Michigan Law Review

Volume 81 | Issue 1

1982

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Recommended Citation

Olin L. Browder, *The Taming of a Duty--The Tort Liability of Landlords*, 81 MICH. L. REV. (1982).

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The Taming of a Duty—The Tort Liability of Landlords

Erratum

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THE TAMING OF A DUTY — THE TORT LIABILITY OF LANDLORDS

*Olin L. Browder**

For one inclined to reform the first-year curriculum in law schools the most simple and comprehensive solution is to expand the treatment of the law on landlord and tenant, and only then break up into the traditional basic subjects to deal with matters not previously covered. Thereby one could embrace all the traditional first-year subjects except Criminal Law, and a good deal more as well.

The other side of this conceit is that one who approaches the modern law of landlord and tenant from traditional property perspectives encounters particular problems that arise from the margins, or along the frontal thrust, of contract and tort law, and so is thrown into their theoretical or philosophical essences, and into emerging forces of social policies, and even economics. Unfortunately, many recent cases dealing with new developments in this field are rife with economic assumptions and conclusions, unsupported by any relevant data. In this maelstrom of ideas and problems, one even encounters the boundary lines between contract and tort law, and must learn, if he does not know it already, that the line is at least fuzzy, if not arbitrary. So one who deals with the law of landlord and tenant must consider not only how contract and tort rules directly affect property rules, but also how the effect of contract law on tort law, or vice versa, indirectly affects property law. This, however, is not an entirely new experience, at least for property lawyers. Something of the same, perhaps to a lesser degree, is encountered in other areas of traditional property law, the most obvious example, of course, being the law of bailments, nuisance, and covenants running with the land.¹

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1. All this is not meant to suggest that property lawyers and teachers, who usually deal most fully with the law of landlord and tenant, so far from being narrow technicians, are the modern renaissance men. Indeed, who among us does all this as it should be done? But we can hardly shun it all together. Someone must try to break out of that familiar pedagogical merry-go-round where nobody touches certain areas because they really belong to someone else. For, unlike some bypassed backwaters of the law, the law of landlord and tenant reeks with modernity and "relevance" and emerging problems requiring new, and sometimes producing conflicting, solutions.

I am not so bold as to believe that in this very limited commentary I can even suggest the full dimensions and implications of this classificatory maze. I presume only to offer some

It must be conceded that current troubles in this area probably have their origins in traditional property law. At least the courts continually have been so alleging. In part, the allegation is no doubt correct; but in part what is alleged to have been traditional property law may be misleading. It may not be entirely beside the point of this inquiry into certain property-tort problems to mention at the beginning the litany recited in many landlord-tenant cases that the solution to current problems in this field depends on recognizing leases as contract, not property transactions. There are objections to this bold and simplistic proposition. The least important objection is the inference that leases of old were not contracts. In fact, leases have always been contracts, which is not to say that every lease in the past was also a contract. In medieval England, before the origin of modern contract doctrines, leases were enforced as covenants.² They were not treated as conveyances, and lessees' rights were in personam only, and their remedies did not include the recovery of possession from dispossessing third parties. This condition was eventually changed in the emergence in the late fifteenth century of the action of ejectment.³ After this time, leasehold interests came to be treated as estates in land, effectively dividing ownership and leaving a reversion in the lessor, and so taking their place within the hierarchy of present and future estates. It has been a long time, however, since leases were merely conveyances with a "reserved" rent in the form of a right to a share of the produce of the land. Leases always include promises by one or both the parties respecting the premises or their use. In fact, it has long been established that a lease, silent respecting rent, contains an implied promise by the lessee to pay rent.⁴

A further objection to the current effort to wrench leases out of property and into contract law is the implication that leases are no longer conveyances. If such an idea is seriously expressed, it is of course absurd. Ever since the time when lessees acquired estates, every lease is in part a conveyance, for it always provides that the right to possession has passed from the lessor to the lessee, with continuing significant consequences.⁵

analysis, with considerable diffidence, and limited by my own special perspective, of one quite restricted part of the law of landlord and tenant.

2. See 3 W. HOLDWORTH, *A HISTORY OF ENGLISH LAW* 213 (1923).

3. 1 *AMERICAN LAW OF PROPERTY* § 3.78 (A. Casner ed. 1952).

4. 1 *AMERICAN LAW OF PROPERTY*, *supra* note 3, at § 3.1.

5. See Siegel, *Is the Modern Lease a Contract or a Conveyance — A Historical Inquiry*, 52 J. URB. L. 649 (1975). Although not now so much in the forefront of courts' attention, it may be further objected about the alleged dominance of contracts law in leases that, in respect to those

Traditional tort law respecting the liability of landlords for injuries to the person or property of tenants or others on the leased premises did indeed derive in part from property law. Since the tenant was an "owner," not merely of his estate of the land "for a time," he alone was responsible for the condition of the leased premises. The doctrine also derived in part from an application of *caveat emptor*, or "caveat lessee," with respect to the condition of the premises when possession was delivered, that is, there were no implied warranties or other duties imposed by a lease respecting the condition of the premises when possession was delivered.⁶

I believe, however, that this is not a complete explanation of the traditional limits on landlords' tort liability. Tort law has always had trouble accommodating the distinction between misfeasance and nonfeasance. It may be argued that, in tort law generally, the distinction is arbitrary, morally indefensible, and sometimes difficult to draw. The fact remains, rightly or wrongly, and generally speaking, that one person has no duty to act affirmatively to protect another person or his property from harm.⁷ One must find a special reason in the relationships or circumstances for holding otherwise. This is certainly the problem where one seeks to impose upon landlords a duty respecting the condition of leased premises. An old analogy, however, will be readily perceived: the duty of landowners or possessors of land to protect persons on their land from unreasonable risk of harm. This involves both affirmative and negative duties. The reason obviously was that a person entering another's land is at a considerable disadvantage in protecting himself against such risks, if

matters which are currently receiving the most attention, the current solutions are not so much a matter of contract or property law as they are of reemergence of a law relating to status. If, for example, leases are now to be held to contain an implied warranty of habitability, which the parties are forbidden to qualify or modify, how can one call this the application of contract law? What sort of contract law is it that prevents parties from contracting altogether, even where their express agreement is not unconscionable? One can resort to the fiction if he wishes, but it may cause trouble, as we will see. If a landlord is to be responsible for the condition of leased premises, for reasons of social and economic policy, that responsibility is incurred simply because he is a landlord who has entered into a continuing relationship with his tenants, who have received possession of leased premises. See Donahue, *Change in American Landlord and Tenant Law*, 37 MOD. L. REV. 242, 258 (1974); Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years*, 9 U. KAN. L. REV. 369 (1961); Cunningham, *The New Implied and Statutory Warranty of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979).

6. 1 AMERICAN LAW OF PROPERTY, *supra* note 3, at § 3.78; R. BOYER, SURVEY OF THE LAW OF PROPERTY 203 (3d ed. 1981).

7. "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant." Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).

in fact he can do anything at all about them. Such circumstances arise because the landowner is in control of his land. A tenant, however, is the one who for the most part is in control of the leased premises. It would seem that something special must be found in the relationship of landlord and tenant to justify imposing tort liability on landlords for injuries to tenants resulting from the condition of leased premises. As we will discover, to impose upon landlords the duty of affirmative action in respect to the condition of premises over which they have no control presents special and peculiar problems. If one finds a basis for such liability, another problem remains: does such liability find a proper place within the broad range of negligence liability, is it strict liability, or is it *sui generis*, partaking of the nature of both?

We should go no further without first recognizing that the rule about the nonliability of landlords long ago ceased to be a correct expression of the law. Exceptions of major significance, some appearing long ago, have eroded the old rule and are now generally accepted as part of the traditional law. Most of these involved the imposition of affirmative duties. The rule of nonliability still remained, however, where the exceptions were not applicable. Is this still the law? An answer to this question is a primary purpose of this study.

I. THE TRADITIONAL TORT LAW

The traditional exceptions in tort law to the old doctrine of *caveat emptor* are restated here, with only limited elaboration, consisting solely of their application in recent cases (during the last fifteen years, more or less), and secondary authority. The exceptions are equally applicable to residential and commercial leases.

A. Premises in Landlord's Control

This is not really an exception to the dogma of *caveat emptor*. It is more closely related to the law on the duty of landowners to persons on their land. Simply stated, the landlord has a duty to use reasonable care to keep those portions of the premises over which he retains control in a reasonably safe condition.⁸ "Possession", and

8. *Cruz v. Drezek*, 175 Conn. 230, 397 A.2d 1335 (1978); *Cappaert v. Junker*, 413 So. 2d 378 (Miss. 1982); *O'Neal v. Kellet*, 284 S.E.2d 707 (N.C. App. 1981).

In *Slusher v. State*, 437 N.E.2d 97 (Ind. App. 1982), the defendant landlords, husband and wife, were convicted of reckless homicide on account of the death of a guest of a tenant who was killed in a fall from a dilapidated outdoor common stairway and landing, the condition of which had been made known to the defendants by tenants and local authorities. The conviction was reversed on the ground that, although an omission to act can be the basis for a charge

"control" are the touchstones here. Accordingly, a landlord's tort liability extends to dangerous conditions in common areas of apartment buildings,⁹ defective plumbing or heating units¹⁰ and such other equipment remaining in the landlord's control that is necessary to the tenant's use of the leased premises.¹¹

Since negligence is the standard for liability under this exception, the landlord need not make the premises absolutely safe.¹² Moreover, he must have knowledge of the defective condition and not merely of the existence of circumstances that naturally produce such a defect. Imputed knowledge will suffice, however, so that a landlord is liable for defects that a reasonable inspection would have revealed.¹³

B. Latent Defects

A landlord's duty with respect to latent defects is not one of inspection, nor does it require him to make repairs. It merely means that the landlord must disclose a condition of the leased premises involving an unreasonable risk of harm if he knows or has reason to know of the condition while the tenant does not.¹⁴ Thus a landlord is

of reckless homicide, the statute defining that crime was vague on the point, so that the conviction under it violated due process requirements.

9. Essentially, the duty extends to all areas maintained for the tenant's benefit within the purposes of the lease. W. PROSSER, LAW OF TORTS §63, at 407-08 (4th ed. 1971).

10. See, e.g., Pollack v. Gampel, 163 Conn. 462, 313 A.2d 73 (1972).

11. RESTATEMENT (SECOND) OF PROPERTY § 17.4 (1977). The duty owed by landlords covers persons on the premises with the consent of the tenant. Hiller v. Harsh, 100 Ill. App. 3d 332, 426 N.E.2d 960 (1981). Two recent cases have imposed the same duty where, although the tenant possessed the premises, the lease permitted the landlord to enter at any time to make repairs. Montgomery Ward & Co. v. N. Y. Cent. R.R., 389 F.2d 556 (2d Cir. 1968); Lemm v. Gould, 425 S.W.2d 190 (Sup. Ct. Mo. 1968); Jones v. Houston Aristocrat Apartments, Ltd., 572 S.W.2d 1 (Tex. Civ. App. 1978).

12. RESTATEMENT (SECOND) OF PROPERTY § 17.3 comment k (1977). See Doyle v. Exxon Corp., 592 F.2d 44 (2d Cir. 1979).

13. See, e.g., Cruz v. Drezek, 175 Conn. 230, 397 A.2d 1335 (1978).

The Texas court recently abandoned its "no-duty" rule, which seemed to say that a landlord owed no duty with respect to known or obvious defects. See Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. Sup. Ct. 1978) (rejecting a doctrine of voluntary assumption of risk and relying on the principles of negligence, contributory negligence and comparative negligence).

In Strong v. Shaw, 96 N.M. 281, 629 P.2d 784 (N.M. App. 1980), the court applied *res ipsa loquitur* to a case involving a fire in a hot water heater in a leased apartment in a mobile home which was in the exclusive control of the landlord. One justice dissented on the ground of the lack of evidence of the cause of the fire.

In dictum in Esbenshade v. National Life Ins. Co., 208 Neb. 216, 303 N.W.2d 272 (1981), the court said that a landlord is not liable for injuries in a common area when the danger is inherent and the conditions complained of are obvious to the injured party.

Liability has been imposed on a landlord where injury resulted from a hole in the ground adjacent to but not owned by the landlord, but where the landlord had assumed control. Smith v. Rengel, 97 Ill. App. 3d 204, 422 N.E.2d 1146 (1981).

14. See RESTATEMENT (SECOND) OF TORTS § 358 (1965). This means that the landlord

obliged to "inform" the tenant.

C. Contract To Repair

The troublesome intersection between contract and tort law is apparent here. Courts have split on the question of a landlord's tort liability where the landlord's breach of a contract to keep the leased premises in repair proximately causes his tenant's injuries.¹⁵ Traditionally, courts have opposed liability on two simple grounds: (1) that a breach of contract creates only contract remedies and (2) that unless specifically indicated, the contracting parties did not contemplate injury to persons or property.¹⁶

The more modern view, endorsed by the *Restatements (Second) of Torts and Property*, holds that a landlord may be liable in tort, but only if (1) he has notice of the need for repair, (2) he fails to exercise reasonable care to perform his obligation and (3) the resulting state of disrepair creates an unreasonable risk of harm.

A variety of rationales for tort liability has been given, not all of which are persuasive. It has been suggested that the contract deters the tenant from making repairs, but Prosser has suggested that the significant factor is the peculiar relation between the parties which gives a tenant a special reason to rely on the contract, and which invokes those familiar modern assertions about placing the burden on the party best able to bear it.¹⁷

In several recent cases the courts overruled prior cases to adopt the rule of the *Restatements*.¹⁸ On the other hand, two courts have recently asserted the old rule of non-liability.¹⁹ An Illinois court took a middle ground by requiring circumstances showing that the parties

has information from which a reasonable person would infer that the condition exists. In *Lemley v. Penner*, 230 Kan. 25, 630 P.2d 1086 (1981), no liability was imposed where the defect was as readily discernible to the tenant as to the landlord.

Some courts, however, do state a stricter requirement of knowledge by the landlord. See *Alvarez v. DeAquirre*, 395 So. 2d 213 (Fla. App. 1981); *Loflin v. Thornton*, 394 So. 2d 905 (Miss. Sup. Ct. 1981); *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980). Cf. *Younger v. United States*, 662 F.2d 580 (9th Cir. 1982).

15. RESTATEMENT (SECOND) OF PROPERTY § 17.5, reporter's note (1977).

16. W. PROSSER, *supra* note 9, § 63, at 408-09. Under this view, of course, only parties to the contract (to repair) would have any remedy. Invitees, for example, could not assert a contractual right, even as third-party beneficiaries.

17. W. PROSSER, *supra* note 9, § 63 at 410.

18. *Mobil Oil Corp. v. Thorn*, 401 Mich. 306, 258 N.W.2d 30 (1977); *Putnam v. Stout*, 38 N.W.2d 607, 381 N.Y.2d 607, 381 N.Y. S.2d 848, 345 N.E.2d 319 (1976); *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968); *Rampone v. Wauskuck Bldgs., Inc.* 227 A.2d 586 (R.I. 1967).

19. *Phillips v. Mills*, 5 N.C. App. 150, 167 S.E.2d 817 (1969); *Payton v. Rowland*, 208 Va. 24, 155 S.E.2d 36 (1967).

contemplated tort liability.²⁰

D. Negligence in Making Repairs

This is the only exception where the duty does not specify affirmative action, a breach of which consists of a failure to act. The main question here is whether one who owes no duty to act for another's protection owes a duty, if he acts, to act reasonably. According to the *Restatement (Second) of Torts*, one who undertakes to render services to another must act with reasonable care.²¹ More specifically, the *Restatement (Second) of Property* states that this duty applies to a landlord who, through his negligence in making repairs, gives the leased premises a deceptive appearance of safety or in fact creates an even more dangerous situation.²²

At least one court, however, has strayed from a pure negligence standard. A recent Massachusetts case, *Markarian v. Simonian*,²³ held that although a landlord who contracts to repair is liable for his ordinary negligence, one who makes gratuitous repairs is liable only for gross negligence.²⁴

20. *Gula v. Farvel*, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966). One case imposing tort liability held that such a result is not precluded by a provision in the lease permitting the tenant to make repairs where the landlord after notice failed to make the repairs within ten days. *McCreless v. F.W. Woolworth Co.*, 533 S.W.2d 863 (Tex. Civ. App. 1976). As that case held, there is no reason to distinguish between liability for personal injuries and property damages. A Kansas court, after having accepted the *Restatement* rule, rejected an allegation of contributory negligence where the tenant had no entrance to the premises other than a defective front sidewalk. *Richardson v. Weckworth*, 212 Kan. 88, 509 P.2d 1113 (1973).

21. See RESTATEMENT (SECOND) OF TORTS § 323 (1965).

22. See RESTATEMENT (SECOND) OF PROPERTY § 17.7 (1977). The *Restatement* rules impose liability for physical harm to the tenant and those on the property with the tenant's consent.

Apparently, some authority supports the notion that a landlord is liable for mere failure to use reasonable care under the circumstances, regardless of the *Restatement's* requirements. See W. PROSSER, *supra* note 9, § 63, at 411.

The *Restatement* rule does not apply if a landlord makes no repairs where, after having promised to make them, he "assures" the tenant that they have been made. RESTATEMENT (SECOND) OF PROPERTY § 17.7 comment c (1977). Thus, the landlord cannot give the leased property a deceptive appearance of safety. One court has held, however, that a landlord is not liable where the tenant knew the attempted repair was ineffective. *Haga v. Childress*, 43 N.C. App. 302, 258 S.E.2d 836 (1979), *appeal denied*, 299 N.C. 120, 261 S.E.2d 923 (1980).

23. 373 Mass. 669, 369 N.E.2d 718 (1977).

