to hold the landlord liable to the tenant or to third parties for making the promised repairs in a negligent manner. In fact, virtually every jurisdiction recognizes the exception, since it in no way conflicts with landlord-tenant law. It is merely an application of the ordinary principles of negligence in the context of the landlord-tenant relation.

6. PREMISES IN COMMON USE

The previous exceptions permit recovery for damages caused by defects in the premises in the tenant's possession. At one time, these were the only exceptions recognized by the common law, for a landlord customarily transferred control of his entire premises to the tenant. But a new exception arose with the construction of multiunit dwellings and office buildings. It is said that the landlord of such a structure retains possession of those portions of the premises reserved for the common use of the tenants, such as ap-

232. E.g., Hanna v. Fletcher, 231 F.2d 469, 476-77 (D.C. Cir. 1956); Bauer v. 141-49 Cedar Lane Holding Co., 24 N.J. 139, 130 A.2d 833 (1957); 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.05[3], at 428.
233. W. PROSSER, supra note 146, § 63, at 411; Noel, supra note 147, at 388-89.
234. 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.05[3], at 424; 2 POWELL, supra note 26, ¶ 234[3][a], at 358; W. PROSSER, supra note 146, § 63, at 410-11; Noel, supra note 147, at 388-89; Annot., 17 A.L.R.3d 422, § 7 (1968); Annot., 150 A.L.R. 1373, § 4 (1944).
235. Rossiter v. Moore, 59 Wash. 2d 722, 370 P.2d 250 (1962); Comment, Liability of Landlord and Tenant to Persons Injured on the Premises, 39 Wash. L. Rev. 345, 361-62 (1964). Under the minority position, it appears that third persons would be barred by notice to the tenant, since liability is premised on the deceptive appearance of the premises. RESTATEMENT (SECOND) OF TORTS § 362, comment d (1965); Harkrider, supra note 146, at 408-09.
236. 4D L. FRUMER & M. FRIEDMAN, supra note 146, at § 1.05[4][a]; 2 F. HARPER & F. JAMES, supra note 146, at § 27.17; 2 POWELL, supra note 26, at ¶ 234[2][b]; W. PROSSER, supra note 146, § 63, at 405-08; Grimes, supra note 146,
proaches leading to the leased premises, lobbies, stairs and porches used by more than one tenant, elevators, hallways, fire escapes, basements, storage and utility rooms, yards, and swimming pools;\textsuperscript{237} walls, roofs, and foundations;\textsuperscript{238} heating, plumbing, lighting and gas systems;\textsuperscript{239} and appliances furnished for common use, such as washing machines and dryers.\textsuperscript{240} Since the landlord is in possession and control, he owes the tenants and other persons lawfully upon the premises a duty of reasonable care in maintaining these areas. The Restatement of Torts includes this exception:

\begin{quote}
A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him [or which is necessary to the safe use of the leased part], is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.\textsuperscript{241}
\end{quote}

The duty to repair premises reserved for common use is placed upon the landlord for both pragmatic and policy reasons. Practically, if it were left to the tenants to repair these areas, they would have difficulty determining whether repairs were needed, and if so,

\begin{itemize}
\item at 211-14; Harkrider, supra note 146, at 401-04; Noel, supra note 147, at 385-88; Schleicher, Landlord's Control of Leased Premises, 11 CLEV.-MAR. L. REV. 151 (1962); Note, Lesser's Duty to Repair: Tort Liability to Persons Injured on the Premises, 62 HARV. L. REV. 669, 670 (1949); Note, Personal Injuries to the Tenant: The Landlord's Liability in Tort Therefor, 10 S.C.L.Q. 307. 315-17 (1958); Comment, Liability of Landlord and Tenant to Persons Injured on the Premises, 39 WASH. L. REV. 345, 361-64 (1964); RESTATEMENT (SECOND) OF TORTS § 360, comment d (1965). It has been suggested that, due to the difficulty of defining "common areas," leases should contain a clause designating the areas which are reserved for common use. Note, Tort Liability of a Landlord Out of Possession and Control, 9 W. RES. L. REV. 206, 207-08 (1958). The exception has been recognized in England as well as the United States, although the British give it a more restrictive interpretation. J. SALMOND, LAW OF TORTS 418-20 (14th ed. 1965); Blundell, supra note 177, at 270; Grimes, supra note 146, at 211; West & Summerfield, Liability to Repair as Between Landlord and Tenant in the Absence of Express Agreement, 17 CONVEY. (n.s.) 472, 474 (1953).
\item 238. Annot., 26 A.L.R.2d 468, 576-603 (1952); Annot., 43 A.L.R. 1292 (1926).
\item 241. RESTATEMENT (SECOND) OF TORTS §§ 360-61 (1965) (The material in brackets is that part of § 361 which differs from § 360).\end{itemize}
who should make them and how the cost should be allocated.\textsuperscript{242} From a policy standpoint, it also makes sense to place the responsibility on the landlord, since he is more apt to have both the incentive and the financial ability to make repairs.\textsuperscript{248} Moreover, this is consistent with legal precedent: since the landlord is in control of these areas, he is the one who should be held liable in tort for any personal injuries or property damage caused by a defect in the premises.\textsuperscript{244}

In the vast majority of jurisdictions, the tenant and his invitees or licensees are treated as the landlord's business invitees while in common areas.\textsuperscript{245} As a result, the landlord owes them the full duty of reasonable care.\textsuperscript{246} This means that, as to defects of which he has actual or constructive knowledge,\textsuperscript{247} he must either give a warning sufficient to enable them to avoid the risk of harm or repair the dangerous condition within a reasonable time.\textsuperscript{248} Since the tenant's invitees or licensees are regarded as the landlord's business invitees, a warning to the tenant will not relieve the landlord of liability to

\begin{quote}
243. See \textit{Restatement (Second) of Torts} \S 356, comment a (1965).
244. 4D L. \textit{FRUMER \& M. FRIEDMAN}, \textit{supra} note 146, \S 1.05[4][a], at 435-37; W. \textit{PROSSER}, \textit{supra} note 146, \S 63, at 405-06.
245. W. \textit{PROSSER}, \textit{supra} note 146, \S 63, at 406; \textit{Restatement (Second) of Torts} \S 360, comments c, f (1965); Annot., 17 A.L.R.3d 422, \S 6 (1968). \textit{See}, e.g., Snyder v. I. Jay Realty Co., 30 N.J. 303, 153 A.2d 1 (1959). A business invitee is a "person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." \textit{Restatement (Second) of Torts} \S 332(3) \& comment k (1965). It should be noted that the landlord's liability is limited by the scope of his express or implied invitation to use the parts of the premises retained in his control. Sackett v. Gottlieb, 187 Cal. App. 2d 760, 766, 9 Cal. Rptr. 831, 834 (1960); 4D L. \textit{FRUMER \& M. FRIEDMAN}, \textit{supra} note 146, at \S 1.05[4][c]; \textit{Restatement (Second) of Torts} \S 360, comment e (1965). When the plaintiff is a social guest of the tenant, the landlord owes him a greater duty of care than the tenant does. Van Der Woude v. Gatty, 107 N.J. Super. 164, 257 A.2d 720 (1969); Taneian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954). Similarly, when a plaintiff is a prospective tenant, the landlord may owe him a greater duty of care than after he becomes a tenant. Annot., 3 A.L.R.3d 976 (1966).
246. 2 F. \textit{HARPER \& F. JAMES}, \textit{supra} note 146, \S 27.17, at 1516; Grimes, \textit{supra} note 146, at 212-13; Moskowitz, \textit{Landlord's Retention of Power to Control Premises}, 15 \textit{CLEV.-MAR. L. REV.} 579, 581-82 (1966); Noel, \textit{supra} note 147, at 385-86; \textit{Restatement (Second) of Torts} \S 360, comment c (1965). In Massachusetts and a few other jurisdictions, the courts have held that the landlord merely has a duty to keep the areas reserved for common use in the condition they were in at the time of the leasing. Wheeler v. Boston Housing Authority, 341 Mass. 510, 170 N.E.2d 465 (1960); McCarthy v. Isenberg Bros., Inc., 321 Mass. 170, 72 N.E.2d 422 (1947); 4D L. \textit{FRUMER \& M. FRIEDMAN}, \textit{supra} note 146, \S 1.05[4][a], at 438; 2 F. \textit{HARPER \& F. JAMES}, \textit{supra} note 146, \S 27.17, at 1516.

247. Inglehardt v. Mueller, 156 Wis. 609, 146 N.W. 808 (1914); 4D L. \textit{FRUMER \& M. FRIEDMAN}, \textit{supra} note 146, at \S 1.05[4][b]; Schlegel, \textit{supra} note 147, at 319.
248. 4D L. \textit{FRUMER \& M. FRIEDMAN}, \textit{supra} note 146, \S 1.05[4][b], at 450-53; W. \textit{PROSSER}, \textit{supra} note 146, \S 63, at 406-07; \textit{Restatement (Second) of Torts} \S\S 344, 360 \& comment c (1965).}
such visitors. There are only two situations in which the landlord's duty may be restricted: he may have no obligation either to provide illumination in common areas (although this restriction has been removed by statute in several jurisdictions), or to remove natural accumulations of snow and ice (although a majority of jurisdictions now impose liability under such circumstances). Of course, if the plaintiff is merely a licensee of the landlord or a trespasser, the landlord’s duty of care will be limited, unless the plaintiff is a child who can invoke the attractive nuisance doctrine.

This sixth exception, imposing a duty of reasonable care for defective or dangerous conditions in areas reserved for common use, is undoubtedly the one most frequently invoked against landlords of multiunit dwellings or office buildings. The definition of a “common area” has been expanded to include most areas which possess the potential for causing personal injury or property damage. It is a plaintiff-oriented exception, since a warning is frequently not adequate to fulfill the landlord’s duty of care. Instead, he is required to make the premises safe. If the landlord does warn the tenant of the dangerous condition, this will not bar the tenant’s licensees or invitees from recovering, for the landlord owes them a direct duty of care as his business invitees. Finally, it is an exception which the courts universally recognize because it in no way conflicts with landlord-tenant law.

7. STATUTORY DUTY TO REPAIR

The first six exceptions discussed above represent the judiciary’s response to the harshness of the common law doctrine of caveat lessee. But the judiciary was not the only branch of government to react to the problems created by adherence to an agrarian doctrine.

249. W. Prosser, supra note 146, § 63, at 408; Restatement (Second) of Torts § 360, comment a (1965).

250. 4D L. Frumer & M. Friedman, supra note 146, at § 1.05[4][e]; 2 F. Harper & F. James, supra note 146, § 27.17, at 1517; W. Prosser, supra note 146, § 63, at 407; Comment, Liability of Landlord for Personal Injury Due to Inadequate or Lack of Lighting in Common Areas, 5 U. Richmond L. Rev. 148 (1967); Annot., 25 A.L.R.2d 496 (1952). There is no clear rationale for this common law rule, and because it is particularly inappropriate as applied to common passageways in multiunit dwellings, statutes have been enacted imposing a special duty to supply lighting in such housing. Id. at §§ 6-8. See text accompanying notes 280-83 infra.

251. 4D L. Frumer & M. Friedman, supra note 146, at § 1.05[4][d]; 2 F. Harper & F. James, supra note 146, § 27.17, at 1517; W. Prosser, supra note 146, § 63, at 407; Comment, Landlord’s Duty to Remove Snow and Ice, 24 Wash. & Lee L. Rev. 319 (1967); Annot., 49 A.L.R.3d 387 (1973).

252. 4D L. Frumer & M. Friedman, supra note 146, § 1.05[4][a], at 440-41; Noel, supra note 147, at 387-88.

253. Schlegel, supra note 147, at 331; Restatement (Second) of Torts §§ 339, 343B (1965); Annot., 20 A.L.R.3d 1127 (1968).
in an urban setting. Legislatures in several states also responded by enacting the housing codes discussed earlier in this article. Unlike the courts, whose exceptions could almost always be reconciled with the common law notion that a lease is a conveyance, the legislatures shifted the responsibility for making repairs from the tenant to the landlord without regard for whether the tenant had control of the premises. The legislatures created criminal and civil sanctions for violations of the housing codes. But in no state did the legislature create a cause of action for personal injury or property damage resulting from a statutory violation. Consequently, injured plaintiffs turned to the courts to create a seventh exception to caveat lessee based on the widely accepted principle that a statute may establish the standard of conduct in a negligence action.

a. Criminal statutes

Housing codes imposing criminal sanctions have been enacted in several jurisdictions. Altz v. Lieberson was the first case to consider whether a landlord's violation of such legislation should give rise to tort liability. New York's Tenement House Law, which was applicable to all dwellings designed for three or more families, provided that "every tenement house and all parts thereof shall be kept in good repair." The plaintiff, a tenant in the defendant's apartment house, was injured by a ceiling which fell after the defendant had been notified of the defect and had had a reasonable time to make repairs. The defendant contended that he was not liable be-

254. See notes 120-30 supra and accompanying text.
255. See notes 131-45 supra and accompanying text.
256. 2 F. HARPER & F. JAMES, supra note 146, at § 17.6; W. PROSSER, supra note 146, at § 36; RESTATEMENT (SECOND) OF TORTS §§ 285(b), 286-288B (1965); Thayer, Public Wrong and Private Action, 27 HARV. L. REV. 317 (1914).
257. E.g., CAL. HEALTH & SAFETY CODE §§ 17921-22 (West Supp. 1974) (all apartment housings and dwellings must comply with the Uniform Housing Code unless otherwise provided by law); CONN. GEN. STAT. ANN. § 19-343 (1969) (each building used as a tenement, lodging, or boarding house and all parts thereof must be kept in good repair); MASS. GEN. LAWS ANN. ch. 144, § 66 (1958) (every tenement house and all parts thereof shall be kept in good repair); MICH. STAT. ANN. § 5.2843 (1969) (every dwelling and all the parts thereof including plumbing, heating, ventilating and electrical wiring shall be kept in good repair); N.J. STAT. ANN. § 55:13A-7 (Supp. 1974) (regulations of state-wide application will be promulgated to assure that multiple dwellings will be maintained in such manner as to protect the health, safety and welfare of the occupants and the public generally); N.Y. MULT. DWELL. LAW § 78 (McKinney 1946) (every multiple dwelling and every part thereof shall be kept in good repair); OHIO REV. CODE ANN. § 3781.06 (Baldwin 1971) (any building which may be used as a multiple dwelling shall be so maintained as to be safe and sanitary for its intended use and occupancy); PA. STAT. ANN. tit. 53, § 25025 (1957) (every tenement house and every part thereof shall be kept in good repair).
258. 233 N.Y. 16, 134 N.E. 703 (1922).
259. Id. at 18, 134 N.E. at 704.
cause a landlord owed no common law duty to keep the premises under the tenant's control in good repair. The court upheld the verdict for the plaintiff on the ground that the "command of the statute" had "changed the ancient rule" of caveat lessee.\footnote{260} The statute was said to give rise to tort liability for the following reasons:

The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.\footnote{261}

A large number of jurisdictions have followed New York's lead, holding that the violation of a housing code is negligence per se or evidence of negligence.\footnote{262} The impact of these decisions has been to enhance the enforcement of housing codes. In fact, most of the reported cases construing the housing codes have arisen in this context, for only in such cases has there been enough at stake to warrant an appeal.\footnote{263}

Some jurisdictions, on the other hand, have refused to impose tort liability for a violation of a housing code. Several reasons have been given for this judicial reluctance to recognize the seventh exception. A few courts have adhered to the classic argument that it would be contrary to legislative intent to construe a penal statute as creating a new civil cause of action because the legislature could easily have enacted a private remedy had it intended to create one.\footnote{264} Other courts, in a closely related argument, have asserted

\footnotesize{\begin{itemize}
\item \footnote{260} Id.
\item \footnote{261} Id. at 19, 134 N.E. at 704.
\item \footnote{263} Feuerstein & Shestack, supra note 262, at 209-10; Grad, New Sanctions and Remedies in Housing Code Enforcement, 3 URBAN LAWYER 577, 587-88 (1971).
\end{itemize}}
that the legislature did not intend to abolish the fundamental common law doctrine of caveat lessee through the enactment of a criminal statute. But the one factor that has most significantly influenced those courts which reject the seventh exception is a reluctance to depart from the old adage that tort liability follows control and occupation of the premises. As one court recently put it:

[1] If the statute were the standard of care by which owners of buildings were judged regardless of whether the area complained of was within the owner’s control, the result would be either an unfair burden on the landlord (requiring him to maintain an area he could not enter), or an invasion of the domain of the tenant in his leased premises.

Courts may feel compelled to take this position because the housing codes, while shifting the duty to repair, have not altered the basic notion that a lease is a conveyance. This explanation is certainly supported by those decisions which recognize the violation of a housing code as negligence per se when the defect appears in an area under the landlord’s control, but not when it shows up in a portion of the premises in the tenant’s possession.

In the jurisdictions that do impose tort liability for the violation of a housing code, it is generally agreed that the code creates a duty of care that extends beyond the tenant to anyone lawfully on the premises. However, there is a division of opinion regarding the


267. Compare Chambers v. Lowe, 117 Conn. 624, 169 A. 912 (1933) (no tort liability for violation of housing code; defect in ceiling of apartment; code does not apply to “separate apartments” in building), with Panaroni v. Johnson, 158 Conn. 92, 256 A.2d 246 (1969) (tort liability for violation of housing code; defect in outside stairway leading to plaintiff’s apartment; evidence supported finding that landlord retained control of stairway). Compare Palmigiani v. D’Argenio, 234 Mass. 434, 125 N.E. 592 (1920) (no tort liability for violation of housing code; defect in stairs under tenant’s control; code does not “do away with fundamental law” of caveat lessee), with Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 246 N.E.2d 798 (1969) (tort liability for violation of housing code; defect in fire sprinkler system; housing code may be evidence of negligence as to defect in area which is not part of the common premises, but under the landlord’s control).

New Jersey has explicitly rejected the above distinction between areas under the landlord’s and the tenant’s control, as well as the distinction between fixtures and personality, in Michaels v. Brookchester, Inc., 26 N.J. 379, 386-87, 140 A.2d 199, 203 (1958).

268. 4 D. L. FRUMER & M. FRIEDMAN, supra note 146, § 1.06[1], at 510-11; 2 POWELL, supra note 26, ¶ 234[3][a], at 360-61. In Gould v. DeBeve, 330 F.2d 826

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type of statute that will give rise to tort liability. In most jurisdictions, liability can be premised on a statute imposing a general duty to keep the premises in good repair. But in some jurisdictions, the courts insist upon proof that the defendant violated either a statute creating a specific duty of care or a safe place statute. For ex-

(D.C. Cir. 1964), recovery was even permitted by a plaintiff who was "technically" a trespasser.

269. 4D L. FRUMER & M. FRIEDMAN, supra note 146, § 1.06[1], at 509.


271. Compare Halliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (1966) (tort liability can be imposed for violation of safe place statute requiring two escape exits from a work area) with Gustin v. Williams, 255 Cal. App. 2d 929, 62 Cal. Rptr. 838 (1967). Wisconsin is one of the few jurisdictions to hold that a "public building," as that term is used in a safe place statute, encompasses multiunit residential dwellings. Wis. STAT. ANN. §§ 101.01(2)(g)(h), 101.11(1) (1971). See generally 4D L. FRUMER & M. FRIEDMAN, supra note 146, at § 1.06[3][a]; 2 POWELL, supra note 26, at ¶ 233[2][c]; Harkrider, supra note 146, at 390; Wilcox, Wisconsin Safe Place Statutes, 32 WIS. B. BULL. 7, 9-11 (Oct. 1959); Comment, The Wisconsin Safe Place Statute, 1939 WIS. L. REV. 314, 326. It has been held that the statute imposes a higher duty than that of ordinary care, but does not make the defendant an insurer. Gross v. Denow, 61 Wis. 2d 40, 212 N.W.2d 2 (1973); accord, Merkeley v. Schramm, 31 Wis. 2d 134, 142 N.W.2d 173 (1966). Consequently, a landlord must have actual or constructive notice of any condition in violation of the statute. Sheehan v. 535 North Water St., 268 Wis. 325, 67 N.W.2d 273 (1954); Boyle, Safe Place Law Updated, 41 WIS. B. BULL. 48, 53-54 (Aug. 1968). He is liable to tenants or frequenters, but not to trespassers. McNally v. Goodenough, 5 Wis. 2d 293, 92 N.W.2d 890 (1958); Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935). As to those portions of a public building which are used or held out to be used by tenants in common, the owner has a duty to maintain such areas in a safe condition, regardless of whether less than three tenants actually use them. Lealiou v. Quatsoe, 15 Wis. 2d 128, 112 N.W.2d 193 (1961); Zeininger v. Preble, 173 Wis. 243, 180 N.W. 844 (1921). This is consistent with the common law rule that a landlord owes a duty of reasonable care with respect to premises used in common by two or more tenants. On the other hand, as to those portions of the building which are not held out for use in common by two or more tenants, the landlord is liable for any structural defect, but has no duty to maintain the premises in safe condition during the term of the lease. Frion v. Coren, 13 Wis. 2d 300, 108 N.W.2d 563 (1961); Bewley v. Kipp, 202 Wis. 411, 233 N.W. 71 (1930). This, again, is consistent with the common law notion that a landlord has no duty to repair the premises under the tenant's control. It should be noted, however, that when the landlord has reserved the right
ample, if the plaintiff has sustained lead poisoning as the result of ingesting flakes of lead paint, some jurisdictions will impose tort liability under a statute that requires the landlord to keep the premises in good repair. Others will deny liability unless there is a specific statute or administrative regulation proscribing the use of lead paint or requiring the landlord to take precautionary measures with respect to old layers of such paint. It may well be, of course, that this particular division of opinion is more apparent than real. Imposing tort liability for the violation of a statute defining a specific duty of care may simply be a stepping stone toward imposing liability for the violation of a statute creating a general duty to repair.


275. Compare Kolojeski v. John Deisher, Inc., 429 Pa. 191, 239 A.2d 329 (1968) (landlord not liable for lead paint poisoning in the absence of a statute regulating the use of lead paint) with City-Wide Coalition Against Childhood Lead Poisoning v. Philadelphia Housing Authority, 356 F. Supp. 123 (E.D. Pa. 1973) (action to enjoin HUD from selling or transferring title to residential dwellings until it complied with local regulations requiring the removal of lead paint from all surfaces). See also City of Philadelphia v. Page, 363 F. Supp. 148 (E.D. Pa. 1973) (third-party action by homeowners whose house was in violation of Philadelphia Housing Code against seller (HUD), homeowners recovered costs of removing lead paint). If there is no applicable statute imposing a general duty to repair or a specific duty to remove lead paint, liability will be denied unless the plaintiff can bring himself within one of the six common law exceptions. Compare Graham v. Wisenburn, 39 App. Div. 2d 334, 334 N.Y.S.2d 81 (1972) (tenant's request for preliminary injunction requiring landlord to delead premises denied where multiple dwelling laws were inapplicable because tenant lived in one-family residence) with Caroline v. Reicher, 267 Md. 125, 304 A.2d 831 (1973) (plaintiff permitted to go to jury on theory that landlord breached covenant to repair) and Weaver v. Arthur A. Schneider Realty Co., 381 S.W.2d 866 (Mo. 1964) (plaintiff sought to recover for lead paint in common area, but recovery denied because landlord neither knew nor had reason to expect that small children would be in the hallway unattended).

