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PERSONAL INJURIES TO THE TENANT; THE LANDLORD'S LIABILITY IN TORT THEREFOR

HISTORY

At early common law a lessee was regarded as having merely a personal right against the lessor and his heirs, and no property rights in the land accrued to him.¹ But as a result of the several remedies that were created in his favor, and especially as a result of the writ *ejectione firmæ* (from which we have the modern action in ejectment), whereby a tenant could protect and defend his possession of the property against all the world, the law came to regard him as having rights *in rem*.² Thus his interest became a proprietary interest which he could enforce against any wrongdoer. This so well established the property conception of the lessee's interest that a lease came to be regarded as a sale of the demised premises for a term.³ The rule of *caveat emptor* applied and accordingly the landlord was subject to no liability for leasing premises that were in a dangerously defective condition;⁴ consequently the lessee was left to determine for himself the condition of the premises before making the lease.⁵ As a result of this *sale* concept, the landlord was considered to have surrendered both possession and control and he was not permitted to enter the premises without the consent of the tenant.⁶ Accordingly, the courts imposed no duty on the lessor to keep the premises in repair once the tenant had entered into possession.⁷ The theory, undoubtedly, behind this early common law rule was that the landlord need not rent, and the prospective tenant was free to take or leave a proposed rental. If he took it he accepted all the disclosed

1. POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, p. 106 *et seq.*

2. DIGBY, HISTORY OF REAL PROPERTY, 4th ed. p. 176.

3. Fowler v. Bott, 6 Mass. 58, 62 (1809). The New York court said the leasing of land was "like the sale of specific personal property to be delivered." Church, C. J., in Becar v. Flues, 64 N. Y. 518 (1876).

4. Daulton v. Williams, 81 Cal. App. 2d 70, 183 P. 2d 325 (1947); Rotte v. Meierjohan, 78 Ohio App. 387, 70 N. E. 2d 684 (1946).

5. Cover v. Sunderland, 145 Mass. 363 (1887). An injured visitor, consequently, had recourse only against the occupier of the land. Bouy v. Fidelity-Philadelphia Trust Co., 338 Pa. 5, 12 A. 2d 7 (1940).

6. See 1 TIFFANY, LANDLORD AND TENANT 7 (1910).

7. Phelan v. Fitzpatrick, 188 Mass. 237, 74 N. E. 326 (1905); Ward v. Fagin, 101 Mo. 669, 14 S. W. 738 (1890).

terms including the condition of the premises,⁸ or as one English judge so succinctly put it “[F]raud apart, there is no law against letting a tumble-down house.”⁹ But couple this with the statement by Rolfe, C. J. in *Winterbottom v. Wright*:¹⁰

This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

This gives one a somewhat keener insight into the singularly harsh conception of the English common law which came to pervade the rules surrounding the landlord-tenant relationship.

The courts eventually began to recognize, however, the desirability of shifting the burden of repair upon the lessor in a number of situations and various exceptions thus became engrafted upon the common law rules.¹¹ One of the first of these exceptions was when liability was imposed in favor of the public in cases involving wharves and piers;¹² later it was extended where the premises were leased for such purposes as hotels¹³ and stores.¹⁴

None of the court-drawn exceptions, however, imposed upon the landlord the duty of repairing ordinary leased premises. Here, the common law rule placing the burden of repair upon the tenant was retained.¹⁵ Whereas in most of the above exceptions the court satisfied the common law theories by discovering some measure of control by the landlord that would justify shifting the burden of repair upon him, in the repair of ordinary leased premises the measure of control sufficient to satisfy the court seemed to be lacking, and the rule was

8. See James, *Tort Risks of Land Ownership*, 28 CONN. B. J. 128 (1954).

9. Erle, C. J., in *Robbins v. Jones*, 15 C. B. (N. S.) 221, 240, 143 Eng. Rep. 768 (1863).

10. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

11. See Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260. Note, 62 HARV. L. REV. 669 (1949).

12. *Swords v. Edgar*, 50 N. Y. 28 (1874). Judge J. Henry Johnson notes this in *Timmons v. Wood Products Corp.*, 164 S. C. 361, 162 S. E. 329. See note 83 *Post*.

13. *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656 (1900).

14. *Turner v. Kent*, 134 Kan. 574, 7 P. 2d 513 (1932).

15. *Rotte v. Meierjohan*, 78 Ohio App. 387, 7 N. E. 2d 684 (1946).

retained as hereinbefore stated. It failed, however, to harmonize with the social and economic conditions of the late 19th and early 20th centuries, for it was becoming increasingly apparent that the lessor was best able to exercise a long term supervision over conditions needing repair and, of most importance, was in the economic position most suited for the burden. In *Fifty Years of Torts*,¹⁶ Mr. Bohlen states:

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 repairs, the repairs necessary to safe occupancy. Therefore, if those who came 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."

