

1951

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Recommended Citation

Thomas P. Segerson, *LANDLORD AND TENANT-LIABILITY OF LANDLORD TO PERSONS ON THE PREMISES-BREACH OF COVENANT TO REPAIR*, 49 MICH. L. REV. 1080 (1951).

Available at: <https://repository.law.umich.edu/mlr/vol49/iss7/16>

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LANDLORD AND TENANT—LIABILITY OF LANDLORD TO PERSONS ON THE PREMISES—BREACH OF COVENANT TO REPAIR—Plaintiff, a carpenter, hired by tenant, suffered personal injuries in a fall caused by a defective railing on the rear porch of premises leased by defendant to tenant. By the terms of the lease, tenant was given exclusive possession of the premises, while defendant agreed to keep the rear porch in repair. Defendant had failed to repair the railing on being notified of its defective condition. From a judgment holding defendant liable to plaintiff for the injuries sustained, defendant appealed. *Held*, reversed. In the absence of control of the premises, a lessor is not liable in tort for personal injuries because of his breach of an agreement to make repairs. *Huey v. Barton*, 328 Mich. 584, 44 N.W. (2d) 132 (1950).

The decision of the Michigan court is in keeping with the traditional view that a covenant to repair by the lessor does not change the general rule of no liability on the part of the lessor to those injured on the leased premises, in the absence of his "control" of such premises.¹ However, an increasing number of courts within the past twenty years have modified the rule basing liability, in whole or in part, on breach of the covenant.² Thus, there are courts which accept the view of the American Law Institute³ and hold the lessor liable in tort on the theory that the covenant gives him the ability to make repairs and consequent control over the premises.⁴ In addition, a number of courts have sought some middle ground between the traditional view and the view of the *Restatement*. In this group are courts that feel the covenant by itself fails to give the requisite "control" upon which tort liability can be predicated, but that something more is required. Thus, it has been held in New York that the covenant plus the making of subsequent repairs will permit the jury to infer the degree of control necessary for liability.⁵ The Massachusetts and Illinois courts find the needed control if the covenant is to maintain a condition of safety, not simply to repair.⁶ Virginia seemingly draws a distinction between

¹ In general on the entire subject of the landlord's liability, see Harkrider, "Tort Liability of a Landlord," 26 MICH. L. REV. 383 (1928) and Eldredge, "Landlord's Tort Liability for Disrepair," 84 UNIV. PA. L. REV. 467 (1936).

² 163 A.L.R. 330 (1946). Compare 8 A.L.R. 765 (1920) and 68 A.L.R. 1195 (1930). *Cooper v. Roose*, 151 Ohio St. 316, 85 N.E. (2d) 545 (1949); *Hall v. Meyers*, Mun. Ct. of Piqua, Ohio, 77 N.E. (2d) 81 (1947); and *Roach v. Herz-Oakes Candy Co.*, 357 Mo. 1236, 212 S.W. (2d) 758 (1948), are recent decisions in accord with the traditional view.

³ 2 TORTS RESTATEMENT §357 (1934).

⁴ *Saturnini v. Rosenblum*, 217 Minn. 147, 14 N.W. (2d) 108 (1944); *Baum v. Bahn Frei Mutual Building and Loan Assn.*, 237 Wis. 117, 295 N.W. 14 (1940); *Asheim v. Fahey*, 170 Ore. 330, 133 P. (2d) 246 (1943); and *Scholey v. Steele*, 59 Cal. App. (2d) 402, 138 P. (2d) 733 (1943), are cases expressly accepting the *Restatement*. But cf. *Daulton v. Williams*, 81 Cal. App. (2d) 70, 183 P. (2d) 325 (1947), and *Dorswitt v. Wilson*, 51 Cal. App. (2d) 623, 125 P. (2d) 626 (1942).

⁵ Compare *Noble v. Marx*, 298 N.Y. 106, 81 N.E. (2d) 40 (1948), with *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931), as to what is meant by "control." *Murphy*, "Repairs by a Landlord and Control of Leased Premises," 16 INSURANCE COUNSEL J. 217 (1949), gives a detailed analysis on the problem as it exists in New York. For a comparison of recent New York and Ohio decisions, see 48 MICH. L. REV. 689 (1950).

