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TORTS-LIABILITY OF A LANDLORD FOR INJURIES TO PERSONS ON THE PREMISES-COVENANT TO REPAIR-EFFECT OF REPAIRS MADE UNDER SUCH COVENANT SUBSEQUENT TO AN INJURY CAUSED BY DEFECT REPAIRED

William M. Myers S.Ed.
University of Michigan Law School

TORTS—LIABILITY OF A LANDLORD FOR INJURIES TO PERSONS ON THE PREMISES—COVENANT TO REPAIR—EFFECT OF REPAIRS MADE UNDER SUCH COVENANT SUBSEQUENT TO AN INJURY CAUSED BY DEFECT REPAIRED—It is generally agreed that the tort liability of the holder of an estate in land is an incident of occupation or control.[1] However, the courts are not agreed as to the degree of control which will sustain such liability.[2] Neither are their holdings uniform as to the inferences which are to be drawn with respect thereto from the existence of an agreement by a landlord to make repairs[3] or from the act of a landlord in repairing a defect in demised premises under such agreement, subsequent to an injury caused by the defect repaired.[4]

New York and Ohio were at one time in agreement as to the liability of a landlord for injuries to persons on the premises and the legal

[1] 2 TORTS RESTATEMENT §357 (1935); 163 A.L.R. 327 (1946).
[2] 163 A.L.R. 327 et seq. (1946).
[3] 8 A.L.R. 765 (1920); 68 A.L.R. 1195 (1930); 163 A.L.R. 300 (1946).
[4] E.g., Cooper v. Roose, 151 Ohio St. 316, 85 N.E. (2d) 545 (1949); Noble v. Marx, 298 N.Y. 106, 81 N.E. (2d) 40 (1948).

effect of an agreement to repair.[5] Recently decided cases in each jurisdiction on fundamentally the same facts indicate that this may no longer be true.[6] It is the purpose of this comment to examine the decisions in these two jurisdictions since the time of apparent agreement to discover if there has been a divergence of view on the question and if so, the extent of such divergence.

1. *Two Recent Cases*

Case 1—Ohio. Defendant was the owner of a three-story brick building. He rented the second and third floors of the building to plaintiff on a month-to-month basis. Plaintiff occupied one of the apartments at the rear of the second floor, and rented the remainder of the rooms to others. The landlord agreed to be responsible for repairing the building outside. Plaintiff went to a porch in the back of her apartment to shake a small rug. As she leaned against the porch railing, a section gave way, and she fell to the ground. A few days later, defendant repaired the defective railing. Plaintiff sued defendant to recover for injuries received in her fall. *Held:* Liability in tort is an incident to occupation and control. Defendant's agreement to repair, plus his act of repairing the defective railing, was not sufficient evidence of occupation or control to sustain tort liability.[7]

Case 2—New York. Defendant was owner of a two-family apartment building. One of the apartments was occupied by plaintiff under a written lease providing in part that plaintiff should keep the premises in good repair, but on failure of plaintiff to make such repairs, the landlord might make them. The lease also permitted the landlord to enter the premises during reasonable hours of the day to inspect the premises and to make necessary repairs. At the time plaintiff rented the apartment, the floor of the bathroom was defective. The rental agent promised plaintiff that defendant would repair the defect. Plaintiff was injured when her heel caught in a hole in the bathroom floor. Three days later, defendant had the defect repaired. Plaintiff sued defendant to recover for injuries received in her fall. *Held*: Liability in tort is an incident of occupation and control. "Where lease gave landlord the right to enter to make repairs, evidence that, for a period antedating the term of the lease, landlord through agent had notice of

[5] See Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931); Berkowitz v. Winston, 128 Ohio St. 611, 193 N.E. 343 (1934).

[6] Supra, note 4.

[7] Cooper v. Roose, 151 Ohio St. 316, 85 N.E. (2d) 545 (1949).

the defective condition but failed to make repair in response to tenant's demand, and evidence of repairs made by landlord after the accident, were sufficient to justify a verdict for the tenant."[8]

It will be noted that both courts appear to start with the same major premise. Yet they reach opposite conclusions on what appear to be fundamentally similar facts, when the facts are limited to those relevant to the major premise initially stated.