24. For a general statement of the Massachusetts rule and citations to cases supporting it, see RESTATEMENT (SECOND) OF PROPERTY § 17.7, reporter's note 8 (1977). If a landlord contracts to repair, under Massachusetts law he is liable for ordinary negligence, but not for failure to make the repair. *Markarian v. Simonian*, 373 Mass. 669, 672-73, 369 N.E.2d 718, 720 (1977).

The court in *Markarian* distinguished an earlier, similar case, *Chelefou v. Springfield Inst. for Sav.*, 297 Mass. 236, 8 N.E.2d 769 (1937). In *Chelefou*, a child fell through a window over

E. *Violation of Statutes*

The violation of a statute, ordinance, or administrative regulation as a basis for the tort liability of a landlord is not ordinarily mentioned as an exception to *caveat emptor*. The reason may be that the rule involved is not a landlord-tenant rule but a rule of tort law generally. Its recent growth in the landlord-tenant cases may also reflect the considerable recent increase in housing laws at both the state and local levels.

The *Restatement (Second) of Torts*²⁵ declares an intricate standard for the conduct of a reasonable man based upon legislation or an administrative regulation. Since most legislation regulating the conduct of persons is penal in nature, the use of such legislation also to declare duties owed by one person to another is considerably restricted respecting the persons and interests to be protected and the hazards against which persons are to be protected.

The basis for deriving civil liability from an imposed penal liability is not obvious, nor are courts agreed about what it really is.²⁶ A penal statute may justify or require the connection by its terms, properly construed, but this is rarely true. In the ordinary case, a court may simply borrow the penal requirement as a standard for tort liability; the *Restatement* in fact says that a "court may adopt as a standard of conduct of a reasonable man" the requirement of a statute or administrative regulation.²⁷ In other words, there is no necessary or inherent connection between the two. It is clear that many enacted requirements do not sensibly lend themselves to such treatment. Those that do are those which suggest that the requirement is imposed not merely in the general public interest, but for the protection of certain classes of persons. In such a case, it is hardly a great leap, but seems rather a natural corollary, to say that the purposes of the enactment, and the public interest, are best served by giving a remedy to those persons who are injured by a violation of the enacted duty. In respect to landlord-tenant law, many of the re-

which the landlord had placed a screen. Since the purpose of the screen was to keep out insects, not to serve as a safety barrier, the landlord could not have foreseen the injury.

Other courts have relied on the RESTATEMENT (SECOND) OF TORTS § 323 (1965) (dealing with negligent performance of an undertaking to render services) to hold a landlord liable. See, e.g., *Anderson v. Kroh*, 301 N.W.2d 359 (N.D. 1981) (conduct complained of was not an attempted repair, but rather a negligent attempt to relight a propane water heater).

A recent Kentucky case reaffirmed the rule that a landlord's liability encompasses negligent repairs made by an independent contractor in his employ. See *Rietze v. Williams*, 458 S.W.2d 613 (Ky. 1970). See also RESTATEMENT (SECOND) OF PROPERTY § 19.3 (1977).

25. §§ 285-288 (1965).

26. W. PROSSER, *supra* note 9, § 36, at 190 *et seq.*

27. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

quirements of building or housing codes imposed on property owners, and more clearly those imposed on landlords as such, readily fall into this category.

The *Restatement (Second) of Torts* further declares that a violation of a statute or regulation that has been adopted as a standard of conduct for a reasonable man is "negligence in itself,"²⁸ unless the violation is among a list of "excused violations."²⁹ The rigid harshness of such a rule is softened and given a negligence flavor by the nature of at least some of the excused violations. Obviously the act complained of must be the legal cause of the injury, and presumably the defenses of assumption of risk and contributory negligence are available.

The more recent *Restatement (Second) of Property* declares a more simple rule.³⁰ A landlord is liable for physical harm to the tenant (or others on the leased premises with the consent of the tenant) caused by a dangerous condition existing before or after the tenant has taken possession, if the landlord "has failed to exercise reasonable care to repair the condition and the existence of the condition is a violation of . . . (2) a duty created by statute or administrative regulation." The comment adds that the landlord is liable only for conditions of which he is aware or which he could have known by the exercise of reasonable care.³¹ The landlord is ordinarily chargeable with notice of conditions existing when the tenant takes possession.

Most of the recent cases dealing with the effects of violations of statutes involve violations of simple, specific requirements declared in building or housing codes. It is obvious that the more sweeping recent legislation, referred to below,³² which virtually abolishes *caveat emptor* and imposes a requirement of habitability or the like, invokes the same principle.

In several recent cases the courts refused to construe administra-

28. RESTATEMENT (SECOND) OF TORTS § 288B(1) (1965).

29. RESTATEMENT (SECOND) OF TORTS § 288A (1965):

- (1) An excused violation of a legislative enactment or an administrative regulation is not negligence
- (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when
 - (a) the violation is reasonable because of the actor's incapacity;
 - (b) he neither knows nor should know of the occasion for compliance;
 - (c) he is unable after reasonable diligence or cure to comply;
 - (d) he is confronted by an emergency not due to his own misconduct;
 - (e) compliance would involve a greater risk of harm to the actor or to others.

30. RESTATEMENT (SECOND) OF PROPERTY § 17.6(2) (1977).

31. RESTATEMENT (SECOND) OF PROPERTY § 17.6(2), comment c (1977).

32. See text at note 55 *infra*.

tive regulations governing the condition of stairways or the keeping of fireworks on commercial premises as affecting the relation of landlord and tenant.³³

A number of courts have held that the violation of a statute is evidence of negligence,³⁴ or at least evidence of negligence,³⁵ or prima facie evidence of negligence.³⁶ Other courts have merely stated that the question is whether the landlord was negligent in violating a statutory provision.³⁷ It has been held that a landlord is liable for the negligence of a contractor who constructed a porch in violation of the applicable housing code.³⁸

In several cases the courts held that the particular violations of local codes amounted to negligence per se³⁹ or negligence as a matter of law.⁴⁰ Some emphasis in these cases was laid on the usual requirement that the plaintiffs were within the class of persons for whose protections the ordinances were passed.

The enforcement of building or housing codes is usually vested in officers or administrative agencies who inspect premises and issue notices of violations. Normally no penalties are imposed unless the landowner unreasonably delays making the prescribed changes, and the penalties themselves are hardly intimidating unless conditions have reached such a state as to justify the issuance of an order requiring abandonment of the premises or the appointment of a receiver. To impose liability on landlords for injuries received by

33. *Hatfield v. Palles*, 537 F.2d 1245 (5th Cir. 1976); *Stover v. Fechtman*, 140 Ind. App. 62, 222 N.E.2d 281 (1966); *Stapleton v. Cohen*, 353 Mass. 53, 288 N.E.2d 64 (1967), *cert. denied*, 391 U.S. 968 (1968). One court held that an ordinance requiring landowners to keep stairways in repair could not be used by a person hired by a tenant to wash windows against a landlord who was not found to be in control of the premises. *Coshenent v. Holbub*, 80 Ill. App. 3d 430, 399 N.E.2d 1022 (1980).

34. *Whetzel v. Jess Fisher Mngmt.*, 108 App. D.C. 385, 282 F.2d 943 (1960); *Williams v. Foutes*, 417 N.E.2d 963 (Mass. 1981); *Dolan v. Suffolk Franklin Sav. Bank*, 355 Mass. 665, 246 N.E.2d 798 (1969).

35. *McCoy v. Coral Hills Assocs.*, 264 A.2d 896 (D.C. App. 1970).

36. *Enis v. Ba-Call Bldg. Corp.*, 639 F.2d 359 (7th Cir. 1980); *Gula v. Farvel*, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966).

37. *Scoggins v. Jude*, 419 A.2d 999 (D.C. App. 1980); *Grant v. Hepshir*, 257 Cal. App. 2d 375, 64 Cal. Rptr. 892 (1967); *Ford v. Ja-Sin*, 420 A.2d 184 (Del. Super. 1980); *Yoder v. Greenwald*, 246 So. 2d 148 (Fla. App. 1971).

38. *Gardenville Realty Corp. v. Russo*, 34 Md. App. 25, 266 A.2d 101 (1976); *cf.* RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 19.1 (1977).

39. *Schwartzman v. Weiner*, 319 A.2d 48 (Del. Super 1974); *John's Pass Seaford Co. v. Weber*, 369 So. 2d 616 (Fla. App. 1979).

40. *Panaroni v. Johnson*, 158 Conn. 92, 256 A.2d 246 (1969). One court held that, assuming a violation of a city housing code, the tenant assumed the risk of injury by continuing to live on the premises, and in case of injury, is guilty of contributory negligence. *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E.2d 627 (1970). Such a view has been rejected and is not likely to find much favor. *Kanelos v. Kettler*, 406 F.2d 951 (D.C. Cir. 1968).

tenants and others resulting from code violations, especially when such liability can produce jury verdicts for damages in large amounts, is a more serious matter. Unless one can discount the impact of such liability on the assumption that landlords will be protected by liability insurance, one can understand the torts *Restatement's* effort to detail specific limitations on liability. In fact, it may raise some doubt about the negligence per se rule. On the surface, at least, the position of the property *Restatement*⁴¹ that a landlord is liable in such circumstances for failure to exercise reasonable care to repair the defective conditions may seem more appealing. On the other hand, the latter view will usually put the question of liability in the hands of a jury, who may not be prepared to handle the inescapable refinements or distinctions necessary to keep the liability rule from becoming oppressive. There is also some justification for assuming that in cases of doubt about the proper limits of liability the verdict will be against the landlord. Under the torts *Restatement*,⁴² presumably a court must first sift out those cases involving one or more of the variety of excused violations.

II. THE GREAT UPHEAVAL

A. *The Implied Warranty of Habitability*

Beginning about twelve years ago, in *Javins v. First National Realty Corporation*,⁴³ a frontal assault was launched against fundamental features of landlord and tenant law. It really began in Wisconsin, ten years earlier, in *Pines v. Perssion*;⁴⁴ but *Javins* was the leading case in delineating the dimensions of what was happening. Fundamental deficiencies in traditional law in dealing with slumlords, and perhaps with mass housing generally in urban areas, had been bruited about for some time. When indigent or low-income tenants became armed with counsel, the deficiencies in the law became focused and glaring. The main substantive defect was that the duty to repair leased premises rested on tenants. If this is reversed to put the duty on landlords, another more difficult remedial problem remains. Breaches of duty by landlords traditionally invoked the remedy of

41. See text at note 30 *supra*.

42. See note 27 *supra*.

43. 428 F.2d 1071 (D.C. Cir. 1970).

44. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In *Pines*, the Wisconsin court extended the implied warranty of habitability, theretofore applicable only to leases of furnished dwellings and dwellings under construction, to leased residential property in general. Arguably, the Wisconsin Supreme Court overruled *Pines*, *sub silentio*, in *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

damages or of constructive eviction, which required that aggrieved tenants leave the premises affected. Obviously neither was adequate or effective for seriously dilapidated housing. The need was for an effective remedy that would permit tenants to stay put. The solution proclaimed was a double-barreled assault that employed contract ingredients. An implied warranty of habitability was laid upon landlords, without any hesitation about what a warranty really is, or the full consequences of imposing it. Further, if tenants were not to be left merely with a new remedy for damages, the traditional rule of the independence of covenants in leases was declared abandoned, but without explaining that it was not necessary or desirable that every promise by a lessee be dependent on any promise by the lessor, or vice versa. This enabled tenants to withhold rent and resist a suit for eviction by proving violation of the implied warranty. This remedy, strictly speaking, was not rent withholding, if that is seen as merely procedural, without affecting the tenant's duty to pay rent or determining the ultimate liability of each of the parties under the terms of the lease. It is rather rent abatement, which involves a determination of the extent, if any, that a tenant's duty to pay rent has been reduced because of the landlord's breach, and leaving a tenant subject to the risk that he may still be evicted if he fails to prove the landlord's breach, or perhaps even if rent in some amount remains unabated. It was further held that, in view of the policy of the new law, the warranty of habitability could not be waived by the lease or otherwise.⁴⁵

To justify the judicial assumption of authority to produce so drastic and detailed a change in prior law, the court in *Javins* said that the traditional rules derived from feudal property law in an agrarian economy, where the value derived by the lease was in the land itself.⁴⁶ This was contrasted with modern urban conditions in which tenants expect "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."⁴⁷ These circumstances called for treating leases like any other contract, and for finding that the implication of a warranty is

45. In *Javins*, the court refused to consider whether the tenant's express covenant to repair constituted a waiver of the implied warranty because the parties may not waive or shift duties imposed by the housing code. 428 F.2d at 1081-82. Moverover, "[a]ny private agreement to shift the duties would be illegal and unenforceable." 428 F.2d at 1082 n.58.

46. 428 F.2d at 1077.

47. 428 F.2d at 1074 (footnote omitted).

at least analogous to the implied warranties in the sale of goods.⁴⁸ Further policy support was found in the unequal bargaining power of landlord and tenant.⁴⁹

This over-simplified and superficial litany has been repeated almost verbatim by most of the courts in the fifteen states where the law declared in *Javins* has been substantially adopted.⁵⁰ It is not necessary to restate this development in detail, even where the courts clarified some of the implications left in doubt by *Javins*, or in some significant particulars departed from *Javins*. Several points, relevant to the purpose of this Article, may be mentioned. It seems clear that the implied warranty of habitability, etc., was designed for residential housing only, and it is not likely to be applicable to commercial leases, at least without important limitations, or by way of analogy.⁵¹ In some jurisdictions, the warranty is limited to leases of multi-unit housing, but more often it has been extended to all residential leases.⁵² The scope of warranty has usually been measured by the terms of applicable housing codes; but this does not mean that every violation of a housing code is a breach of warranty, nor that there can be no breach of warranty without a violation of a housing code.

Some courts perceived that the effectuation of the warranty of habitability does not require entering the throes of the dependency of covenants under contract law.⁵³ All that is needed is to recognize that a claim for damages sustained by a tenant can be asserted in a summary proceeding for possession by a landlord for nonpayment of

48. The *Javins* court outlined, in considerable detail, the use of implied warranties in the modern commercial codes. See 428 F.2d at 1075.

49. See 428 F.2d at 1079. For documentation of the disparity in bargaining power between landlord and tenant, see generally *Edward v. Habib*, 397 F.2d 687 (D.C. Cir. 1968); 2 R. POWELL, REAL PROPERTY ¶ 221[1], at 183 (1967).

50. See *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Berzito v. Gambins*, 63 N.J. 460, 308 A.2d 17 (1973); *Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975); *Glyco v. Schulte*, 350 Ohio Misc. 25, 289 N.E.2d 919 (Mun. Ct. 1972); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979); *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978). See generally *Cunningham, The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, at 74-81 (1979).

51. Cf. *Reste Realty Co. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

52. See *Cunningham*, *supra* note 5, at 81.

53. See *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 357-59, 280 N.E.2d 208, 212-13; *Mease v. Fox*, 200 N.W.2d at 793 (suit by landlord for rent); *Kamarath v. Bennett*, 568 S.W.2d at 659-60 (suit by tenant for damages). A claim for damages sustained by a tenant may be asserted in a summary proceeding for possession brought by the landlord for nonpayment of rent.

rent or other breach. Some of the summary possession statutes rigorously limit the defenses available to the tenant to insure the expeditious nature of the proceedings. The Illinois court found no insuperable difficulty on this score, when a tenant asserts a breach of the warranty of habitability.⁵⁴

Most of the courts that have declared the warranty of habitability, as in *Javins*, have said that the compelling policy reasons supporting the new law would be subverted if the parties to a lease could, by contract or otherwise, disclaim, waive, or modify the warranty.

The most startling feature of the new warranty is that it was made applicable to the conditions of leased premises both at the time of the lease and thereafter throughout the term of the tenancy. How can the latter of these elements be called a warranty at all? It looks like an implied promise to keep the premises in repair. Having regard for the real nature of a warranty, and that it is even something of a strain to speak of it as essentially contractual, how much sense is there in saying that one warrants his own future conduct respecting the condition of the thing he has sold and warranted? It is of course conceivable, but it is at least unprecedented. If one objects that this is only a play on words, it may appear in due course that a source of difficulty with this problem is the conceptual apparatus chosen to explain legal liability and unfortunate and unnecessary confusion in handling all its implications.

B: *Statutory Enlargement of Statutory Duties*

A less publicized and dramatic, but a more sweeping, phase of the big change-over in landlord and tenant law has been action by the various state legislatures. This development, together with the movement of courts mentioned above, has constituted a phenomenon second only in the time taken to do it and in the extent of its acceptance to the sweeping enactment of condominium law twenty years earlier. The legislation has consisted of the enactment or amendment of landlord and tenant codes and laws, almost all of which have created a new duty in landlords similar in scope to the implied warranty of habitability declared by some courts.⁵⁵ Consid-

54. *Jack Spring, Inc. v. Little*, 50 Ill. 2d at 357-59, 280 N.E.2d at 212-13.

55. See ALASKA STAT. § 34.03.100; ARIZ. REV. STAT. ANN. §33.1324 (1974); CONN. GEN. STAT. § 47a-7 (1981); DEL. CODE ANN. tit. 25, § 5303 (1975); FLA. STAT. ANN. § 83.51 (1976); HAWAII REV. STAT. § 521-42 (1976); IDAHO CODE § 6-320 (1979); IOWA CODE § 562A.15 (1981); KAN. STAT. ANN. § 58-2553 (1976); KY. REV. STAT. § 383.595 (Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 6021 (1980); MD. REAL PROP. ANN. CODE § 8.211 (1981); MASS. ANN. LAWS ch. 186 § 19 (Michie/Law. Co-op. 1981); MICH. COMP. LAWS § 554.139 (1979); MINN.

ering the new legislation together with recent judicial declarations, over forty jurisdictions⁵⁶ have made the change in one form or degree or another; and the process may not yet have ended.