⁶ *Ryerson v. Fall River Philanthropic Burial Soc.*, 315 Mass. 244, 52 N.E. (2d) 688 (1943); *Farmer v. Alton Bldg. & Loan Assn.*, 294 Ill. App. 206, 13 N.E. (2d) 652 (1938);

a covenant to repair and a reservation of a right of possession for purposes of making repairs,⁷ while Mississippi has distinguished between a general covenant to repair and a covenant to repair a specific defect;⁸ the latter is thought to give the requisite "control" while the former will not. Also in this third group are states which may hold the lessor liable without any consideration of the "control" element. Thus, the Maryland court has held that a mere breach is not sufficient but that a breach coupled with unreasonable delay might constitute negligence upon which liability could be based.⁹ Decisions in Connecticut indicate a somewhat similar view.¹⁰ New Hampshire has specifically rejected the "control" theory but intimates that recovery may be had on the contract upon proof that the damages were within the contemplation of the parties.¹¹ An anomalous situation exists in New Jersey where recovery for personal injuries can be had, but only if there is privity of contract or privity of estate between the lessor and the party injured.¹² It is believed that the judicial development outlined as well as the various statutory enactments changing the rule¹³ indicate the need felt for a reconsideration of the traditional common law thinking underlying the subject of the lessor's liability.¹⁴ If it is admitted that present day social and economic needs demand a change of the substantive law in this field, certainty in the law would seem to favor change through the legislatures. Not only is change by judicial decision slow but very often it finds expression in the formulation of exceptions based upon special and limited, often unpredictable, circumstances.

Thomas P. Segerson

Crawford v. Orner and Shayne, Inc., 331 Ill. App. 568, 73 N.E. (2d) 615 (1947). It is doubtful, however, that the Massachusetts and Illinois courts mean the same thing when they speak of a covenant to maintain a condition of safety.

⁷ *Caudill v. Gibson Fuel Co.*, 185 Va. 233, 38 S.E. (2d) 465 (1946).

⁸ *Rich v. Swalm*, 161 Miss. 505, 137 S. 325 (1931); *Hodges v. Hilton*, 173 Miss. 343, 161 S. 686 (1935). Cf. *Chelefou v. Springfield Institute for Savings*, 297 Mass. 236, 8 N.E. (2d) 769 (1937), which specifically rejects such a distinction.

⁹ Cf. *Edelman v. Monouydas*, 186 Md. 479, 47 A. (2d) 41 (1946), with *King v. Compton*, 187 Md. 363, 50 A. (2d) 131 (1946).

¹⁰ *Papallo v. Meriden Savings Bank*, 128 Conn. 563, 24 A. (2d) 472 (1942); *Scibek v. O'Connell*, 131 Conn. 557, 41 A. (2d) 251 (1945); *Des Marchais v. Daly*, 135 Conn. 623, 67 A. (2d) 549 (1949).

¹¹ *Busick v. Home Owners Loan Corp.*, 91 N.H. 257, 18 A. (2d) 190 (1941). The case is criticized in 40 *MICH. L. REV.* 313 (1941).

¹² The lessee could recover for personal injuries but members of his family could not. *Ceccato v. Chiara*, 4 N.J. Super. 140, 66 A. (2d) 548 (1949); *Coligan v. 680 Newark Avenue Realty Corp.*, 131 N.J.L. 520, 37 A. (2d) 206 (1944).

¹³ As to the different types of statutes enacted and a brief discussion of their treatment by the courts, see 62 *HARV. L. REV.* 669 at 674 (1949). The article also stresses the need for the adoption of a fundamentally different theory as to the duties of the lessor.

¹⁴ *Bohlen*, "Fifty Years of Torts," 50 *HARV. L. REV.* 725 at 746 (1937), speaks of the problem in these words: "The problem is to make a fair adjustment which will take into account the conflicting interests of the occupants and lessors of such buildings and also the interest of the state in having all its citizens safely housed."