2. *Control and the Agreement to Repair*

Twenty years ago a minority of jurisdictions held that a covenant to repair necessarily implied the reservation by the landlord of a right to enter and have possession of the premises for the purpose of making repairs, that this degree of control would be sufficient to sustain a tort liability, and that if his negligence in making or failing to make the repairs resulted in an unsafe condition of the premises, he was liable for injuries to persons lawfully on the premises who were not guilty of contributory negligence.[9] This view was accepted by the American Law Institute in its *Restatement of Torts*,[10] where it is made clear that the liability rests in tort and not upon contract and is an incident of control.[11]

At that time a majority of courts, although not in agreement as to the degree of control required to sustain a tort liability, held that the breach by a landlord of an agreement to repair leased premises imposed on him no liability for personal injuries to a tenant or other person on the premises caused by a defect in the premises, either in tort or assumpsit.[12] This was so despite the fact that since 1794, when *Payne v. Rogers*[13] was decided, it has been universally accepted that a landlord's covenant to repair demised premises during the term of the lease makes him liable for any harm suffered by persons outside the premises

[8] Noble v. Marx, 298 N.Y. 106 (syll.) (1948).

[9] 8 A.L.R. 765 (1920); 68 A.L.R. 1195 (1930).

[10] 2 TORTS RESTATEMENT §357 (1935): "A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or after the lessee has taken possession, if (a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented."

[11] Ibid., comment *a*: "The lessor's duty to repair . . . is not contractual but is a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them."

[12] 68 A.L.R. 1195 (1930).

[13] 2 H. Bl. 350, 126 Eng. Rep. 590 (1794).

by his failure to repair any dangerous condition, even though it developed after the tenant had gone into possession.[14]

In *Cullings v. Goetz*,[15] decided in 1931, the New York Court of Appeals considered and rejected the view of the *Restatement* for that of the then majority primarily, it would seem, because of the force of precedent and the effect of a contrary decision on lessors having repair covenants in their leases under a belief that no tort liability was entailed.[16] Chief Justice Cardozo, speaking for the Court, laid down the test of landlord liability in these words:

> "Liability in tort is an incident to occupation or control. . . . By preponderant opinion, occupation and control are not reserved through an agreement that the landlord will repair. . . . The tenant and no one else may keep visitors away until the danger is abated, or adapt the warning to the need. The landlord has at most a privilege to enter for the doing of the work, and at times not even that if the occupant protests. 'The power of control necessary to raise the duty . . . implies something more than the right or liability to repair the premises. It implies the power and the right to exclude people from them.' "[17]

and later:

> "What resulted was not a reservation by an owner of one of the privileges of ownership. It was the assumption of a burden for the benefit of the occupant with consequences the same as if there had been a promise to repair by a plumber or a carpenter."[18]

Similarly, the Supreme Court of Ohio had aligned itself with the then majority. In *Berkowitz v. Winston*,[19] decided in 1934, Matthais, J., speaking for the court said:

> "The rule that liability in tort is an incident to occupation or control, and that a covenant to repair does not impose upon the lessor a liability in tort at the suit of the lessee or other on the premises in the right of the lessee, has been generally adopted and applied, though there are some announcements to the contrary. The majority view is presented with cogent reasoning and ample citation of authority by Cardozo, C.J., in a comparatively recent decision in *Cullings v. Goetz*. . . ."[20]

[14] Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 725 at 747 (1937).
[15] 256 N.Y. 287, 176 N.E. 397 (1931).
[16] Id. at 291-292.
[17] Id. at 290.
[18] Id. at 291.
[19] 128 Ohio St. 611, 193 N.E. 343 (1934).
[20] Id. at 613-614.