Another issue on which there is some disagreement is the need for the landlord to have notice of a defect as a prerequisite to imposing tort liability. Housing codes typically make no provision for such notice, and strict liability is the standard in criminal proceedings. However, in *Altz v. Lieberson*, the court expressed its opinion that "before a right of action will accrue in favor of the tenant, there must be notice, actual or constructive, of the defect to be repaired." This dictum has been almost universally followed. But in *Monsour v. Excelsior Tobacco Co.*, the court imposed tort liability for the landlord's violation of a statute requiring him to keep lights in the common halls and stairways "constantly burning from twilight in the evening until daylight in the morning of each and every day," although the landlord had neither actual nor constructive notice that the light at the head of the stairway down which the plaintiff fell was not burning at the time of the accident.

Of course *Monsour* can easily be distinguished from *Altz*. In *Monsour*, the plaintiff relied on a statute creating a specific and absolute duty to keep lights "constantly burning"; in *Altz*, the plaintiff alleged the violation of a general duty to keep the premises in "good repair." This distinction was in fact made by the *Monsour* court and it is underscored by *Yoder v. Greenwald*. In *Yoder*, the defendant allegedly violated a statute requiring that public lodging be properly lighted. In reversing a judgment for the defendant and remanding the case for a new trial, the *Yoder* court expressed its opinion that "the statute as applied to apartment buildings does not impose upon the landlord strict liability in tort . . . but imposes a particular statutory standard of reasonable care . . . ." A synthesis of *Altz*, *Monsour*, and *Yoder* would suggest that the courts will waive the notice requirement in a tort action based on a housing code violation only if the statute is a specific regulation that clearly imposes an absolute duty of care, and not if it is merely a general or specific regulation requiring that the premises be kept in good repair.

Why are the courts so reluctant to impose strict liability for the

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277. 233 N.Y. 16, 134 N.E. 703 (1922).
278. Id. at 18, 134 N.E. at 704.
280. 115 S.W.2d 219 (Mo. Ap. 1938).
281. Id. at 223.
282. 246 So. 2d 148 (Fla. App. 1971).
283. Id. at 150.
violation of a housing code? First, as noted by the court in Monsour, most housing code provisions can be construed as creating no more than a duty of ordinary care. But secondly, and more important, to hold the landlord strictly liable for defects in the premises under the tenant's control would violate the concept of a lease as a conveyance. This second reason for refusing to impose strict liability surfaces in the cases dealing with the question of constructive notice. It is generally agreed that tort liability may be based on constructive notice of statutory violations in common areas under the landlord's control or in the exterior portions of the demised premises which the landlord can inspect without entering. In such situations, the landlord will be deemed to have constructive notice of a defect if the plaintiff proves that the landlord had a reasonable opportunity to discover and remedy the defect. But when the statutory violation appears in interior portions of the premises not under the landlord's control, the courts have found themselves in a quandary. Occasionally, constructive notice has been based on complaints from prior tenants or on the landlord's knowledge of similar defects (either in other apartments or in the apartment where the accident occurred). In a growing number of jurisdictions, the courts have required the landlord to inspect heating, sanitary, water supply, or lighting systems on the theory that they are actually under the landlord's control. And in a few jurisdictions, constructive notice has been found where the landlord had a contractual right to enter, inspect, and repair, coupled with evidence that the landlord had sufficient time to discover and remedy the defect. But in only one reported case, Benjamin v. Kimble, has a court grappled with the question of whether to impose a similar duty to inspect in the absence of such a contractual right. The plaintiff in Benjamin, a ten-

284. 115 S.W.2d at 223.
285. For example, in Tair v. Rock Inv. Co., 139 Ohio St. 629, 631-32, 4 N.E.2d 867, 868 (1942), the court refused to impose tort liability on the basis of a statute which required the defendant to keep a common stairway in good repair because the statute, as interpreted by the trial court, "imposed absolute liability rather than the requirement of ordinary care," and furthermore, it did "not distinguish between demised premises and those used in common," which meant that "the civil liability of a landlord would be the same irrespective of whether possession and control of the premises were retained by him."
290. 43 Misc. 2d 497, 251 N.Y.S.2d 708 (Sup. Ct. 1964).
ant in a multiple dwelling apartment, was injured in a fall of several stories when a defective and loosened window frame pulled away from the wall as she stood at the window hanging clothes on an outside line attached to the frame. In dismissing the plaintiff’s complaint, the court reasoned that

[a]s the landlord has the obligation under section 78 of the Multiple Dwelling Law to see that all parts of the dwelling are kept in good repair, including those not in his control, it should reasonably follow that he has the duty to make an inspection to see whether he is conforming with the law and should therefore seek the tenant’s permission to make the inspection where he does not have the right to enter the apartment by virtue of lease provisions. However, such duty only requires inspections at reasonable intervals . . . .

The court held that the three months for which the landlord had owned the premises did not constitute a “reasonable interval” sufficient to impute constructive knowledge of the defect.

Until such time as other courts are willing to infer a right of entry from the enactment of a housing code requiring the landlord to keep all parts of the demised premises in good repair, plaintiffs will find it difficult to recover under the seventh exception for any damage caused by a latent defect in the premises under the tenant’s control, for a right of entry, whether express or implied, is a prerequisite to imposing liability on the basis of constructive notice. Yet as long as a lease is regarded as a conveyance of real property, it is unlikely that an implied right of entry will be widely recognized.

Tort liability premised on the violation of a housing code is one of the more popular theories in those jurisdictions which recognize it. It is a cause of action which can be brought by tenants and third parties alike. The standard of care is established by the legislature. Frequently it is a higher duty than that created by a contract to repair, and often it is more specific than the general duty of reasonable care imposed by the courts. It is possible to construe the violation of a housing code as imposing strict liability in tort, but due to the notion that a lease is a conveyance, the courts have required the plaintiff to prove that the landlord had actual or constructive knowledge of the statutory violation. As a result, the action sounds in negligence, except in those rare cases that impose strict liability in tort for the violation of a statute specifically imposing an absolute duty of care.

291. Id. at 499, 251 N.Y.S.2d at 710-11.
b. Civil statutes

A second type of housing statute that has the potential for establishing the standard of conduct in a tort action is "repair and deduct" legislation. California's statute, which has been the model for the other jurisdictions that have enacted such legislation, provides that the "lessor of a building intended for the occupation of human beings must ... put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable." The tenant must notify the landlord of any dilapidations which ought to be repaired, and if the landlord fails to act within a reasonable time, the tenant may repair the premises and deduct his expenses from the rent or vacate the premises. The statute does not expressly preclude the recovery of damages for personal injuries or property damage, but in *Gately v. Campbell*, where the plaintiff-tenant sought tort recovery under the statute, the court denied relief, holding that "the only consequence of a breach of the landlord's obligation is that the tenant may either vacate the premises or expend one month's rent for repairs."

California's restrictive interpretation of this legislation has been followed in every other jurisdiction which has considered the question. It should be emphasized, however, that these courts do not preclude the plaintiff from bringing a tort action under housing legislation imposing criminal sanctions. They merely refuse to expand upon the civil remedies expressly set forth in their repair and deduct statutes.

Repair and deduct legislation is the only type of civil housing

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292. See note 141 *supra* and accompanying text.
297. 124 Cal. 520, 57 P. 567 (1899).
298. Id. at 523, 57 P. at 568.
statute that imposes a broader standard of care than that set forth in the typical housing code. The other types of civil statutes discussed earlier simply impose civil sanctions for noncompliance with the standards of criminal housing legislation. Nevertheless, the enactment of such civil statutes may be significant to the personal injury lawyer. In a jurisdiction that has refused to recognize the violation of a housing code as negligence per se or evidence of negligence, it could be argued that the courts should reconsider their position based on the enactment of legislation imposing civil sanctions. Such legislation evidences a policy favoring the noncriminal enforcement of housing codes, and there are few private remedies as effective as a tort action for personal injury or property damage.

C. Defenses

If the plaintiff is able to establish a prima facie case in a tort action against a landlord, the defendant may be able to assert one of the following affirmative defenses: governmental immunity, express assumption of risk, implied assumption of risk, or contributory negligence. Although any landlord is potentially subject to liability under one of the seven exceptions to caveat lessee, the applicability of the affirmative defenses may vary somewhat, depending upon whether the defendant is a public or private landlord. This distinction will be emphasized whenever relevant throughout the following discussion.

1. GOVERNMENTAL IMMUNITY

When a plaintiff brings an action for damages caused by a defect in premises leased from a public housing authority, the first

301. See notes 131-45 supra and accompanying text.
302. Public housing originated with the Housing Act of 1937 “to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety and morals of the citizens of the Nation.” Ch. 896, § 1, 50 Stat. 888 (1937), as amended 42 U.S.C. § 1401 (1970). The program continues to be administered in much the same fashion as originally set forth in the 1937 Act. See 42 U.S.C. § 1401 et. seq. (1970); Special Project, Public Housing, 22 VAND. L. REV. 875, 902 (1969). The Department of Housing and Urban Development (HUD) is in charge of public housing at the federal level. Id. at 901-02. States must pass enabling legislation authorizing the creation of local housing authorities, and by the mid-1960’s, virtually every state had enacted such legislation. L. FRIEDMAN, supra note 110, at 107. The local governing body then creates a local housing authority, supervised by a board of commissioners and administered by an executive director with a permanent staff. Aaron, Low-Rent Public Housing, in HOUSING THE POOR 195 (D. Reeb & J. Kirk eds. 1973); Special Project, Public Housing, 22 VAND. L. REV. 875, 902 (1969). The housing authority selects a site, contracts for the construction of new housing, and manages the project once construction has been completed, subject to federal guidelines, directives, and supervision. Id.
question to be resolved is whether the defendant can assert the defense of governmental immunity. Most housing projects are owned by local public corporations. In the absence of legislation to the contrary, such corporations are entitled to governmental immunity in the same manner as any other local governmental entity. But almost invariably there is specific legislation supporting plaintiff's argument that the local housing authority should not be immune. In a few jurisdictions, statutes have been enacted making a local housing authority liable in tort in the same manner as a private corporation. In most jurisdictions, however, there is merely legislation providing that a public housing authority may sue and be sued. The courts are divided regarding the impact of such legislation on traditional notions of governmental immunity; many courts have held that such legislation waives the housing authority's preexisting immunity, but a substantial minority have held that...
such legislation alone is not sufficient to eliminate governmental immunity as a defense.\textsuperscript{310} In these latter jurisdictions, it must first be determined whether the housing authority was performing a governmental or proprietary function. If proprietary, the housing authority is subject to suit under the statute authorizing it to sue or be sued.\textsuperscript{811} If governmental, it is immune from tort liability.\textsuperscript{812}

The preceding discussion has assumed the recognition of governmental immunity as a defense. Since the enactment of the Federal Tort Claims Act in 1946,\textsuperscript{818} however, a number of jurisdictions have abrogated the immunity,\textsuperscript{314} and most of these have enacted state tort claims acts modeled after the federal act.\textsuperscript{315} Public housing authorities are typically subject to suit under such legislation.\textsuperscript{816} Liability can be avoided by proving that the housing authority was performing a “discretionary function,”\textsuperscript{317} but, as a general rule, the

\begin{quote}

\textsuperscript{310}. \textit{E.g.}, Muses \textit{v.} Housing Authority, 83 Cal. App. 2d 489, 189 P.2d 305 (1948); Knowles \textit{v.} Housing Authority, 212 Ga. 729, 95 S.E.2d 659 (1956); Wickman \textit{v.} Housing Authority, 196 Ore. 100, 247 P.2d 630 (1952).\textsuperscript{311} Harper \textit{v.} Vallejo Housing Authority, 104 Cal. App. 2d 621, 232 P.2d 262 (1951); Knowles \textit{v.} Housing Authority, 212 Ga. 729, 95 S.E.2d 659 (1956); Hill \textit{v.} Housing Authority, 373 Pa. 92, 95 A.2d 519 (1953).\textsuperscript{312} Wickman \textit{v.} Housing Authority, 196 Ore. 100, 247 P.2d 630 (1952). \textit{See also} Bass \textit{v.} City of New York, 38 App. Div. 2d 407, 330 N.Y.S.2d 569 (1972).\textsuperscript{313} The Act provides that the United States shall be held vicariously liable for the:

- negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.


\textsuperscript{314}. W. Prosser, \textit{supra} note 146, § 131, at 984-87.

\textsuperscript{315}. 2 F. Harper & F. James, \textit{The Law of Torts} § 29.11 (Supp. 1968); W. Prosser, \textit{supra} note 146, § 131, at 987.

\textsuperscript{316}. \textit{E.g.}, Tyhurst \textit{v.} Housing Authority, 213 Cal. App. 2d 715, 29 Cal. Rptr. 239 (1963).

In the relatively few instances when the housing project is owned by the federal government, it has been held that the United States is subject to suit under the Federal Tort Claims Act. United States \textit{v.} Dooley, 231 F.2d 423 (9th Cir. 1955); Maryland \textit{v.} Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949); Schetter \textit{v.} Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955) (United States held property under lease from private owner); Toth \textit{v.} United States, 107 F. Supp. 37 (N.D. Ohio 1952); 5A L. Frumer & M. Friedman, \textit{supra} note 146, § 1.01 at 152; Annot., 61 A.L.R.2d 1246, § 2 (1958). \textit{For a general discussion of the Federal Tort Claims Act see} 4 L. Frumer & M. Friedman, \textit{Personal Injury: Actions, Defenses, Damages} 143-304 (1967).

The United States has sought to avoid liability under the Act by “leasing” federally owned housing projects to managing agents and then asserting that these managers are “independent contractors.” Not surprisingly, the courts have refused to accept the government’s characterization of the relationship. Guided by the “actualities of the relationship,” the courts have held that such managing agents are “instrumentalities of the United States” whose purpose is to effectuate federal housing policies. Schetter \textit{v.} Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955); Toth \textit{v.} United States, 107 F. Supp. 37 (N.D. Ohio 1952).\textsuperscript{317} 28 U.S.C. § 2680(a) (1970). \textit{E.g.}, Bass \textit{v.} City of New York, 38 App. Div.
functions of a housing authority are ministerial.\textsuperscript{318}

2. \textbf{EXPRESS ASSUMPTION OF RISK}

The second potential defense—express assumption of risk\textsuperscript{319}—is available to both public and private landlords, although the courts may be less inclined to recognize the defense when the defendant is a public housing authority.\textsuperscript{320} Typically, the defense is based upon a written clause in a standard form lease which exculpates the landlord from liability for any personal injury or property damage sustained by the tenant (or persons on the premises with the consent of the tenant) as a result of the negligence of the landlord or his agents or employees.\textsuperscript{321} It is, of course, also possible to base the defense upon a verbal agreement or a written exculpatory clause which has been negotiated through arm's-length bargaining.\textsuperscript{322}

In contexts other than landlord-tenant relations,\textsuperscript{323} the courts have often voided exculpatory clauses on the grounds that it would be against public policy to enforce them or that there is something in the social relationship of the parties militating against upholding the agreement.\textsuperscript{324} As a general rule, however, these traditional grounds for voiding exculpatory clauses have not been applied to

\begin{footnotesize}
\textsuperscript{318} E.g., Maryland \textit{v.} Manor Real Estate & Trust Co., 176 F.2d 414, 419 (4th Cir. 1949) (housing authority had "absolute duty" to keep common areas in good repair).

\textsuperscript{319} 4D L. \textsc{Frumer} \& M. \textsc{Friedman}, \textit{supra} note 146, at § 4.04; 2 F. \textsc{Harper} \& F. \textsc{James}, \textit{supra} note 146, at § 21.6; 2 \textsc{Powell}, \textit{supra} note 26, at ¶ 234(4); W. \textsc{Prosser}, \textit{supra} note 146, § 68, at 442-45; \textit{Restatement (Second) of Torts} § 496B (1965).

\textsuperscript{320} See text accompanying note 340 infra.


\textsuperscript{322} \textit{Restatement (Second) of Torts} § 496B, comment a (1965).

\textsuperscript{323} Courts have voided exculpatory clauses in contracts between an employer and employee and in contracts between one who performs a public service (e.g., common carrier, innkeeper, professional bailee, public utility) and a member of the public. 2 F. \textsc{Harper} \& F. \textsc{James}, \textit{supra} note 146, § 21.6, at 1185-86; W. \textsc{Prosser}, \textit{supra} note 146, § 68, at 442-44; \textit{Restatement (Second) of Torts} § 496B, comments e-g (1965). It has been argued that contracts between lessors and lessees should be subject to the same rules as those between bailors and professional bailees. Arensberg, \textit{Limitations by Bailees and by Landlords of Liability for Negligent Acts}, 51 \textsc{Dick. L. Rev.} 36 (1946).

\end{footnotesize}
leases because a lease is viewed as an agreement relating exclusively to private affairs of the parties concerned, and not as a matter of public interest. Thus most courts hold that exculpatory clauses in leases are valid and enforceable, at least when the action is brought by the tenant. In so holding, they resolve the conflict between “freedom of contract” and the “desirability of preserving those legal rights and duties arising by operation of [tort] law” in favor of the constitutionally guaranteed freedom of contract.

Although the courts have not usually voided exculpatory clauses in leases, they have often construed them strictly in order to soften the impact of the general rule. Some courts have also held that a landlord cannot avoid liability for “active” (as opposed to “pass-


In an excellent comment on standard form leases, it is noted that the courts which adhere to the freedom of contract principle have “failed to perceive that doctrine’s inapplicability to the standard form lease situation.” Comment, A Flexible Approach to the Problem of Exculpatory Clauses in the Standard Form Lease, 1972 Wis. L. Rev. 520, 524.


Many courts are reluctant to enforce general, as opposed to specific, exculpatory clauses. Note, Exculpatory Clauses and Landlord’s Liability for Negligence, 15 Temp. L.Q. 427 (1941). Others refuse to uphold exculpatory clauses which do not include an express reference to the landlord’s “negligence.” Comment, A Flexible Approach to the Problem of Exculpatory Clauses in the Standard Form Lease, 1972 Wis. L. Rev. 520, 524-25 n.30.

It has been suggested that, in reality, the courts apply tort principles in construing exculpatory clauses, enforcing them only if the tenant had knowledge of the hazard and authority to make the needed repairs. Note, Exculpatory Provisions in Leases: A Multi-Factor Analysis of Pennsylvania Supreme Court Decisions, 40 Temp. L.Q. 195 (1967). In recent years, there has certainly been a trend toward construing exculpatory clauses to cover only that portion of the premises within the tenant’s control. This is consistent with the tort theory that a landlord owes the tenant a duty to keep the common areas in good repair. E.g., Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177 (1932); Feigenbaum v. Brink, 66 Wash. 2d 125, 401 P.2d 642 (1965).
sive") negligence, and most have ruled that exculpatory clauses are ineffective as to fraudulent, reckless, or intentional misconduct. In addition, third parties, including the minor children of the tenant, are normally not barred by such clauses because they are not parties to the contract.

In recent years, there has been a movement away from the traditional position by both legislatures and courts. Legislatures in a few states have enacted statutes which declare that exculpatory clauses in leases of real property are "void as against public policy." In some states, these statutes apply to the entire leased premises, and in others, they apply only to those portions of the premises under the landlord's control. These statutes have prompted a reexamination of the general rule by courts in other jurisdictions.

New Hampshire is the only jurisdiction whose judiciary has categorically refused to enforce exculpatory provisions, but in the other jurisdictions which have considered the question, the courts have begun to recognize that, in certain circumstances, the landlord-


331. 2 POWELL, supra note 26, ¶ 234(4), at 370; RESTATEMENT (SECOND) OF TORTS § 496B, comment d (1965).


333. ILL. REV. STAT. ch. 80, § 91 (1973); Byrum, The Exculpatory Clause in Leases: Public Policy and the Impact of Insurance, 50 CHI. B. RECORD 95 (1968); Rehberg, supra note 326, at 396-400 (1953); Annot., 49 A.L.R.3d 321, §§ 7-8 (1973). California has enacted the following statute:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

CAL. CIV. CODE § 1668 (West 1973). Although the statute appears to categorically void all exculpatory clauses, it has been strictly construed to void only those clauses which are in violation of statutes or against the public interest. Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); Annot., 49 A.L.R.3d 321, § 11 (1973).

334. E.g., ILL. REV. STAT. ch. 80, § 91 (1973); N.Y. GEN. OBLIG. § 5-321 (McKinney 1964).

335. E.g., MD. ANN. CODE art. 21, § 8-211 (1973); MASS. GEN. LAWS ANN. ch. 186, § 15 (1958).


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tenant relationship is a matter of "public interest." The first cases to depart from the general rule were ones in which the plaintiff sought to recover on the theory that a violation of the housing code constituted negligence per se. Several courts followed a Pennsylvania case in holding that, even if exculpatory clauses are generally valid,

[t]he situation becomes an entirely different one in the eye of the law when the legislation in question is, as here, a police measure obviously intended for the protection of human life; in such event public policy does not permit an individual to waive the protection which the statute is designed to afford him.

A second departure from the general rule came in cases involving exculpatory clauses in public housing leases. In several such cases, the courts refused to allow the defense, reasoning that since public housing was provided only to those who were unable to obtain safe and sanitary housing elsewhere, the situation presented "a classic example of unequal bargaining power." In a third line of departure, some courts began to look beyond declarations of legislative policy to the circumstances surrounding the negotiation of the lease. If it was apparent that the parties were in an unequal bargaining position, as in situations where there was a severe housing shortage, the courts began to express a willingness to void exculpatory clauses on a case-by-case basis.