All this means that the change is no longer thought of merely as an effort to eliminate congested slum housing in large cities. In fact, it is now widely believed that neither this nor any other change in the private law of landlord and tenant will accomplish that objective. One can infer that the change was not thought of as an attack upon any particular social problem or evil, but that under conditions generally prevailing in our time, the old law is an out-worn relic that ought to be discarded.

The Uniform Residential Landlord and Tenant Act (URLTA)⁵⁷ no doubt has been at least a triggering force in this development. The act has been substantially enacted in some states, but generally with varying amounts of additions and elaborations, in respect both to the details of the definition of landlord duties and to remedies or procedures for enforcement. Some statutes in fact bear little resemblance to the URLTA, but still leave it unmistakable that the primary responsibility respecting the condition of leased residential premises rests upon landlords.⁵⁸ The statute in Delaware is so framed as to apply to both residential and commercial leases.⁵⁹

The new legislation declares a standard that is not new. The duty of a landlord to put premises in a condition fit for human habitation and repair all subsequent dilapidations has been a part of the California Civil Code for over a hundred years,⁶⁰ and in several other states affected by the Field Code.⁶¹ This legislation apparently was

STAT. §504.18 (1980); MO. ANN. STAT. § 441.530 (Vernon Supp. 1982); MONT. CODE ANN. § 70-24-303 (1981); NEB. REV. STAT. § 76.1419 (1976); NEV. REV. STAT. § 118A.290 (1981); N.H. REV. STAT. ANN. §§ 48-A:14, 540:13-d (Supp. 1981); N.J. STAT. ANN. §§ 2A: 42-86 to 97 (West Supp. 1981); N.M. STAT. ANN. § 47-8-20 (1978); N.Y. REAL PROP. LAW § 235-b(3) (McKinney Supp. 1981); N.C. GEN. STAT. § 42-42 (Supp. 1981); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE ANN. § 5321.04 (Page 1981); OKLA. STAT. tit. 41 §118 (1981); OR. REV. STAT. § 91.770 (1981); R.I. GEN. LAWS § 34-18-16 (1969); S.D. CODIFIED LAWS ANN. § 43-32-8 (Supp. 1981); TENN. CODE ANN. § 66-28-304 (1982); TEX. REV. CIV. STAT. ANN. art. 5236f § 2 (Supp. 1981); VA. CODE REV. § 55-248.13 (1981); WASH. REV. CODE § 59.18.060 (1981); W. VA. CODE § 37-6-30 (Supp. 1982); WIS. STAT. § 704.07 (1979).

56. The only states with neither a relevant statute nor a decision are Alabama, Arkansas, Colorado, Indiana, Mississippi, South Carolina and Utah.

57. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972) [hereinafter cited as URLTA].

58. See, e.g., statutes cited in note 55 *supra* for Idaho, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire and New Jersey.

59. DEL. CODE ANN. tit. 25, § 5303 (1975).

60. See CAL. CIV. CODE § 1941.1 (West Supp. 1981).

61. Such legislation has now been superseded by recent statutes. Section 1941 of the California Civil Code has been elaborated in § 1941.1.

not thought adequate for present conditions, for it restricts a tenant's remedy to repairing and deducting from the rent the cost of repair. The Georgia Code has long imposed on landlords the duty to make all repairs for the preservation or protection of the property.⁶² More rigorous burdens upon landlords have long been imposed in Louisiana.⁶³

Without attempting here any general survey of the differences in the scope of the various statutes, several relevant observations may be in order. The URLTA states two primary obligations of lessors: to comply with applicable housing codes affecting health and safety, and to put and keep the premises in a habitable condition.⁶⁴ This dual source of a landlord's duty is found in a majority of the statutes.⁶⁵ A substantial minority of statutes make no mention of housing or other laws, but impose the duty to keep the premises habitable.⁶⁶ There are frequent specifications in the scope of this duty. The Missouri statute requires a violation of the housing code which constitutes a nuisance,⁶⁷ and the Wisconsin statute enlarges a landlord's common-law duty only to require structural repairs and repairs of plumbing, electrical wiring, and machinery and equipment.⁶⁸

In two statutes imposing a landlord's duty, the relevant provision asserts that a landlord "covenants and warrants,"⁶⁹ and in three statutes it is stated that the landlord "covenants."⁷⁰ In all the others, the words are merely that the landlord "shall" or the like. In respect to the tort liability of landlords, this straightforward approach may have significance as a way to avoid becoming ensnared in the throes of the meaning and implications of warranties as they are found in the law on the sale of goods.

That a landlord's duty extends to the condition of leased prem-

62. See GA. CODE ANN. §§ 61-111, 112 (1979), § 85-805 (1978).

63. See LA. CIV. CODE ANN. art. 2695 (West 1973).

64. URLTA, *supra* note 57, at § 2.104; *id.* at § 2.104(a)(2). The statute imposes other duties relating to maintenance of common areas, services and facilities supplied to tenants; however, "[i]f the duty imposed by paragraph (1) is greater than any duty imposed by any other paragraph of this subsection, the landlord's duty shall be determined by reference to paragraph (1)." *Id.* at § 2.104(a).

65. But see KAN. STAT. ANN. § 58-2553 (1976).

66. See statutes cited at note 55 *supra* for Alaska, Idaho, Maine, Maryland, Nevada, New York, Oklahoma, Oregon, South Dakota and Texas.

67. See MO. REV. STAT. § 441.530 (1978).

68. See WIS. STAT. ANN. § 704.07 (West 1981).

69. ME. REV. STAT. ANN. tit. 14, § 6021 (1980); N.Y. REAL PROP. LAW § 235b (McKinney Supp. 1981).

70. MICH. COMP. LAWS ANN. § 554.139 (Supp. 1981); MINN. STAT. ANN. § 504.18 (Supp. 1982); R.I. GEN. LAWS. § 34-18-18 (1970).

ises both at the beginning and throughout the term is in most of the statutes either explicitly stated, as in the URLTA, or implied by a more general statement, such as by declaring that a landlord shall "at all times during the term" do what is required of him.⁷¹ The question may be more arguable in those several jurisdictions which declare that a landlord covenants or warrants that the premises are fit for human habitation.

A substantial majority of the statutes include the recovery of damages among the remedies of a tenant for the breach of the statutory duty of a landlord.⁷² Some of these provide as a condition of recovery the giving of notice to the landlord and an allowance of time for the landlord to remedy the defect.⁷³ A substantial minority of the statutes, however, make no mention of the recovery of damages.⁷⁴

In only a few statutes is there a specific reference to tort liability. The Nebraska statute states that the duty imposed is not intended to change the existing tort law of the state.⁷⁵ The North Carolina statute provides that a violation of the statute shall not constitute negligence *per se*.⁷⁶ On the other hand, the Massachusetts statute provides that a landlord of buildings larger than for three families shall within a reasonable time after written notice from a tenant or a code enforcement agency of an unsafe condition exercise reasonable care to correct it, and that a tenant or other person lawfully on the premises who is injured as a result of a failure to correct the conditions shall have an action in tort for damages.⁷⁷ The Texas statute limits a landlord's duty so that, upon notice from the tenant, he shall make a diligent effort to repair any condition materially affecting the health of an ordinary tenant.⁷⁸ A provision of the Washington statute prescribing action by a tenant who is in default in the payment of

71. See, e.g., WASH. REV. CODE § 59.18.060 (1981) ("The landlord will at all times during the tenancy keep the premises fit for human habitation. . . .").

72. See, e.g., IDAHO CODE § 6-230 (1979); NEV. REV. STAT. § 118 A.350 (1979); N.M. STAT. ANN. § 47-8-27(A) (1978); N.D. CENT. CODE § 47-16-13.1(2) (1978); TEX. REV. CIV. STAT. ANN. art. 5236f § 2(a) (Vernon Supp. 1981).

73. IDAHO CODE § 6-320 (1979); NEV. REV. STAT. § 118A.350 (1981); N.M. STAT. ANN. § 47-8-27(B) (1978); N.D. CENT. CODE § 47-16-13.6 (1978); TEX. CIV. STAT. ANN. art. 523f § 6(d) (Vernon Supp. 1981).

74. See statutes cited in note 55 *supra* for Connecticut, Delaware, Maryland, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Dakota, West Virginia, and Wisconsin.

75. NEB. REV. STAT. § 76-1419 (1976).

76. N.C. GEN. STAT. § 42-44(d) (Supp. 1981).

77. MASS. ANN. LAWS ch. 186, § 19 (Michie/Law. Co-op 1981).

78. TEX. REV. CIV. STAT. ANN. art. 523f § 6(d) (Vernon Supp. 1981).

rent is stated not to be applicable to a civil remedy for negligence or intentional damages.⁷⁹

III. THE CHANGE IN TORT LAW

The main purpose of this Article is to inquire as to how courts have applied and, more critically, should apply tort standards in light of the landlord's increased duties. To some extent, this investigation may be premature. Most of the statutes mentioned in the previous section,⁸⁰ for example, are relatively new, and their potential influence lies in the future. Although few statutes say anything explicit about tort liability,⁸¹ courts may find statutory language relevant and even draw inferences from silences or omissions.

In addition to cases based on statutes, the following discussion deals with decisions that respond to prior judicial recognition of an implied warranty of habitability. The question is: Do these changes in the law affect a landlord's tort liability, and if so, how? This section identifies the three general standards under which most of the cases seem to fall: (1) no change in the traditional rule of landlord nonliability, with its established exceptions; (2) strict tort liability; and (3) a negligence or "reasonable care" standard.

A. No Change — the Traditional Rule

In *Dapkunas v. Cagle*,⁸² the plaintiff sought recovery for injuries sustained on the dilapidated back steps of the residence she had leased from the defendant, the condition complained of having existed from the inception of the lease. The Illinois court affirmed the dismissal of the complaint under traditional law, noting that none of the traditional exceptions applied.⁸³ The plaintiff relied on *Jack Spring v. Little*,⁸⁴ in which the court had declared an implied warranty of habitability. The court found that case not to be controlling and that it had not fully rejected *caveat emptor*. Noting several factual distinctions, the court insisted that the problem in *Dapkunas* was not to be treated as involving products liability.⁸⁵

79. WASH. REV. CODE § 59.18.080 (1981).

80. See statutes cited in note 55 *supra*.

81. See note 77 *supra* and accompanying text.

82. 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976).

83. 42 Ill. App. 3d at 648, 356 N.E.2d at 578.

84. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

85. 42 Ill. App. 3d at 648, 356 N.W.2d at 578. *Dapkunas* rejected a products liability approach and noted that, unlike *Jack Spring*, plaintiffs had not alleged housing code violations. 42 Ill. App. 3d at 649, 356 N.E.2d at 579. Moreover, the court recognized that the implied

A number of Illinois appellate court cases followed *Dapkunas*. In *Cuthbert v. Stempin*,⁸⁶ the plaintiff alleged that the landlord made an oral promise to make repairs. Since he offered no proof as to when the promise was made, however, the court could assume that it was made after the lease and was, therefore, *nudum pactum*.⁸⁷

One year prior to *Cuthbert*, in *Magnotti v. Hughes*,⁸⁸ the same court held for the landlord in a wrongful death suit. There, a social guest of the tenant died in a fire on the leased premises. Plaintiffs alleged that the premises had been a serious firetrap and, moreover, that a statute forbidding owners or lessees from allowing such a condition to exist warranted a claim for relief.⁸⁹ The court, however, stressed that the statute directed a state agency to promulgate specific regulations and, since none had issued, a cause of action could not stand.⁹⁰

A third case relying on *Dapkunas*, *Webster v. Heim*,⁹¹ involved injuries sustained by a tenant in escaping from an apartment building fire. The tenant claimed that his landlord's negligence in maintaining common areas and failing to disclose defects caused his injuries.⁹² According to the court, however, the landlord had no duty to maintain fire exits and fire doors, and the tenant had not proved the existence of latent defects.⁹³ In response to plaintiff's argument that the court should adopt a standard of reasonable care for landlords, the court cited *Dapkunas* for the proposition that *Jack Spring* does not extend to liability for personal injuries.⁹⁴ As asserted in a subsequent case, *Dapkunas* confines *Jack Spring* to use as a "shield" and not as a "spear" with respect to such liability.⁹⁵

It is not clear from these cases whether the acceptance of an implied warranty of habitability has no effect upon prior tort law or

warranty in *Jack Spring* had served merely as a *defense* against a landlord's action to recover possession for nonpayment of rent. 42 Ill. App. 3d at 650, 356 N.E.2d at 579.

86. 78 Ill. App. 3d 562, 396 N.E.2d 1197 (1979).

87. 78 Ill. App. 3d at 569, 396 N.E.2d at 1203.

88. 57 Ill. App. 3d 1000, 373 N.E.2d 801 (1978).

89. 57 Ill. App. 3d at 1002, 373 N.E.2d at 802. The flimsily constructed cabin consisted mainly of plywood and flammable glue and had neither smoke alarms nor fire extinguishers.

90. 57 Ill. App. 3d at 1006, 373 N.E.2d at 805.

91. 80 Ill. App. 3d 315, 399 N.E.2d 690 (1980).

92. 80 Ill. App. 3d at 316, 399 N.E.2d at 691.

93. 80 Ill. App. 3d at 317, 399 N.E.2d at 692.

94. 80 Ill. App. 3d at 317, 399 N.E.2d at 692.

95. *Beese v. National Bank*, 82 Ill. App. 3d 932, 935-36, 403 N.E.2d 595, 598 (1980). Note that in the most recent Illinois case, the court merely applied traditional law without referring to any alternative, perhaps suggesting that counsel did not urge more. See *Gilbreath v. Greenwalt*, 88 Ill. App. 3d 308, 410 N.E.2d 539 (1980).

whether the cases leave room for some sort of limited application of the new contract rule in tort law.

The Kansas court, in *Borders v. Roseberry*,⁹⁶ presented the most elaborate statement of traditional tort liability to date. After considering and finding inapplicable each of the recognized exceptions to the rule of non-liability,⁹⁷ the court held for the defendant/landlord. Strangely, the court failed to consider the effect upon tort liability of the implied warranty of habitability, which it had accepted the previous year in *Steele v. Latimer*.⁹⁸ Possibly, the grounds for argument in *Borders* were frozen prior to *Steele*. More likely, however, plaintiff's counsel erred in neglecting to adapt their arguments to the changed law.

Until very recently, the Ohio courts' position was similar to that taken both in Illinois and Kansas. In *Thrash v. Hill*,⁹⁹ the plaintiff was injured when the apartment ceiling collapsed. His claim for relief relied upon the new Landlords and Tenants Act,¹⁰⁰ which required landlords to make all repairs and do whatever is reasonably necessary to keep the premises fit and habitable. While it provided the standard remedies—termination of the lease and deposit of rent in escrow—the Act said nothing about tort liability. In a four-to-three decision and *per curiam* opinion, the court interpreted this to mean that the Act does not apply in tort cases.¹⁰¹

Thrash v. Hill was emphatically overruled little more than a year later.¹⁰²

B. *Strict Liability*

Where statutes or decisions impose a new duty on landlords respecting the condition of leased premises, confusion has ensued concerning the dimensions of the duty and the consequences of a breach. If the duty extends to the condition of leased premises both at the beginning and throughout the term, a question arises concerning the very nature of the duty. If the duty is imposed by a statute which imposes the duty in both situations, one may simply deal with

96. 216 Kan. 486, 532 P.2d 1366 (1975).

97. 216 Kan. at 488-94, 532 P.2d at 1360-72.

98. 214 Kan. 329, 521 P.2d 304 (1974). Apparently, the *Borders* court relied on the RESTATEMENT (SECOND) OF TORTS §§ 357-61, 379 (1965). See 216 Kan. at 488-93, 532 P.2d at 1369-72.

99. 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980).

100. OHIO REV. CODE ANN. § 5321.04 (Page Supp. 1981).

101. 63 Ohio St. 2d at 181-82, 407 N.E.2d at 498.

102. See *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981); note 186 *infra* and accompanying text.

a breach of duty in terms of the tort consequences of a violation of a statute. This leaves one to wrestle with the problems of negligence per se, and what that properly means. If the duty is stated, by decision or by statute, in terms of a warranty of habitability, even greater difficulty is encountered with the meaning of a warranty, particularly when the warranty is deemed to apply to the dilapidations of leased premises arising after the lease is made. In any case, if one sticks to the notion that a breach of the duty is a breach of warranty, obvious civil nontort remedies ensue. Is it also obvious that tort liability also automatically ensues? Some courts, sometimes without thinking of the inherent difficulties or the alternatives, assume that it does.

The Massachusetts court struggled with these questions in *Crowell v. McCaffrey*.¹⁰³ The plaintiff was injured when a porch, which was in disrepair, gave way. The landlord had judgment below because of the finding that control of the premises had passed to the tenant.¹⁰⁴ The judgment was reversed. One ground for decision was traditional: there was sufficient evidence to go to the jury that the landlord had retained control of the porch.¹⁰⁵ In addition, the court found that the jury should also have had the issue respecting a possible breach of an implied warranty of habitability,¹⁰⁶ as declared in *Boston Housing Authority v. Hemingway*.¹⁰⁷ That case, like the others, did not contain any ruling or language on tort liability. It also was limited to defects in facilities vital to the use of the premises for residential purposes. The latter limitation, however, was not asserted in the dissenting opinion, which instead of imposing a more general warranty, would confine it to an implied agreement by the landlord that the leased premises shall comply with minimum standards imposed by law and regulations.¹⁰⁸ The court here simply resorted to the minority standard in *Hemingway* for the purposes of this case. In respect to the nature or extent of the landlord's duty, the court relied mainly on the old furnished-house-for-a-short-term rule, which was first adopted in this country in Massachusetts.¹⁰⁹ Apparently that doctrine is not one of negligence, but of strict liability.