Today it may no longer be said that there is a clear majority and minority view; the courts are about equally divided on the question.[21] There is a pronounced trend toward the view that a landlord is liable under such circumstances.[22] It is suggested that recent New York cases, culminating in *Noble v. Marx,* supra, indicate that New York is but a step away from the former minority position. Ohio, on the other hand, as is illustrated by *Cooper v. Roose,* supra, holds firmly in accordance with the former majority, and New York, view.

3. *Control—What Degree*

As has been previously noted, implicit in the view of the *Restatement* and of the courts following it, with respect to the effect of an agreement to repair on a landlord's liability, is a holding that control for the purpose of making repairs is sufficient to sustain tort liability.[23] Since both New York and Ohio explicitly rejected the view of the *Restatement,* and Ohio specifically accepted the New York view as set forth in *Cullings v. Goetz,* it would appear not unreasonable to expect the two courts to reach the same results on the same evidentiary facts. Subsequently decided cases and the language of the two courts therein indicate the contrary to be true. The divergence can be explained only on the basis of differing prescriptions of the degree of control necessary to sustain tort liability, and in the inferences which the two courts are willing to draw from the evidentiary facts.

The required degree of control which was in the mind of Chief Justice Cardozo when he wrote the opinion in *Cullings v. Goetz,* he expressed in the words of a leading English case:

> "The power of control necessary to raise the duty . . . implies the power and the right to admit people to the premises and to exclude people from them."[24]

It will be noted that the control here visualized is a rather substantial one.

[21] "It now seems improper to say that it is the majority rule that the landlord is not liable for personal injuries, for it is doubtful whether a majority of the courts adhere unqualifiedly to this view. . . ." 163 A.L.R. 300 (1946).

[22] Ibid.

[23] Supra, notes 10 and 11.

[24] Cullings v. Goetz, 256 N.Y. 287 at 290, 176 N.E. 397 (1931), quoting from Cavalier v. Pope, [1906] A.C. 428. It is interesting to note that the English court cited as authority for its statement, Miller v. Hancock, [1893] 2 Q.B. 177, a leading English case on the liability of landlords for injuries to persons on stairways and other areas of common use over which the landlord retains control.

The Supreme Court of Ohio approved the rule of *Cullings v. Goetz* in *Berkowitz v. Winston,* as has been previously noted.[25] It interpreted the rule in *Ripple v. Mahoning National Bank,*[26] decided in 1944. In its syllabus the court said:

> "The reservation in a lease of a suit of rooms for use as a private office, whereby control thereof is retained only 'for the purpose of repairing the same and the doing of daily janitor work,' does not render the lessor liable for injuries sustained by an employee of the lessee caused by falling plaster, in an absence of authority of the lessor to exercise control over such premises *to the exclusion of any control by the lessee.*"[27]

In its opinion the thought was expressed in these words:

> "The employer of the plaintiff was a tenant, a lessee, and not a mere licensee in the building. The office occupied by him was a 'private office room' and the plaintiff cannot recover in the absence of showing that the lessor had a right of control to the exclusion of any control by the tenant if the former elected to exercise such right."[28]

Ohio interprets the "power and right to admit people to the premises and to exclude people from them" to mean "exclusive control by the lessor" who is sought to be held liable.

The New York "interpretation" of these words is in effect a renunciation of them as a test of a landlord's liability. In *Scudero v. Campbell,*[29] it was held that an act of repairing a defect in premises subsequent to an injury suffered by a licensee of the tenant was sufficient evidence to sustain a finding by a jury that the landlord had sufficient control over the premises to support a tort liability. Implicit in this holding is a subordinate holding that the degree of control necessary to sustain a finding of a tort liability is control for the purpose of making repairs. In *Antonsen v. Bay Ridge Savings Bank,*[30] decided in 1944, the New York Court of Appeals approved an instruction of a trial justice that:

> "There may be no recovery in this case for the plaintiffs based on the alleged promise to repair the ceiling . . . that there is no

[25] Supra, notes 19 and 20.
[26] 143 Ohio St. 614, 56 N.E. (2d) 289 (1944).
[27] Id. at 614. Cf. Noble v. Marx, 298 N.Y. 106, 81 N.E. (2d) 40 (1948). Italics added.
[28] Id. at 620. Cf. the language used in Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931).
[29] 288 N.Y. 328, 43 N.E. (2d) 66 (1942).
[30] 292 N.Y. 143, 54 N.E. (2d) 338 (1944).