341. Kay v. Cain, 154 F.2d 305, 306 (D.C. Cir. 1946) (Dictum: "The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy."); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955) (residential lease; defective condition in common area; judicial notice of housing shortage); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971) (residential lease; defective condition in common area; landlord had "affirmative duty" to maintain common area in a reasonably safe condi-
Landlord’s Liability for Defective Premises

Today, there is considerable support for the position that a residential lease is not purely a matter of private interest governed by freedom of contract principles. An exculpatory clause in a residential lease may so affect the public interest that it will be held void as against public policy, particularly if the jurisdiction has enacted a housing code, if there is a housing shortage, or if the clause appears in a standard form lease used by a large number of landlords in a given geographical area. On the other hand, the courts have been reluctant to void exculpatory clauses in commercial leases under the “public interest” doctrine. The relevant criterion, however, should be not whether a lease is residential or commercial, but whether the parties to the lease are in an equal bargaining position. Because the Uniform Commercial Code’s doctrine...
of unconscionability has been used successfully to void exculpatory clauses in commercial leases where the parties were not in an equal bargaining position.\textsuperscript{347} It has been suggested that this doctrine would provide a more “flexible and viable approach to the law of exculpation in the landlord-tenant situation.”\textsuperscript{348}

3. IMPLIED ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

The defenses of implied assumption of risk and contributory negligence will be discussed together because the courts frequently fail to distinguish between the two in determining whether to hold a landlord liable for damages caused by a defect in the premises. In the majority of jurisdictions, both defenses are available in a negligence action and the successful assertion of either defense will bar recovery by the plaintiff.\textsuperscript{349} However, in the increasing number of jurisdictions where the comparative negligence doctrine has been adopted by statute or judicial decision,\textsuperscript{350} contributory negligence does not bar recovery, but merely reduces the amount of damages awarded.\textsuperscript{351} The adoption of comparative negligence by some states has also triggered the reexamination, by both those and other states, of assumption of risk as a separate defense.\textsuperscript{352} As a result, several jurisdictions have abolished implied assumption of risk on the grounds that it serves no useful function.\textsuperscript{353}

\textsuperscript{347} Uniform Commercial Code § 2-302. Section 2-302 was applied by analogy to void the exculpatory clause in Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971). Commentators have also urged the extension of section 2-302 to leases of real property. Cramer, Extension of the Uniform Commercial Code’s Unconscionable Contract Provision to Exculpatory Lease Clauses, 5 Am. Bus. L.J. 287 (1967); Note, 6 Ind. L. Rev. 108 (1972).

\textsuperscript{348} Comment, A Flexible Approach to the Problem of Exculpatory Clauses in the Standard Form Lease, 1972 Wis. L. Rev. 520, 529. The unconscionability doctrine has been applied to residential leases by § 1.303 of the Uniform Residential Landlord and Tenant Act.

\textsuperscript{349} 2 F. Harper & F. James, supra note 146, at §§ 21.1-22.3; W. Prosser, supra note 146, at §§ 65, 68; Restatement (Second) of Torts §§ 463-78, 496A, 496C-496G (1965).

\textsuperscript{350} 2 F. Harper & F. James, supra note 146, at § 67. As of April, 1974, comparative negligence had replaced contributory negligence in at least twenty-six states (Arkansas, Connecticut, Colorado, Florida, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming) and Puerto Rico. V. Schwartz, Comparative Negligence (1974); W. Prosser, supra note 146, at § 67. As of April, 1974, comparative negligence had replaced contributory negligence in at least twenty-six states (Arkansas, Connecticut, Colorado, Florida, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming) and Puerto Rico. V. Schwartz, supra, § 1.1, at 13 (citations are given to all of the statutes and the Florida Supreme Court judicial decision adopting comparative negligence).

\textsuperscript{351} V. Schwartz, Comparative Negligence § 2.1 (1974).

\textsuperscript{352} Id. at § 9.1.

\textsuperscript{353} In these jurisdictions, it is said that if the plaintiff has knowledge of the risk and reasonably assumes it, the defendant either owes the plaintiff no duty of care or has not breached the duty owed. If the plaintiff has knowledge of the risk and
In those jurisdictions which do recognize implied assumption of risk as a defense, it has been used successfully to defeat tort actions brought against landlords, and it is therefore necessary to discuss this defense briefly. A distinction will be made here between "primary" and "secondary" assumption of risk. In its primary sense, assumption of risk "is an alternative expression for the proposition that [the] defendant was not negligent, i.e., either owed no duty or did not breach the duty owed." In its secondary sense, assumption of risk refers to the affirmative defense which may be established by proving that the plaintiff voluntarily and unreasonably encountered a known and appreciated risk.


Furthermore, in a comparative negligence jurisdiction, assumption of risk may bar the plaintiff from recovering for conduct which would only have reduced the amount of damages awarded had it been characterized as contributory negligence. See, e.g., Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971). Implied assumption of risk has been a popular topic in legal literature, with many commentators urging the abolition of the defense for the reasons stated above. Anderson, The Defense of Assumption of Risk Under Comparative Negligence, 5 ST. MARY'S L.J. 678 (1973); Edgar, Voluntary Assumption of Risk in Texas Revisited—A Plea for Its Abolition, 26 S.W.L.J. 849 (1972); Greenhill, Assumed Risk, 20 S.W.L.J. 1 (1966); James, Assumption of Risk: Unhappy Reincarnation, 78 YALE L.J. 185 (1968); James, Assumption of Risk, 61 YALE L.J. 141 (1952); Keeton, Assumption of Products Risks, 19 S.W.L.J. 61 (1965); Smith, The Last Days of Assumption of the Risk, 5 GONZAGA L. REV. 190 (1970); Symposium: Assumption of Risk, 22 LA. L. REV. 1 (1961); Note, Assumption of Risk Bites the Dust in Idaho—Almost, 6 IDAHO L. REV. 119 (1969); Note, Contributory Negligence and Assumption of Risk—The Case for Merger, 56 MINN. L. REV. 47 (1971); Comment, Distinctions Between Assumption of Risk and Contributory Negligence, 23 WASH. & LEE L. REV. 91 (1966).

355. RESTATEMENT (SECOND) OF TORTS § 496C (1965).
357. The difference between the Restatement of Tort's definition and Harper and

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In actions against a landlord, assumption of risk in its primary sense serves as an alternate means of expressing the doctrine of caveat lessee. If the landlord owes no duty of care or merely owes a duty to warn the plaintiff of a defective condition in the premises, when the plaintiff knows of the defective condition, it can be said either that the landlord has satisfied his duty of care or that the plaintiff has assumed the risk of the defective condition. As the doctrine of caveat lessee has gradually been eroded by exceptions requiring the landlord to maintain the premises in a reasonably safe condition, the courts have begun to talk in terms of eliminating the defense of implied assumption of risk in its primary sense. Thus, for example, the defense has been "abolished" (or "not recognized") in actions based on the breach of a covenant to repair, the failure to maintain premises in common use in a reasonably safe condition, and the violation of a statutory duty to repair.

Secondary assumption of risk and contributory negligence are still recognized as defenses in any action against a landlord based on negligence (as opposed to strict liability). Therefore, sec-

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363. The implied warranty of habitability or merchantability appears to be a strict liability action. This means that secondary assumption of risk or advertent contributory negligence should be a defense to such an action, but inadvertent contributory negligence should not. However, no court has yet passed on the question. Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emporium*, 3 U. RICHMOND L. REV. 322, 325 (1969); see *Restatement (Second) of Torts* §§ 466, 484 (1965).
ondary assumption of risk and contributory negligence are defenses to actions alleging a failure to disclose latent defects known to the lessor, a failure to put premises leased for admission to the public in reasonably safe condition, breach of a covenant to repair, negligent repairs, a failure to maintain premises in common use in a reasonably safe condition, and a violation of a statutory duty to repair. The stated rationale for the distinction between primary and secondary assumption of risk as defenses to an action based on violation of a statutory duty to repair is that the former is analogous to express assumption of risk, and it is against public policy to permit a person to waive his statutory rights. Secondary assumption of risk, on the other hand, is equivalent to contributory negligence, and it is not inconsistent with public policy to expect a person to exercise reasonable care for his own safety, unless the statute in question was clearly enacted "to protect the plaintiff against his inability to protect himself." Housing codes have not been

364. E.g., Merrill v. Buck, 58 Cal. 2d 552, 375 P.2d 304, 25 Cal. Rptr. 456 (1962); Noel, supra note 147, at 374, 379-80; Note, Landlord and Tenant: Defects Existing at the Time of the Lease, 35 Ind. L.J. 361, 365-66 (1960). However, one recent case held that there was no contributory negligence as a matter of law where the plaintiff had no actual knowledge of the defect. Jackson v. Wyant, 265 Ore. 19, 506 P.2d 693 (1973).

365. E.g., Austin v. Buettner, 211 Md. 61, 124 A.2d 793 (1956).

366. E.g., Dean v. Hershowitz, 119 Conn. 398, 177 A. 262 (1935); Sacks v. Pleasant, 253 Md. 40, 251 A.2d 858 (1969); Maday v. New Jersey Title Guar. & Tr. Co., 127 N.J.L. 426, 23 A.2d 178 (1941); Annotation, 78 A.L.R.2d 1238, § 8 (1961); Annotation, 163 A.L.R. 300, § 4(c) (1946); Annotation, 8 A.L.R. 765, § 2(c) (1920).


368. Dinman v. Jozwiakowski, 156 Conn. 432, 242 A.2d 747 (1968); McCullagh v. Fortune, 76 N.J. 669, 38 N.W.2d 771 (1949). However, in two recent cases, it was held as a matter of law that the plaintiff was not contributorily negligent. Di Mare v. Cresci, 58 Cal. 2d 292, 373 P.2d 860, 23 Cal. Rptr. 772 (1962); Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 234 A.2d 415 (1967).


371. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 431, 218 P.2d 17, 31 (1950); Mula v. Meyer, 132 Cal. App. 2d 279, 282 P.2d 107 (1955). For an example of a statute which was enacted "to protect the plaintiff against his inability to protect himself," see Boyles v. Hamilton, 215 Cal. App. 2d 492, 45 Cal. Rptr. 399 (1965) (child labor statute bars assumption of risk and contributory negligence as defenses). For a suggestion that the policy behind a safety statute may prompt a court to rule
characterized as this type of protective legislation, and consequently, both secondary assumption of risk and contributory negligence may bar recovery against a landlord in an action based on the violation of a statutory duty to repair.\textsuperscript{372}

Although secondary assumption of risk and contributory negligence are almost always potentially available to a landlord,\textsuperscript{373} they rarely preclude the plaintiff from getting to the jury. There is a noticeable trend toward holding that both defenses present questions of fact,\textsuperscript{374} even when the plaintiff has encountered an obvious or known defect.\textsuperscript{375} The courts are particularly lenient in those cases in which the plaintiff demonstrates that he has no reasonable alternative to using the defective premises.\textsuperscript{376} Only when the plaintiff could not reasonably have relied on the landlord to make the needed repairs have the courts barred the plaintiff from recovering as a matter of law.\textsuperscript{377}

as a matter of law that the plaintiff did not assume the risk in the secondary sense of the term, see Fonseca v. Orange County, 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 (1972). See generally W. Prosser, supra note 146, § 65, at 425; § 68, at 453-54; Feuerstein & Shestack, supra note 262, at 217-20; Prosser, Contributory Negligence as Defense to Violation of Statute, 32 Minn. L. Rev. 105 (1948).

372. E.g., Richardson v. Fountain, 154 So. 2d 709 (Fla. App. 1963); Feuerstein & Shestack, supra note 262, at 218-19.

373. The plaintiff can preclude the defendant from asserting contributory negligence as a defense by alleging that the defendant acted recklessly, but normally the evidence will not support such an allegation. E.g., Daulton v. Williams, 81 Cal. App. 2d 70, 183 P.2d 325 (1947); Mendenhall v.Siegel, 1 Wash. App. 263, 462 P.2d 245 (1969); W. Prosser, supra note 146, at § 65, at 426; Annot., 40 A.L.R.3d 795, § 8 (1971).

374. E.g., Sherrard v. Lidyoff, 108 Cal. App. 2d 325, 239 P.2d 28 (1951); Annot., 78 A.L.R.2d 1238, § 9 (1961); Annot., 163 A.L.R. 300, § 4(d) (1955). However, the trend is to permit the tenant to rely on the landlord's promise or legal duty to repair. E.g., Ewing v. Balan, 168 Cal. App. 2d 619, 336 P.2d 561 (1959) (tenant's failure to utilize remedy under repair and deduct statute does not bar recovery); Sacks v. Pleasant, 253 Md. 40, 251 A.2d 858 (1969) (plaintiff's financial ability must be considered in determining whether plaintiff has duty to make minor repairs).


D. Summary

The preceding discussion demonstrates the significant impact that the common law of landlord-tenant relations has had on the tort liability of a landlord. The doctrine of caveat lessee is reflected in the general rule that a landlord is immune from tort liability. The notion that a lease is a conveyance of property has restricted and influenced the development of the exceptions to the general rule of immunity. On the other hand, the courts have not been insensitive to the increased urbanization of the tenant population, the resultant trend toward short-term leases and multiple dwellings, and the enactment of housing codes. These phenomena have given rise to several of the exceptions to a landlord's immunity—the implied warranty of habitability in short-term leases of furnished premises, the "common areas" exception, and the imposition of tort liability for the violation of a housing code provision. They have also prompted the courts to make it more difficult for a landlord to successfully assert an affirmative defense, particularly if the defendant is a public housing authority. Thus the current law governing a landlord's tort liability is a tribute to the flexibility of the judiciary in responding to social and economic realities by creating exceptions to an outmoded legal principle, caveat lessee. The question to be addressed in the remainder of this article is whether such legal fictions are still necessary, or whether recent developments in the law of landlord-tenant relations have set the stage for abolishing a landlord's immunity from tort liability and imposing a duty of reasonable care.

III. LANDLORD-TENANT RELATIONS: RECENT DEVELOPMENTS

A. The Development of the Implied Warranty of Habitability

The common law principles governing the landlord-tenant relation, which evolved in an agrarian setting, continued to be applied without modification to urban leases of commercial and residential property in the industrialized society of the twentieth century. The resulting dissonance prompted Justice Holmes to observe that "the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke." It was not until the 1960's, however, that the judiciary finally undertook a full scale re-examination and reformulation of the common law principles govern-

378. See sections I.A.-C. supra.
There were numerous factors creating a climate conducive to change, the most important of which was the transformation in the nature of a lease. While the characterization of the rights created by a lease had once moved from status to contract to property, there was now a movement back to contract. Residential tenants did not regard a lease as a conveyance of land; it was an obligation to provide a dwelling space and essential services. A commercial lease was no longer a simple conveyance of real estate; it was a complex document containing numerous express covenants regulating the landlord-tenant relationship. Other factors producing a climate receptive to change included the development of legal services for the poor, the existence of a severe housing shortage, the organization of tenants' unions, and an atmosphere of increased judicial activism. The final catalyst for change was the publication of several scholarly pieces calling for the recognition of a lease as a contract consisting of mutually dependent covenants, including an implied warranty of habitability in a lease of residential premises.


Sax and Hiestand proposed an alternative remedy for the tenant living in substandard housing: an action for damages against the landlord for committing the intentional tort of slumlordism (a derivative of the tort action for intentional infliction of emotional distress). Sax & Hiestand, Slumlordism as a Tort, 65 Mich. L. Rev. 869 (1967). This new tort was immediately subjected to sharp criticism, prompting its proponents to write a brief response in its defense. Blum & Dunham, Slumlordism as a Tort—A Dissenting View, 66 Mich. L. Rev. 451 (1968); Sax, Slumlordism as a Tort—A Brief Response, 66 Mich. L. Rev. 445 (1968). One of the commentators who favored the implied warranty of habitability compared the implied warranty with the tort of slumlordism, and concluded that the courts would probably adopt the implied warranty of habitability, because it is more consistent with traditional principles.
The scholars did not lack precedent for their recommendations. The civil law countries have always regarded a lease as a contract composed of mutually dependent covenants. The civil codes have created an implied warranty of habitability in the lease of premises for occupation by human beings enforceable by such

of property and contract law. Levine, The Warranty of Habitability, 2 CONN. L. REV. 61 (1969). In the light of hindsight, it is evident that this prediction was correct. Very few courts have considered the tort of slumlordism, and most have rejected it. E.g., Golden v. Gray, 68 Misc. 2d 679, 327 N.Y.S.2d 458 (Sup. Ct. 1971). But see Comment, The Intentional Infliction of Emotional Harm: The Tort of Slumlordism in New York, 38 ALB. L. REV. 826 (1974). The principal problems with the tort of slumlordism are that (1) it requires proof of the elements of a cause of action for intentional infliction of emotional distress, while the implied warranty of habitability requires no more than proof of negligence; and (2) the tenant's only remedy is an action for damages (or possibly an injunction), while the implied warranty offers the tenant the full panoply of contract remedies. Although the tort of slumlordism does not appear to be a viable remedy for recovering the economic and psychic losses associated with living in substandard housing, it has spawned proposals that landlords be held strictly liable for personal injuries (including psychic harm) caused by defects which constitute violations of a housing code. Falick, A Tort Remedy for the Slum Tenant, 58 ILL. B.J. 204 (1969); Comment, Housing Codes and a Tort of Slumlordism, 8 HOUSTON L. REV. 522 (1971).

388. For example, the following provisions of the French Civil Code impose an implied warranty of habitability:

The lessor is obligated, by the nature of the contract, and without any special provision being required:

2. To maintain the property in such condition that it will be fit for the use for which it has been leased . . . .
C. Civ. art. 1719 (64e ed. Petits Codes Palloz 1965).

The lessor is required to deliver the property in good repair in all respects.
He must make all necessary repairs during the term of the lease, except those incumbent on the lessee.
Id. art. 1720. The German Civil Code also imposes an implied warranty of habitability:

The lessor is obliged to turn over the rental property to the lessee in a condition fit for the contractual use and to preserve it in that condition during the term of the lease.

BGB § 536 (C.H. Beck, Munich, 1974).

(1) If the rental property at the time of delivery has a defect which destroys or diminishes its fitness for the contractual use, or if such defect arises during the term of the lease, the lessee is released from payment of the rent during the time for which fitness is destroyed; during the time for which fitness is diminished, he is only obliged to pay a part of the rent, to be computed according to §§ 472, 473. An insignificant decrease of fitness for use is to be disregarded.

(2) Subparagraph (1) is also applicable when a warranted quality does not exist, or when it ceases to exist later. In case of a lease of real property, warranty of a certain size is to be deemed the equivalent of a warranty of quality.

(3) With respect to the lease of a dwelling, a stipulation which changes these provisions to the detriment of the lessee is null and void.

Id. at § 537.
contract remedies as damages, rescission, and rent abatement.\(^{389}\) In England, where the characterization of the lease as a conveyance of property and the doctrines of *caveat emptor* and independent covenants originated, Parliament has enacted legislation imposing an implied warranty of fitness for human habitation in leases of residential dwellings to the poor.\(^{390}\) And by the 1960's, courts in the United States had moved toward recognizing the mutual dependence of covenants in a lease by developing the doctrine of constructive eviction.\(^{391}\) A few American courts had even gone so far as to hold that a commercial lease was a contract, with the tenant's obligation to pay rent dependent upon the landlord's performance of covenants essential to the purpose of the lease (e.g., a covenant not to lease to a competing business).\(^{392}\) Of course these decisions were outside the mainstream of the common law, and were generally inapplicable to the residential tenant.\(^{393}\) The strongest precedent for applying contract principles to residential leases was provided by those cases recognizing an implied warranty of habitability in a lease of a furnished dwelling for a short term\(^{394}\) or an implied warranty of fitness in a lease of premises under construction.\(^{395}\)

\(^{389}\) For a discussion of the remedial provisions of the German Civil Code and a suggestion that the United States adopt a statutory scheme of landlord-tenant relations patterned after that developed in the civil law countries, see Lipsky & Neumann, *Landlord-Tenant Law in the United States and West Germany—A Comparison of Legal Approaches*, 44 TUL. L. REV. 36 (1969).


\(^{393}\) In a few cases, the courts talked in terms of applying contract principles to residential leases, but each of the cases involved the breach of an essential express covenant and the tenant had vacated, making constructive eviction an alternative remedy. Berman v. Shelby, 93 Ark. 472, 125 S.W. 124 (1910); Stevenson Stanoyevich Fund v. Steinacher, 125 N.J.L. 326, 15 A.2d 772 (1940); Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (1926).

\(^{394}\) *See* text accompanying notes 50-60 *supra*.

\(^{395}\) *See* text accompanying notes 61-64 *supra*. 
The initial assaults on the fundamental tenets of landlord-tenant law in the 1960's were rather timid. The Wisconsin Supreme Court spearheaded the attack with its landmark case, *Pines v. Persision.*\(^{396}\) In *Pines*, the plaintiffs (college students) had entered into a one-year lease of a furnished house. When they moved in, the house was filthy and lacked student furnishings. The plaintiffs attempted to clean the house themselves, but soon became discouraged. Upon advice of counsel, they requested the city to inspect the house, and several building code violations were found. Plaintiffs then vacated the premises and brought an action to recover their deposit on the lease and the value of their labor. The court awarded them this amount, less the reasonable rental value of the premises for the period of actual occupancy, on the theory that there had been a breach of an "implied warranty of habitability in the lease."\(^{397}\) In language suggesting a bold departure from the common law, the court said that it was abolishing *caveat emptor* in favor of an implied warranty of habitability so as to further the legislative policy expressed in the safe place statute and the building code,\(^{398}\) and that the tenant's covenant to pay rent and the landlord's covenant to provide a habitable dwelling were mutually dependent.\(^{399}\) Given the facts of the case, however, it is questionable whether the decision represents a significant break with the past. The court could have reached the same result by expanding the implied warranty of habitability in the lease of a furnished dwelling for a short term so that it would encompass a lease for a period of one year, and by invoking the common law remedies of constructive eviction, damages, and restitution. Indeed, in *Posnanski v. Hood,*\(^{400}\) the Wisconsin court implicitly gave just such a restrictive interpretation to *Pines v. Persision.*\(^{401}\)

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396. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In a 1952 dissenting opinion which was to forecast future developments in the law of landlord-tenant relations, Judge Bazelon had called for the creation of an implied warranty of habitability in leases of furnished dwellings. Bowles v. Mahoney, 202 F.2d 320, 325 (D.C. Cir. 1952) (dissenting opinion).
397. 14 Wis. 2d at 594, 111 N.W.2d at 412.
398. Id. at 595-96, 111 N.W.2d at 412-13.
399. Id. at 596, 111 N.W.2d at 413.
400. 46 Wis. 2d 172, 174 N.W.2d 528 (1970). In *Posnanski*, the landlord of an unfurnished apartment brought an action for rent, and the tenant sought to defend on the grounds that violations of the Milwaukee Housing Code had developed during the term of the lease. The court refused to recognize the defense. Contrary to the language in *Pines* (indeed, without reference to *Pines*), the court held that neither the legislature nor the common council of Milwaukee intended that the housing code be an implied covenant mutually dependent with a tenant's covenant to pay rent because this would sanction rent withholding, which would circumvent administrative enforcement of the housing code. Id. at 178-83, 174 N.W.2d at 531-33.
401. *Posnanski* has been criticized by commentators. E.g., Comment, Wisconsin Housing Codes not an Implied Part of a Lease, 1972 Urban L. Ann. 245, 248-49.
The next pair of cases decided in the 1960's, *Buckner v. Azulai*\(^{402}\) and *Reste Realty Corp v. Cooper*,\(^{403}\) were like *Pines v. Perssion* in that they presaged a major advancement of the law of landlord-tenant relations within the old common law framework. In both cases, it was held that there had been a breach of the implied covenant of quiet enjoyment resulting in a constructive eviction.\(^{404}\) In dictum, however, the *Buckner* court suggested that it would recognize an implied warranty of habitability in leases of furnished or unfurnished residential dwellings,\(^{405}\) and the *Reste* court indicated readiness to recognize an implied warranty of fitness against latent defects in leases of commercial premises.\(^{406}\) These two cases set the stage for the subsequent adoption of the implied warranty of habitability (or fitness) by more than fourteen jurisdictions, including California and New Jersey, between 1969 and 1974.\(^{407}\)

Prior to *Posnanski*, in a case citing *Pines v. Perssion*, the Wisconsin Supreme Court had recognized an implied warranty in a commercial lease that the premises were fit for their intended purpose when the tenant took possession. Earl Millikin, Inc. v. Allen, 21 Wis. 2d 497, 124 N.W.2d 65 (1963). Subsequent to *Posnanski*, the Wisconsin legislature enacted legislation allocating responsibility for major repairs to the landlord, and for minor repairs to the tenant. *Wis. Stat.* § 704.07 (1971).