103. 377 Mass. 443, 386 N.E.2d 1256 (1979).

104. 377 Mass. at 444, 386 N.E.2d at 1258.

105. 377 Mass. at 449, 386 N.E.2d at 1260.

106. 377 Mass. at 450-53, 386 N.E.2d at 1260-62.

107. 363 Mass. 184, 293 N.E.2d 831 (1973).

108. 377 Mass. at 451, 386 N.E.2d at 1261.

109. 377 Mass. at 451, 386 N.E.2d at 1261.

In addition to the usual exceptions to landlord nonliability, some jurisdictions have held that in a lease of a furnished house for a short term and for immediate occupancy, the lessor implicitly warrants that the premises are fit for human occupancy. This implication stems from the assumption that a lessee, in such circumstances, cannot make an adequate inspection

While seeming to say that *Hemingway* removed the limits on the furnished-house doctrine, so that it is now applicable to all residential housing, the court nevertheless expressly drew back from passing upon such questions as notice to the landlord or the time allowed to correct violations, and was content to say merely that the jury would have been justified in finding that the landlord, by the exercise of reasonable care, could have discovered whatever code violations the jury found to have existed.¹¹⁰ Put in this way, the ruling asserts negligence liability. But strict liability was approved in general terms and left standing in the wings. The court seems obviously concerned about what to do about the notice requirement and what such a requirement, if declared, would do to an assertion of strict liability. One may wonder why the court did not simply apply that section of the Massachusetts statute that requires a landlord to exercise reasonable care to repair defects on written notice¹¹¹ and give a tort remedy for injuries sustained for failure to repair. The statute in fact was cited. It is possible, although not clear, that the premises here were part of a three-family house, and so fell within the exceptions provided in the statute of owner-occupied two-or-three-family houses. A year later, in *Young v. Garwacki*,¹¹² the court reversed a judgment for the landlord in a suit by a guest of the tenant who was injured in a fall when a railing on a second floor porch gave way. The plaintiff alleged negligence against the landlord. The court traced the old law through new developments, ending with an acceptance of a generally applicable negligence doctrine, such as announced in *Sargent v. Ross*.¹¹³ Instead of simply finding that the above statute was controlling, the court merely asserted at the end of its opinion that the statute was consistent with the result reached in this case. Maybe again, the statute was not applicable because, although the landlord was found to have knowledge of the defect, apparently no written notice of the defect had been given to him. The court said, however, that a landlord should not be liable in negligence unless he knew or reasonably should have known of the defect and had a reasonable opportunity to repair it. In a footnote to this proposition the court said that the rule may be different in an action for injuries resulting from breach of the warranty of habitability, citing *Crowell* and ad-

of the premises before entering the lease. See 1 AMERICAN LAW OF PROPERTY, *supra* note 3, at § 345; RESTATEMENT (SECOND) OF PROPERTY § 17.6 reporter's note 8 (1977).

110. 377 Mass. at 449, 386 N.E.2d at 1260.

111. See MASS. ANN. LAWS ch. 186, § 19 (Michie-Law. Co-op. 1981).

112. 402 N.E.2d 1045 (Mass. 1980).

113. 113 N.H. 388, 308 A.2d 528 (1973), discussed *infra* at note 192. See 402 N.E.2d at 1049.

ding further that in that case, "We left open the question whether the landlord's liability begins only after he has had notice of the defect and reasonable time to repair it."¹¹⁴

A lower New York court, in *Kaplan v. Coulston*,¹¹⁵ has provided the most comprehensive survey to be found of the arguments for and against strict liability for residential landlords. The case involved a kitchen cabinet which fell injuring the plaintiffs, who sued originally alleging negligence of the landlord, but then moved to amend their complaint to assert strict liability for breach of an implied warranty.¹¹⁶ The answer, the court said, lies "in the resolution of the conflicting policies that press on all sides of this question."¹¹⁷ The arguments of the New Jersey court in *Dwyer v. Skyline Apartments, Inc.*,¹¹⁸ against strict liability, were restated. Others were mentioned, relating mostly to the problem of dealing with premises that may be new, but may also be old, with conditions of premises arising after the lease as well as those existing at the time of the lease, the probable lack of recourse by a landlord against suppliers of a building built long in the past, and the need of notice of defects from a tenant who is in control so that the landlord may take corrective action.¹¹⁹

On the other side, the court referred to the advance of strict liability in analogous areas and to its application in Louisiana¹²⁰ to landlords for tenant injuries. The court offered this summary of its arguments for strict liability: the landlord is in a better position to inspect and examine and to know when to repair or replace, he makes a profit from the venture, and he is in a better position to

114. 402 N.E.2d at 1050 n.9. In *Simon v. Solomon*, 385 Mass. 91, 431 N.E.2d 556 (1982), involving the repeated flooding of the plaintiffs' apartment by water and sewage, the court affirmed a judgment for damages for the reckless infliction of emotional distress. The court said that the landlord had "such a pattern of indifference that its conduct was outrageous, 'beyond all possible bounds of decency.'" 385 Mass. at 98, 431 N.E.2d at 562.

115. 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. 1976).

116. 85 Misc. 2d at 745, 381 N.Y.S.2d at 634. Section 235-b of the New York Real Property Law, N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981), which essentially imposes such a warranty, was enacted after *Kaplan*; however, the court cited a prior case which had found a warranty, see *Tonetti v. Penati*, 48 A.D.2d, 367 N.Y.S.2d 804 (1975), and subsequently considered whether a violation of the warranty produces strict tort liability. See 85 Misc. 2d at 746-47, 381 N.Y.S.2d at 635.

117. See 85 Misc. 2d at 748, 381 N.Y.S.2d at 636.

118. 123 N.J. Super. 48, 301 A.2d 463, *aff'd.*, 63 N.J. 577, 311 A.2d 1 (1973), discussed *infra* note 136; construed in 85 Misc. 2d at 748-49, 381 N.Y.S.2d at 636-37. But see *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436 (1980) (rejecting notice requirement in criminal intrusion context; discussed at note 280 *infra* and accompanying text).

119. 85 Misc. 2d at 748, 381 N.Y.S.2d at 636.

120. 85 Misc. 2d at 749-51, 381 N.Y.S.2d at 637-38. See text accompanying notes 220-21 *infra*.

spread the loss by insurance.¹²¹ Although the court did not invoke the law of products liability, it added that one of the purposes of strict products liability was to eliminate the difficulty of having to prove negligence.¹²² The result was a ruling that those arguments prevailed, and so the motion to amend the pleadings was granted.¹²³

The court in *Kaplan* mentioned the generally accepted notion that strict liability applies to the landlord's personal property found in furnished houses.¹²⁴ The California courts have extended this rule to include a wall-panel heating unit,¹²⁵ but, to this point, they have avoided a determination of strict liability with respect to structures such as stairways, balconies and railings. Similarly, a recent decision by the Hawaii court in *Boudreau v. General Electric Company*,¹²⁶ referring to the explosion of a washer-dryer, applied the principles of strict liability.

C. Negligence

A major problem with assuming that a breach of warranty means strict liability has been noted before. As many violations as not will relate to the condition of leased premises that arose after the tenant took possession under the lease. It only clouds analysis and understanding to call these breaches of warranty. It makes no sense to say that a landlord represents that he will repair ensuing conditions of disrepair. Rather he is making a promise, pure and simple. If one is willing to impose strict liability for breach of a true warranty, is it sensible to have two rules, strict liability and negligent liability, for circumstances that are the same, except that in one case the condition complained of existed when the lease was made? In fact, it may impose some difficulty in litigation to prove when such a condition first existed. The so-called warranty of habitability, for tort purposes, should be treated the same as any simple promise to keep the leased premises in a safe condition. This difficulty has apparently

121. 85 Misc. 2d at 752, 381 N.Y.S.2d at 638-39.

122. 85 Misc. 2d at 750-51, 381 N.Y.S.2d at 638.

123. In two later cases decided under § 235-b, the courts followed *Kaplan*. See *McGuinness v. Jakubiak*, 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. Ct. 1980); *McBride v. 218 E. 70th St. Assocs.*, 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979). In *McGuinness*, the court found that the absence of any provision for damages in 235-b was no obstacle.

Note, however, that several other New York cases have construed 235-b to justify liability for negligence, but not strict liability. See notes 162-63 *infra* and accompanying text. See generally Note, *New York's Search for an Effective Implied Warranty of Habitability in Residential Leases*, 43 ALB. L. REV. 661 (1979) (criticizing *Kaplan*).

124. 85 Misc. 2d at 750, 381 N.Y.S.2d at 637.

125. See *Golden v. Conway*, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

126. 625 P.2d 384 (Hawaii Ct. App. 1981).

been perceived by several legislatures that have declared a "covenant" by a landlord to keep the premises habitable.¹²⁷ The *Restatement (Second) of Property*, as explained below,¹²⁸ offers a way to take special account of defects existing when a lease takes effect under a theory of negligence liability.

As previously noted,¹²⁹ the *Restatement (Second) of Torts* provides that where a landlord contracts to repair, and if disrepair creates an unreasonable risk to persons on the property, the landlord is liable for physical harm to persons on the property if he "fails to exercise reasonable care to perform his contract." What does this mean? It certainly means that a breach of covenant alone is not enough. It seems irrelevant in an action for breach of contract that the defaulting party acted reasonably and in good faith. Although it may ultimately be a question of making a public policy judgment, rather than merely a conceptual classification as between contract and tort law, it does seem permissible to say that personal injuries from a breach of contract, which can produce large and unexpected losses or costs, should be treated if possible as within traditional notions of tort liability. But how can one who breaches a contract still have acted reasonably? Several possibilities should be evident. The failure of a landlord to act may be because he was unavoidably prevented or delayed in acting. In respect to repairs of leased premises, it seems vital that he must know, or under the circumstances should have known, of the need for repairs. This, in turn, implies that upon discovery of a defect, repairs rarely can be made instantly, on the spot. And in actually making repairs, should account be taken of the fact that he did all that anyone could be expected to do to make them properly?

In respect to violations of statutes or ordinances, such as building or housing codes, or administrative regulations, and even broadly stated duties of the lessor to keep premises safe, one might suppose that the same kind of analysis is applicable. Account must be taken of the fact that many of such statutes impose requirements that do not affect the safety of persons using the property. Apart from such cases, why should not a landlord be held simply to the duty to act reasonably in response to the need for action and also in the process of taking action?

127. See, e.g., ME. REV. STAT. ANN. tit. 14, § 6021 (1980); MICH. COMP. LAWS § 554.139 (1979); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981).

128. See text accompanying note 132 *infra*.

129. RESTATEMENT (SECOND) OF TORTS § 357 (1965).

As noted above,¹³⁰ the *Restatement (Second) of Torts* offers a very complicated standard that is put in terms of a statutory violation being "negligence in itself," but which is variously restricted, including the notion of excused violations, that is not substantially different from a duty to use reasonable care to comply with the statutes. We have also noted that in fact some courts have rejected any notion of negligence *per se* and have said that a violation of a statute, etc., is evidence, or *prima facie* evidence of negligence.¹³¹

If one can extricate himself from all the prevailing preconceptions concerning the nature of this problem, the most simple and obvious avenue to defining a landlord's tort liability respecting the condition of leased premises is to brush aside contracts, warranty, or statutory violations, and declare a rule of reasonable care, which includes the duty to respond reasonably to the need for action and to act reasonably in doing so. This approach would be based on the same policy considerations that caused courts and legislatures to declare a new enlarged duty and to prescribe certain non-tort remedies. It would not, however, be derived from an attempt to fashion tort remedies for nontort faults. The courts that have declared implied warranties of habitability could most easily arrive at such a result. In most of those states having new statutes that impose a similar general obligation on landlords, courts by construction could do the same; that is, they could treat the statutes as enlarging a landlord's duty without necessarily defining it in terms of negligence *per se*.

Part VI on the tort liability of landlords in the new *Restatement (Second) of Property* has been adroitly and simply framed to escape most of the conceptual difficulties mentioned above. In the introductory note reference is apologetically made to the traditional rule of immunity from tort liability, which, however, is given no black-letter recognition. The chapter consists almost entirely of a restatement of the traditional exceptions,¹³² which are identical with those appearing in the *Restatement (Second) of Torts*. A new one, section 17.6, is added, however, which in practice may supersede all the others. It provides that a landlord is liable for physical harm to tenants (and others) caused by a dangerous condition on the leased premises if he fails to exercise reasonable care to repair the condition, and the condition is in violation of (1) an implied warranty of habitability or (2) a duty created by statute or administrative regulation. Note first that this section completely short circuits the notion that the duty respect-

130. See notes 25-29 *supra* and accompanying text.

131. See notes 34-36 *supra* and accompanying text.

132. See RESTATEMENT (SECOND) OF PROPERTY at §§ 17.1-17.5, 17.7 (1965).

ing habitability is a warranty that implies some sort of strict tort liability. Note also the simple substitute for the complexity of the rules stated in the *Restatement (Second) of Torts*¹³³ about the tort consequences of statutory violations. In all cases covered by the section the dangerous condition which is the origin of the landlord's duty may have originated either before or after the tenant takes possession. The introductory note also notes that the doctrine of *res ipsa loquitur* has been applied to landlord tort liability. Comment c states that a landlord is subject to liability only for conditions for which he is aware or which he could have known in the exercise of reasonable care. In further elaboration of this requirement, it is stated that ordinarily a landlord will be chargeable with knowledge of conditions which existed prior to the time the tenant takes possession. In respect to conditions arising thereafter, a landlord may not be able to discover the condition, and so will not be liable until he has had a reasonable opportunity to remedy the condition after the tenant notifies him of it; but it is stated that a landlord, in the exercise of reasonable care, may be able to discover the condition on his own.

This section is applicable to residential property and no position is taken on its applicability to commercial or industrial property.

To those who argue, as have the appellate courts in Illinois,¹³⁴ that the invocation of an implied warranty of habitability was not intended to change traditional tort law, the *Restatement* offers the obvious comment about the incongruity of permitting a tenant to withhold rent on account of a hole in his floor but denying him any remedy for personal injuries sustained as a result of it.¹³⁵

Turning to the cases that have been decided after prior adoption of the implied warranty of habitability, *Dwyer v. Skyline Apartments, Inc.*,¹³⁶ was the first and leading case declaring that the implied warranty of habitability does not impose strict liability on landlords. The court said a duty was created in the landlord both by the common-law rule relating to facilities and equipment under his con-

133. See note 25 *supra* and accompanying text.

134. See notes 82-95 *supra*.

135. RESTATEMENT (SECOND) OF PROPERTY § 17.6, reporter's note 8 (1977). Section 18.3 extends the rule of § 17.6 to physical harm caused to persons outside the leased premises. Comment (b) to § 17.6 states that usual defenses in negligence actions, including contributory negligence and assumption of risk, are available to the landlord. Although nothing is said about it in the *Restatement*, presumably rules relating to comparative negligence should also be applicable.

136. 123 N.J. Super. 48, 301 A.2d 463, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973).

trol,¹³⁷ and by the Hotel and Multiple Dwelling Act, which enlarged the common-law duty to include all parts of the building and equipment.¹³⁸ On either basis, the court said that the basis for liability is negligence, referring specifically to the requirement that the landlord knew, or should have known, of the defect and had the opportunity to correct it.¹³⁹

In denying strict liability the court said that in *Marini v. Ireland*,¹⁴⁰ which declared an implied warranty of habitability, the plaintiff faced the remedial dilemma of premises unfit for habitation and his inability to assert any defense on that account in the landlord's dispossession action. The court said that the new "bill of rights" for tenants does not lead to tort liability.¹⁴¹ Did the court mean the same thing as the Illinois courts, referred to above, which held that the traditional tort law applies despite an implied warranty of habitability? If so, *Dwyer* should be included among the cases in the first section of this Part. In other words, what would be the result where the facts are not such as to invoke the Hotel and Multiple Dwelling Law or the rule about premises within the landlord's control? Would a landlord escape liability even if he were negligent? Is the court assuming that the implied warranty of habitability either produces strict liability or no tort liability at all? The only clear conclusion from the case is that the warranty does not invoke strict liability.

In rejecting strict liability, the court proceeded on the assumption that if the warranty of habitability were given tort consequences, these would be in terms of the strict liability declared in products liability cases. The court stated a number of reasons against accepting this analogy: the landlord was not engaged in mass production, had not created a product with a defect preventable by greater care at the time of manufacture, does not have the expertise to know and correct defects,¹⁴² and that an apartment has many facilities constructed by many artisans with different kinds of expertise and sub-

137. N.J. STAT. ANN. § 55:13A (West Supp. 1982). This statute imposes much of the same sort of duties on the landlord as do most of the recent enactments that purport to amend or reform traditional law. It is clear that *Dwyer* did not treat the statute as imposing strict liability.

138. 123 N.J. Super. at 52, 301 A.2d at 465.

139. In speaking of negligence as the basis of liability, the court only referred to the requirement of notice to the landlord and of opportunity to repair. It did not say that a landlord, upon receiving notice of a defect, must act as a reasonable person. Perhaps the court implied this by identifying the issue as one of negligence.

140. 56 N.J. 130, 265 A.2d 526 (1970).

141. 123 N.J. Super. at 55, 301 A.2d at 467.