> duty at common law on the part of the owner or one acting in the owner's stead to repair a ceiling in a two-family house such as involved in this case, *where the portion of the premises involved was demised in its entirety.*"[31]

The court said, with reference to the element of control:

> "In view of those instructions . . . there is implicit in the verdict for the plaintiffs a finding that, under the terms of the lease by which the plaintiffs occupied the apartment, the defendant as landlord reserved control of the premises *to the extent of permitting it to make repairs.* In support of such a finding there is evidence . . . from which the jury could find *'a reservation by . . . [the defendant] of one of the privileges of ownership' . . . [Citing Cullings v. Goetz].* . . . [The] basis [of defendant's liability] . . . was the evidence to which reference has been made from which the jury could have found that the possession and dominion of the premises demised by the defendant to the plaintiffs was not exclusive and complete but reserved to the defendant such a measure of control as permitted it to make necessary repairs."[32]

Noble v. Marx cited both the *Scudero* and the *Antonsen* cases as authority for its holding.

In view of these cases it would appear that New York not only rejects the "exclusive control by the landlord" test of the Ohio courts, but also the "power and right to admit people to or exclude people from the premises" test of *Cullings v. Goetz.* It totally disregards that part of the quotation approved by the court in that case which says in so many words, "the power of control necessary to raise the duty . . . implies more than the right or liability to repair the premises,"[33] and fastens avidly upon a later casual phrase, "a reservation by (the defendant) of one of the privileges of ownership,"[34] which was, in its original context, used negatively. It finds liability where there is non-exclusive "control" by the tenant.

4. *Evidentiary Facts and Inferences—Subsequent Repair*

Space will not permit a detailed treatment of this phase of the subject. It is sufficient for our purpose to point out that under the "exclusive control by the landlord" doctrine of the Ohio court, any

[31] Id. at 146.
[32] Id. at 146-147. Italics added.
[33] Note 17, supra.
[34] Note 18, supra.

evidence of control exercised by the tenant will defeat an action against his landlord.[35] Under the language of the New York court and its "non-exclusive control by the tenant" doctrine, it should follow that any evidence of control exercised by the landlord would sustain an action against him. Yet, before summing up the evidence in the *Marx* case, supra, the court said:

> "The written lease . . . gives evidence of the right expressly reserved by the defendant landlord to enter the plaintiff's apartment during reasonable hours 'to ascertain if said premises are kept in proper repair and condition and to make any repairs that the Landlord may deem necessary for the preservation or safety of the premises or appurtenances'. There was also evidence that at the time of making the lease and at various times during the term of the lease prior to the accident agents of the defendant had made unfulfilled oral promises to repair the defective floor condition which later caused the plaintiff's injuries. *If this were the only evidence of control exercised by the defendant it might be true that 'what resulted was not a reservation by an owner of one of the privileges of ownership.'* "[36]

But, the court concludes:

> "In the circumstances presented by this record, including defendant's evidence of repairs made by her after the accident and received solely on the question of control, and the further evidence that for a period of time which antedated the term of the lease, the defendant through her agent had notice of the defective condition but failed, in response to the plaintiff's demands, to exercise the right expressly reserved by her in the lease to enter the premises to make necessary repairs, we think there was evidence 'enough to countenance the verdict.' "[37]

Thus it would seem that any evidence of an act of the landlord in coming upon leased premises to make repairs under a right reserved in a lease will permit a jury to infer the degree of control necessary to liability. In *Scudero v. Campbell* the act alone was held sufficient to permit such an inference. And it would appear that a landlord may reserve to himself one of the "privileges of ownership" (i.e., the right to come on the land) without liability, but if evidence discloses that

[35] Goodall v. Deters, 121 Ohio St. 432, 169 N.E. 443 (1929); Berkowitz v. Winston, 128 Ohio St. 611, 195 N.E. 343 (1934); Cooper v. Roose, 151 Ohio St. 316, 85 N.E. (2d) 545 (1949).