406. 53 N.J. at 453-54, 251 A.2d at 272-74.
There is now a distinct trend in the United States toward characterizing a lease as a contract containing an implied warranty of habitability (or fitness) which is interdependent with the covenant to pay rent and enforceable by contract remedies. The remainder

1, 1973). The publication of the Uniform Residential Landlord and Tenant Act, which creates an implied warranty of habitability in all residential leases, will probably stimulate additional legislative activity in this area. UnifoRM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104; see note 140 supra.

A few jurisdictions have refused to recognize the implied warranty of habitability. Pointer v. American Oil Co., 295 F. Supp. 573 (S.D. Ind. 1969) (Indiana law); Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972) (Connecticut has a statute requiring that leased premises be maintained in "tenantable" condition, but the court held that there had been no violation of the statute and refused to recognize an implied warranty of habitability). Cameran v. Calhoun-Smith Dist. Co., 442 S.W.2d 815 (Tex. Civ. App. 1969) (refuses to recognize an implied warranty of fitness in a commercial lease). The United States Supreme Court has refused to invalidate Oregon's Forcible Entry and Wrongful Detainer Statute, stating:

The Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants.


In a closely related development, some jurisdictions have held that a lease is a contract, and that a landlord's violation of a housing code voids the lease, thereby entitling the tenant to vacate the premises and recover rent paid in excess of the reasonable rental value. William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. Ct. App. 1970); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968); Longenecker v. Hardin, 30 Ill. App. 2d 468, 264 N.E.2d 878 (1970); Hicks, supra note 391, at 470-81; Indritz, supra note 132, at 1; Schoshinski, Remedies for the Indigent Tenant: Proposal for Change, 54 Geo. L.J. 519, 537-38 (1966); Note, Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code, 56 Geo. L.J. 920 (1968); Note, Landlord and Tenant: Lease Agreement Void as an Illegal Contract when Dwelling is in Violation of Local Housing Code at Time of Letting, 30 U. Pitt. L. Rev. 134 (1968). This theory has been held to be inapplicable to defects arising during the term of the lease; only the implied warranty of habitability offers protection against such defects. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Riley v. Nelson, 256 S.C. 545, 183 S.E.2d 328 (1971); Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

of this section will summarize the reasons given by the courts for following this trend, discuss the scope of the implied warranty of habitability (or fitness), and identify the remedies which have been recognized for its enforcement.

B. The Rationale Behind the Implied Warranty of Habitability

Courts adopting the implied warranty of habitability have emphasized that the factual assumptions underlying the original common law of landlord-tenant relations have long ceased to exist. The tenant is no longer principally interested in the land itself; he now seeks a place to live:

When American city dwellers, both rich and poor, seek "shelter" today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.  

Nor does the modern tenant have much in common with the "jack-of-all-trades" farmer who had the skill, incentive, and financial resources to make the necessary repairs of his relatively simple dwelling. The modern tenant has a "single specialized skill unrelated to maintenance work," lives in a complex building (often without access to or control over the facilities in need of repair), lacks the financial wherewithal to make more than minor repairs, and is highly mobile, giving him little incentive to make even those repairs which are within his means.

Just as the courts adopting the implied warranty of habitability have noted that the factual assumptions underlying the common law are now appropriate only to the pages of a history book, so they have noted the serious erosion of the legal doctrines forming the founda-


410. Id. at 1077-79; Green v. Superior Ct., 10 Cal. 3d 616, 624-25, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973).
tion of the common law of landlord-tenant relations. For example, the lease was once regarded as a conveyance of property, but the courts have begun to recognize the contractual nature of the contemporary lease agreement.\textsuperscript{411} Similarly, \textit{caveat emptor} originally precluded the imposition of a duty to repair or maintain on the landlord, but exceptions (such as the implied warranty of habitability in a short term lease of furnished premises) have been carved out,\textsuperscript{412} and \textit{caveat emptor} has been completely overthrown by the implied warranties of merchantability and fitness in the law governing commercial sales transactions.\textsuperscript{413} Finally, although lease covenants were traditionally regarded as independent (largely for historical reasons), this notion has been partially undermined by the doctrine of constructive eviction.\textsuperscript{414} In light of these developments, the courts adopting the implied warranty of habitability have concluded that much of the common law of landlord-tenant relations, like the factual assumptions upon which it was erected, should be relegated to history books.

Three additional factors have prompted a reexamination of landlord-tenant law and have shaped the contours of the resulting implied warranty of habitability or fitness. First of all, legislative dissatisfaction with the common law doctrine of \textit{caveat emptor} has been clearly shown by the widespread enactment of housing codes.\textsuperscript{415} Secondly, urbanization and population growth have produced a shortage of low-cost housing which has created a disparity in the bargaining power between landlords and residential tenants.\textsuperscript{416} Standardized form leases have become contracts of ad-


\footnotesize{\textsuperscript{415} Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (D.C. Cir. 1970); Green v. Superior Ct., 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974); Mease v. Fox, — Iowa —, 200 N.W.2d 791 (1972); Boston Housing Authority v. Hemming, — Mass. —, 293 N.E.2d 631 (1972).}

\footnotesize{\textsuperscript{416} Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970);}
hesion, offered to residential tenants on a take-it-or-leave-it basis. Under these circumstances, the common law assumption that a tenant can bargain for an express warranty of habitability or fitness has become totally unrealistic. Finally, the characterization of a lease as a "package of goods and services" has prompted several courts to apply products liability principles to the landlord-tenant relation by analogy. Like the consumer, the modern urban tenant relies on the landlord's implied representation that the premises are fit for human habitation. Like the commercial businessman, the landlord has the "greater opportunity, incentive and capacity to inspect and maintain the condition of the building." Moreover, if the landlord is in the business of leasing, he is in a better position to distribute the cost of maintaining the premises. These similarities between the merchant-consumer transaction and the landlord-tenant relation have prompted the courts to conclude that there should be an implied warranty of habitability in the lease of real property, just as there is an implied warranty of merchantability in the sale or lease of personal property, and just as there is an implied warranty of habitability in the sale of real property.

C. The Scope of the Implied Warranty of Habitability

Although there is a clearly identifiable trend toward recognition of an implied warranty of habitability in leases of real property, the courts are not in complete accord regarding the scope of the warranty. It is generally agreed that the warranty should be implied in both long and short term leases, regardless of whether they


423. E.g., King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973) (month-to-month lease); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973) (one-week lease).
are written or oral. There is also a consensus that the warranty imposes a duty on the landlord to put the premises in habitable condition at the inception of the lease and to maintain the premises in such condition for the duration of the lease. To be actionable, it is agreed that the defective condition must affect either the tenant's dwelling or the common areas used by the tenant. There is no unanimity of opinion, however, regarding the standard to be applied in determining whether the warranty has been breached.

1. STANDARD OF HABITABILITY

When discussing the standard of habitability, it is useful to distinguish between those cases which have founded the implied warranty of habitability on the legislative enactment of housing codes and those which have relied on public policy considerations or products liability analogies. In those jurisdictions which have based the warranty on provisions of a housing code, the standard of habitability is set by statute. Not every violation of a housing code is a breach of the implied warranty: only "substantial" violations are actionable. However, very little guidance has been offered to the trier of fact in distinguishing between a "substantial" and "de minimis" violation.

When the implied warranty is based on public policy considerations, the standard of habitability is set by the judiciary and is even

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425. E.g., Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973) (oral lease). Several courts have explicitly stated that the warranty is implied in both written and oral leases. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 n.29 (D.C. Cir. 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972).
428. See text accompanying notes 418-21 supra. Throughout the remainder of this article, the cases relying on public policy considerations or products liability analogies will be referred to as "cases relying on public policy considerations."
431. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 372, 280 N.E.2d 208, 221-22 (1972) (dissenting opinion). For example of the difference between "substantial" and "de minimis" violations, see note 436 infra.
A typical warranty is that the premises are "habitable and fit for living." Once again, only "substantial" or "material" breaches are actionable. The following factors have been identified as being relevant to a determination of the issue of materiality: (1) the nature and seriousness of the deficiency or defect; (2) the effect of the defect on the habitability, safety, or sanitation of the premises; (3) the length of time for which the defect has been in existence; (4) the age of the structure; and (5) the amount of the rent. Some courts have summarized the above criteria by stating that the judicial standard of habitability does not require the landlord to ensure that the premises are in perfect or aesthetically pleasing condition, but it does require that "bare living requirements" must be maintained.

The legislative standard of habitability has the advantage of greater certainty, but lacks the flexibility of the judicial standard. For example, under the legislative standard, if a detailed housing code does not proscribe an allegedly defective condition, that condition is not actionable. There are no such arbitrary restrictions on the definition of what is "uninhabitable" under the judicial standard. On the other hand, if the code simply requires the landlord to keep the premises "in good repair," there is little difference between the specificity of the two standards. If more jurisdictions were to enact comprehensive, statewide housing legislation, the legislative standard would be the more uniform, but at the moment

435. In Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 482-83, 268 A.2d 556, 559 (1970), the court illustrates the distinction between "bare living requirements" and "amenities": [In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability. Malfunction of venetian blinds, water leaks, wall cracks, lack of painting, at least of the magnitude presented here, go to what may be called "amenities." Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability. Accord, Green v. Superior Ct., 10 Cal. 3d 616, --, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974); Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (N.Y.C. Civ. Ct. 1973).
437. See section I.D.1. and note 257 supra.
most housing codes are municipal ordinances. This means that the legislative standard varies with the language of the local ordinance. Moreover, no protection is offered to tenants who live in communities that have not enacted a housing code. On balance, then, the judicial standard would appear to offer the greatest protection to the tenant, even though it is the less certain.

2. TYPE OF LEASE

Just as there is a split of authority regarding the standard of habitability, so there is a division of opinion as to whether the implied warranty should be restricted to residential leases or extended to commercial leases. If the warranty is founded on the legislative enactment of a housing code, it will be restricted to leases of residential premises. Depending upon the scope of the housing code, the warranty will be confined to multiple dwellings or will extend to all residential dwellings. If, on the other hand, the warranty is based on public policy considerations, it should cover all residential leases and it might well extend to commercial leases. Indeed, the products liability analogy invites such an extension. There are very few cases, however, which have recognized an implied warranty in commercial leases. The principal support for this extension of the implied warranty comes from the Restatement (Second) of Property, which has recognized an implied warranty of fitness or suitability in all leases, with a restriction on the range of remedies available to the commercial tenant. Should the courts follow the Restatement's lead, it can be anticipated that the legal principles governing the implied warranty in commercial leases will be somewhat different from those developed for residential leases.

440. See note 107 supra and accompanying text.
442. See cases cited in note 429 supra.
447. See text accompanying notes 418-21 supra.
For example, the standard of tenantability will necessarily be a judicial (not a legislative) standard, and the courts will probably be more willing to permit a commercial tenant to waive or modify the terms of the implied warranty, particularly when the parties to the lease are in an equal bargaining position. The courts will also have to find a label to describe the warranty. They could retain the term "implied warranty of habitability" for residential leases and adopt a new term to describe the warranty implied in commercial leases. In the alternative, they could follow the Restatement (Second) of Property and adopt a single label—implied warranty of tenantability, suitability, or fitness—which would be broad enough to cover the warranty implied in both types of leases.

3. NOTICE REQUIREMENT

As a general rule, the landlord must have notice of the allegedly defective condition and a reasonable time in which to correct it before the tenant can successfully assert a breach of the implied warranty of habitability. Neither the nature nor the rationale of the notice requirement has been fully articulated by the courts, although the Restatement (Second) of Property has attempted to fill the gaps in the reported decisions. With respect to defects present at the time of the lease, the notice requirement is waived if the landlord knew or should have known of the defective condition, but if a reasonable inspection would not have disclosed the defect, notice is required. As for defects arising after the transfer of possession, notice is a prerequisite unless the landlord had actual knowledge of the defect. In either case, if public authorities have notified the landlord of a housing code violation or if another tenant has informed the landlord of a defective condition, the tenant has no duty

450. Id. at § 5.1, Comment b & Reporter's Note 2.
451. Id. at § 5.1.
453. RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e; § 5.2, Comment h; § 5.3, Comment g; § 5.4, Comment g (Tent. Draft No. 1, 1973).
454. E.g., Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e (Tent. Draft No. 1, 1973).
455. E.g., Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 483-84, 268 A.2d 556, 560 (1971); RESTATEMENT (SECOND) OF PROPERTY § 5.4, Comment g (tent. draft No. 1, 1973). Although the issue has not been addressed by either the Restatement or the courts, it would seem that the notice requirement ought to be waived when a landlord "should have known" of a defect in an area under his control, such as an area reserved for the tenants' common use. See notes 603-05 infra and accompanying text.
to give a second warning.\footnote{456} And if the tenant makes reasonable, but unsuccessful, attempts to contact the landlord, the notice requirement is satisfied.\footnote{457}

The notice requirement reflects an unwillingness to hold the landlord strictly liable. Although the courts have not expressly stated that the tenant must prove "fault" in order to establish a breach of the implied warranty, the Restatement clearly indicates that a landlord cannot be held liable for a defect of which he neither knew nor should have known.\footnote{458} With respect to defects present at the time of the transfer of possession, this requirement of proof of fault distinguishes the implied warranty of habitability from its commercial analogue, the implied warranty of merchantability.\footnote{459} No reasons have been given for granting the landlord greater protection against the imposition of liability than the merchant, and in fact one court has suggested that the landlord should be held strictly liable for any defects in existence at the beginning of the lease.\footnote{460}

With regard to defects arising after the transfer of possession, it is this author's hypothesis that the notice requirement reflects the continuing vitality of the notion that a lease is a conveyance of property. As a result, the landlord can be held liable only for defects of which he had actual knowledge, and this knowledge must of necessity be obtained either from the tenant or from some other party with access to the tenant's premises.\footnote{461} Once the tenant takes possession, the landlord is deemed to have no right of entry, and therefore no duty to inspect. Given the assumption that a lease is a conveyance of property, the notice requirement makes sense. But the implied warranty of habitability is premised on the assumption that a lease is a contract. If a lease is a contract containing an implied duty to repair, then it would seem that the courts could also infer the concomitant right to enter for purposes of making periodic inspections.\footnote{462}

Their failure to do so suggests that they wish to preserve the tenant's exclusive right to possession, a right which dates back to the period

\footnote{456} E.g., Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 844 & n.17 (Mass. 1972); \textit{Restatement (Second) of Property} § 5.4, Comment g (Tent. Draft No. 1, 1973).


\footnote{458} \textit{Restatement (Second) of Property} § 5.1, Comment e (Tent. Draft No. 1, 1973).

\footnote{459} \textit{Uniform Commercial Code} § 2-316.

\footnote{460} Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 844 n.18 (Mass. 1972).

\footnote{461} \textit{See} notes 455-56 supra and accompanying text.

\footnote{462} \textit{See} Bowles v. Mahoney, 202 F.2d 320, 327 (D.C. Cir. 1952) (Bazelon, J., dissenting opinion). Eliminating the notice requirement would not necessitate the imposition of strict liability. The courts could require the tenant to prove that the defect would have been detected by a reasonable inspection in order to establish a breach of the implied warranty.
when a lease was first characterized as a conveyance of property.463

D. Defenses to the Implied Warranty of Habitability

Assuming that the notice requirement has been satisfied, there are two defenses that the landlord can assert in an action for breach of the implied warranty of habitability. First of all, the tenant is barred from relief if the defect resulted from the tenant's unusual, abnormal, or malicious use of the premises.464 Secondly, the tenant cannot successfully assert a breach of the implied warranty of habitability if the warranty has been waived or disclaimed. The first defense requires no discussion. The second has produced a division of opinion which once again can best be analyzed by distinguishing those jurisdictions that base the implied warranty of habitability upon the enactment of housing codes from those that premise it upon judicial public policy considerations. When the warranty is based upon the provisions of a housing code, the courts have not permitted the tenant to waive or disclaim it.465 This is consistent with general principles of both tort, and contract law.466

On the other hand, when the warranty is premised on judicial notions of public policy, the courts have normally held that the warranty may be waived or disclaimed.467 This means that a tenant who takes possession of leased premises with obvious defects or continues to remain in possession of the premises after discovering and giving the landlord an opportunity to repair latent defects has waived the right to claim that such defects breach the implied warranty of habitability. To mitigate the potential harshness of this rule, the courts have held that there is no waiver if the landlord has promised to make repairs,468 if the tenant's mobility is restricted by a housing shortage,469 or if the defect constitutes a violation of a housing code.470 A tenant may also avoid a disclaimer of the implied

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463. See section I.A.3. supra.
466. See text accompanying notes 338-39 supra.
468. Restatement (Second) of Property § 5.1, Comment d; § 5.3, Comments b, c, d (Tent. Draft No. 1, 1973).
469. Restatement (Second) of Property § 5.3, Comment e; § 5.4, Comment e (Tent. Draft No. 1, 1973).
warranty of habitability if the disclaimer is unconscionable or drawn so broadly as to cover housing code violations. Recently it has been suggested that a distinction should be drawn between residential and commercial leases, so that any disclaimer of the implied warranty of habitability by a residential tenant could be prohibited, while a disclaimer by a commercial tenant could be enforced, provided it were freely and fairly negotiated.

The preceding discussion of the scope of the implied warranty of habitability has assumed that the courts base the warranty either on the provisions of a housing code or on public policy considerations. In some of the more recent decisions, the courts have attempted to combine the strengths of the above two lines of cases by adopting an implied warranty of habitability based on public policy considerations, and then holding that the housing code either sets a minimum standard of habitability or is a factor in determining whether there has been a breach of the warranty. Under these more recent decisions, the standard for determining whether the warranty has been breached has the certainty and precision of the legislative standard, while preserving the flexibility of the judicial standard. The warranty need not be confined to those types of residential premises covered by the housing code. It can be expanded to cover all types of residential leases as well as commercial leases. The waiver or disclaimer of such a warranty can be prohibited insofar as the alleged defect constitutes a violation of a housing code, but can be enforced in all other circumstances unless unconscionable. It can be anticipated that these decisions will have a significant influence in shaping the future scope of the implied warranty.


473. E.g., Green v. Superior Ct., 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173-74 n.9, 111 Cal. Rptr. 704, 709-10 n.9 (1974); Restatement (Second) of Property § 5.5 (Tent. Draft No. 1, 1973). For a more precise definition of an "unconscionable" agreement, see Uniform Land Transactions Act § 1-311 (Tent. Draft No. 3, 1974).


475. Uniform Residential Landlord and Tenant Act § 1.403(a)(1)(b). See notes 343-44 supra and accompanying text. This distinction has been made in Germany. See note 388 supra.

of habitability.\footnote{477}

E. Remedies Under the Implied Warranty of Habitability

Those courts which have adopted the implied warranty of habitability have had to confront the question of whether the warranty is independent of the tenant's covenant to pay rent. There is nothing to preclude a court from adhering to the common law doctrine of independent covenants.\footnote{478} However, the implied warranty of habitability is based upon the assumption that a lease is a contract to provide space and services, while the doctrine of independent covenants is associated with the common law's conception of the lease as a conveyance of an interest in real estate. Consequently, if a court were to hold that the implied warranty of habitability and the tenant's obligation to pay rent were independent covenants, it would have created a union of two legal doctrines based on fundamentally different conceptual assumptions as to the nature of a lease.\footnote{479} It would also have created a right without a realistic remedy, for it is virtually meaningless to tell a tenant that he has a right to a habitable dwelling, but that he must move out or continue to make rental payments and sue the landlord for damages in the event that the premises become uninhabitable.\footnote{480} In recognition of the incompatibility of the two doctrines, most courts have held that the tenant's covenant to pay rent and the landlord's express or implied covenant to maintain the premises in a habitable condition are mutually dependent.\footnote{481} A few courts have held that the interdependency of the covenants is a question of fact to be determined by the intent of the parties and the circumstances surrounding the negotiation of the lease.\footnote{482}

At common law, the only remedies available to the tenant were damages and termination of liability for rent under constructive eviction.\footnote{483} Statutes in some jurisdictions augmented these remedies by

\footnote{477. They have already had a significant impact. \textsc{Uniform Residential Landlord and Tenant Act} §§ 2.104(a), (b); \textsc{Restatement (Second) of Property} § 5.1, Comment f (Tent. Draft No. 1, 1973).