For the most part this gradual exodus from the common law was accomplished by statute,¹⁷ the consensus no doubt being in accordance with that of Mr. Bohlen stated above.

In some cases, however, the courts have determined to dispel the harshness of the common law. In *Thompson v. Clemens*,¹⁸ the Maryland Court, although affirming a finding for defendant because of insufficient evidence as to the negligence of the landlord, held that a failure to repair by a landlord, when he should have known that the defect complained of by his tenant was likely to result in an injury, gave rise to a cause of action sounding in tort for his negligent failure to repair.

This significant revising into a tort liability of that which previously had been regarded as a contractual duty, was the basis for a minority stand that was subsequently to find adherents so numerous that "(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 . . ."¹⁹

Whether majority or minority, the courts holding the landlord liable in tort for injuries to his tenant have proceeded

16. 50 HARVARD L. REV. 725 at 746 (1937).

17. 17 A. L. R. 2d 704 (1951).

18. 96 Md. 196, 53 Atl. 919 (1903).

19. 163 A. L. R. 300 (1946).

to do so under certain exceptions which may be briefly classified into the following:

1. Fraudulent concealment by the landlord at the time of leasing;
2. "Misfeasance" (rather than "non-feasance"), in making repairs;
3. Negligence of the landlord as to the condition of premises within his control; and
4. The lessor's failure to perform his agreement to repair.²⁰

When added to any statutorily imposed duty to repair, the aforementioned classifications appear to cover effectively the liabilities in fact imposed upon the owner of land insofar as his tenant is concerned.

The writer will briefly discuss these main classifications and will conclude with a review of the South Carolina law applicable to the general topic.

DUTY IMPOSED BY STATUTE

The statutory duty to repair affords varied coverage — from certain types of tenements to a duty to repair all buildings whatsoever. Generally, however, these statutes can be divided into three types.

California Type Statutes — This type, first adopted by California in 1872²¹ and subsequently by Montana, North Dakota, Oklahoma and South Dakota,²² requires that the lessor of a building intended for occupation by human beings must, in the absence of agreement to the contrary, place the premises in a condition fit for occupation, and must repair any and all subsequent dilapidations. Under these statutes the landlord is entitled to notice by the tenant of any defects²³ and is excused from making repairs necessitated by the tenant's want of ordinary care.

20. In his treatise *THE LAW OF REAL PROPERTY* sec. 238 at p. 252, Professor Powell lists another classification in which, conceivably, there are cases where the lessee seeks recoupment from the lessor for liabilities theretofore imposed on the lessee by other claimants. "Such recoupment is theoretically possible but has not been granted in any case found by the author." *Id.* at p. 263.

See *Dick v. Sunbright Steam Laundry*, 307 N. Y. 422, 121 N. E. 2d 399 (1954), which held that the lessee could not compel contribution or indemnification by the lessor, because the lessor is not liable in tort under a covenant to repair.

21. CAL. CIV. CODE secs. 1941, 1942 (1949).

22. MONT. REV. CODES ANN. secs. 42-201, 42-203 (1947); N. D. REV. CODE secs. 47-6212, 47-1613 (1943); OKLA. STAT. tit. 41, secs. 31, 32 (1941); S. D. CODE secs. 38.0409, 38.0410 (1939).

23. *Tatum v. Thompson*, 86 Cal. 203, 24 Pac. 1009 (1890).

The tenant has two remedies under the California Statute if the landlord fails to repair after being given notice so to do. Either the tenant may vacate the premises, in which case he is discharged from further payment of rent, or he may repair the defects himself and deduct the cost from the rent, provided such cost does not exceed the rental amount for one month.

The language of this California Statute indicated that it was to apply to any building "intended for use of human beings," but the courts early restricted it to dwelling houses and excluded from its coverage stores, factories, or business premises.²⁴ Earlier, it had been held that the dilapidations must have occurred after the beginning of the term and be such as to render the premises untenable.²⁵ On its face, however, the statute had made no such restrictions.

The early decisions construing the statutes also negated any civil action for damages being brought by the tenant. Only those remedies specifically granted by the statutes were available to the injured party.²⁶

New York Type Statutes — During the period surrounding the first World War, several states passed Housing Codes or Tenement Housing Laws which elaborately attempted to control construction, maintenance, repair, safety, and other similar matters. Some states limited these provisions to tenement houses,²⁷ while the New York Legislature has extended coverage to multiple dwelling houses.²⁸ In at least two states,²⁹ the statutes applied to all dwellings.