142. 123 N.J. Super. at 55, 301 A.2d at 467.

ject to constant deterioration from many causes.¹⁴³

In a later case involving criminal intrusions on leased property, the court seems to have changed its position concerning strict liability.¹⁴⁴

As in New Jersey, the Texas court, in *Kamarath v. Bennet*,¹⁴⁵ declared the implied warranty of habitability. In two later cases in the Court of Civil Appeals¹⁴⁶ (one in fact decided before the final decision on appeal in *Kamarath*), the court held, as in *Dwyer*, that *Kamarath* does not apply in a personal injury case so as to impose strict liability. The matter seems now to have been settled by the enactment in 1978 of amendments of the law of landlord and tenant, which include a provision that a landlord has the duty "upon actual notice . . . to make a diligent effort to repair or remedy any condition which materially affects the physical health or safety of an ordinary tenant."¹⁴⁷

A Pennsylvania superior court has held that the implied warranty of habitability declared in *Pugh v. Holmes*¹⁴⁸ produces tort liability in landlords for negligence and that there is no breach of warranty until notice of a defect is given the landlord and a reasonable opportunity to repair.¹⁴⁹ The court cited as authority the *Restatement (Second) of Property*.¹⁵⁰

A Missouri court held that its previous adoption in *King v. Moorehead*¹⁵¹ of an implied warranty cannot be used to impose liability on the landlord for latent defects without his actual or constructive knowledge of the defect.¹⁵² The court then confessed that such a qualification seems to reduce the warranty for tort purposes so as to create liability only for negligence.¹⁵³ Such a conclusion may reasonably follow from the stated requirement about a notice or knowledge, but it is not necessarily so. One could argue that if a landlord acts within a reasonable time after notice of a defect, he

143. 123 N.J. Super. at 55, 301 A.2d at 467.

144. See *Trentacrost v. Brussel*, 82 N.J. 214, 412 A.2d 436 (1980).

145. 568 S.W.2d 658 (Tex. 1978).

146. *Porter v. Lubermen's Invest. Corp.*, 606 S.W.2d 715 (Tex. Civ. App. 1980); *Morris v. Kaylor Eng. Co.*, 565 S.W.2d 334 (Tex. Civ. App. 1978).

147. TEX. REV. CIV. STAT. ANN. art. 5236f § 2(a) (Vernon Supp. 1981).

148. 486 Pa. 272, 405 A.2d 897 (1979).

149. *Rivera v. Selfon Home Repairs & Improvements Co.*, 439 A.2d 739 (Pa. Super. 1982).

150. 439 A.2d at 743.

151. 495 S.W.2d 65 (Mo. App. 1973).

152. *Henderson v. W.C. Hass Realty Management*, 561 S.W.2d 382 (Mo. App. 1977) (construing *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973)).

153. 561 S.W.2d at 387.

would still be held strictly liable for the consequence of his action. In fact, it was held in *King v. Moorehead* that the warranty itself is not breached unless a landlord has received notice of the defect and had a reasonable time to repair. It may be noted that this case involved a claim for property damage rather than personal injury.

The Missouri court relied in part, as have a number of other courts, on the Indiana court's decision in *Old Town Development Co. v. Langford*.¹⁵⁴ That case involved the grim consequences of a fire resulting from the defective installation of an apartment building's heating system. As a result of the fire, a tenant's wife and two children were killed and the tenant himself was severely injured. Recognizing for the first time in that state the existence of an implied warranty of habitability, the court discussed at some length and with approval the applicability of strict liability.¹⁵⁵ The decision in favor of the tenant, however, was not based on that ground. The court fell back on an application of *res ipsa loquitur*, and, stressing that the landlord was also the builder of the building, found him negligent in failing properly to inspect the building during construction.¹⁵⁶ The court was troubled about applying strict liability where a defect arises after a lease begins, and in fact recognized that the warranty in such a case is really a promise to repair. The court expressed reluctance, as other courts have, to impose liability in such a case if the landlord had not had notice of the defect. In fact the court was willing to extend the notice requirement to defects existing when the tenant takes possession. Such a requirement was found to be satisfied here in a finding of constructive notice. The court found even that holding troublesome, because it implies that notice is imputed on the basis of what a reasonable inspection would reveal. Here such an inspection would not have revealed the defect. The decision regarding negligence was grounded on the fact that the landlord was also the builder and so should have discovered the defect in the process of building. The case is the epitome of the true dimensions of our problem. It reflects, with a greater degree of perception, the struggle that other courts have had in fashioning a warranty of habitability for tort purposes. The irony of it all is that *Old Town* appears not to be the law in Indiana. After oral argument on appeal, the case was settled, but the Supreme Court saw fit to issue an order declaring: "We grant transfer [equivalent of certiorari] and set aside the opin-

154. 561 S.W.2d at 387 (citing *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. Ct. App. 1976)).

155. 349 N.E.2d at 765-72, 774-76.

156. 349 N.E.2d at 781-82.

ion of the Court of Appeals in this case.”¹⁵⁷ I understand that this unusual sort of ruling means that the status of the case in Indiana is the same as if the opinion of the court below had never been written.¹⁵⁸

Turning to states which have enacted statutes imposing a duty on landlords similar in scope to the usual implied warranty of habitability, Washington's recently enacted statute is the most comprehensive and detailed code to be found so far in any state.¹⁵⁹ The statute has been interpreted not to impose strict liability on landlords,¹⁶⁰ the court relying on the provision that requires landlords to keep all structural components of leased premises in “reasonably good repair.” The court construed this language to mean that there is no violation until after notice to a landlord and a reasonable time thereafter to repair.¹⁶¹

Section 235-b of the New York Real Property Law¹⁶² provides that in every lease of residential premises the landlord covenants and warrants that the premises are fit for human habitation and are not subject to conditions dangerous, hazardous, or detrimental to life, health, or safety. The lower courts in New York are divided on whether this section imposes strict liability on landlords. In the only case to reach the Appellate Division,¹⁶³ the court refrained from a definitive interpretation of the statute. The court expressed its opinion, however, that the section was not intended to extend strict liability to landlords with regard to wrongs that had traditionally been in the area of tort liability. This was based on the legislative history of the section which indicated an intention to codify principles first developed in decisions in other jurisdictions, citing *Javins* and others, and later in this state.¹⁶⁴ The court said there was no hint in those decisions of such an extension of tort liability.¹⁶⁵

A Florida court has construed its applicable statute¹⁶⁶ to impose

157. 267 Ind. 176, 369 N.E.2d 404 (1977) (per curiam).

158. Statement to the author by a staff member in the office of the Clerk of the Supreme Court of Indiana.

159. See WASH. REV. CODE §§ 59.18.010 to 59.18.900 (1981).

160. *Lincoln v. Fornkoff*, 26 Wash. App. 717, 613 P.2d 1212 (1980).

161. 26 Wash. App. at 718-19, 613 P.2d at 1213.

162. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981).

163. *Mahlmann v. Yelverton*, 109 Misc. 2d 127, 439 N.Y.S.2d 568 (N.Y. Civ. Ct. 1980).

164. 109 Misc. 2d 127, at 128-29; 439 N.Y.S.2d 568, at 569-70.

165. 109 Misc. 2d 127, at 129-30, 439 N.Y.S.2d 568, at 571-72. See also *Hamel v. Schmidt*, 106 Misc. 2d 315, 431 N.Y.S.2d 770 (N.Y. Sup. Ct. 1980).

166. FLA. STAT. ANN. § 83.51 (1976). In *Mansur v. Eubanks*, 401 So. 2d 1328 (Fla. App. 1981), the court did not apply the new statute, presumably because the defect in a gas stove and water heater were not among those enumerated in the statute. But the court imposed a

on landlords the duty to take reasonable precautions to maintain the common areas of an apartment house in a safe and clean condition.¹⁶⁷

Similarly, the appellate court in North Carolina has, in three recent cases,¹⁶⁸ applied its new statute which expressly requires a landlord to keep all common areas in a safe condition,¹⁶⁹ but also provides that a violation of the statute is not to be treated as negligence *per se*.¹⁷⁰ The court construed the statute to require a landlord who knows of an unsafe condition, or should have known in the exercise of reasonable care, to exercise ordinary care to remove the unsafe condition. This duty is not essentially different from the prior traditional common law respecting common areas, except that the court found the statute to require that the unsafe condition be corrected, not merely that the landlord should warn the tenant of it.¹⁷¹

Several cases have scrutinized the District of Columbia's housing regulations, which require landlords to keep leased premises in repair so as to provide decent living accommodations.¹⁷² One case found that the landlord must keep a door sill in a reasonably safe condition;¹⁷³ another, in reversing a directed verdict for the defendant, held that the jury should decide whether the landlord had sufficient notice of a defective window screen and, if so, whether his failure to fix it was unreasonable;¹⁷⁴ and another, involving the death of a child who fell from an allegedly dangerous balcony, ruled that the landlord must use reasonable care under the circumstances.¹⁷⁵ In the last of these, the plaintiff lost for want of proof as to how or why the child fell. The court reasoned that strict liability should not ap-

duty which it said corresponded to that statutory duty: to reasonably inspect the premises before leasing, and to use reasonable care to repair dangerously defective conditions upon notice. *See also* *Thompson v. Rock Springs Mobil Home Park*, 413 So. 2d 1213 (Fla App. 1982).

167. *Forth v. Marhoefer*, 406 So. 2d 521 (Fla. App. 1981).

168. *Allen v. Equity & Investors Management Corp.*, 289 S.E.2d 623 (N.C. App. 1982); *O'Neal v. Kellett*, 284 S.E.2d 707 (N.C. App. 1981); *Long v. Ridgewood Assts.*, 284 S.E.2d 702 (N.C. App. 1981).

169. N.C. GEN. STAT. § 42-42 (Supp. 1981).

170. N.C. GEN. STAT. § 42-42 (Supp. 1981).

171. *Allen v. Equity & Investors Management Corp.*, 289 S.E.2d 623 (N.C. App. 1982). *Long v. Ridgewood Assocs.*, 284 S.E.2d 702 (N.C. App. 1981), involved an injury to a tenant from falling on accumulated ice on a pathway between the tenant's apartment and a parking lot.

172. *See, e.g., Kanelos v. Kettler*, 406 F.2d 951, 953-54 (D.C. Cir. 1968); *Noble v. Worthy*, 378 A.2d 674 (D.C. 1977).

173. *Kanelos v. Kettler*, 406 F.2d 951, 953-54 (D.C. Cir. 1968).

174. *Clarke v. O'Connor*, 435 F.2d 104, 111 (D.C. Cir. 1970).

175. *Noble v. Worthy*, 378 A.2d 674 (D.C. 1977).

ply since a landlord cannot anticipate all possible dangers.¹⁷⁶

Brennan v. Cockrell Investments, Inc.,¹⁷⁷ relied on Section 1714 of the California Civil Code, which makes the landlord responsible for injuries "occasioned to another by his want of ordinary care or skill in the management of his property"¹⁷⁸ The court found that a landlord must act reasonably at all times with respect to the leased premises.¹⁷⁹ In a later case, *Golden v. Conway*,¹⁸⁰ a defective wall-panel heater caused injury to the tenant, and the court ruled that the issue of strict liability should be submitted to a jury. This can be reconciled with *Brennan*, however, since the premises were nonresidential and the heater, although a part of the premises, invoked the law of products liability.¹⁸¹

Other state courts have followed the trend set by Washington, New York, California, and the District of Columbia in construing their respective landlord-tenant statutes to require a negligence standard. The Montana court, for example, reached the same conclusion as *Brennan* in applying what it called a "general obligation" statute.¹⁸² Similarly, a Michigan case rejected strict liability and said the plaintiff must prove that the defendant knew or should have known of an alleged defect and failed to exercise reasonable care in repairing it.¹⁸³ The Delaware court has reached the same result.¹⁸⁴ The Georgia court, in construing an old statute, at least requires notice to a landlord of the need for repairs.¹⁸⁵

176. 378 A.2d at 677.

In another case, the court did not rely on housing regulations, but upon *Javins* to declare that a landlord must anticipate dangerous, regularly recurring conditions and take necessary precautions. *Harris v. H.G. Smithy Co.*, 429 F.2d 744, 746 (D.C. Cir. 1970) (construing *Javins v. First Natl. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970)).

177. 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973).

178. CAL. CIV. CODE § 1714(a) (West 1982). Note that the court did not rely on CAL. CIV. CODE § 1941 (West 1954).

179. 35 Cal. App. 3d at 800-01, 111 Cal. Rptr. at 125.

180. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

181. 55 Cal. App. 3d at 960-63, 128 Cal. Rptr. at 77-79.

182. See *Corrigan v. Janney*, 626 P.2d 838, 840-41 (Mont. 1981).

183. See *Hockenhull v. Cutler Hubble, Inc.*, 39 Mich. App. 163, 167-68, 197 N.W.2d 344, 345-46 (1972) (construing MICH. COMP. LAWS § 125.471 (1970) (repealed 1978)).

184. See *Ford v. Ja-sin*, 420 A.2d 184 (Del. Super. Ct. 1980). The court held that the applicable landlord-tenant code superseded common law with respect to a landlord's tort liability. Although it did not explicitly define the landlord's duty, the court seems to have proceeded on a negligence theory, for it cited the RESTATEMENT (SECOND) OF TORTS § 360 (1965). That section deals with a landlord's traditional duty respecting common areas, and the court found that this duty extended to cover all parts of the leased premises. 420 A.2d at 188.

185. See *Tribble v. Sommers*, 115 Ga. App. 847, 156 S.E.2d 130 (1967); *Marr v. Dieter*, 27 Ga. App. 711, 109 S.E. 532 (1921); *McGee v. Hardacre*, 27 Ga. App. 106, 107 S.E. 563 (1921). These cases all construe the applicable Georgia statute to require notice to or knowledge of the landlord with respect to the need for repairs. See GA. CODE ANN. §§ 61-111, 61-112 (1982)

The Ohio court, in *Shroades v. Rental Homes, Inc.*,¹⁸⁶ in overruling *Thrash v. Hill*¹⁸⁷ in record time, affirmed a judgment for a tenant who was injured by a fall on a defective outside stairway leading to her apartment. The court relied on the Landlords and Tenants Act of 1974¹⁸⁸ which requires a landlord to comply with all relevant codes that materially affect health and safety, and to make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition. Local officials, upon inspection, had found the stairway defective and so informed the landlord's secretary. The tenant herself had attempted to give the same notice to the landlord. The obstacle to recovery in *Thrash v. Hill* was the fact that the statute specified certain remedies, but none for personal injuries. Now the court finds that a provision allowing damages for a breach of any duty imposed by law is sufficient for the present purpose.

It can be assumed that some courts would find the language of this statute, in requiring a landlord to do whatever is "reasonably necessary," etc., justified liability for negligence. In fact the court quotes with approval the relevant section of the *Restatement (Second) of Property*,¹⁸⁹ which requires a landlord to exercise reasonable care to repair when there is a violation of an implied warranty of habitability or a statute. But the court, in restating the statutory phrase omitted the word "reasonably," and after finding that the purpose of the statute is to protect persons using residential premises from injuries, declared that the violation of a statute which states specific duties is negligence *per se*. This principle was qualified only by requiring proof of proximate cause and the absence of contributory negligence, which was satisfied here by the jury's verdict, and also by the familiar requirement that the landlord received notice of the defective condition, or knew about it, or that the tenant made unsuccessful efforts to give notice.

It has been seen that the notice requirement has been assumed by some courts to invoke ordinary negligence as the governing theory of

(providing that "a landlord must keep the premises in repair" and "is responsible . . . for damages arising from defective construction or from damage from failure to keep the premises in repair."). One case, however, has held that the statute does not require notice or knowledge where conditions resulted from defective construction. See *Marr v. Dieter*, 27 Ga. App. 711, 109 S.E. 532 (1921).

186. 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

187. 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980), discussed *supra* at note 99.

188. OHIO REV. CODE ANN. § 5321.01 (Page Supp. 1981).

189. RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1977), discussed *supra* at notes 132 *et seq.*

liability. Does the court in *Shroades* approve the limitations upon negligence *per se* declared in the *Restatement (Second) of Torts*? The absence of notice to a landlord of a defect could be treated as within one of the "excuses."¹⁹⁰ It remains in doubt whether the Ohio court will accept the other excuses stated in the *Restatement* which, as we have noted, leave the *Restatement* rule, in practical effect, little different from a negligence standard.¹⁹¹ Those courts which treat the violation of a statute as only evidence of negligence avoid any difficulty on this score.

The most simple and direct approach to the problem, as previously noted, is to avoid dealing with tort consequences of breaches of contract or warranty or violations of statutes, and to assert an independent negligence doctrine that is supported by the same policy that justifies the imposition of an implied contract or warranty.

The leading case is *Sargent v. Ross*,¹⁹² where a tenant's four-year-old child was killed in a fall from an outside stairway. In affirming a judgment for the plaintiff-tenant, the New Hampshire court abandoned the old rule of *caveat emptor*, with its exceptions, and announced simply the acceptance for landlord-tenant relations of the general negligence doctrine of reasonable care in the circumstances.¹⁹³ It should be noted that, as applied to the facts of this case, such a doctrine is not a dramatic change in the old law. The landlord built the stairway, or was chargeable with building it properly, and was liable for building it without taking reasonable steps to prevent its being unsafe for use by the child of a tenant.¹⁹⁴ The court stated that this was a simple case of liability for misfeasance. If the rule announced by the court is applied to a case where a landlord is charged with the failure to act, such as to repair a condition that has fallen into disrepair, the rule is misleading. The general law of negligence does not reach such a case except in special relations between

190. See RESTATEMENT (SECOND) OF TORTS § 288A(b) (1965).

191. In *Horvath v. Burt*, 643 P.2d 1229 (Nev. 1982), the court relied on the Nevada statute that imposes a duty on landlords to maintain dwelling units in a habitable condition, and that specifically designated that such a unit is not habitable when it lacks electrical lights, etc., in conformity to applicable law and in good working order. The plaintiff was injured when she jumped from a window to escape a fire in the apartment building in which she was a tenant. Presumably on a finding that the fire was caused by faulty electrical wiring, the court reversed a judgment for the defendant. The court said that the jury could have concluded that the landlord's failure to inspect the wiring was either common law negligence or negligence *per se*. The landlord argued that he was under no duty to inspect the wiring, but the court said that the landlord had had sufficient previous notice of the deteriorated condition of the wiring to preclude the landlord's defense.