[36] Noble v. Marx, 298 N.Y. 106, 81 N.E. (2d) 40 (1948). Italics added.

[37] Id. at 111.

he in fact exercised that right, he may be liable in tort. It may be remarked in passing that it is a very peculiar "right" which, upon its exercise, is automatically transformed into an inchoate ground for tort liability.

It will be noted that while the New York court will permit a jury to infer control from the landlord's act of entering, it will not itself make the inference as a matter of law. Likewise, it will not permit a jury to infer, nor will it infer as a matter of law, from either the reservation of a right to enter or from a covenant to repair, non-exclusive control by a tenant, at least in an action involving an injury to one upon the premises. Yet in *Appel v. Muller*,[38] decided in 1933, two years after *Cullings v. Goetz*, it was held that a landlord who reserved the right to make repairs but did not covenant to do so was nevertheless liable for personal injuries sustained by one outside the premises, since by the reservation of right to repair the landlord "had never parted so completely with possession and control that he had disabled himself from performing his duty of care."[39] "It would seem that if the landlord had control as to pedestrians on the street he also had control as to persons on the premises, insofar as making repairs was concerned."[40] And if the court will infer control as a matter of law from a reservation of right, it is difficult to see why such an inference may not as easily be drawn from an agreement to repair. The element of control would seem to be independent of the location of the injured party; it would also seem evident that an agreement to repair without a right thereunder to enter for the purpose of making the repairs would be not only a useless act, but also a trap for the unwary, visiting unexpected tort liability upon one acting in the conscientious discharge of his contract obligations. The desirability of this result may well be questioned. It may also be pointed out that the present holding of the New York court is an open invitation to breach-of-contract.

5. *Summary*

Under the former minority and *Restatement* view of the law, an agreement to repair will permit an inference of control for the purpose of making the repairs which is sufficient to compel a landlord to respond in tort for personal injuries to persons lawfully on the premises where

[38] 262 N.Y. 278, 186 N.E. 785 (1933).
[39] Id. at 283; 163 A.L.R. 328-329 (1946).
[40] 163 A.L.R. 329 (1946).

the injury is caused by a defect in the premises coming into existence either before or after his tenant takes possession. Under the New York view, by a process of redefinition, the degree of control which will entail liability has been progressively reduced to exactly the same degree as that required by the courts following the former minority and *Restatement* view. An act of repair under such an agreement is sufficient to permit an inference by the jury of this required degree of control. Where the case involves a person outside the premises, the court will infer the necessary dgree of control where it finds a right to make repairs reserved.

It is submitted that the distance separating New York law and that of the courts following the *Restatement* with respect to the legal effect of an agreement to repair is but a matter of an inference. New York has, while paying lip service to *Cullings v. Goetz,* in effect all but overruled it. Ohio, on the other hand, unimpressed by the policy factors moving the New York court,[41] continues to apply the rule of that case, reaching contrary results on fundamentally the same facts.

And since the present New York position is, as pointed out above, not only a trap for the unwary, but also a continuing invitation to litigation, it perhaps is not too presumptuous to suggest that the time is not far distant when New York will take the final step now separating it from courts following the *Restatement* on this point.

Whether or not one agrees with the position of the Ohio court on the basis of policy, it is at least true that in that state a landlord conscientiously undertaking to carry out a promise to repair a defect in leased premises does not by so doing make himself automatically liable for an injury for which, absent such undertaking, he could not have been held liable.

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[41] "It is a notorious fact that those whose slender incomes force them to rent dilapidated buildings are rarely, if ever, in such a financial position as to make it possible to expect them to make the repairs necessary to safe occupancy. Therefore, if those who come into such buildings as members of the tenant's household or otherwise are to be protected from injury and to be given a chance of compensation if they are injured, 'it is obvious', as Justice Holmes said, 'that the safety of the building must be left mainly to the lessor.'" Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 725 at 746 (1937).