483. \textit{See section I.C. supra.}
recognizing the tenant's right to repair and deduct or withhold (or suspend) rental payments until the premises had been brought into compliance with the provisions of the housing code.\textsuperscript{484} The modern characterization of a lease as a contract consisting of mutually dependent covenants has prompted many courts to recognize the tenant's right to assert the full panoply of contract remedies against the landlord.\textsuperscript{485} This has had a dramatic impact on the law of landlord-tenant relations, particularly insofar as it has enabled the tenant to remain in possession of the premises and still seek the elimination of uninhabitable conditions.\textsuperscript{486}

Rescission (or termination) of the lease is the first of the contract remedies that can be asserted for breach of the implied warranty of habitability.\textsuperscript{487} As with the doctrine of constructive eviction, the tenant must vacate the premises in order to utilize this remedy,\textsuperscript{488} but it is easier to prove a breach of the implied warranty of habitability than to establish a "substantial interference with the tenant's use and enjoyment of the premises."\textsuperscript{489} A second remedy, compensatory damages, is available regardless of whether the tenant vacates the premises or remains in possession.\textsuperscript{490} The tenant is entitled to recover the loss in value of the premises as a result of the landlord's breach of the implied warranty, plus incidental and consequential damages.\textsuperscript{491} In recognition of the difficulty that the tenant may have proving the precise amount of the loss under the traditional rules of valuation, a few courts have authorized the computation of damages in terms of a percentage of the tenant's rent.\textsuperscript{492}

If the tenant decides to remain in possession, he may bring an action for specific performance of the implied warranty of habitability.\textsuperscript{493}
ability, but this is a remedy that is rarely invoked.\textsuperscript{498} If he is in possession of premises that are partially uninhabitable, he may seek reformation of the lease to cover only the habitable portion of the premises.\textsuperscript{494} However, perhaps because it is more appropriate to commercial than to residential leases, this is a remedy that has been invoked as infrequently as the doctrine of specific performance. The final contract remedy available to the tenant in possession, a remedy which has revolutionized the law of landlord-tenant relations, is rent abatement.\textsuperscript{495} It is premised on the mutual dependency of the implied warranty of habitability and the covenant to pay rent. It permits the tenant to obtain a declaratory judgment reducing the amount of rent due under the lease in direct proportion to the amount by which the value of the leased premises has been reduced as a result of the landlord's breach of the implied warranty of habitability.\textsuperscript{496} It is more commonly invoked, however, by withholding rental payments and asserting the breach of the implied warranty of habitability as a defense in the landlord's action to evict or summarily dispossess the tenant.\textsuperscript{497} In such cases, if the trier of fact finds that the entire rental obligation has been extinguished by the landlord's total breach of the warranty, judgment will be entered for the tenant. On the other hand, if the trier of fact determines that the tenant's rental obligation has been only partially abated, the tenant will be given an opportunity to pay the amount of rent due and owing. If the tenant fails to pay this amount, a judgment for possession will be entered in favor of the landlord.\textsuperscript{498}

In addition to the contract remedies described above, some courts have also recognized the self-help remedy of rent application,\textsuperscript{499} which is virtually identical to the statutory "repair and de-
duct" remedy. If the tenant requests the landlord to make repairs, and the landlord fails to act within a reasonable period of time, the tenant may make the repairs and deduct the reasonable costs incurred from the rent. This remedy has the advantage of assuring that the premises are restored to a habitable condition, but it is effective only for making minor repairs, as the value of the repairs cannot exceed the amount of rent due under the lease.

F. Summary

The trend toward characterization of a lease as a contract containing an implied warranty of habitability which is mutually dependent with the covenant to pay rent has had a profound impact on the law of landlord-tenant relations. The landlord, no longer able to invoke caveat lessee, is now subject to a duty to maintain the premises in good repair. In many jurisdictions, this duty arises even in the absence of a housing code. If the landlord fails to fulfill his duty, the tenant has available not only the civil sanctions designed to coerce compliance with the housing code, but the full panoply of contract remedies for breach of the implied warranty, including rescission, damages, and rent abatement. One might well ask whether the law of landlord-tenant is now weighted too heavily in favor of the tenant. Indeed, some commentators have criticized the development of the implied warranty of habitability on the grounds that it will cause landlords to raise rents or abandon rental properties, thereby aggravating the shortage of low-income housing. Empirical studies have demonstrated that their fears are not altogether unfounded. Nevertheless, there has been a steady increase in the

500. See note 141 supra and accompanying text.
503. E.g., G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT (1973); G. STERNLIEB, THE TENEMENT LANDLORD (1966). The literature analyzing the economic impact of imposing a duty to repair on landlords has focused on the effect of fully enforcing housing codes. It has generally been predicted that full enforcement would lead to the abandonment of buildings which could not be brought into compliance and increased rents for those that could. Bross, Law Reform Man Meets the Slumlord: Interactions of New Remedies and Old Buildings in Housing Code Enforcement, 3 URBAN LAWYER 609 (1971); Burke, Redrafting Municipal Housing Codes, 48 J. URBAN L. 933, 935-36 (1971); Grigsby, Economic Aspects of Housing Code Enforcement, 3 URBAN LAWYER 533 (1971); Hartman, Kessler & LeGates, Municipal Housing Code Enforcement and Low-Income Tenants, A.I.P.J. 90, 91-95 (1974). But see Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 YALE L.J. 1093 (1971); Komesar, Return to Slumville: A Critique of the Ackerman 1975:19 Landlord's Liability for Defective Premises

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number of jurisdictions adopting the implied warranty,\textsuperscript{504} making it realistic to predict that it will soon become the majority rule. This suggests that the courts are willing to risk a certain amount of economic dislocation in an effort to attain the ultimate objective of a habitable dwelling for every tenant.\textsuperscript{505}

IV. LANDLORD'S LIABILITY FOR DEFECTIVE PREMISES: NEGLIGENCE

A landlord's immunity from tort liability at common law was premised on the characterization of a lease as a conveyance of property and the related doctrine of \textit{caveat emptor}.\textsuperscript{506} Although recent developments in the law of landlord-tenant relations have seriously undermined these basic principles,\textsuperscript{507} to date only one court that has characterized a lease as a contract containing an implied warranty of habitability has subsequently abrogated the landlord's common law immunity from tort liability.\textsuperscript{508} In \textit{Sargent v. Ross},\textsuperscript{509} a four-
year-old child fell to her death over the side of an outdoor stairway while under the care of her baby-sitter, a tenant in a second-story apartment. There was no apparent cause for the fall except for evidence that the stairs were dangerously steep and the railing was insufficient to prevent the fall. The child's mother brought a wrongful death action against the landlord for negligent construction and maintenance of the stairway, and the jury returned a verdict for the mother. The defendant appealed on the grounds that she owed no duty of care to the deceased child because the case did not come within any of the exceptions to the general rule of landlord immunity. The plaintiff contended that the landlord was subject to liability on two alternative theories: that the stairway was an area of "common use" over which the landlord retained control, and that the case fell within the "negligent repairs" exception. The New Hampshire court realized that it could either "strain the control test to the limits and find control in the landlord" or "broaden the [negligent repairs] exception to include the negligent construction of improvements to the premises." It chose instead to re-

178, 501 P.2d 17, 19 (1972), the court noted the decisions from other jurisdictions adopting the implied warranty of habitability and held: "In residential short-term lease situations, we believe the duty of due care is owed to a tenant throughout the lease period to maintain premises free from 'unreasonably dangerous' instrumentalities that could potentially cause injury." This decision does not impose a duty of reasonable care on all landlords; it is limited to circumstances reminiscent of the implied warranty of habitability in short-term leases of furnished dwellings. See section II.B.3. supra.


510. 113 N.H. at —, 308 A.2d at 529-30. The defendant lived in a ground-floor apartment in the building and had added the outside stairway approximately eight years prior to the accident. Id.

511. Id. The mother also brought suit against the tenant for negligent supervision, but the jury returned a verdict for the defendant and the plaintiff chose not to appeal. Id. at —, 308 A.2d at 530.

512. See section II.B.6. supra.

513. See section II.B.5. supra.

514. See section II.B.6. supra.

515. 113 N.H. at —, 308 A.2d at 532. The court cited Gibson v. Hoppman, 108 Conn. 401, 143 A. 635 (1928), in which the plaintiff, the adult daughter of the defendant's tenants, fell while descending an interior stairway that served only her parents' apartment. The court held that the defendant owed the plaintiff a duty of reasonable care because "the stairway formed no part of the tenement rented to the plaintiff's parents, but was retained by the defendant landlords within their exclusive control." Gibson v. Hoppman, 108 Conn. 401, 407, 143 A. 635, 637 (1928).

516. 113 N.H. at —, 308 A.2d at 533. The court's sole authority for broadening the negligent repairs exception to cover the landlord's construction of the outdoor stairway was a passage from Bohlen, Landlord and Tenant, 35 HARV. L. REV. 633, 648 (1922), in which the author suggested that no distinction should be made between "repairs" and "alterations" made during the term of the lease.
verse the general rule of nonliability. It noted that by recognizing the implied warranty of habitability in an earlier case, it had removed caveat emptor from landlord-tenant law, and that in so doing, it had "discarded the very legal foundation and justification for the landlord's immunity in tort . . . ." The court brought "the other half of landlord-tenant law" up to date by imposing on landlords a duty to "exercise reasonable care not to subject others to an unreasonable risk of harm." It is this author's thesis that other jurisdictions should follow New Hampshire's lead. The policy considerations and legal precedents that support the imposition of a duty of reasonable care will be discussed in this section, followed by an analysis of the issues that would arise in the litigation of a negligence action against a landlord.

A. The Case for Negligence Liability

Any jurisdiction that has adopted the implied warranty of habitability has necessarily recognized that a lease is a contract (not a conveyance of real property) and has imposed a duty on the landlord to maintain the premises in good repair throughout the term of the lease. In such jurisdictions, the modern law of landlord-tenant relations stands in direct conflict with the landlord's common law immunity from tort liability. A tenant can withhold rent for the landlord's failure to repair the premises, yet cannot recover for personal injuries or property damage sustained as a result of the landlord's failure to make those same repairs unless one of the seven common law exceptions to the general rule of nonliability happens to apply. For example, if the tenant discovers that her bathroom floor has begun to weaken as a result of dry rot and notifies the landlord of this defective condition, she may withhold rental payments in the event that the landlord fails to make the requested repairs. However, if she falls through the weakened floorboards, she will have no right to recover against the landlord for her personal injuries unless the dangerous condition constitutes a violation of a housing

517. 113 N.H. at --, 308 A.2d at 533.
519. 113 N.H. at --, 308 A.2d at 534.
520. Id. at --, 308 A.2d at 534.
521. See section III. supra.
522. See section II.A. supra.
523. See section II.B. supra.
525. In Hinson v. Delis, the plaintiff sustained personal injuries in the manner described in the text, but did not seek to recover compensatory damages.
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code and the jurisdiction imposes tort liability for the violation of a criminal statute.\textsuperscript{526}

If a jurisdiction has based its adoption of the implied warranty of habitability on legislative enactment of a housing code,\textsuperscript{527} it should at least permit recovery for personal injuries or property damage on the theory that the violation of a housing code provision is negligence per se or evidence of negligence.\textsuperscript{528} Any prior refusal to impose tort liability under this theory\textsuperscript{529} should be reconsidered. The classic argument that it would be contrary to legislative intent to construe a penal statute as creating a new civil cause of action\textsuperscript{580} would no longer be persuasive because the implied warranty of habitability creates precisely such a cause of action for a tenant who has sustained economic loss as the result of a landlord's violation of a housing code. Although it might well be desirable as a matter of policy, judicial consistency would not require the imposition of a broader duty of reasonable care on the landlord, for the landlord's duty to repair under the implied warranty of habitability would be limited to the requirements prescribed by the housing code.\textsuperscript{581} In those jurisdictions that have based the implied warranty of habitability on public policy considerations,\textsuperscript{582} imposing tort liability for a landlord's violation of a housing code will not suffice to bring the law of torts up to date because a landlord's duty to repair under the warranty is not prescribed by the provisions of the code. Instead, it will be necessary to impose a duty of reasonable care, as the court did in Sargent v. Ross.\textsuperscript{583}

\textsuperscript{526} See section II.B.7. supra.
\textsuperscript{527} See notes 429-31 supra and accompanying text.
\textsuperscript{528} See section II.B.7. supra.
\textsuperscript{529} See notes 264-66 supra and accompanying text.
\textsuperscript{530} See cases cited note 264 supra.
\textsuperscript{531} See cases cited notes 265-66 supra.
\textsuperscript{532} See notes 432-36 supra and accompanying text.
\textsuperscript{533} 113 N.H. 388, 308 A.2d 528 (1973). It would also be possible to develop a "contract theory" of liability by permitting recovery of "consequential damages" for personal injury or property damage arising out of a landlord's breach of the implied warranty of habitability. \textit{E.g.}, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 447, 481-82, 485 (D.C. Cir. 1970) (tenant permitted to recover for personal injuries sustained as result of criminal assault in common hallway of residential apartment building on both tort and contract theories). However, since the implied warranty of habitability can be breached only by the commission of a negligent act (see notes 458-63 supra and accompanying text), and since a court might recognize one or more of the contract limitations on liability (i.e., privity, notice, and disclaimer), there would be no advantage to imposing liability on a contract theory. \textit{Note}, 59 \textit{Cornell L. Rev.} 1161, 1167-69 n.43 (1974); \textit{Note}, 2 \textit{Fordham Urban L.J.} 647, 654-56, 659-60 (1974); \textit{see Note}, 35 \textit{Ohio St. L.J.} 212, 219-22 (1974). For a description of the contract limitations on liability, see \textit{Uniform Commercial Code} §§ 2-318 (Alternative A) (privity); 2-607(3)(a) (notice); 2-719(3) (disclaimer). The contract theory of recovery is discussed and compared with the tort theory in several student comments. \textit{Comment}, \textit{Landlord's Liability for Criminal
1. POLICY CONSIDERATIONS

The policy considerations that dictated the adoption of the implied warranty of habitability in the first place also dictate the imposition of a duty to use reasonable care.\(^{534}\) There is nothing unjust about holding a landlord to a duty of reasonable care, for liability will be based on proof of fault, and it is the landlord who has the "greater opportunity, incentive and capacity to inspect and maintain the condition of the building."\(^{535}\) The deterrent effect of the implied warranty of habitability will be enhanced if the penalty for a landlord's failure to maintain the premises in good repair is liability not only for the tenant's economic loss, but for consequent personal injury and property damage as well. The compensatory function of tort law will be advanced by holding a landlord liable for a failure to exercise due care, and landlords as a class will typically be in a position to distribute the risk of loss by purchasing liability insurance (or acting as self-insurers) with funds derived from tenants' rental payments. It might be argued that imposing negligence liability on landlords will result in increased rents or the abandonment of rental properties, thereby reducing the amount of housing available to low-income tenants.\(^{536}\) However, this is a risk inherent in the adoption of the implied warranty of habitability,\(^{537}\) and it would not be appreciably increased by recognizing tort liability for a failure to use reasonable care. In the first place, a landlord's immunity from tort liability is currently riddled with so many exceptions that most landlords already carry some form of liability insurance.\(^{538}\) Imposing a

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\(^{534}\) See text accompanying notes 409-21 supra.

\(^{535}\) See cases cited in note 417 supra.

\(^{536}\) Note, 1974 DUKE L.J. 175, 192; Note, 35 OHIO ST. L.J. 228 (1974); Note, 5 TEX. TECH. L. REV. 887, 890 (1974).

\(^{537}\) See notes 502-05 supra and accompanying text.

\(^{538}\) There are three types of insurance policies which a landlord may purchase. Owners', landlords', and tenants' liability insurance coverage offers protection against liability for "bodily injury or property damage . . . caused by an occurrence, and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto . . . ." Owners', LANDLORDS' AND TENANTS' LIABILITY INSURANCE COVERAGE PART, THE HARTFORD INSURANCE GROUP, HARTFORD, CONNECTICUT. Special multi-peril insurance coverage is a "package policy" consisting of owners', landlords', and tenants' liability insurance, fire insurance, and fringe coverage to protect against other types of specified perils. Comprehensive general liability insurance obligates the insurer to "pay on behalf of the insured all sums
duty of reasonable care would merely increase the premiums slightly.\(^5\) Secondly, if the courts do not impose a duty of reasonable care, it can be anticipated that the adoption of the implied warranty of habitability will cause such an expansion of the exceptions to the general rule of nonliability\(^6\) that landlords seeking full protection will want to insure against the commission of virtually all negligent acts anyway. As a matter of policy, then, a jurisdiction that has adopted the implied warranty of habitability ought to hold a landlord to a standard of reasonable care.

2. **LEGAL PRECEDENT**

The establishment of liability for a landlord's negligence is also supported by legal precedent. Abolishing a landlord's immunity from tort liability would be consistent with the trend toward abrogation of the immunities enjoyed by other classes of defendants, such as

which the insured shall become legally obligated to pay as damage because of (a) bodily injury or (b) property damage to which this insurance applies, caused by an occurrence . . . .", and is thus not limited to damage arising out of the ownership, maintenance, or use of real property. **COMPREHENSIVE GENERAL LIABILITY INSURANCE COVERAGE PART, THE HARTFORD INSURANCE GROUP, HARTFORD, CONNECTICUT.**

Because none of the above types of insurance is sold exclusively to landlords, it is impossible to ascertain the total number of landlords who presently carry liability insurance. However, in 1971 (the latest policy year for which statistics are available), landlords of apartments, tenements, and boarding or rooming houses (as opposed to commercial premises) purchased owners', landlords', and tenants' liability insurance to cover 1,768,170,698 square feet of property.

This footnote is based on conversations and correspondence with Mr. Graham Boyd and Mr. Arthur Curley of the Insurance Services Office, 160 Water Street, New York, N.Y. 10038.

539. It is impossible to predict with precision the impact which the imposition of a duty of reasonable care will have on liability insurance premiums for landlords. Premium rates are normally based on actual loss experience, and there is roughly a three-year time lag in collecting and reporting actual loss data. Thus the 1974 rates (the most recent rates) for owners', landlords', and tenants' liability insurance coverage are based on the losses sustained as a result of accidents occurring during the 1971 policy year. For a random sample of 1974 rates, see note 662 infra. Since New Hampshire had not imposed a duty of reasonable care on landlords as of 1971, its 1974 rates do not reflect the impact of Sargent v. Ross, 13 N.H. 388, 308 A.2d 528 (1973). Although it would have been possible to estimate the impact of Sargent v. Ross in establishing New Hampshire's 1974 rates, such action was not taken, suggesting that only a slight increase in premiums is anticipated as a result of the judicial decision. Even when the actual loss data for the 1973 and 1974 policy years is accumulated in New Hampshire, it will be impossible to determine the impact of Sargent v. Ross, because there are many factors which influence the number of claims filed and the amount paid out on settled or adjudicated claims in any given policy year, including the natural variation in frequency of occurrence, a pattern of larger jury awards, inflation or recession, and claims consciousness. This footnote is based on conversations and correspondence with Mr. Graham Boyd and Mr. Arthur Curley of the Insurance Services Office, 160 Water Street, New York, N.Y., 10038.

as governmental entities, charitable organizations, family members and landowners or occupiers. Similarly, it would be consistent with those products liability decisions imposing a duty of reasonable care on manufacturers and distributors of new products, vendors of used products, repairers and lessors of personal property, and building contractors or builder-vendors of real property.

As a matter of fact, these two lines of cases removing some of the more arbitrary, historical limitations on tort liability may become directly applicable to a landlord once a jurisdiction has adopted the implied warranty of habitability. If a lease is a contract, rather than a conveyance of real property, there is no reason to accord a landlord a vendor’s immunity from tort liability. Unlike the vendor, who has permanently parted with possession of his property, the landlord has a continuing contractual duty to maintain the leased premises in habitable condition which gives him a sufficient reversionary interest

541. E.g., Holtyz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). See cases cited in W. Prosser, supra note 146, § 131, at 984-86.
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in the property to support an analogy between the landlord and a landowner. Consequently, if a jurisdiction has abrogated the tort immunity of landowners and occupiers, imposing a broad duty of reasonable care, it can be argued that this duty should be extended to landlords.

The above argument has been advanced successfully in California, where the immunity of landowners and occupiers was first overthrown. In Brennan v. Cockrell Inv., Inc., the plaintiff-tenant was injured when a handrail broke, causing him to fall off the back stairs of a house he had rented from the defendant-owner. The jury, instructed that the landlord was immune from liability unless he

553. See RESTATEMENT (SECOND) OF TORTS § 357, Comment 3 (1965).


failed to warn the tenant of unsafe conditions about which he had actual knowledge at the time of the lease, returned a verdict for the defendant.\textsuperscript{557} The appellate court reversed, holding that the jury should have been instructed that the landlord owed the tenant a duty of reasonable care\textsuperscript{558} under \textit{Rowland v. Christian}.\textsuperscript{559} The landlord contended that his lack of possession and consequent lack of control exonerated him from the duty of reasonable care, but the appellate court refused to create an immunity for landlords based on these considerations. Instead, it held that possession and control were merely factors (albeit significant ones) in determining whether the defendant had breached his duty of reasonable care.\textsuperscript{560} The decision thus acknowledges the relevancy of a tenant's possession and control to the issue of a landlord's negligence without allowing proof of control to become a prerequisite to the imposition of liability.

If a jurisdiction which has adopted the implied warranty of habitability has not yet imposed a duty of reasonable care on landowners and occupiers,\textsuperscript{561} the products liability cases descending from \textit{MacPherson v. Buick Motor Co.}\textsuperscript{562} may provide a useful precedent in establishing a landlord's negligence liability. If the plaintiff is suing for damages caused by a structural defect and the landlord constructed the premises, it could be argued that the landlord should be considered analogous to a manufacturer of a product\textsuperscript{563} or to a builder-vendor of real property.\textsuperscript{564} If the landlord purchased the premises following their completion and the plaintiff is injured by a defect that was present at the inception of the lease, the landlord should be held to the same duty of care as is imposed on distributors of new products\textsuperscript{565} or vendors of used products.\textsuperscript{566} If the landlord

\begin{footnotesize}
\begin{enumerate}
\item[557.] Id. at 798-99, 111 Cal. Rptr. at 123-24.
\item[558.] Id. at 800, 111 Cal. Rptr. at 125.
\item[559.] 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
\item[560.] The following passage summarizes the court's position:
That a landlord must act toward his tenant as a reasonable person under all 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.
\item[561.] See cases cited notes 407 & 554 supra.
\item[562.] 217 N.Y. 382, 111 N.E. 1050 (1916).
\item[563.] See note 545 supra.
\item[564.] See note 551 supra.
\item[565.] See note 546 supra. The Restatement, reflecting the majority position, does not impose a duty to inspect on distributors of new products. Restatement (Second) of Torts § 402 (1965). However, this view has been criticized. 2 L. Frumer
\end{enumerate}
\end{footnotesize}
repaired or made improvements on the premises (either prior to or during the term of the lease), he should be subject to the same duty as repairers or lessors of personal property. And finally, if the plaintiff sustained damage as a result of the landlord's failure to repair a defective or dangerous condition which arose during the term of the lease, the landlord should be judged by the same standard as that applied to lessors of personal property, provided the landlord had access to the leased premises for purposes of making periodic inspections and repairs. Thus once a lease is characterized as a contract instead of a conveyance of real property, there is much precedent to support the imposition of a duty of reasonable care.