192. 113 N.H. 388, 308 A.2d 528 (1973).

193. 113 N.H. at 397, 308 A.2d at 534.

194. 113 N.H. at 399, 308 A.2d at 535.

the parties which justify imposing an affirmative duty to act. This case must be taken to mean that the court is really declaring that a residential landlord-tenant relation is now among those special relations, and that a landlord owes a duty to his tenant to act reasonably to keep leased premises safe. The court said that the special circumstances constituting the bases for the traditional exception to the old rule are not to be ignored, but that they are relevant only to the question whether the landlord had acted as a reasonable person. Unlike the view of other courts which have refused to impose liability unless the landlord had knowledge or notice of the defect in a reasonable time to act, this factor is merely included among relevant factors in deciding whether the landlord acted reasonably.¹⁹⁵ So presumably the absence of such notice is not a ground for withholding the case from a jury.

Several states have recently aligned themselves with the New Hampshire theory of an independent negligence doctrine. The Wisconsin court in *Pagelsdorf v. Safeco Insurance Company*¹⁹⁶ made clear that the doctrine extends to negligent omissions such as the failure to maintain a balcony in good repair.¹⁹⁷ In *Mansur v. Eubanks*,¹⁹⁸ the Florida court refused to apply an apparently relevant statute;¹⁹⁹ instead, it imposed a duty to conduct a reasonable inspection of the premises before leasing and to use reasonable care to repair dangerously defective conditions. An Arizona case, *Presson v. Mountain State Properties*,²⁰⁰ likewise applied traditional negligence theories where a defective water heater injured a tenant and his child. *Presson* held first that a landlord must act as a reasonable man in protecting his lessees from "unreasonably dangerous" condi-

195. 113 N.H. at 398, 308 A.2d at 534.

196. 91 Wis. 2d 734, 284 N.W.2d 55 (1979).

197. According to the court, the issue in *Pagelsdorf* was whether the landlord exercised ordinary care in maintaining the premises, and the absence or presence of notice is merely one of the relevant factors in this determination. 91 Wis.2d at 745, 284 N.W.2d at 61. In *Maci v. State Farm Fire & Cas Co.*, 314 N.W.2d 914 (Wis. App. 1982), the plaintiff was injured by a fall on accumulated ice on a pathway to the garage of a duplex apartment. The jury found the defendants 80% negligent. The appellate court, in affirming, followed *Pagelsdorf*, and added that where there is a known and obvious condition which is unavoidable by the person on the premises, the possessor (landlord) is not relieved of liability for physical harm merely by warning of the condition.

198. 401 So. 2d 1328 (Fla. 1981).

199. See FLA. STAT. ANN. § 83.51 (Harrison 1976) (requiring a residential landlord to maintain specified parts of the property in good repair).

200. 18 Ariz. App. 176, 501 P.2d 17 (1972). *Presson* was decided prior to the enactment of the Arizona statute that enlarged a landlord's duty. See ARIZ. REV. STAT. ANN. § 33-1324 (1974). Nevertheless, nine years later in *Shirkey v. Crain & Assocs. Management Co.*, 129 Ariz. 128, 130, 629 P.2d 95, 97 (Ct. App. 1981), the same court approved of *Presson* (though it did not apply).

tions²⁰¹ and, second, that under a negligence theory, the landlord must know about the defect.²⁰² Finally, in *Hall v. Wanen*²⁰³ the Utah court fashioned a rule of negligence similar to the one announced in *Sargent v. Ross*;²⁰⁴ moreover, it held that, under this law, a statutory violation serves merely as evidence of negligence, not as negligence per se.²⁰⁵

Summary of Negligence Cases

The New Jersey court held that an implied warranty of habitability does not result in strict liability, but the case so holding may no longer be the law. It was not perceived that such a warranty may have changed the traditional law by imposing a duty on landlords to keep leased premises safe, measured by a negligence standard. Several other courts seem more clearly to have so held. A considerable number of other courts have construed statutes imposing a broad duty of repair of leased premises in the same manner, that is, to have created tort liability for negligence. The Ohio court, in following its rule of negligence per se, has left its theory of liability in some doubt. Other courts have arrived at a negligence standard, not by construing statutes, or an implied warranty of habitability, but independently, as justified by contemporary conditions and expectations.

A theme running through most of the cases is the necessity for notice to a landlord of the need for repair and reasonable time to respond. This requirement is often seen as a hallmark of a negligence theory, and as therefore invoking that theory.

D. Comment on Negligence v. Strict Liability

Overall, judging by the cases so far, and taking into account the position of the *Restatement (Second) of Property*,²⁰⁶ the prospect of the acceptance of strict liability in landlord-tenant cases is not promising. Among the states conceding changes in the traditional law, it has not yet been clearly established as the law in any state. Liability for negligence clearly predominates.

Looking through the cases to the fundamental issues at stake, it should be clear that the use of a warranty as a vehicle for strict liability

201. 18 Ariz. App. at 177-78, 501 P.2d at 19.

202. 18 Ariz. App. at 178, 501 P.2d at 20.

203. 632 P.2d 848 (Utah 1981).

204. 632 P.2d at 850. See *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973); text accompanying notes 192-95 *supra*.

205. 632 P.2d at 850 n.1.

206. RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1977), discussed *supra* at note 132.

ity is seriously defective. It has been stated before that the so-called warranty of habitability, when applied to the facts of many cases involving defective premises, is not a warranty at all, but a promise to repair. In such cases, apart from other compelling considerations, the breach is a simple breach of contract, to which the usual contract-tort relations produce liability for negligence.

Neither is analysis furthered by treating the products liability law as applicable, even as an analogy. There is, of course, an analogy. But a resort to products liability law as authority directs attention to the fine points of difference or of similarity. Similarities are there, but the differences are significant. Efforts to add up the score divert attention from the main issue: does current public policy, inhering in landlord-tenant relations, compel or justify holding landlords in all cases as insurers of the condition of leased premises? To put that question does not necessarily suggest a negative answer. A substantial case can be made for such liability, perhaps limited or qualified, as will be further explored.

There is, however, a more substantial obstacle to strict liability, which is inherent in the nature of the landlord-tenant relation. Some voice keeps repeating, in case after case: the landlord must be given notice of the defect and time to repair it. This idea has not fared well in the products liability cases. Here it becomes a central theme. Perhaps for a good reason: the tenant is in possession and control of the place where he lives. This fact was the matrix of the old law, which was later fragmented by exceptions, now finally abandoned. But its last remnant cannot be readily exorcised. It is a remnant of the property ingredient in leases. It does make a difference if you are in control, if for no other reason than that you are the one who will know what is wrong. If you know it, can you hide it or forget about it? If your being in possession, or at least in constant contact, is no longer the basis for putting all the risks on you, you may well remain under a duty to communicate what you see. It is the kind of communication that tenants have never been reluctant to make; they do it all the time, even under the old law. The only alternative is to prescribe a right in a landlord to inspect leased premises regularly. Apart from the invasion of privacy this entails, inspection from time to time is not an effective substitute for the knowledge of a defect by the person who lives there. The ultimate goal of the new regime in landlord-tenant law is to keep premises in a habitable condition. Can a tenant who sees a defect, perhaps small but possibly dangerous, in a floor, a balcony, or in plumbing or heating equipment, be permitted to keep it to himself and later claim damages, perhaps

staggering damages, for hospitalization or doctors' bills, if he is hurt by it, or for wrongful death if his child is killed by it? And where, if the defect were made known, it could have been repaired at a relatively insignificant cost to the landlord? I am prepared to believe that, where a landlord does not know or have reason to know of a defect which is known to a tenant but uncommunicated to the landlord, few if any courts of last resort will hold a landlord liable. This need not preclude a contrary result where the defect is in a common area open to all tenants and within the landlord's control, so that knowledge of the defect can be attributed to the landlord.

One might couch all this in terms of voluntary assumption of risk. It may not be sensible to say that a tenant must leave an apartment if necessary to avoid a risk that he knows about. But if he continues to encounter it, without seeking to have it abated by his landlord, one might say that he assumed the risk. It may be preferable, however, not to analyze the problem in this manner, for its emphasis is upon whether a tenant encountered a known risk, with the usual difficulties about whether he had any reasonable alternative. It could be held that, after he has notified his landlord of a defect, he has no cause of action if he continues to encounter the risk; and the courts may confuse assumption of risk with contributory negligence, as they sometimes do. The emphasis should rather be upon the duty of a landlord to correct defects that he knows about or should know about. If a tenant notifies his landlord of a defect, and thereafter uses due care to avoid being injured by it, his cause of action should be preserved.

For many, if not most, cases involving injuries caused by defects in leased premises, a negligence doctrine will vindicate the basic goals of the new regime in landlord-tenant relations. Such a doctrine implies the requirement that a landlord know or should know of such a defect. With the assumed, but perhaps unprovable, inclination of juries to hold against a landlord in any case where a tenant is injured by such a defect, the inclusion of the notice requirement by the New Hampshire and Wisconsin courts as merely one of several factors to be left to a jury may encounter future objections. If it means that a jury is free to dispense with the requirement by emphasizing other elements in a plaintiff's case, it will not be acceptable to some courts.

A word can still be said, however, for strict liability, not by way of supplanting negligence doctrine entirely, but only in limited circumstances. Consider the type of case where a tenant is injured by a defect in leased premises which is unknown to him and to the land-

lord and which could not reasonably have been discovered by either. The rule of negligence requiring notice of the defect to the landlord will on these facts insulate him from liability and leave the tenant to bear his own loss. This is the typical case of a latent defect which, under traditional law, produced no liability unless the landlord knew or should have known of the defect.²⁰⁷ The basic policy of forcing improvements in deteriorated or defective housing is not relevant if no one knows of the particular defect. Is there still a basis in policy for shifting the loss to the landlord? If neither party could have reduced or avoided an unknown risk, what basis is there for deciding who must bear the loss? Since traditionally one must bear his own losses unless some ground exists for shifting them to someone else, one might find no basis for any kind of tort liability.

It has been argued in support of the implied warranty of habitability that a landlord is better able to bear the costs of making repairs. It is another matter, however, when losses result from personal injuries which can be so large as to constitute a financial disaster for any party who must bear them. In the absence of any fault on the part of either landlord or tenant, and where the tenant has no knowledge of the defect which can be passed to the landlord, attention will naturally focus on a possible method of spreading the loss. This is hardly the place to expect an assumption of the loss by the public through some enacted entitlement program. But losses such as these can be effectively spread by insurance. Whose insurance? That, of course, is the question. Landlords generally carry liability insurance. If their coverage is extended to include liability for the kind of losses referred to above, it may be assumed that their insurance rates will increase. Professor Love, in supporting strict liability on a broader scale than is proposed here, offers some comparative data respecting insurance rates in Louisiana, where strict liability is in effect, and in neighboring states.²⁰⁸ These data showed no appreciable difference.²⁰⁹ My own more limited inquiry showed a difference in such rates, the amount and significance of which is difficult to estimate.²¹⁰ Such data, of course, are deficient in assuming that a difference in rates among the states reflects only a difference in the extent of the landlord's liability. In any event, any

207. See text at note 14 *supra*.

208. See Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 135 n.662.

209. Insurance rates for New Orleans were comparable to other large cities, whereas rates for the rest of Louisiana were slightly higher than those in Mississippi and Georgia (excluding Atlanta), for example. See *id.*

210. The results were as follows:

increase in rates is likely to be reflected at least in part in rentals, although no reliable assessment of any of these variables is possible on the basis of what is now known.

On the other hand, if the loss remains on tenants, there is no available insurance for them as tenants, but only insurance generally available to persons for hospitalization and certain medical expenses. Such insurance probably will not cover all losses suffered by tenants from injuries on leased premises. Nor is it known how many tenants have such insurance; although it may be assumed that many do not. In the absence of any empirical study of major dimensions, can any judgment about the effects of such risk-spreading be made?

This is not a new kind of problem, but perhaps only more acute. Courts continually make value judgments that may not be supported by empirical data, if there were any. Very little of the common law is supported by such data. The new regime in landlord-tenant law itself — the enlargement of landlord duty apart from tort liability — has been criticized as representing only a moral judgment, unsupported by economic data.²¹¹ There is little room for a moral judgment in assessing the risk-spreading efficacy of a rule of law. Courts can decide as they have in other kinds of cases upon such insights as they have, perhaps subject to future change in doctrines that are proven inadequate. Strict products liability was not hindered by such a problem.

There is another problem here, however. Courts have traditionally avoided framing rules of tort law on the basis of the availability of insurance to one or both of the parties in a legal relationship. Regimes of no-fault insurance to cover automobile injuries or property are a legislative response to special circumstances.²¹² No-fault insurance for products liability cases has been recommended.²¹³ Perhaps some form of no-fault insurance program could be more easily worked out for landlord-tenant law than for the more diverse

<u>State</u>	<u>Rate (per 100 sq. ft.)</u>	<u>Date</u>
Louisiana:		
New Orleans	\$3.70	8/81
Remainder of State	2.10	8/81
Arkansas	1.10	8/81
Mississippi	.96	8/81

(rates furnished the author by two insurance companies).

211. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975).

212. See, e.g., Epstein, *Automobile No-Fault Plans: A Second Look at First Principles*, 13 CREIGHTON L. REV. 769 (1980) (25 states have adopted no-fault plans).

213. See J. O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975); Cooperrider, Book Review, 22 WAYNE L. REV. 189 (1975).

problems in products liability.²¹⁴ Workmen's Compensation laws were not enacted primarily as a device for spreading the risk of loss from industrial accidents, although that has been their effect. For the present, little reason appears why a court should not proclaim a very limited rule such as that proposed here solely on the basis of its own assessment of the risk spreading efficiency of the rule.²¹⁵ The court in *Kaplan*²¹⁶ did so with respect to a rule of strict liability much broader than the one proposed here, saying merely that a landlord is in a better position to spread the loss by insurance.²¹⁷

The court in *Kaplan* referred to other supporting factors, one of which was that landlords are in their business for profit; and so it can be asserted that liability insurance can be treated as one of the costs of their business, as of course it already is.²¹⁸ The court also included the argument that strict liability reduces the cost of lengthy jury trials by eliminating the difficulty of proving or disproving negligence.²¹⁹

It is relevant that the courts in Louisiana have lived for a long time with a broad doctrine of strict liability for landlords,²²⁰ but limited by the defenses of contributory negligence and assumption of risk.²²¹ These defenses may have reduced strict liability to a rule that is not greatly different from that proposed herein.

214. New Zealand has adopted this approach with respect to almost all types of accidental injuries. *See Gaskins, Tort Reform in the Welfare State: The New Zealand Accident Compensation Act*, 18 OSGOOD HALL L.J. 238 (1980).

215. A number of theoretical considerations suggest some inherent shortcomings of individualized insurance for tenants. First, individuals will have a relative disadvantage with respect to the availability and reliability of the relevant information; a landlord will better understand the likelihood and severity of accidents to be expected from defects in his properties, because he has the benefit of the experience of many different tenants over a longer period of time. Another problem is that those with the highest risk of premises-caused injuries are those least likely to locate affordable insurance. Unless low-risk and high-risk tenants are grouped under the same insurance regime, losses will not be spread interpersonally, only intertemporally. On both points, *see generally* G. CALABRESI, *THE COSTS OF ACCIDENTS* 55-64 (1970).

216. 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. 1976). *See* text accompanying notes 115-23 *supra*.

217. 85 Misc. 2d at 750, 381 N.Y.S.2d at 638.

218. 85 Misc. 2d at 750-51, 381 N.Y.S.2d at 638.

219. 85 Misc. 2d at 750, 381 N.Y.S.2d at 638.

220. The relevant portion of the Louisiana Civil Code states:

The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

LA. CIV. CODE ANN. art. 2695 (West 1973).

221. *See, e.g.*, *Frey v. Galle*, 399 So. 2d 1300 (La. App. 1981); *Anderson v. Sciambra*, 310 So. 2d 128 (La. App. 1975); *Revon v. American Guar. & Liab. Ins. Co.*, 285 So. 2d 354 (La. App. 1973); *Wilson v. Virgademo*, 258 So. 2d 572 (La. App. 1972).

The limited nature of this sort of liability seems to preclude the existence of facts that would permit the defenses of voluntary assumption of risk or contributory negligence.²²²

IV. EXCULPATORY CONTRACTS

Leases may contain variously worded provisions, most of which are broadly stated to relieve a landlord or his agent or employee from liability for personal injuries (or property damage) resulting from the condition of leased premises (or from any cause). Such clauses may also include a provision whereby the tenant agrees to hold the landlord harmless from any claim for damages. Provisions that the tenant shall accept the premises "as is" or shall assume the duty to repair have sometimes been treated as exculpatory clauses.²²³ The traditional law has been that such clauses are valid, even where liability is alleged for a landlord's negligence.²²⁴ Vindication of freedom of contract was asserted, sometimes including a denial that the landlord/tenant relation is one raising any countervailing policy.²²⁵

Recently, however, inroads have been made against this rule. Mainly a contrary result has been dictated by a finding of unequal bargaining power²²⁶ in residential leases or occasionally a finding of unconscionability.²²⁷ Unequal bargaining power is usually based on a finding or an assumption of the existence of an acute housing shortage. One court recently found that the very existence of an exculpatory clause is a sign of unequal bargaining power.²²⁸ Several courts have drawn a distinction between active and passive negligence of a landlord, invalidating the clause in the cases of active

222. It should be emphasized again that the strict liability suggested here should apply only in circumstances where the requirement of notice to landlords of the existence of defects is inapplicable because neither party knew anything about the defect nor is properly chargeable with notice. It is a matter of degree and of judgment whether such a rule should extend to cases where a tenant does not know but should have known of the defect. In its application, such a rule would mean that wherever strict liability is asserted against the landlord, he may, as a defense, prove that the tenant knew (or should have known) of the defect but failed to notify the landlord or make a reasonable effort to do so. Or, as a procedural alternative, a tenant asserting strict liability might be required to prove that he had no knowledge of the defect (and perhaps also that the defect was not apparent to one using the premises).

223. See, e.g., *Jones v. Houston Aristocrat Apartments*, 572 S.W.2d 1 (Tex. Civ. App. 1978).

224. See Annot., 49 A.L.R.3d 321, 328 (1973).

225. See, e.g., *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. 2d 436, 155 N.E.2d 545 (1958).

226. See, e.g., *Tenants Council v. DeFranceaux*, 305 F. Supp. 560 (D.D.C. 1969); *Cardona v. Eden Realty Co.*, 118 N.J. Super. 381, 288 A.2d 34 (1972).

227. See, e.g., *Tenants Council v. DeFranceaux*, 305 F. Supp. 560 (D.D.C. 1969); *Cardona v. Eden Realty Co.*, 118 N.J. Super. 381, 288 A.2d 34 (1972).

228. *Cardona v. Eden Realty Co.*, 118 N.J. Super. 381, 288 A.2d 34 (1972).

negligence.²²⁹ A number of cases have held that duties, specific or general, imposed by housing or other laws assert a public policy that invalidates contractual efforts to relieve landlords from such a duty.²³⁰ Where an exculpatory clause was offered to relieve a landlord of negligence in maintaining common areas in an apartment building, the Mississippi court recently held it against public policy, without reference to bargaining power or unconscionability.²³¹

Most of the above law may now be superseded. Statutes in several states have expressly declared exculpatory clauses invalid.²³² In states where the implied warranty of habitability has been declared, courts have held that the duty created cannot be varied or waived by lease provisions.²³³ Tort liability was not involved in these cases, but if a court holds that a breach of warranty has tort consequences, it is hardly to be expected that courts would prevent contracting against nontort liability while permitting exculpation for tort liability.²³⁴

Of greatest current significance are all the new landlord-tenant statutes or amendments. A section forbidding exculpatory or indemnifying provisions appears in the URLTA,²³⁵ but in the sections imposing duties on landlords to maintain premises, it is provided that, in respect to a single-family residence, the parties may agree in writing that the tenant shall perform the landlord's duty or make specified repairs only if entered into in good faith and not for the purpose

229. *See, e.g.*, *Matthews v. Mountain Lodge Apartments, Inc.*, 388 So. 2d 935 (Ala. 1980). *Cf.* *State Farm Fire & Cas. Co. v. Home Ins. Co.*, 88 Wis. 2d 124, 276 N.W.2d 348 (1979) (landlord's *deliberate* failure to take corrective action was active negligence). In *Taylor v. Leady & Co.*, 412 So. 2d 763 (Ala. 1982), without disturbing its distinction between active and passive negligence where the negligent act occurs after the beginning of the lease, the court said that the concealment of a known latent defect is a willful act not protected by an exculpatory clause. Three concurring justices felt that it was time for the court to announce the invalidity of all exculpatory clauses in residential leases, asserting that the exculpatory clauses not only violated public policy but are *prima facie* unconscionable.

230. *E.g.*, *Panaroni v. Johnson*, 158 Conn. 92, 256 A.2d 249 (1969); *John's Pass Seafood v. Weber*, 369 So. 2d 616 (Fla. App. 1979); *Feldman v. Stein Bldg. & Lumber Co.*, 6 Mich. App. 180, 148 N.W.2d 544 (1967).

231. *Cappaert v. Junker*, 413 So. 2d 378 (Miss. 1982).

232. *E.g.*, MD. REAL PROP. CODE ANN. § 8.208 (Supp. 1981); MASS. ANN. LAWS ch. 186, § 15 (Michie/Law. Co-op. 1981); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981).

233. *E.g.*, *Javins v. First Natl. Realty Corp.*, 428 F.2d 1091 (D.C. Cir. 1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973). Although these cases did not involve tort liability, courts may extend the prohibition against waivers of warranties to include waivers of tort claims.

234. Assuming, of course, that a court concedes a link between a breach of warranty and tort liability.

235. URLTA, *supra* note 57, at § 1.403. This section should be read together with the section prescribing a landlord's duty to maintain leased premises, which includes provisions that permit limited shifting of specified duties to a tenant. *See id.* at § 2.104.

of evading the landlord's duties.²³⁶ With respect to other kinds of dwelling units, the parties may agree that the tenant is to perform specified repairs only if the agreement appears in a separate writing and is supported by adequate consideration, is entered in good faith, etc., as in the case of a single-family residence, and the work prescribed is not necessary to cure noncompliance of the statutes; but the parties may not make the performance of the separate agreement a condition to any obligation of any rental agreement.²³⁷ A dozen states have such or similar provisions.²³⁸ Statutes in a larger number of states have less restricted provisions: a number contain only the requirement of good faith and the purpose not be to evade a landlord's duties;²³⁹ one simply prescribes good faith;²⁴⁰ two permit the modification of duties in leases for a term of one year or more,²⁴¹ or nine months or more;²⁴² and one simply permits a shift in burdens to a tenant as consideration for the rental agreement.²⁴³ The Texas statute provides that the relevant lease provision be in bold face type or underlined and be entered into knowingly, voluntarily, and for certain consideration.²⁴⁴ In a half dozen states, the statutes contain nothing on such clauses.²⁴⁵ It should be noted that the above provisions permitting restricted exculpatory clauses are applicable to the newly enlarged duty of landlords respecting habitability and compliance with housing codes. As in the URLTA, some statutes contain more general provisions rendering void clauses exculpating landlords. Exculpatory clauses are probably void under such provisions unless the particular duty involved is covered by the narrower and more permissive statutory provisions surveyed above.

In those states that have declared a tort duty on landlords not dependent upon specific violations of a warranty of habitability or a statute, it remains to be seen how exculpatory contracts will fare. Since a strong public interest is asserted as the basis for the duty, it can be expected that exculpatory clauses will not fare well.

236. URLTA, *supra* note 57, at § 2.104(b).

237. URLTA, *supra* note 57, § 2-104(c).

238. See the statutes cited in note 55 *supra* for the following states: Alaska, Arizona, Delaware, Iowa, Kansas, Kentucky, Montana, Nebraska, North Carolina, North Dakota, and Oklahoma.

239. See the statutes cited in note 55 *supra* for the following states: Hawaii, New Mexico, Tennessee, and Virginia.

240. NEV. REV. STAT. § 118a.290 (1981).

241. MICH. COMP. LAWS § 554.139 (Supp. 1981).

242. R.I. GEN. LAWS. § 34-18-16 (1969).

243. CAL. CIV. CODE § 1942.1 (West Supp. 1981).

244. TEX. REV. CIV. STAT. ANN. art. 5236F § 13 (Vernon Supp. 1981).

245. Idaho, Missouri, New Hampshire, New Jersey, Wisconsin, and West Virginia.

Overall, exculpatory clauses in residential leases may be on their way into oblivion, or at most to a restricted, minor role in landlord-tenant relations.

IV. LIABILITY FOR CRIMES OF THIRD PERSONS

This is a story of violent crimes — mostly murders, rapes, and gunfire, rather than merely burglaries and thefts — in apartments and apartment buildings. The fear felt by most residents in many areas is heightened in tenants because the incidence of crime is greater in multi-unit facilities and because in such areas there is little or nothing a tenant can do to protect himself. It is natural to assume that some responsibility rests on landlords because, apart from police protection, they are usually the only persons who can take protective measures. On the other hand, the situation has so deteriorated, especially in large low-income housing projects, that crime seems to be the order of the day, so that one may despair about any effort to remedy or alleviate the situation.

A. *The Duty To Act*

In respect to landlords' responsibility in this situation, the first problem again is the basis for finding a duty to do anything.²⁴⁶ Many of the cases involve crimes in common areas of residential buildings. One may resort to the traditional duty of landlords to discover unsafe conditions and make them safe.²⁴⁷ Traditionally this duty was thought of as involving injuries sustained because of physical defects in the property itself. Recently courts have had little trouble in extending the duty to injuries sustained from the crimes of intruders whose intrusions can be said to have been the foreseeable consequences of the condition of the premises. As likely as not, however, crimes will be committed within apartments, that is, on the premises leased and in the exclusive possession of the tenants. Here, if a duty is to be found, it must derive from the larger new duty of landlords created by an implied warranty of habitability or a similar duty declared by statutes. From either source the duty is commonly defined as including a duty to keep the leased premises safe. The extension of this duty to include security against criminal invasions

246. The traditional attitude was recently asserted in *King v. Ilikai Properties, Inc.*, 632 P.2d 657 (Hawaii App. 1982), asserting the absence of a duty unless there is some special relationship between the parties, of which the landlord-tenant relation is not one. The court distinguished *Kline v. 1500 Massachusetts Ave. Corp.*, 439 F.2d 477 (D.C. Cir. 1970), as involving special circumstances not present here.

247. See notes 8-14 *supra* and accompanying text.

is no more difficult, and perhaps easier, than an extension of the traditional duty respecting areas remaining within landlords' control.

The leading case is *Kline v. 1500 Massachusetts Ave. Corp.*²⁴⁸ The plaintiff was criminally assaulted in a common hallway in an apartment building. In imposing a duty on the landlord, the court began with the traditional duty of landlords respecting the condition of common areas. But the court expanded this duty, observing that crime in individual apartments requires that an intruder gain access through common entries and passageways. Judge Wilkey had no difficulty linking such a duty to the familiar principle that one in the best position to prevent injury is obligated to do so: "[a]s between tenant and landlord, the landlord is the only one in the position to take the necessary acts of protection required."²⁴⁹ This rationale for the *Kline* result reflects the sort of independent negligence analysis we have already seen in the context of accidental injuries.

But in the light of the policies underlying the expansion of traditional tort doctrine to encompass some expanded duty for landlords, the temptation to rely upon the implied warranty of habitability proved irresistible to the *Kline* court in the context of criminal third-party behavior.²⁵⁰ And beyond grounding the landlord's newfound duty in the implied warranty as well as the conditions of modern urban living, the court's reference to *Javins* as clearing away "the legal underbrush" of the old law indicates that this duty may rest on all landlords of residential premises.²⁵¹

Subsequent courts have played many variations on these two themes. In several major states the absence of a decision by the jurisdiction's highest court has left the issue in doubt, but in general the traditional tort rationale has been relied on. Thus, in a later District of Columbia case, the court appeared content to base liability on the landlord's duty to maintain common areas.²⁵² In Florida, one court approved the notion that access to apartments implies access through common areas.²⁵³ A court in another district upheld liability for a rape committed by an intruder in an apartment with a defective door lock, a latent defect known to the landlord but not to the tenant, but refused to declare any general duty on the part of the

248. 439 F.2d 477 (D.C. Cir. 1970).

249. 439 F.2d at 484.

250. 439 F.2d at 482.

251. 439 F.2d at 482.

252. *Graham v. M & J Corp.*, 424 A.2d 103 (D.C. Ct. App. 1980).

253. *Holley v. Mt. Zion Apartments, Inc.*, 382 So. 2d 98 (Fla. App. 1980).

landlord.²⁵⁴ The appellate courts of California show a transition. The notion was expressed that access to an apartment implies access through a common area.²⁵⁵ But initial reluctance was expressed to find a broad duty such as that imposed on innkeepers.²⁵⁶ Then a court, citing *Kline*, said that recent inroads have been made on traditional landlord immunity, at least in an urban, residential context.²⁵⁷ In the most recent case, the court seems to have accepted the view that a special relationship exists between landlord and tenant which justifies imposing on landlords a duty respecting foreseeable risks.²⁵⁸

A New York court reversed a judgment for the defendant landlord in *Sherman v. Concourse Realty Corp.*,²⁵⁹ where the tenant was injured in the lobby of a building that had a broken lock on the entry door. The issues as framed centered on proximate cause, but by entertaining this analysis the court indicated that the fact that the risk resulted from the intervening criminal conduct of another party was irrelevant. The opinion notes the approval of *Kline* in other jurisdictions, but maintained that the issue in *Kline* was not reached in the instant case. It is not clear what the court thought the issue was in *Kline*. Perhaps this treatment of that decision meant no more than that the landlord's duty existed merely in respect to common areas, such as the lobby of his apartment building. A later case in another judicial district, involving an assault in an unlighted parking lot, relied on the landlord's duty respecting common areas.²⁶⁰ A civil court opinion based liability on these two cases, and on a decision in the court of appeals²⁶¹ predicated liability for injury sustained in a lobby of a commercial building on the duty of a landowner respecting access areas open to the public.²⁶²

254. *Whelan v. Dacomo Enterprises, Inc.*, 394 So. 2d 506 (Fla. App. 1981).

255. *See O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

256. *Totten v. More Oakland Resid. Hous., Inc.* 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1977).

257. *Duarte v. State*, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978).

258. *Kwaitbowsky v. Superior Trading Co.*, 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).

259. 47 A.D.2d 134, 365 N.Y.S. 2d 239 (1975).

260. *Loeser v. Nathan Hale Gardens, Inc.*, 73 A.D.2d 187, 425 N.Y.S.2d 104 (App. Div. 1980).

261. *Nallan v. Helmsby-Spear, Inc.*, 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980).

262. *Dick v. Great South Bay Co.*, 106 Misc. 2d 696, 435 N.Y.S.2d 240 (Civ. Ct. 1981). In *Bass v. City of New York*, 61 Misc. 2d 265, 305 N.Y.S.2d 801 (1969), a public housing authority was authorized to provide a uniformed police force. The authority elected to assume such powers, but was found to have taken inadequate measures to implement its authority. It was held liable in a suit for wrongful death of a daughter of a tenant who was raped and murdered within the premises under the authority's control.

The Maryland court has recognized that a landowner may incur liability for personal injuries of tenants arising from the criminal acts of third persons in common areas, but has restricted this liability with a fairly rigorous foreseeability standard.²⁶³ The Virginia court, in reversing a judgment for the plaintiff-tenant, refused to approve any general duty owed by the landlord for the provision of protection against the criminal acts of third parties.²⁶⁴ But the court cited *Kline* as approving recovery in certain circumstances where the risk of criminal assault was clearly foreseeable.²⁶⁵

In *Johnston v. Harris*²⁶⁶ a tenant was assaulted upon entering through an unlocked door into a dimly lighted vestibule in an apartment building located in a high-crime area. The court of appeals treated the action as based on the failure of the defendant's "decendent," the landlord, to provide proper locks and lighting. The supreme court found that this basis for liability was too narrow and did not take account of the allegation that the landlord was negligent in creating a condition conducive to criminal assaults. The court relied on Section 302B of the *Restatement (Second) of Torts*.²⁶⁷ The court failed to notice that, although the section refers to omissions, as well as to acts, it does not impose a duty upon all persons to take affirmative action to protect other persons from the crimes of third parties. Section 302B is merely a special application of section 302A.²⁶⁸ It is clear that the omissions referred to in section 302A are those arising out of acts, such as where a person constructs a building which blocks a sidewalk but fails to provide a guardrail against traffic on the street. Section 302B expands the scope of the rule in a comment that refers to circumstances where the defendant is under a special responsibility toward the individual who suffers harm. The *Restatement* does not specifically include the landlord-tenant relationship among those, such as the inkeeper-guest relationship, that give rise to such an obligation. This would not have prevented the court from finding a sufficient similarity between these relationships to justify the imposition of an affirmative duty, but the court did not

263. *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976).

264. *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E.2d 841 (1974).

265. 215 Va. at 159, 207 S.E.2d at 845.

266. 387 Mich. 569, 198 N.W.2d 409 (1972).

267. "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." *RESTATEMENT (SECOND) OF TORTS* § 302B (Tent. Draft No. 17, 1971).

268. "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person." *RESTATEMENT (SECOND) OF TORTS* § 302A (1965).

make the point explicit. Similarly, the facts fail to indicate whether the vestibule where the assault took place was a common entryway or led only to the plaintiff's apartment. The decision therefore leaves unclear whether the court would have extended the landlord's duty beyond the familiar obligation to keep common areas in a proper condition. A later case affirmed judgment for a tenant in an office building who was injured by a patient in a mental health clinic, which was a tenant in the same building.²⁶⁹ Although the main issue concerned proximate cause, the court recognized that the landlord's duty was based on its control of the common areas, which of course is nothing more than the duty of any possessor to persons properly upon his land.

Reference was made to the refusal of Illinois courts to extend the traditional tort liability of landlords.²⁷⁰ It was only to be expected that these courts would discover no duty in the landlord to protect the tenant from crime. The Illinois courts in fact have so held, both in cases of crimes in apartments and in common areas. Most of these cases arose out of crimes in public housing projects in Chicago. In a decision by the supreme court, a provision of the State Housing Authority Act requiring landlords to provide decent, safe, and sanitary dwellings, was held to refer merely to the physical condition of the premises.²⁷¹ But the supreme court imposed liability on the basis of the way security guards were used, that is, they were off-duty during certain hours, which was found to increase the hazards during those hours.²⁷² Recently that case was explained and limited by the assertion of an exception where a landlord undertakes to provide security measures but does so negligently.²⁷³ The prior case was declared to stand for that proposition and not the proposition that a landlord is under a duty not to increase the danger from criminal intrusions, in the absence of a voluntary undertaking to provide security. It is possible that the court's rigorous ruling may not withstand other exceptions, the definitions of which are not yet discernible. The supreme court, in the two cases mentioned above, made no reference to an

269. *Samson v. Saginaw Professional Bldg.*, 393 Mich. 393, 224 N.W.2d 843 (1975). But see *Escobar v. Brent Gen. Hosp.*, 106 Mich. App. 828, 308 N.W.2d 691 (1981), where the court held that no duty was owed to a tenant in a house who was robbed in a driveway adjacent to the house, in the absence of any showing that the house was improperly maintained or without outside lights. In cases of this kind, the court said that the landlord owed no duty to provide security personnel.