In addition to the above judicial authority, there are two jurisdictions that currently impose a duty of reasonable care on landlords by statute: England and Georgia. The English law did not

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&M. FRIEDMAN, PRODUCTS LIABILITY § 18.03 [1] [b] (1974); 2 F. HARPER & F. JAMES, supra note 146, at § 28.29. Since a landlord is more than a "conduit" of the leased premises, it would seem that he should be subject to the duty to inspect imposed by the minority rule.

566. See note 547 supra. A duty to inspect has also been imposed on vendors of used products in a minority of jurisdictions. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 18.03[3] (1974); 2 F. HARPER & F. JAMES, supra note 146, at § 28.29.

567. See note 548 supra.

568. See note 549 supra. A lessor of personal property for immediate use has a duty to inspect for latent defects. RESTATEMENT (SECOND) OF TORTS § 408, Comment a (1965).

569. A lessor of personal property has a continuing duty to make periodic inspections. RESTATEMENT (SECOND) OF TORTS § 408, Comment a (1965).

570. See text accompanying notes 602-05 infra.

571. In Louisiana, if a landlord is not held strictly liable, he is subject to a duty to use reasonable care. Since negligence liability is secondary to strict liability in Louisiana, however, the discussion of its case law appears in the next section. See notes 698-711 infra and accompanying text.

572. DEFECTIVE PREMISES ACT 1972, ch. 35, § 4:

(1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by the defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

A landlord is under an obligation to the tenant to maintain or repair the premises when he expressly contracts to make repairs, expressly reserves the right to enter the premises to carry out any description of maintenance or repair, or when the lease is subject to a statutory implied warranty of habitability. Id. at §§ 4(4) & (5).

The Defective Premises Act also imposes a duty of reasonable care on building contractors and other persons who take on work "in connection with the provision of a dwelling," including professional persons, such as architects and surveyors. Id. at § 1. In this respect, the Act codifies the holding in Dutton v. Bognor Regis Urban District Council, [1972] 1 Q.B. 373 (1971). For a discussion of the provisions of the Act, see North, DEFECTIVE PREMISES ACT 1972, 36 MOD. L. REV. 628 (1973);
go into effect until January 1, 1974, and consequently there is no case law construing it. The Georgia statutes, on the other hand, have existed since the late 1800's, and the case law construing them will shed some light on the issues considered in this section.

B. Issues Raised by Imposing a Duty of Reasonable Care

If, based upon the policy considerations and legal precedents set forth above, a jurisdiction decides to impose a duty of reasonable care on landlords, it will be necessary to identify the persons to whom the duty of care is owed, define the nature of the duty, and specify the defenses available to the landlord. These issues will be discussed in the remainder of this section. It will be assumed that the jurisdiction in question has founded the implied warranty of habitability on public policy considerations, but regards the housing code as either a minimum standard of habitability or a factor to be taken into account in determining whether there has been a breach of the warranty. This will permit discussion of the full range of questions that would arise in a negligence action.

1. PERSONS TO WHOM THE DUTY IS OWED

To whom should the landlord owe a duty of reasonable care? Certainly the duty should run to the tenant, and presumably it should extend to certain third parties as well, but there is no clearly acceptable method of identifying the third parties deserving of protection. One alternative would be to distinguish among invitees, licensees, and trespassers as is done in many of the


573. GA. CODE ANN. § 61-111 (1966):
The landlord must keep the premises in repair, and shall be liable for all substantial improvements placed upon them by his consent.

Id. at § 61-112:
The landlord, having fully parted with possession and right of possession, is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; but he is responsible to others for damages arising from defective construction or for damages from failure to keep the premises in repair.

574. For a discussion of the history behind the enactment of the Georgia statutes, see Birdsey v. Greene, 176 Ga. 688, 168 S.E. 564 (1933).

575. See note 476 supra and accompanying text.


578. A landowner or occupier owes a duty of reasonable care to invitees. RESTATEMENT (SECOND) OF PROPERTY §§ 343-44 (1965).

579. A landowner or occupier owes a limited duty of care to licensees. RESTATEMENT (SECOND) OF PROPERTY § 342 (1965).

580. Generally, a landowner or occupier owes no duty of care to trespassers. RESTATEMENT (SECOND) OF PROPERTY § 333 (1965). In special circumstances, a landowner or occupier may owe a trespasser a limited duty of care. Id. at §§ 334-39.
cases holding a landlord liable for a defective condition in an area reserved for the tenants' common use,\textsuperscript{581} which would mean that persons on the premises with the express or implied consent of either the tenant or the landlord would be entitled to recover, but trespassers would not.\textsuperscript{582}

Some jurisdictions have ruled that a plaintiff's status is no longer determinative of the landowner's duty of care, however,\textsuperscript{583} and the cases permitting recovery against a landlord from these jurisdictions suggest that a different method of identifying third party plaintiffs is needed.\textsuperscript{584} Perhaps the pertinent inquiry should be not who the plaintiff is, but whether the risk of harm to the plaintiff was foreseeable.\textsuperscript{585} In resolving that question, the plaintiff's status might be a relevant factor. Similarly, the degree of the landlord's control over the defective condition causing the plaintiff's injury might be germane. However, no attempt would be made to identify in advance those classes of third persons entitled to bring a negligence action against a landlord. This second alternative has the advantage of flexibility, although it lacks the certainty of the first. Its principal virtue is that it shifts the focus of the judicial inquiry from the technical classification of the plaintiff's status to the more appropriate question of whether there was a foreseeable risk of harm to the plaintiff.

2. SCOPE OF THE DUTY

Assuming that the landlord owes the plaintiff a duty of reasonable care, what should be the nature or scope of that duty? Since liability is based on proof of fault, it would seem that the same standard of care ought to apply whether the landlord is a lessor of commercial or residential property, and whether the residential premises are multiple or single-unit dwellings.\textsuperscript{586} If the landlord is subject

\textsuperscript{581} See text accompanying notes 245-53 supra.


\textsuperscript{583} See cases cited in note 554 supra. A few jurisdictions have abolished the distinction between licensees and invitees, but have retained the rule that a landowner owes no duty of care to a trespasser. E.g., Wood v. Camp, 284 So. 2d 691 (Fla. 1973).

\textsuperscript{584} E.g., Prudgen v. Boston Housing Authority, 308 N.E.2d 467, 478 (Mass. 1974) ("common duty of reasonable care is owed by an owner to a trespasser who has become helplessly trapped on the premises to the owner's knowledge"). See also Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972).


\textsuperscript{586} See text accompanying notes 441-49 supra.
to a statutory duty to repair, the statute should set the minimum standard of conduct. Otherwise, the duty ought to be a duty to make the premises safe, and it should extend to areas within the tenant's possession as well as those under the landlord's control. A recent line of cases suggests that it should be a duty to protect persons on the premises against criminal attacks or other dangerous activities as well as a duty to repair defective or dangerous conditions. With respect to the latter, it ought to be a duty to protect against defects arising prior to or during the term of the lease, and it should be a duty to protect against both obvious and latent defects. As stated by the court in Sargent v. Ross, "the mere


588. In the cases imposing a duty of reasonable care on landowners and occupiers, a few courts have explicitly stated that the duty is one to make the premises safe. Mile High Fence Co. v. Radovich, 175 Colo. 537, —, 489 P.2d 308, 315 (1971); Pickard v. City & Cty. of Honolulu, 51 Hawaii 134, 135, 452 P.2d 445, 446 (1969). Contra, Powers v. Bethlehem Steel Corp., 483 F.2d 963 (1st Cir. 1973) (applying Massachusetts law). For a discussion of what constitutes a breach of the implied warranty of habitability, see cases cited in notes 429-40 supra.

589. Cases cited in note 427 supra. As stated in Brennan v. Cockrell Inv., Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973), the landlord's lack of possession or control may be relevant in determining whether he failed to meet the standard of care, but should not immunize him from liability.


592. Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973). In the cases imposing a duty of reasonable care on landowners and occupiers, the courts have generally held that there is a duty to protect against both obvious and latent defects. E.g., Beauchamps v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1969). See also A.E. Inv. Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764
fact that a condition is open and obvious . . . does not preclude it from being unreasonably dangerous . . . "^593 Consequently, the patency of a defect should not preclude the imposition of a duty of reasonable care, but should simply be regarded as a factor bearing on the defenses of assumption of risk and contributory negligence.\(^594\) Finally, the landlord ought to have a duty to repair not only those defects of which he had actual knowledge, but also those of which he should have known.\(^595\) This raises questions regarding the landlord's duty to inspect and the tenant's obligation to notify the landlord of dangerous or defective conditions.\(^596\)

Since a lease transfers possession of the premises to the tenant, careful consideration must be given to the circumstances in which it is appropriate to hold that a landlord "should have known" of a defect. A failure to exercise caution in this area will result in holding a landlord strictly liable. If the landlord constructed the premises or supervised their construction, he should be presumed to have knowledge of any latent defects in the original construction of the building.\(^597\) A similar rule ought to be applicable for repairs or improvements made by the landlord prior to\(^598\) or during the term of the lease.\(^599\) A landlord ought to have a duty to inspect for any

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\(^{593}\) 113 N.H. at —, 308 A.2d at 532.

\(^{594}\) Id. at —, 308 A.2d at 533. See text accompanying notes 629-30 infra.

\(^{595}\) See text accompanying notes 452-63 supra.

\(^{596}\) Questions regarding the landlord's duty to inspect and the tenant's obligation to notify the landlord of dangerous or defective conditions have arisen in the past in the context of several of the exceptions to a landlord's common law immunity from tort liability. See notes 221-26, 247, 277-91 supra and accompanying text.


\(^{598}\) E.g., Scarboro Enterprises, Inc. v. Hirsh, 119 Ga. App. 866, 169 S.E.2d 182 (1969) (dictum). When the repairs are made by an independent contractor, knowledge is not presumed, but it is a question of fact as to whether the landlord actually knew or should have known of the defect. Id.; see note 155 supra.

\(^{599}\) Rourke v. Clifton, 64 Ga. App. 474, 13 S.E.2d 587 (1941). When repairs are made by an independent contractor, knowledge is not presumed and it will be difficult to prove that the landlord knew or should have known of the defect unless he has retained control of that portion of the premises. Robertson v. Nat Kaiser Inv. Co., 82 Ga. App. 416, 61 S.E.2d 298 (1950).
defects in existence at the time possession is transferred to the tenant, realizing that this would not obligate him to discover every latent defect, but only those that a reasonable inspection would disclose. After the transfer of possession, the landlord should have a duty to inspect both those parts of the premises over which he retains control, such as areas reserved for the tenants' common use, and those parts of the premises to which he has access for purposes of making inspections and repairs, whether by express or implied agreement or by law. In all other circumstances, the landlord should be held liable only if he has received notice of the defect from the tenant or if he knew or must have known of the defect due to information acquired from some other source. In Georgia, it has been held that notice of a discovered defect charges the landlord with notice of all other defects that might reasonably have been detected if the landlord had repaired the discovered defect as requested. Otherwise, the landlord is not liable for damages caused by undiscovered latent defects. A landlord who has been notified of a defect should have a reasonable time in which to make the necessary repairs, although he may be required to


602. It must be emphasized that imposing a duty to inspect the premises during the term of the lease does not mean that the landlord will be held strictly liable. He will be held responsible only for those defects which should have been detected through a reasonable inspection. See notes 458 & 601 supra and accompanying text.


605. There is some authority for the proposition that a landlord's duty to repair includes a duty to seek entry, or even a right to enter, for the purpose of making periodic inspections. See Benjamin v. Kimble, 43 Misc. 2d 497, 251 N.Y.S.2d 708 (Sup. Ct. 1964), discussed in notes 290-91 supra and accompanying text; Bowles v. Mahoney, 202 F.2d 320, 327 (D.C. Cir. 1952) (Bazelon, J., dissenting).

606. E.g., Ocean Steamship Co. v. Hamilton, 112 Ga. 901, 38 S.E. 204 (1901); White v. Montgomery, 58 Ga. 204 (1876).


610. E.g., Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900).
warn of the defective or dangerous condition in the interim. The notice requirement should be applicable not only in actions brought by the tenant, but also in actions brought by third parties. Adherence to these rules regarding a landlord's duty to inspect would assure proof of fault, for the landlord would be held responsible for damages caused by defects of which he should have known without incurring liability for defects of which he could not have known.

3. DEFENSES

a. Governmental immunity

The defenses to this type of negligence action will be the same as those that are available to a landlord in a tort action at common law. A defendant public housing authority will be in a position to assert the defense of governmental immunity, but in most instances the housing authority will be unsuccessful, either because it will be deemed to have waived its immunity or because the court will find that it was performing a proprietary or ministerial function.

b. Express assumption of risk

If the lease contains an exculpatory clause, the defendant will be able to assert that the plaintiff assumed the risk, provided the action is brought by the tenant, and not by a third party. However, such clauses are ineffective against fraudulent and willful or wanton misconduct. Moreover, there is a trend to hold such clauses invalid, particularly if the defendant is a public housing authority, if the defective condition constitutes a violation of a hous-

613. See section II.C. supra.
615. See section II.C.2. supra.
620. See note 340 supra and accompanying text.
ing code, or if the circumstances surrounding the negotiation of the lease make the clause unconscionable. This trend has culminated in the drafting of model legislation that declares that all exculpatory clauses in residential leases are void. Unless the tenant is in an equal bargaining position with the landlord, exculpatory clauses should not be enforced. A contrary holding would completely negate the imposition of a duty of reasonable care, for standard form leases would quickly be drafted exonerating the landlord from any and all liability for his negligent acts.

c. **Implied assumption of risk and contributory negligence**

The final defenses available to a landlord are assumption of risk and contributory negligence, and they will probably preclude recovery in a significant number of actions. Since the abolition of *caveat* lessee imposes a duty of reasonable care on landlords, primary assumption of risk ought to be abolished, particularly if the defective condition is a violation of a housing code. It would be unrealistic to suggest that secondary assumption of risk and contributory negligence also be abolished, but they ought to be applied with an understanding of the special circumstances surrounding the landlord-tenant relationship. When the defect is obvious or the plaintiff

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622. See note 341 supra and accompanying text.
624. See note 346 supra and accompanying text.
625. See section II. c.3. The defenses of assumption of risk and contributory negligence have not been considered in depth by the courts which have imposed a duty of reasonable care on landlords. In Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973), assumption of risk was not considered at all because New Hampshire has abolished the defense. Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941). The court indicated that the obviousness of the risk was "primarily relevant to the basic issue of a plaintiff's contributory negligence," but contributory negligence was not assertable against the plaintiff because the deceased was only four years old. Sargent v. Ross, 113 N.H. 388, —, 308 A.2d 528, 533 (1973). In Minoletti v. Sabini, 27 Cal. App. 3d 321, 325, 103 Cal. Rptr. 528, 530 (1972), the court refused to hold that the plaintiff was guilty of either assumption of risk or contributory negligence as a matter of law, but did not discuss either defense.
627. See notes 362-372 supra and accompanying text. For a definition of secondary assumption of risk, see text accompanying notes 355-57 supra.
has actual knowledge of it, it should be a question of fact as to whether the plaintiff acted unreasonably under the circumstances.²⁹ The jury should be permitted to take into account such factors as the plaintiff's reasonable reliance on the landlord's promises to make the necessary repairs, the necessity of using the defective portion of the premises, or the existence of a sudden abstraction or emergency causing the plaintiff to forget about the known danger.³⁰ Although a tenant should be required to use reasonable care to avoid a known defect, he should not be required to repair it.³¹ When the defect is latent, the plaintiff should be found contributorily negligent only if the defect could have been discovered by means of a reasonable inspection, and in defining the plaintiff's duty to inspect, the courts should recognize the plaintiff's right to rely on the landlord's duty to discover and repair latent defects.³²

C. Summary

*Caveat* lessee was erased from the law of landlord-tenant relations with the adoption of the implied warranty of habitability. It

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²⁹ See cases cited in note 374 supra. In Georgia, it has been held that the tenant has the duty to notify the landlord of a discovered defect, but “even after notice to the landlord the tenant has a right to use those parts of the premises which are apparently in good condition, if there is nothing to call his attention to what may be a hidden defect.” Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900).


³¹ In jurisdictions which have enacted statutes authorizing the tenant to repair and deduct, it has been held that a failure to exercise this statutory right does not bar recovery in a personal injury action. E.g., Ewing v. Baalan, 168 Cal. App. 2d 619, 336 P.2d 561 (1959); Boule v. New Orleans Terminal Co., 139 La. 945, 72 So. 513 (1916). A similar rule should be adopted in those jurisdictions which recognize the self-help remedy of rent application. See notes 499-501 supra and accompanying text.

³² See, e.g., DiMare v. Cresci, 58 Cal. 2d 292, 300, 373 P.2d 860, 865, 23 Cal. Rptr. 772, 777 (1962); Turner v. Dempsey, 36 Ga. App. 44, 135 S.E. 220 (1926); Jackson v. Wyant, 265 Ore. 19, 506 P.2d 693 (1973); Wilcox v. Hines, 100 Tenn. 538, 560-61, 46 S.W. 297, 302-03 (1898) (quoted in note 167 supra). This is the standard which has been applied in the cases imposing a duty of reasonable care on landowners and occupiers. Celli v. Sports Car Club of America, Inc., 29 Cal. App. 3d 511, 105 Cal. Rptr. 904 (1973). In Georgia, it has been held that where a tenant has notified a landlord of an obvious defect, he is not guilty of contributory negligence for failure to discover a latent defect in the immediate vicinity of the potential defect. E.g., Aycock v. Houser, 96 Ga. App. 99, 99 S.E.2d 298 (1957); Shaddix v. Eberhart, 53 Ga. App. 598, 190 S.E. 408 (1937).
is now time to bring tort law up to date by abolishing the landlord's common law immunity from liability for personal injury or property damage. The policy considerations that prompted the courts to recognize the implied warranty of habitability also justify imposing a duty of reasonable care on landlords. Moreover, the imposition of such a duty would advance the deterrent, compensatory, and loss distribution functions of tort law. Precedent for abrogating a landlord's immunity from tort liability can be found in those cases abolishing the immunity of such classes of defendants as landowners and occupiers and imposing a duty of reasonable care on such classes of defendants as lessors of personal property and builder-vendors of real property. Statutes have also been enacted in England and Georgia imposing a duty of reasonable care on landlords.

If a jurisdiction decides to abrogate a landlord's immunity from tort liability, it should recognize a duty of reasonable care to any foreseeable plaintiff on the premises, regardless of the plaintiff's status as an invitee, licensee, or trespasser. The landlord should be required to keep the premises in a safe condition, and if there is a housing code, it should be deemed to set the minimum standard of care. Liability ought to be imposed only for defects of which the landlord knew or should have known; if the landlord could not reasonably have been expected to discover the defect (as in the case of a defect arising during the term of a lease granting no express or implied right of entry), the tenant should be required to give the landlord notice of the defect and a reasonable opportunity to repair it. The potential defenses to such a negligence action would be governmental immunity, express and implied assumption of risk, and contributory negligence. However, to guarantee the plaintiff the intended protection of the duty of reasonable care, exculpatory clauses ought to be enforced only if the parties to the lease are in an equal bargaining position, and primary assumption of risk ought to be abolished. Adherence to the above guidelines would create a cause of action for all foreseeable plaintiffs, yet would impose liability solely upon proof of fault.

V. LANDLORD'S LIABILITY FOR DEFECTIVE PREMISES: STRICT LIABILITY

In adopting the implied warranty of habitability, several courts have drawn an analogy between the merchant-consumer transaction and the landlord-tenant relation, concluding that if there is an implied warranty of merchantability in the former, there ought to be an implied warranty of habitability in the latter.633 They have char-

633. See notes 418-21 and accompanying text.
acterized a lease as a contract pursuant to which the tenant receives a “well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.” This use of a products liability analogy to justify the adoption of the implied warranty of habitability has prompted some plaintiffs to assert that a landlord should be held strictly liable for personal injury or property damage caused by a defective or dangerous condition in the leased premises. Thus far, however, in the two reported cases the courts have expressed a willingness to impose strict liability only under limited circumstances.

In *Fakhoury v. Magner*, the plaintiff, a tenant in the defendant’s furnished apartment, injured her back when she fell through a couch with defective supporting straps. The plaintiff’s case was submitted to the jury on the theory of strict liability in tort, and the jury returned a verdict in her favor, but the trial judge granted a new trial on the grounds that he had erred in presenting the subject of strict liability to the jury. The appellate court reinstated the jury’s verdict, holding that “under the circumstances of this case, the doctrine of strict liability does apply to the landlord, not as lessor of real property, but as lessor of the furniture.” Thus the line of cases holding a lessor of personal property strictly liable in tort was extended to a landlord of a furnished apartment. The court noted that the defendant was in the business of leasing, since it had furnished five apartments with the type of couch that had injured the plaintiff. It also noted that the couch was a “substantial” item

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636. The plaintiff fell after sitting in a “kind of a fall” while holding her 40-pound infant son. A subsequent inspection of the straps supporting the cushion on which she had sat revealed that two of the four straps were missing and the remaining straps were loose. The defendant had purchased the couch approximately one year before the accident, but the plaintiff was the first tenant to use it. Although the plaintiff had lived in the apartment for approximately four months, she had never sat on the spot where she fell through, nor had she had occasion to lift or clean the cushions prior to the accident. 25 Cal. App. 3d at 62, 101 Cal. Rptr. at 475.

637. *Id.* at 61-63, 101 Cal. Rptr. at 474-76.

638. *Id.* at 63, 101 Cal. Rptr. at 476.


640. 25 Cal. App. 3d at 64, 101 Cal. Rptr. at 476. In addition to the facts set
of furniture that was "relatively new, subject to recent inspection and readily traceable to the seller."{641} Under these circumstances, it concluded that the policy reasons for imposing strict liability in tort were present:

the injured persons are virtually powerless to protect themselves;
the lessor can recover the cost of protection by charging for it in his business; and he has a better opportunity than does the injured person of recouping from anyone primarily responsible for the defect.{642}

Although Fakhoury applies only to "lessors of furniture," it was decided before the California Supreme Court had adopted the implied warranty of habitability. Now that the California court has characterized a lease as a contract whereby the landlord agrees to provide goods and services,{643} it is quite possible that Fakhoury will be extended to "lessors of real property."