270. See notes 82-92 *supra* and accompanying text.

271. *Pippin v. Chicago Hous. Auth.*, 78 Ill. 2d 204, 299 N.E.2d 596 (1979).

272. *Cross v. Wells Fargo Alarm Servs.*, 82 Ill. 2d 313, 412 N.E.2d 472 (1980).

273. See *Phillips v. Chicago Hous. Auth.*, 91 Ill. App. 3d 544, 414 N.E.2d 1133 (1981).

earlier case in the appellate court where entries into a tenant's apartment were made on three occasions by breaking through a wall.²⁷⁴ Notifications and protests about the earlier break-ins were made to the landlord. The court threw up its hands and said that, given the "bizarre facts" and nature of the prior burglaries, another occurrence was eminently foreseeable, and the defendant was obligated to guard against it.

A few courts have sought to go the warranty route. In a case brought in federal district court in Kansas, the court initially found no basis in Kansas law for imposing liability on a landlord for negligence that allegedly permitted the rape of the plaintiff in her apartment.²⁷⁵ The case led to another opinion after the plaintiff alleged breach of an express and an implied warranty.²⁷⁶ This time the plaintiff won a verdict, and the court denied the defendant's motion for judgment n.o.v. The court relied on *Steele v. Latimer*,²⁷⁷ which recognized an implied warranty that a landlord will keep the premises in the same condition as they were in at the beginning of the tenancy. In denying liability for negligence, but sustaining liability for breach of warranty, these opinions raise the question whether the warranty path to finding a duty of security against third-party intruders leads to strict liability whenever tenants suffer injuries from crimes upon the premises.

The development of this approach in the New Jersey courts suggests this very outcome. In *Braitman v. Overlook Terrace Corporation*,²⁷⁸ a landlord was held liable for the theft of property from a tenant's apartment, alleged to have resulted from a defective dead-bolt lock in a door. All the justices concurred, but three opinions were written, leaving the rationale in doubt. The following grounds were mentioned with some reservations as to their independent sufficiency: a broad view of *Kline* as a response to prevailing urban conditions; the foreseeability of criminal conduct; the existence of an implied warranty of habitability; and the violation of statutory regulations as either evidence or conclusive evidence of negligence. The assertion of the implied warranty as an independent rationale was

274. *Stribling v. Chicago Hous. Auth.*, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975). The court felt that these extreme facts justified an exception to the general rule. The facts in the case were exceptional, but only in degree, and leave some doubt about when an Illinois court may be willing to depart from its general rule. A subsequent opinion limited *Stribling* to its facts. See *Phillips v. Chicago Hous. Auth.*, 91 Ill. App. 3d 544, 414 N.E.2d 1133 (1981).

275. *Flood v. Wisconsin Real Estate Inv. Trust*, 497 F. Supp. 320 (D. Kan. 1980).

276. *Flood v. Wisconsin Real Estate Inv. Trust*, 503 F. Supp. 1157 (D. Kan. 1980).

277. 214 Kan. 329, 521 P.2d 304 (1974).

278. 68 N.J. 368, 346 A.2d 76 (1975).

accompanied by a footnote indicating that its acceptance would require a reconsideration of *Dwyer v. Skyline Apartments*.²⁷⁹

In *Trentacost v. Brussel*,²⁸⁰ the court faced the problem again in a case where a tenant was attacked and robbed in a hallway of an apartment building. In affirming a judgment for the plaintiff, the court was again unanimous, although one justice wrote a limited concurring opinion and another dissented in part. The court reiterated the validity of *Kline* and statutory violations as grounds of liability. But it also recognized breach of an implied warranty of habitability as an independent ground for the decision, thus taking the opportunity created in *Braitman* for effectively overruling *Dwyer*. The court indicated the warranty requires a landlord to provide reasonable security from the risk of criminal activities. There follows this consistent, but startling, proposition: since the warranty itself is not dependent on the landlord's knowledge of any risks, the plaintiff does not need to prove notice to the landlord of any unsafe conditions.²⁸¹ Strict liability has enjoyed limited success even without the added intervention of third-party criminals;²⁸² aside from *Flood*, the federal decision in Kansas, this is the only decision even suggesting such a regime in this context.²⁸³ The *Brussel* decision seems to hold landlords strictly accountable for every crime committed on their property, without regard to the reasonableness of their precautions or their knowledge of any risk.

So we have seen the New Jersey court swinging from one extreme to the other. First, the warranty of habitability is held irrelevant to a landlord's tort liability. Then the warranty is offered as the basis for strict liability. The source of the court's trouble is obvious. Instead of facing the difficult question whether strict liability is justified in these circumstances, and identifying proper factors justifying such liability, the court simply assumed that its prior judgment in favor of a warranty of habitability for nontort purposes automatically produced strict liability for tort purposes.

Other courts have been able to see a middle ground: breach of a

279. 123 N.J. Super. 48, 301 A.2d 463, *aff'd.*, 63 N.J. 577, 311 A.2d 1 (1973), discussed *supra* at note 136.

280. 82 N.J. 214, 412 A.2d 436 (1980).

281. 82 N.J. at 228, 412 A.2d at 443.

282. See note 206 *supra* and accompanying text.

283. In *Kwaitkowsky v. Superior Trading Co.*, 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981), the court, citing *Trentacost*, asserted a breach of the implied warranty of habitability as one ground imposing a duty on landlords. There was, however, no discussion of the dimensions of such a duty. But in laying emphasis on the landlord's knowledge of a defective lock, and his failure to repair it, one senses little in the opinion to indicate an acceptance of a new kind of strict liability.

warranty of habitability is an important element in finding a landlord liable for negligence.²⁸⁴ Such a solution is fortified by a factor previously emphasized herein: often in these cases the condition of the premises develops after the lease begins, where it makes little sense to treat a landlord's non-tort duty as a true warranty rather than as a promise to repair.

B. *Scope of the Landlord's Duty*

It is not enough to declare a duty in a landlord to his tenants that embraces security against unlawful intrusions. A landlord is not liable for harm done by every criminal intruder. In cases not involving criminal acts of third persons, causation or foreseeability poses no special problem. Where a tenant is injured by a fall on a stairway where the steps are decayed or the lighting is insufficient, it is an easy step to find the landlord liable for failure to maintain proper conditions. Here the problem is not so easy. Initially this problem was conceived of as one of proximate cause, where the criminal acts of third persons could be treated as an intervening cause which insulated landlords from liability.²⁸⁵ For the most part, the courts have had no difficulty in avoiding this conclusion. The reason given is that a landlord is not responsible for all crimes that may be committed on his property, but only for those that are foreseeable.

There is no need here for any inquiry into tort law generally in regard to the role of or the relation between proximate cause and foreseeability. Whether articulated as a limit on the defendant's duty, a justification for his conduct as reasonable under the circumstances, or a failure to prove proximate cause, the emphasis courts place on foreseeability in these cases evidently means that foreseeability is an important ingredient in defining a landlord's duty.²⁸⁶ Whatever may be the proper legal analysis, most of the recent cases have explicitly or implicitly asserted the foreseeability requirement.²⁸⁷ Presumably, even the New Jersey courts would do the same,

284. See notes 136-58 *supra* and accompanying text.

285. See Eldridge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937); W. PROSSER, LAW OF TORTS § 44 at 272 (4th ed. 1971).

286. The elements of negligence do not exist in isolation, and foreseeability is relevant to each of them. The prevailing approach views the risks of a defendant's conduct that a reasonable man would foresee as defining the scope of duty and the limits of proximate cause. See, e.g., *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 90, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed."); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.2 (1956).

287. *Flood v. Wisconsin Real Estate Inv. Trust*, 497 F. Supp. 320 (D. Kan. 1980); *Graham v. M & J Corp.*, 424 A.2d 103 (D.C. App. 1980); *O'Hara v. Western Seven Trees Corp.*, 75 Cal. 3d 798, 142 Cal. Rptr. 487 (1977); *Johnston v. Harris*, 387 Mich. 569, 198 N.W.2d 409 (1972);

at least with respect to allegations of negligence, as opposed to claims based on the implied warranty theory.

The courts have taken widely varying approaches in determining what evidence is relevant to foreseeability. The *Kline* court responded to the objection that all crimes are foreseeable by arguing that only those crimes that are predictable and probable are foreseeable.²⁸⁸ This was immediately tied to prior crimes, known to the landlord, on his property. The Maryland court limited the relevance of proof of prior criminal acts to those that occur on the premises in question.²⁸⁹ On the other hand, a New York civil court encountered no difficulty with the absence of such proofs, because of the rising crime rate in all neighborhoods.²⁹⁰

Several courts have had occasion to rule or comment on the foreseeability of crime in particular circumstances. One court said that a gunfight between unknown persons in a laundry room in an apartment building was not to be anticipated,²⁹¹ and another ruled that a heart attack induced by the throwing of a can of paint from the balcony of an apartment building down upon the plaintiff was not foreseeable.²⁹² In another case, where a tenant was injured by a fire set by an evicted tenant, one judge concluded that the foreseeability question in these cases is too complex to be entrusted to a jury.²⁹³ One court held that a showing of a high incidence of crime is not enough; prior incidents similar to the one complained of must be proved.²⁹⁴

Few of the courts in the recent cases have addressed the issue of legal cause. Three courts²⁹⁵ have cited sections 448²⁹⁶ and 449²⁹⁷ of

Sherman v. Concourse Realty Corp., 47 A.D. 134, 365 N.Y.S.2d 230 (1975); *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E.2d 841 (1974).

288. 439 F.2d at 483.

289. *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976).

290. *Dick v. Great South Bay*, 106 Misc. 2d 686, 435 N.Y.S.2d 240 (Civ. Ct. 1981).

291. *Totten v. More Oakland Resid. Hous., Inc.*, 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1977).

292. *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E.2d 841 (1974).

293. *Graham v. M & J Corp.*, 424 A.2d 103, 108 (D.C. App. 1980) (Nebeker, J., dissenting).

294. *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976).

295. *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); *Holley v. Mount Zion Terrace Apartments*, 382 So. 2d 98 (Fla. App. 1980); *Johnston v. Harris*, 387 Mich. 569, 198 N.W.2d 409 (1972).

296. "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded the opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the

the *Restatement (Second) of Torts* to support their decisions. In one of these the court remarked that section 448 recognizes the underlying significance of the element of foreseeability.²⁹⁸

The cases suggest that the courts are concerned by something that is not explained merely by a simple standard of foreseeability as an answer to treating criminal intrusions as superseding causes. Part of this concern may reflect the perceived futility of attempts to prevent crime by the assertion of tort duties. Another factor contributing to this concern may be the apprehension that any case which goes to a jury under general tort instructions about a heinous crime committed within rental housing will inevitably result in a verdict for the plaintiff. Most people are angry and frustrated about the prevalence of violent crime, and about the inability of victims to do anything about it; they are likely to take any means offered to shift the burden of crime prevention from innocent victims. This can result in putting burdens on landlords that they are no better able to bear than are the police. And the negative economic consequences of imposing this burden on the operators of low-income housing, the site of the greatest incidence of crime, surely exceed those attributed to the imposition of the duty on landlords to provide habitable dwellings.²⁹⁹

This state of affairs may not be conducive to a simple and straightforward solution. One may expect some courts to dispose of some cases by a narrowing of the scope of a landlord's duty. Note how some courts apparently have responded to the problem. The Illinois courts refused to lay down a rule that conceded a landlord's liability for criminal intrusions; but in one case asserted a landlord's liability where three identical crimes were committed by the same means in the same apartment.³⁰⁰ The Maryland court defined a landlord's duty, in response to a certification of questions, as limited

opportunity to commit such a tort or crime." *RESTATEMENT (SECOND) OF TORTS* § 448 (Tent. Draft No. 17, 1971).

297. "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." *RESTATEMENT (SECOND) OF TORTS* § 449 (Tent. Draft No. 17, 1971).

298. *Johnston v. Harris*, 387 Mich. 569, 198 N.W.2d 409 (1972).

299. Low-income housing is the site of most residential crime; if the costs of security measures are passed on to tenants, an unexpected hardship will be imposed on the very people a strict liability standard is intended to protect. See Recent Development, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity*, 33 VAND. L. REV. 1493, 1519 (1980). Cf. *Goldberg v. Housing Auth.*, 38 N.J. 578, 591, 186 A.2d 241, 298 (1962) ("The bill will be paid, not by the owner, but by the tenants. And if, as we apprehend, the incidence of crime is greatest in the area in which the poor must live, they, and they alone, will be singled out to pay for their own police protection.").

300. *Stribling v. Chicago Hous. Auth.*, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975).

to circumstances where the landlord knows or should know of prior criminal activity within his own common areas, but not of criminal activity in the neighborhood.³⁰¹ A New York court, in sustaining a landlord's liability where he had failed to provide a proper lock on a lobby door, refused to concede that it was following the rule of *Kline*.³⁰² The California courts, obviously affected by the direction taken by *Kline*, are still in conflict about throwing down the old bars to liability and treating landlords like innkeepers. One California court, in following *Kline*, emphasized that the plaintiff was not the victim of a sudden unexpected outburst of gunfire (as in a prior case), but was raped in the same manner as other tenants in the same building.³⁰³ As for *Kline* itself, the court, in defining foreseeable crime as "probable and predictable," laid emphasis on the fact that tenants other than the plaintiff had been subjected to crimes within the same building as the result of the defendant's abandonment of security measures previously taken. In fact, *Kline* was one of the easiest kinds of cases in which to impose liability on a landlord. It is not always easy to tell, where courts have followed *Kline*, whether the court is moved more by *Kline's* sweeping generalities than by *Kline's* possibly narrowing implications.

It is not easy to generalize from these responses. If we see, more than anything else, an emphasis on prior crimes within a defendant's property, and at least one refusal to extend foreseeability beyond those boundaries, does this relate less to foreseeability than to the adequacy of the defendant's conduct in securing the premises? The concerns suggested about the consequences of an unrestricted application of foreseeability might in fact be resolved by centering attention on the adequacy of a defendant's conduct in the circumstances, that is, did the defendant take security measures that were reasonable in the circumstances? Any thoughtful person will realize that a landlord should not be cast in the role of a private law enforcement agency nor expected to prevent all crimes on his property. Do some courts believe that, for reasons previously stated, a jury is unable or unwilling to make such a thoughtful judgment? Note the view expressed by one dissenting justice that the foreseeability issue in these cases is too complicated to entrust to a jury.³⁰⁴

In striking contrast, we recall the New Jersey court's startling ac-

301. *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976).

302. *Sherman v. Concourse Realty Corp.*, 47 A.D. 134, 365 N.Y.S.2d 239 (1975).

303. *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1978).

304. *Graham v. M & J Corp.*, 424 A.2d 103, 108 (D.C. App. 1980) (Nebeker, J., dissenting).

ceptance of something very close to strict liability.³⁰⁵

The future of this law is difficult to predict. Surely we will continue to see liability imposed on landlords for injuries resulting from the criminal acts of third persons. It is not clear, however, whether at least some courts will seek, by undefined, perhaps undefinable, means to limit landlords' duty by something more than instructions to a jury on traditional negligence and causation standards.

CONCLUSION

Something happened to the bandwagon on its way into the brave new world of landlord-tenant law. Property law was rejected, contract law was embraced, and tort law was simply overlooked. Then inevitably tort cases began to rear their heads, and instead of hearing more plaudits for the implied warranty of habitability, we began to witness an extraordinary scenario of hesitations, backing and filling, pulling and hauling, and dramatic reversals over difficult pitfalls of doctrine and disturbing policy problems. The bitter fruit of a careless labelling as a warranty of increased duties on landlords finally came to harvest. Or, in contrast, courts like the Illinois court, spat out the fruit leaving landlords with some significant increase in liabilities, but not for injuries sustained by tenants. These phenomena, however, do not subvert the new regime of increased landlord responsibility. The problem is merely in making the inherently difficult adjustments of an essentially nontort duty to accommodate properly its tort implications. The more dramatic stresses in a few leading jurisdictions do not provide the full measure of what has been going on. For the most part, courts have so far managed reasonably well to gain their equilibrium. The result, again for the most part, is the hardly exciting prospect of finding a resting place in the traditional law of negligence. Most courts who cheerfully rode another bandwagon into strict products liability have drawn back here, and again perhaps for good reason. But strict liability cannot be summarily dismissed and may need to be adapted in some degree for these purposes, as a complementary companion of negligence liability.

The courts in general have also recently moved toward recognizing a duty in landlords to take protective measures against violent crime in and around apartment buildings. The basic obstacle, the absence of a relationship that would justify a duty of affirmative action, has been readily overcome in most jurisdictions. This has been

305. *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436 (1980), discussed *supra* at note 279.

accomplished by a combination of an extension of landlords' traditional duty respecting the condition of common areas under their control and the assertion of a similar but broader duty arising from the recent enlargement of landlords' duty generally by virtue of statutes or judicial decisions. The need for a limitation of this duty has been met by the assertion of liability only for reasonably foreseeable criminal intrusions. Considerable litigation can be expected over the administration of this standard. There are signs that some courts may not be willing to define a landlord's duty merely in terms of foreseeable risks, but just how it might otherwise be defined, or what other limitations might be imposed, is not yet evident.