Such an extension would put California in direct conflict with New Jersey, which has apparently rejected strict tort liability for landlords.{644} In Dwyer v. Skyline Apartments, Inc.,{645} the plaintiff, a tenant for fifteen years in defendant's multiple-family garden apartment development, was scalded when she turned on the bathtub hot water faucet and the entire fixture "came out of the tile." The accident occurred because that portion of the faucet which was in the wall had become "very corroded."{646} This condition was described as a "latent defect unknown to the tenant, unknown to the forth in the trial court's opinion, plaintiff's brief indicates that there were other facts supporting the determination that the defendant was in the business of leasing: the defendant owned two apartment buildings and the building in which the plaintiff lived was a six-story building consisting entirely of furnished apartments. Reply Brief for Plaintiff-Appellant at 6, Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

641. 25 Cal. App. 3d at 64, 101 Cal. Rptr. at 476.
642. Id. at 64, 101 Cal. Rptr. at 477.
646. Id. at 51, 301 A.2d at 464. The testimony in the case was limited to that of the plaintiff, who was awarded $1,500 by the judge after a trial to the court without a jury.
landlord and not discernible on reasonable inspection.” The plaintiff contended that, by logical extension, the court's earlier adoption of the implied warranty of habitability in Marini v. Ireland mandated “the conclusion that proof of negligence with its traditional requisites is no longer necessary for recovery.” The trial court found for the plaintiff on the theory that the landlord was strictly liable because of its “contractual responsibility flowing from a continuing implied covenant of habitability.” The intermediate appellate court rejected the implied warranty theory, however, characterizing Marini as a decision designed solely to create a remedy for economic loss, and concluded that it “was not intended to overturn existing principles of law applicable to tort actions for personal injuries by tenants versus landlords.” The intermediate appellate court also refused to hold the landlord strictly liable in tort. Unlike the court in Fakhoury, it found that the “underlying reasons for the enforcement of strict liability against the manufacturer, seller or lessor of products . . . do not apply to the ordinary landlord of a multiple family dwelling.” In a memorandum opinion, the Supreme Court of New Jersey affirmed “substantially for the reasons expressed by the Appellate Division.”

647. Id. Because the plaintiff was unable to prove negligence, she could not recover for a violation of the housing code nor for a failure to maintain the water supply system in good repair. The court focused on the corrosion, rather than the scalding hot water, as the “defective condition.”


650. Id. at 51, 301 A.2d at 464.

651. Id. at 55, 301 A.2d at 466.

652. Id. at 54-55, 301 A.2d at 466. The plaintiff argued that the application of the strict liability doctrine to a seller and manufacturer of a product . . . , to a mass builder-vendor of real estate . . . , and to a lessor of a motor vehicle . . . , when considered in the context of the rationale in Marini, completes the circle so as to impose strict liability on every vendor, distributor and lessor of personality or realty engaged in a commercial enterprise.

653. Id. at 55, 301 A.2d at 467. The court detailed its reasons for refusing to impose strict liability in the following manner:

[The ordinary landlord of a multiple family dwelling] is not engaged in mass production whereby he places his product—the apartment—in a stream of commerce exposing it to a large number of consumers. He has not created the product with a defect which is preventable by greater care at the time of manufacture or assembly. He does not have the expertise to know and correct the condition, so as to be saddled with responsibility for a defect regardless of negligence.

An apartment involves several rooms with many facilities constructed by many artisans with differing types of expertise and subject to constant use and deterioration from many causes. It is a commodity wholly unlike a product which is expected to leave the manufacturer's hands in a safe condition with an implied representation upon which the consumer justifiably relies.

A. The Case For Strict Liability

1. POLICY CONSIDERATIONS

Fakhoury and Dwyer thus spotlight the issue: Are the policy considerations that have prompted the courts to impose strict liability on manufacturers, distributors, and lessors of personal property and on builder-vendors of real property equally applicable to lessors of real property? One of the reasons commonly given for imposing strict liability is that the products liability defendant has superior knowledge of the product and is in a superior position to discover its defects, while the consumer is encouraged to rely on the defendant's skill, reputation, and express or implied representations of safety. Certainly a landlord who has a duty to maintain the premises in a habitable condition is in a superior position to know of or discover latent defects. In fact, caveat lessee was abolished largely because the modern tenant has neither the skill nor the opportunity to inspect the premises thoroughly. Furthermore, the typical advertisement for leased premises emphasizes the convenience of renting and encourages the tenant to rely on the landlord to maintain the premises in good repair.

A second reason for imposing strict liability is that the defendant is in a better position to bear and distribute the risk of loss. Only landlords in the business of leasing can be held strictly liable.


657. See section III. supra.

658. See note 410 supra and accompanying text.


Such a landlord is normally in a position to spread the risk of loss by purchasing liability insurance (or by acting as a self-insurer) and passing the cost on to his tenants.\textsuperscript{662} Furthermore, at times he will be able to shift the loss through an indemnity action to a third party who was responsible for creating the defective condition.\textsuperscript{663} As with the imposition of liability for negligence, there is

\textsuperscript{662} See notes 538-39 supra. The imposition of strict liability on landlords in Louisiana has not resulted in any significant difference between Louisiana's rates and those of other states for owners', landlords' and tenants' liability insurance covering apartments, tenements, and boarding or rooming houses. In 1974, the following rates were charged in a random sample of states for a basic limit of $25,000 for all bodily injury damages sustained by one or more persons as the result of one occurrence:

<table>
<thead>
<tr>
<th>State</th>
<th>Rate (per 100 sq. ft.)</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Birmingham</td>
<td>$1.70</td>
<td>6/12/74</td>
</tr>
<tr>
<td>Remainder of State</td>
<td>.39</td>
<td></td>
</tr>
<tr>
<td>California</td>
<td></td>
<td></td>
</tr>
<tr>
<td>San Francisco</td>
<td>1.20</td>
<td>12/31/74</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>1.20</td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td></td>
<td></td>
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<tr>
<td>Atlanta</td>
<td>.89</td>
<td>12/31/74</td>
</tr>
<tr>
<td>Remainder of State</td>
<td>.54</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Orleans</td>
<td>1.80</td>
<td>2/13/75</td>
</tr>
<tr>
<td>Remainder of State</td>
<td>.77</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>.64</td>
<td>12/31/74</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>1.80</td>
<td>7/17/74</td>
</tr>
<tr>
<td>Wisconsin</td>
<td></td>
<td></td>
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<tr>
<td>Green Bay, Kenosha</td>
<td></td>
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</tr>
<tr>
<td>Madison &amp; Racine</td>
<td>2.00</td>
<td></td>
</tr>
<tr>
<td>Milwaukee</td>
<td>2.10</td>
<td></td>
</tr>
</tbody>
</table>

The above information was obtained from Mr. Arthur Curley of the Insurance Services Office, 160 Water Street, New York, N.Y., 10038.

a risk that holding a landlord strictly liable for personal injury or property damage will remove some housing for the low-income tenant from the market. However the risk would not be significantly greater than that already incurred by any jurisdiction which has adopted the implied warranty of habitability. Moreover, it is the low-income tenant who most needs the benefit of strict liability in the event that he sustains damages as the result of a defect in the premises.

A final reason for imposing strict liability is to eliminate the barrier of having to prove negligence. Defective conditions in leased premises may be caused either by the landlord's affirmative acts or by his failure to discover or repair defective conditions created by others (for example, by the contractor who originally constructed the building). When a defective condition is created by the landlord's affirmative acts, the plaintiff is in a position analogous to that of a consumer in an action against a manufacturer. It may be difficult for the plaintiff to prove specific acts of negligence, particularly if he was not present at the time the defective condition was produced. When the landlord fails to discover or repair a defective condition created by a third person, the plaintiff is in a position analogous to that of a consumer in an action against a retailer. It may be impossible for the plaintiff to prove that the landlord knew or should have known of the defective condition.

2. LEGAL PRECEDENT

The above discussion suggests that the reasons for imposing strict liability on the more traditional products liability defendants are equally applicable to lessors of real property. This is not surprising, since the adoption of the implied warranty of habitability was prem-


665. See notes 502-05 supra and accompanying text.


668. Id. at § 19A.


It has been said that strict liability differs from negligence "mainly in the element of scienter: Plaintiff will not need to prove either that defendant negligently created the unsafe condition of the product or that he was aware of it." State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss.), cert. denied, 386 U.S. 912 (1966); accord, Wade, On The Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 834-35 (1975).
ised on products liability analogies in many jurisdictions.\(^ {670} \) However, strict liability for personal injury or property damage was first recognized in the context of the sale of goods,\(^ {671} \) and a lease of real property is neither a sale nor a transaction relating to goods. This distinction may engender a certain reluctance to extend strict liability to landlords. It should therefore be emphasized that there are numerous legal precedents for applying strict liability to non-sales and non-goods transactions.

In refusing to hold the landlord strictly liable in *Dwyer v. Skyline Apartments, Inc.*,\(^ {672} \) the court noted that "[a]n apartment involves several rooms with many facilities constructed by many artisans with differing types of expertise . . . ."\(^ {673} \) This passage would suggest that there should be no strict liability for defects in real property. Yet a substantial number of jurisdictions have held that there is an implied warranty of habitability in the sale of a new home by a builder-vendor\(^ {674} \) and that a builder-vendor may be held strictly

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670. See notes 418-21 *supra* and accompanying text.
673. Id. at 55-56, 301 A.2d at 467.

The application of the implied warranty of habitability to builder-vendors has been advocated and analyzed by several commentators. Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 *Vand. L. Rev.* 541 (1961); Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 *J. Urban L.* 533 (1971); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 *Geo. L.J.* 633 (1963); Murray, *Under the Spreading Anal-
liable for personal injury or property damage caused by defects in construction.\textsuperscript{678} The courts have recognized that a structure on real property is more complex than the average product, but it is this very complexity that has justified the imposition of strict liability because it is impossible for the average purchaser to detect even dangerous defects in construction.\textsuperscript{678}

The \textit{Dwyer} court also refused to impose strict liability because an apartment is "subject to constant use and deterioration from many causes,"\textsuperscript{677} which suggests that strict liability is inapplicable because landlords typically lease "used," rather than "new" property. It is true that some courts have refused to hold vendors of used goods\textsuperscript{678} or real property\textsuperscript{679} strictly liable. However, there has been relatively little litigation of the issue, and the more recent decisions have expressed a willingness to impose strict liability on sellers of used goods,\textsuperscript{680} since they are in a superior position to inspect for defects

\begin{flushleft}
Landlord's Liability for Defective Premises

and determine whether to repair the product or remove it from the market place. The imposition of strict liability can be justified because of its deterrent effect (promoting the sale of safe used goods) and because of the seller's ability to distribute both the cost of repairs and the risk of loss upon resale of the used product. It could of course be argued that strict liability should not be applied because a lease is an agreement to provide services, rather than a transaction relating to new or used real property. Not all providers of services are immune from strict liability, however. If tires); Georgia Timberland, Inc. v. Southern Airway Co., 125 Ga. App. 404, 188 S.E. 2d 108 (1972); Peterson v. Lou Backrodt Chevrolet Co., 17 Ill. App. 3d 690, 307 N.E.2d 729 (1974); Overland Bond & Inv. Corp. v. Howard, 9 Ill. App. 3d 345, 292 N.E. 168 (1972); Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974) (used car dealer "ought to be subject to strict liability in tort with respect to a mishap resulting from any defective work, repairs or replacements he has done or made on the vehicle before the sale"); Annot., 53 A.L.R.3d 337 (1973); Annot., 22 A.L.R. 3d 1387 (1968).


Although there are no cases holding the seller of a used home strictly liable, reconditioners and remodelers have been held strictly liable. Philadelphia v. Page, 363 F. Supp. 148 (E.D. Pa. 1973) (reconditioner-vendor); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971) (remodeler). Strict liability for sellers of used homes has been advocated by the commentators. E.g., Bixby, Implied Warranty of Habitability: New Right for Home Buyers, 6 CLEARINGHOUSE REV. 468 (1972); Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 GEO. L.J. 633 (1965).


682. Id. at 694, 697; 307 N.E.2d at 732, 734.


684. For a comprehensive review of the law governing the sale of services and a suggestion that strict liability should be applied to all sellers of services in consumer transactions, see Greenfield, Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort, 1974 UTAH L. REV. 661. For other commentaries on the application of strict liability to service transactions, see Farrows, Implied Warranties of Quality in Non-Sales Cases, 57 COLUM. L. REV. 653 (1957); Miller, A "Sale of Goods" as a Prerequisite for Warranty Protection, 24 BUS. LAWYER 847 (1969); Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code.
the transaction is a "pure service" transaction, strict liability is generally inapplicable. But if the transaction is a "hybrid sales-service" transaction, the defendant can be held strictly liable for damages caused by the transfer of a defective product incident to the rendition of a service, provided the essence of the transaction is not the performance of a professional service. In cases where the plaintiff's injury was caused by the landlord's failure to repair a defect in the premises, it can be anticipated that the landlord-tenant relationship will be analogized to a "hybrid sales-service" transaction and that the services to be provided by the landlord will be characterized as "commercial," rather than "professional."


Consequently, strict liability ought to be imposed on landlords as providers of services, except possibly in those rare situations where the plaintiff's injury was caused by what could be characterized as the failure to perform a "pure service" (for example, the failure to provide security measures sufficient to protect the plaintiff against a criminal attack by a third party).\(^8\)

The preceding discussion demonstrates that, although a lease of real property is not a transaction involving "goods," there is still legal precedent for holding a landlord strictly liable. This is true regardless of whether the lease is characterized principally as a transfer of real property (new or used) or as an agreement to provide services. The remaining question is whether a landlord should be exempt from strict liability because a lease is not a "sale." The cases holding lessors of personal property strictly liable\(^9\) suggest that the question should be answered in the negative. Generally speaking, the courts have perceived "no substantial difference between sellers of personal property and non-sellers, such as bailors and lessors."\(^1\)

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689. See cases cited in note 590 supra.


Lessors, much like retailers and manufacturers, place products in the stream of commerce. They are in a better position than the lessee to know and control the condition of the chattel transferred and to distribute the losses attributable to its defective condition through an adjustment of the rental rate. Since the lessor controls the length of the lease, he is in the best position to prevent the circulation of defective products. And since the lessee normally has an immediate need for the product and acquires only temporary possession of it, he places greater reliance on the competence and expertise of a lessor than he would if he were a buyer purchasing the same product from a seller. For all these reasons, "[p]ublic policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases."

If the policy considerations and products liability analogies discussed above are not sufficiently persuasive, it should be noted that Louisiana, following civil law precedents, has imposed strict liability on landlords since the early 1800's. A landlord is strictly liable to the tenant for any loss resulting from a "vice" or "defect" in the premises, and is similarly liable to third persons on the premises.

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698. LA. CIV. CODE ANN. art. 670 (West 1952); LA. CIV. CODE ANN. arts. 2315-16, 2322 (West 1971); LA. CIV. CODE ANN. arts. 2669, 2681, 2692-95, 2700, 2716-17 (West 1952); LA. REV. STAT. § 9:3221 (West 1951); Comment, Repairs of Leased Premises in Louisiana, 23 LA. L. REV. 458 (1963); Comment, Responsibility of Landlord and Tenant for Damages from Defects in Leased Premises, 20 LA. L. REV. 76 (1959); Comment, Lessor's Liability for Personal Injuries, 7 LA. L. REV. 406 (1947); Editorial, Landlord and Tenant—Injuries from Defective Condition of Premises, 3 So. L.Q. 214 (1918); Comment, The Louisiana Law of Lease, 39 TUL. L. REV. 798 (1965) (comprehensive survey); Comment, Liability of Lessor or Property Owner to Third Persons for Accidental Personal Injury Caused by Defective Premises, 4 TUL. L. REV. 611 (1930).
699. LA. CIV. CODE ANN. art. 2695 (West 1952). E.g., Bates v. Blitz, 205 La. 536, 17 So. 2d 816 (1944); Lasyone v. Zenoria Lumber Co., 163 La. 185, 111 So. 670 (1927); Boutte v. New Orleans Terminal Co., 139 La. 945, 72 So. 513 (1916);
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for any damage caused by the "ruin" of a building or a "vice" in its original construction.\(^7\) If the plaintiff fails to prove the existence of a "vice," "defect" or "ruin," the landlord is not strictly liable.\(^7\) Strict liability may also be avoided if the lessee assumes responsibility for the condition of the premises.\(^7\) In both instances, however, the landlord continues to owe the plaintiff a duty of reasonable care.\(^7\)

Strict liability is not absolute liability in Louisiana. The plaintiff must prove that the defect was the proximate cause of the damage,\(^7\) and plaintiffs have been barred from recovery because the damage resulted from an "abnormal"\(^7\) or "unforeseeable"\(^7\) use of the premises or from the intervention of an "act of God"\(^7\) or a third party.\(^7\) Assumption of risk and contributory negligence are both defenses,\(^7\) but it appears that the plaintiff has no duty to inspect


for latent defects.\textsuperscript{710} Recovery is precluded only if the tenant knew of and voluntarily encountered the risk created by an "imminently dangerous" condition.\textsuperscript{711}

**B. Issues Raised by Imposing Strict Liability**

1. **STRICT LIABILITY PER SE**

Assuming that a jurisdiction decides to impose strict liability on a landlord for personal injury or property damage caused by a defect in the premises, what legal theory should be utilized to accomplish this objective? If the jurisdiction has adopted an implied warranty of habitability based on legislative enactment of a housing code,\textsuperscript{712} and wants to impose strict liability only for violations of the code, it could impose "strict liability per se."\textsuperscript{713} An action under such a theory would be analogous to a negligence per se action,\textsuperscript{714} except that the landlord would not be required to have received notice of the defect as a prerequisite to the imposition of liability, and contributory negligence would not be recognized as an affirmative defense. There is no direct precedent for imposing strict liability per se on a landlord, although one jurisdiction has eliminated the notice requirement in a case involving a landlord's violation of a housing code provision creating an absolute duty of care.\textsuperscript{715} In abolishing contributory negligence, the courts would have to rely on the precedent set by cases imposing strict liability per se for the violation of other types of statutes that were enacted "to protect the plaintiff against his inability to protect himself."\textsuperscript{716} Strict liability per se would impose no increased duty of care, as a landlord is already subject to strict liability in a criminal prosecution for failing to comply with the provisions of a housing code.\textsuperscript{717} Its sole impact would be to advance the compensatory and loss distribution functions of tort law.


\textsuperscript{711} E.g., Wilson v. Virgademo, 258 So. 2d 572 (La. App. 1972) (dictum).

\textsuperscript{712} See note 429 supra and accompanying text.

\textsuperscript{713} Comment, Housing Codes and a Tort of Slumlordism, 8 HOUSTON L. REV. 522, 539-43 (1971). See also, Falick, A Tort Remedy for the Slum Tenant, 58 ILL. BAR J. 204 (1969).

\textsuperscript{714} See section II.B.7.

\textsuperscript{715} Monsour v. Excelsior Tobacco Co., 155 S.W.2d 219 (Mo. App. 1938). See notes 280-83 supra and accompanying text.

\textsuperscript{716} See cases cited note 371 supra. It may be questioned whether it is appropriate to classify a tenant as a plaintiff who is unable to protect himself. In some instances, a tenant may be capable of detecting and avoiding a dangerous condition. In others, however, he will either find it very difficult to conduct a thorough inspection or will find it necessary to continue to use the defective portion of the premises after discovery of the defect.

\textsuperscript{717} See note 108 supra and accompanying text. It is true that, as a matter of
2. STRICT TORT LIABILITY OR IMPLIED WARRANTY

If a jurisdiction has adopted an implied warranty of habitability based on public policy considerations and wants to hold a landlord strictly liable for any defect in the premises regardless of whether it is proscribed by the housing code, the jurisdiction could utilize one of two products liability theories—implied warranty or strict tort liability. The implied warranty theory would permit recovery of consequential damages for breach of the implied warranty of habitability, following the pattern established by actions for breach of the implied warranty of merchantability under the Uniform Commercial Code. Strict tort liability would permit the plaintiff to bring an action against the landlord under the theory set out in section 402A of the Restatement (Second) of Torts. Strict tort liability would probably be preferable, as will be demonstrated by comparing both the elements of the prima facie case and the defenses under each theory of recovery.

a. Privity of contract

To the extent that the implied warranty of habitability has practice, housing code enforcement officials usually notify the landlord of a defect and give him an opportunity to repair it before commencing a criminal prosecution, but in the absence of a statutory notice requirement, they are not required to do so. Comment, Housing Codes and a Tort of Slumlordism, 8 Houston L. Rev. 522, 541 (1971).

718. See note 432 supra and accompanying text.


tractual origins, recovery might be restricted to the tenant, who is in privity of contract with the landlord. Despite judicial decisions abolishing privity as a requirement in actions for breach of the implied warranty of merchantability, the majority of courts have adopted a provision of the Uniform Commercial Code that explicitly permits recovery only by persons in the family or household of the buyer or by guests in his home. By contrast, although the American Law Institute expressed "no opinion" regarding the application of section 402A "to harm to persons other than users or consumers," there is a decided trend toward extending strict tort liability beyond users and consumers to bystanders. Strict tort liability would therefore offer protection to a broader spectrum of plaintiffs. The remaining question would be whether the courts should limit recovery to those persons lawfully on the premises, or permit recovery regardless of the plaintiff's status vis-à-vis the landlord or tenant as landowner or occupier. Presumably this issue would be resolved in the same manner in strict tort liability actions as in negligence actions.

b. Defect

The next point of contrast between the two theories of liability is the method of determining what constitutes a defect. Under the implied warranty of habitability, a defective condition would be judged by the standard developed in the cases involving an implied warranty action for economic loss. Under strict tort liability, on the other hand, the question would be whether the premises were leased "in a defective condition unreasonably dangerous" to the plaintiff or, in some jurisdictions, whether the premises were "de-
fective." Although different tests are thus employed, it is unlikely that there would be a significant discrepancy in the conditions ultimately characterized as defective under the two theories of recovery. To the extent that such a discrepancy might develop, the strict tort liability test would probably be better.

In reality, the difficult questions under either theory will be whether to permit recovery for damages caused by obvious defects, by defects which result from ordinary wear and tear, and by latent defects not discoverable upon a reasonable inspection. With respect to obvious defects, there is a trend in the recent products liability decisions to hold that such defects may be actionable, and to bar recovery only if the defendant is able to prove that the plaintiff assumed the risk. This would be consistent with the proposed treatment of obvious defects in a negligence action against a landlord. In determining whether the plaintiff assumed the risk, the courts ought to be influenced by the same factors that are considered in determining whether a plaintiff who has sustained economic loss has waived the landlord's breach of the implied warranty of habitability.


734. See notes 592-94 supra and accompanying text.

735. See notes 468-72 supra and accompanying text.
Defects arising from ordinary wear and tear are covered by the implied warranty of habitability:

Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further, it is a covenant that these facilities will remain in usable condition during the entire term of the lease.\(^{736}\)

This would suggest that a landlord ought to be held strictly liable for personal injury or property damage arising from such defects. Landlords will undoubtedly contend that different standards should be applied in determining the "defectiveness" of new and used rental property. Support for such a position can be found in the cases imposing strict liability on vendors of used goods.\(^{737}\) However, a lessor differs from a vendor of used property in that the lessor has a continuing duty to maintain the premises in good repair.\(^{738}\) For this reason, the same standard ought to be applied in judging the defectiveness of new and used rental property.\(^{739}\) The fact that the deteriorated condition of the premises was obvious or reflected in the rental rate could be asserted under the defense of assumption of risk.

Perhaps the most difficult question is whether to impose strict liability for latent defects not known to the landlord and not discoverable by a reasonable inspection.\(^{740}\) Manufacturers have been held


\(^{738}\) See section III. supra.

\(^{739}\) Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 448, 212 A.2d 769, 777 (1965). The court may have been influenced by the fact that the rental rate was the same for both new and used vehicles. Id.

\(^{740}\) Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (1973), aff'd mem., 63 N.J. 577, 311 A.2d 1 (1973). If a plaintiff sustained personal injury or property damage as the result of such a defect, and sought to recover for breach of the implied warranty of habitability, the landlord might deny the establishment of a prima facie case on the grounds that the plaintiff did not give the landlord notice of the defective condition and a reasonable time in which to repair it. Brief for Defendant-Appellant at 3-5, Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (1973), aff'd mem., 63 N.J. 577, 311 A.2d 1 (1973). See section III.C.3. supra. However, the notice requirement was developed in the context of actions for economic loss and is designed to permit the landlord to cure the defect before the tenant invokes his rent impairment remedies. Brief for Plaintiff-Respondent at 4-5, 15-18; Petitioner's Brief for Certification at 10-12, Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (1973); aff'd mem., 63 N.J. 577, 311 A.2d 1 (1973). See section III.E. supra. Transferring the notice requirement to an action for personal injury or property damage in this type of fact
strictly liable for damage caused by such defects upon proof that the
defect was in existence at the time the product left the manufactur-
er's control. By analogy, if a latent defect in leased premises was
created by the landlord, he should be held strictly liable. Retailers
have also been held strictly liable for such latent defects, even though
they did not create them, on the theory that retailers form part of
the conduit by which the product reaches the consumer and have
a right of indemnification against the manufacturer. These cases
would suggest that a landlord should be held strictly liable for latent
defects caused by a third party (such as the original builder-vendor)
when the landlord is in a position to obtain indemnification from such
a third party. In all other circumstances, it could be argued that
strict liability would be inappropriate.

There is a line of cases, however, that holds a defendant strictly
liable for any damage caused by a risk arising out of the operation
of his business enterprise. According to these cases, vendors of
used goods and lessors of personal property may be held strictly
liable for undiscoverable latent defects, regardless of their original
situation would preclude the use of the implied warranty as a means of imposing
strict liability, for requiring proof of notice would be tantamount to requiring proof
of negligence. See notes 597-611 supra and accompanying text. For a discussion of
the notice requirement in a strict liability action, see section V.B.2.c. infra.

(recapped tire blew out due to a latent weakness in the casing):

The requirement that the defect must have existed when the product left the
remanufacturer's control does not mean that the defect must manifest itself
at once. The defect may be latent. The fact that there was no evidence that
the remanufacturer by the exercise of reasonable care could have detected the
weakness in the casing would be relevant if this were a negligence case. How-
ever, it is irrelevant in a strict liability action.

See RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965); 54 A.L.R.3d
1079 (1973).

742. E.g., Cushing v. Rodman, 82 F.2d 864 (D.C. Ct. App. 1936); see also Van-

743. For a discussion of a lessor's right to indemnification against third parties,
see note 663 supra and accompanying text.

744. In at least two cases, it has been held that a lessor of personal property is
not subject to strict liability in the absence of proof that the defect occurred in the
manufacturing process. E.g., Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467
other courts have refused to hold the vendor of used goods strictly liable for a latent
defect not discoverable by a reasonable inspection. E.g., Chamberlain v. Bob Matick
Chevrolet, Inc., 4 Conn. Cir. 685, 4 U.C.C. REP. SERV. 936 (1967); Cornelius v.

433 (1972); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d
769 (1965).

746. E.g., Peterson v. Lou Backrodt Chevrolet Co., 17 Ill. App. 3d 690, 307 N.E.

747. E.g., Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178
(1970); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769
(1965).
cause. The imposition of strict liability on lessors of personal property under these circumstances has been justified in the following manner:

The operator of the rental business must be regarded as possessing expertise with respect to the service life and fitness of his vehicles for use. That expertise ought to put him in a better position than the bailee to detect or to anticipate flaws or defects or fatigue in his vehicles. Moreover, as between bailor for hire and bailee the liability for flaws or defects not discoverable by ordinary care in inspecting or testing ought to rest with the bailor . . . . And, with respect to failure of a rented vehicle from fatigue, since control of the length of the lease is in the lessor, such risk is one which . . . ought to be imposed on the rental business.\(^{748}\)

Under this line of reasoning, landlords should also be held strictly liable for latent defects unknown to the landlord and undiscoverable upon a reasonable inspection because such defects are a risk of the business of leasing real property.\(^{749}\)

c. Notice

Assuming that the plaintiff is able to prove the existence of a defect, must he prove that he gave the landlord notice of it to establish liability?\(^{750}\) As a general rule, notice is not required in a strict tort liability action,\(^{751}\) but is a condition of recovery in an action against a seller of goods for breach of the implied warranty of merchantability.\(^{752}\) It could be argued that the notice requirement should be confined to warranties relating to the sale of goods, particularly since notice was not a prerequisite to recovery for breach of implied warranty at common law.\(^{753}\) There is precedent, how-

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\(^{748}\) Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 450-51, 212 A.2d 769, 778 (1965).

\(^{749}\) In Louisiana, the landlord can be held liable for damage caused by a defective condition of which he neither knew nor could have known. Krennerich v. WCG Inv. Corp., 278 So. 2d 842 (La. App. 1973); Joyner v. Aetna Cas. & Sur. Co., 240 So. 2d 545 (La. App. 1970); Phillips v. Cohen, 183 So. 2d 473 (La. App. 1966).


ever, for extending the notice requirement to implied warranties arising in the context of real property transactions.\textsuperscript{754} Further consideration therefore must be given to the appropriateness of requiring notice in a strict liability action against a landlord.

Under the Uniform Sales Act and the Uniform Commercial Code, a plaintiff is required to notify the defendant of the defect which caused the injury within a reasonable time after the accident.\textsuperscript{755} The purpose of this notice requirement is to permit the defendant to inspect the defective product and promote settlement through negotiation.\textsuperscript{756} Requiring post-injury notice in implied warranty (as opposed to strict tort liability) actions has been justified on the ground that contract actions are normally governed by a longer statute of limitations than tort actions,\textsuperscript{757} making it desirable for the defendant to be informed of the accident prior to the filing of the complaint.\textsuperscript{758} If a post-injury notice requirement were imposed in actions for breach of the implied warranty of habitability, the requirement ought to be construed liberally, following the precedent established in actions for personal injury or property damage under the Uniform Sales Act and the Uniform Commercial Code.\textsuperscript{759} It would, of course, be inappropriate to require notice in a strict tort liability action against a landlord.\textsuperscript{760}

In contrast to the above situation, it would also be possible to preclude recovery by a plaintiff who had discovered a defect prior to the accident if the plaintiff failed to notify the landlord of the defect before sustaining personal injury or property damage.\textsuperscript{761} The

The requirement of notice of breach is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements. The notice requirement also protects against stale claims. . . . These considerations are as applicable to builders and sellers of new construction as to manufacturers and dealers of chattels.


\textsuperscript{755} \textit{See} note 752 \textit{supra}.


\textsuperscript{757} \textit{See} section V.B.3.d, \textit{infra}.


\textsuperscript{760} \textit{See} note 751 \textit{supra}.

\textsuperscript{761} Such a notice requirement is imposed in actions for economic loss. \textit{See} section III.C.3. \textit{supra}. 

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purpose of the notice requirement in this setting would be to give the landlord an opportunity to repair the defect. There is no products liability precedent for barring recovery based on a failure to give notice under such circumstances.\textsuperscript{762} Instead, the plaintiff's knowledge is considered relevant to the defense of assumption of risk.\textsuperscript{768} This position would also seem appropriate in a strict liability action against a landlord. If notice were required, however, it would be important to provide for its waiver when the plaintiff had made reasonable, but unsuccessful, attempts to contact the landlord\textsuperscript{764} or when the landlord knew of the defect.\textsuperscript{765} It might also be appropriate to distinguish between defects created by the landlord or discoverable at the time possession was transferred and those not discoverable until after the commencement of the lease.\textsuperscript{766} With respect to the first class of defects, no notice would be required because the landlord would have had an opportunity to discover them.\textsuperscript{767} With respect to the second class, notice would not be required as to defects in areas under the landlord's control,\textsuperscript{768} but would be required for defects in areas under the tenant's control\textsuperscript{769} unless the landlord had a right of entry for purposes of inspecting the premises and making repairs.\textsuperscript{770} To protect the tenant's privacy, this right of entry could be conditioned upon the landlord's receiv-

762. An exhaustive search of the reported cases produced only two decisions of remote relevance, and they are cited here primarily for their anecdotal value. In Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (1956), the defendant was unsuccessful in asserting that the plaintiff should have notified it of her intent to claim damages at the time she first observed a "bunching" in the mattress, instead of a few days after a spring came through the mattress and "penetrated into [her] gluteal prominence." There was evidence to establish that the bunching of a mattress would not indicate the existence of a broken spring. And in Waddell v. American Breeders Serv., Inc., — Mont. —, 505 P.2d 417 (1973), the court rejected the defendant's argument that the plaintiff should have notified the defendant when he first found that defendant's semen was defective (because the "clean-up bull" was "overworked"), instead of some ten months later when he had a substantial calf crop failure.

763. See section V.B.3.c. infra.

764. See note 457 supra and accompanying text. If the plaintiff were a third party, rather than the tenant, it should be easier to establish either compliance with or waiver of the notice requirement.

765. See note 456 supra and accompanying text.

766. See notes 597-611 supra and accompanying text.

767. See notes 597-601 supra and accompanying text.

768. See notes 602-04 supra and accompanying text.

769. The plaintiff must have actual knowledge of the defect before notice can be required, since contributory negligence is generally not a defense to a strict liability action. See section V.B.3.c. infra. Therefore, if the plaintiff failed to discover a discoverable defect or if the defect were not discoverable until the time of the injury, the notice requirement would not bar recovery. See note 740 supra.

770. Louisiana has created a statutory right of entry to make repairs under certain circumstances. La. Civ. Code Ann. § 2700 (West 1952). See also notes 290-91 & 605 and accompanying text.
ing the tenant's permission to enter at a specified time. If the tenant unreasonably refused to permit the landlord to enter, the tenant could be precluded from bringing a strict liability action in those situations where the defect could have been discovered by a reasonable inspection and the tenant failed to notify the landlord of the need for repairs.

3. DEFENSES

As the preceding discussion demonstrates, the principal difference between the prima facie case in a strict tort liability action and an implied warranty action would be the inapplicability of the contract limitations—privity and notice of breach—to the strict tort theory of recovery. We must now turn our attention to a comparison of the affirmative defenses.

a. Governmental immunity

If the defendant were a public housing authority, it might be successful in asserting the defense of governmental immunity under either theory of recovery. The crucial question would be whether a governmental entity can be held strictly liable for causing personal injury or property damage. Under the Federal Tort Claims Act, for example, it has been held that the United States is not subject to strict liability for engaging in ultrahazardous activities because such activities are not "wrongful." To the extent that an action for strict tort liability or implied warranty is an action based on "enterprise liability," it too might be construed as involving the commission of an act which is not "wrongful."

b. Express assumption of risk

There is a significant difference between the two theories of recovery with respect to the validity of an exculpatory clause. Disclaimers of liability cannot be asserted as an affirmative defense in a strict tort liability action. In an implied warranty action, on the

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772. The Act provides for recovery for damages "caused by the negligent or wrongful act or omission" of a government employee. 28 U.S.C. § 1346(b) (1970).
other hand, they are generally enforceable. 775 Exceptions to this general rule have been recognized in certain circumstances, however. For example, an exculpatory clause might not bar recovery in an implied warranty action brought by a person who was not a party to the lease. 776 Similarly, by drawing an analogy to the Uniform Commercial Code, it could be argued that exculpatory clauses should be deemed prima facie unconscionable in actions for personal injury. 777 To be consistent with the rules applicable in implied warranty actions for economic loss, disclaimers ought to be invalidated when proven unconscionable 778 or when the plaintiff’s damages were caused by a housing code violation. 779 Since there are very few circumstances in which it would be desirable, as a matter of public policy, to permit a landlord to disclaim strict liability for personal injury or property damage, 780 strict tort liability would be the preferable theory of recovery in the absence of a statute or judicial decision invalidating disclaimers of the implied warranty of habitability in leases. 781

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778. UNIFORM COMMERCIAL CODE § 2-302; see note 473 supra and accompanying text.

779. See note 474 supra and accompanying text.


781. E.g., MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-406 (Tent. Draft 1969); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1,403.
c. Implied assumption of risk and contributory negligence

Strict liability is not absolute liability because the plaintiff's contributory fault may bar his recovery under certain circumstances. Misuse or abnormal use of the leased premises would be recognized as an affirmative defense in both strict tort liability and implied warranty causes of action. Similarly, implied assumption of risk (at least in its secondary sense) would be a defense under either theory of recovery. The potential difference between the two causes of action arises with reference to contributory negligence. The Restatement (Second) of Torts provides that contributory negligence is not a defense to a strict tort liability action "when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence" and, with one exception, the courts have so held. There is no such unanimity of opinion regarding the applicability of contributory negligence as a defense in implied warranty actions. A majority of courts have held that contributory negligence is not a defense, but a few jurisdictions, including New York, have recently ruled that a plaintiff who could have discovered the defect and perceived its danger, or who could otherwise have averted his injuries by the exercise of

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784. Implied assumption of risk in its secondary sense denotes the plaintiff's voluntarily and unreasonably encountering a known risk. See notes 355-57 supra and accompanying text.


786. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).


reasonable care, is barred from recovering for breach of an implied warranty.\textsuperscript{790} This recent trend to recognize contributory negligence as a defense in implied warranty actions can be supported by reference to the Official Comments to the Uniform Commercial Code,\textsuperscript{791} but it is inconsistent with the general tort principle that contributory negligence is not a defense in strict liability actions.\textsuperscript{792} Since contributory negligence has proven to be a particularly troublesome defense in common law tort actions by tenants against landlords,\textsuperscript{798} strict tort liability emerges from this discussion as the preferable theory of recovery.

d. Statute of limitations

The final point of comparison between the two theories is the statute of limitations.\textsuperscript{794} As a general rule, the tort statute of limitations applies to a strict tort liability action\textsuperscript{795} and the contract statute of limitations governs an implied warranty action.\textsuperscript{796} The principal difference between these two types of statutes is that the tort statute of limitations begins to run from the time of the injury,\textsuperscript{797} whereas the contract cause of action accrues at the time of the sale (or lease).\textsuperscript{798} The advantage to the landlord of the contract statute of


\textsuperscript{791} UNIFORM COMMERCIAL CODE §§ 2-314, Comment 13; 2-316(3)(b), Comment 8; 2-715, Comment 5.

\textsuperscript{792} W. PROSSER, supra note 146, § 102 at 670-71.

\textsuperscript{793} See section II.C.3. supra.

\textsuperscript{794} 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5][g] (1974).


\textsuperscript{796} 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5][g] (1974).

\textsuperscript{797} See section II.C.3. supra.

\textsuperscript{798} See generally Note, Developments in the Law—Statute of Limitations, 63 HARV. L. REV. 1177 (1950).
limitations is that it exposes the defendant to liability for a limited period of time, and it may expire prior to the date on which the plaintiff sustains injury. In the case of a lease renewed on a periodic basis at intervals of one year or less, there would be little actual difference between the operation of the two statutes of limitation. In the case of a long term lease, however, the plaintiff could easily be barred from recovery before sustaining injury. The plaintiff's only recourse in such a situation would be to argue that the implied warranty of habitability is a prospective warranty because it imposes a continuing duty to repair. The statute of limitations would then not begin to run until such time as the breach was or should have been discovered. If the implied warranty of habitability were characterized as a prospective warranty, there would be little difference between the tort and contract statutes of limitations in a strict liability action against a landlord. Otherwise, the tort statute of limitations governing the strict tort liability theory of recovery would be more advantageous to the injured plaintiff.

C. Summary

Because products liability law has provided many of the policy justifications for recognizing an implied warranty of habitability in leases of real property, plaintiffs have urged the imposition of strict liability for personal injury or property damage caused by landlords in the business of leasing. Thus far, they have been successful only when the damage was caused by a defect in personal property leased as part of a furnished apartment. However, as an increasing number

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801. E.g., UNIFORM COMMERCIAL CODE § 2-725(2).
of courts recognize a landlord's liability for negligence, it can be anticipated that at least a few will take the next step and impose strict liability on the landlord in the business of leasing. Like the typical products liability defendant, the landlord puts the premises in the stream of commerce, is in a superior position to discover defects in the premises, and can better bear and distribute the risk of loss. Like the typical consumer, the tenant relies on the landlord's skill, reputation and express or implied representations of safety. Builder-vendors of real property, sellers of used property, providers of commercial services rendered in conjunction with the sale of a product, and lessors of personal property have all been held strictly liable. The extension of strict liability to a lessor of real property, a step taken long ago by Louisiana, would therefore represent a logical extension of existing products liability precedents.

If strict liability were imposed on landlords for defects causing personal injury or property damage, strict tort liability would be the preferable theory of recovery. Unlike the implied warranty theory, strict tort liability would require no proof of privity or notice; express assumption of risk and contributory negligence would not bar recovery; and the statute of limitations would not begin to run until the time of the injury or damage.

The plaintiff's principal problem under a strict tort liability theory would be establishing the existence of a defect. Recovery should be allowed regardless of whether the defect could be characterized as obvious, latent, or attributable to ordinary wear and tear. Misuse and implied assumption of risk would be the principal defenses. Because strict liability does not require proof of fault, a landlord could be held liable for a latent defect of which he neither knew nor should have known. Liability would be imposed on the theory that a landlord is in the best position to bear and distribute the risks of loss attributable to the business of leasing.

VI. Conclusion

The law of landlord-tenant relations and the principles governing the tort liability of a landlord are inextricably intertwined. At common law, the nature of the landlord-tenant relation moved from status to contract to property. At the culmination of this progression, the lease was characterized as a conveyance of property; caveat emptor generally precluded the imposition of a duty to repair on the landlord; and if the lease contained an express or implied covenant to repair, it was regarded as independent of the tenant's covenant to pay rent. These common law principles were appropriate to the agrarian setting in which they were developed, but they worked
severe injustices in an industrialized, urban environment. The task of tempering the common law fell to the legislatures. Housing codes were enacted imposing a duty to repair on residential landlords (or at least on landlords of multiple-unit dwellings). In most jurisdictions, however, these codes could be enforced only by public officials through criminal proceedings. When an innovative legislature did recognize a private remedy, it was ordinarily surrounded by restrictions consistent with the common law doctrine of independent covenants. In effect, then, the housing codes substantially eroded cavea emptoria in the realm of residential leases, but left intact the common law notion that a lease is a conveyance.

Against this background, the courts granted the landlord a general immunity from tort liability. The common law doctrine of cavea emptoria has retained its vitality, and exceptions to the general rule are recognized today only when they can be harmonized with the characterization of a lease as a conveyance of property or when they are mandated by the trend toward short-term leases, multiple dwellings, and the enactment of housing codes. Thus a landlord can be held liable in tort only if the plaintiff sustained personal injury or property damage as the result of an undisclosed latent defect, a defect in premises leased for admission of the public, a breach of the implied warranty of habitability or merchantability in a short-term lease of furnished premises, a breach of a covenant to repair, negligent repairs, a defect in the "common areas" under the landlord's control, or a violation of a housing code.

A landlord's immunity from tort liability, subject to the seven exceptions listed above, is perfectly compatible with the common law, but is completely out of step with recent developments in the law of landlord-tenant relations. The lease, which was once characterized as a conveyance of property, is now considered a contract composed of mutually dependent covenants, including an implied warranty of habitability imposing a continuing duty to repair. Although the standard of habitability may be established by the legislature through the provisions of a housing code, the judiciary has created its own more comprehensive and flexible standard in several jurisdictions. To enforce the landlord's duty to repair, the tenant may invoke the complete spectrum of contract remedies, including the powerful sanction of rent abatement.

As a result of these recent developments, tort law now lags behind landlord-tenant law. To bring the law of torts up to date, the courts should abolish a landlord's common law immunity and replace it with a duty to use reasonable care. Failure to take such action will result in an intolerable inconsistency between these two branches of the law, since a tenant who is able to withhold rent be-
cause of the landlord's failure to repair a defect in the premises will not be permitted to recover if that same defect causes personal injury or property damage (unless, of course, the tenant is able to bring his case within one of the seven exceptions to the general rule of nonliability). It is therefore imperative that courts, lawyers, and legal scholars reexamine *caveat lessee* in light of the development of the implied warranty of habitability. New Hampshire and California have already established a precedent for imposing a duty of reasonable care. The American Law Institute could facilitate the process of updating the law of torts by refusing to incorporate into the Restatement (Second) of Property those sections of the Restatement (Second) of Torts which set forth the old common law tort liability of a landlord and by drafting substitute sections imposing a duty of reasonable care.

Although the recognition of liability for a landlord's failure to exercise due care would certainly help to harmonize tort law with the modern law of landlord-tenant relations, the process will not be complete until strict liability is imposed on landlords in the business of leasing. The adoption of the implied warranty of habitability was premised in large part on products liability analogies. If a lease is a contract to provide goods and services, these same products liability precedents suggest that a landlord (like a builder-vendor of real property, seller of used property, provider of commercial services, or lessor of personal property) should be held strictly liable for personal injury or property damage caused by a defect in the premises. The landlord is in a superior position to discover and repair defects (thereby encouraging reliance on his expertise) and is also in a better position to bear and distribute the risk of loss. New Jersey has rejected strict tort liability for landlords, but it should be noted that the Supreme Court of New Jersey was asked to impose strict liability before it had been given an opportunity to abolish a landlord's common law tort immunity and impose a duty of reasonable care. In other jurisdictions, it can be anticipated that, following the pattern established in the products liability field, most courts will recognize a duty of reasonable care, and many will then impose strict liability on landlords in the business of leasing.