This second group of statutes was construed much more broadly than were the California Type Statutes. New York cases, for instance, have held that every part of a multiple

24. *Wall Estate Co. v. Standard Box Co.*, 20 Cal. App. 311, 128 Pac. 1020 (1912).

25. *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015 (1890).

26. *Van Every v. Ogg*, 59 Cal. 563 (1881). See also the collection of cases in Annot., 17 A. L. R. 2d 704 (1951).

27. CONN. REV. GEN. STAT. secs. 4050, 4054 (1949); KY. REV. STAT. secs. 101.170, 101.990 (1948); MASS. GEN. LAWS c. 144, secs. 66, 89 (1932); WIS. STATS. 1947, secs. 101.06, 101.28 (applied to factories, stores and tenement houses).

28. N. Y. MULTIPLE DWELLING LAW sec. 782 (1946).

29. IOWA CODE secs. 413.66, 413.108 (1946); MICH. STAT. ANN. secs. 5.2843, 5.2873 (Henderson 1936), which states at sec. 5.2843 that: "Every dwelling and all parts thereof shall be kept in good repair by the owner. The roof shall be kept as not to leak and the rainwater shall be so drained and conveyed therefrom as not to cause dampness in the walls or ceilings."

dwelling must be kept in good repair,³⁰ and this includes faucets,³¹ windows,³² and even gas ranges.³³

Is there then to be civil liability imposed upon the lessor who violates these repair statutes? One view is that if the legislature has omitted a private remedy in behalf of the lessee, then it cannot be treated as accidental; it must be regarded as an indicia of intent upon the part of the legislature that no remedy shall be permitted.³⁴ But, it is argued, the omission of a private remedy is not conclusive; it is as reasonable to conclude that the problem was not considered by the legislature and therefore they had no such intent at all.³⁵ In *Altz v. Lieberman*,³⁶ Judge Cardozo said:

A "tenement house," as the meaning is enlarged by the definition of the statute may include the dwellings of the rich. In its primary and common application it suggests the dwellings of the poor. . . . We may be sure that the framers of this statute when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officials. The right extends to all whom there was a purpose to protect.³⁷

Thus the landlords found that a state of disrepair could impose tort liability for injuries resulting from such disrepair, and the New York Statute thus acquired what is best termed "real teeth." In fairness, the courts have confined this duty to cases wherein the lessor is shown to have had either actual or constructive notice of the need for repair.³⁸

30. *Wechsler v. United Produce*, 126 Misc. 563, 214 N. Y. S. 136 (1926).

31. *Tucker v. Wagner*, 132 Misc. 402, 229 N. Y. S. 769 (1928).

32. *Weiss v. Walloch*, 256 App. Div. 354, 10 N. Y. S. 2d 69 (1939), *re-argument denied*, 256 App. Div. 1059, 11 N. Y. S. 2d 839 (1939). These cases are discussed generally in Annot., 93 A. L. R. 778 (1934).

33. *Goldkopf v. Metropolitan Life Ins. Co.*, 149 Misc. 663, 268 N. Y. S. 126 (1933).

34. *Thayer, Public Wrong and Private Action*, 27 HARV. L. REV. 317, 331 (1914).

35. See Harkrider, *op. cit. supra* note 11, at 387.

36. 233 N. Y. 16, 134 N. E. 703 (1922).

37. *Ibid.* at 19, 134 N. E. at 705.

38. *People v. Weil*, 286 App. Div. 753, 146 N. Y. S. 2d 416 (1955); *Stem v. Zalaynick*, 148 N. Y. S. 2d 493 (1956).

The problem has long been a troublesome one, however, and at least one New York Court has viewed with suspicion the apparent departures from the common law and has strictly construed the applicable New York Statute.³⁹

Louisiana Type Statutes — This third type of legislation specifically gives the tenant the right to sue in tort and has been adopted in the states of Georgia and Louisiana.⁴⁰ The statutes cover the repair of all buildings and its coverage is generally held to extend not only to the tenant but to all persons rightfully on the premises.⁴¹ It also eliminates the requirement of knowledge by the lessor.⁴² The Louisiana Court has, however, allowed the owner to contract away his liability for injury to the lessee caused by any defect within the premises unless the owner knew or should have known of the defects or had received notice thereof and failed to remedy it within a reasonable time.⁴³

FRAUDULENT CONCEALMENT OF DEFECTS BY LANDLORD

With respect to this category, the Restatement of Torts states:

A lessor of land, who conceals or fails to disclose to his lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land is subject to liability for such harm caused thereby to the lessee and others on the land with the consent of the lessee or a sublessee after the lessee has taken possession, if

(a) the lessee does not know of the condition or the risk involved therein, and

(b) the lessor knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk.⁴⁴

39. *Wesseley v. Trustees of First German M. E. Church of N. Y.*, 165 Misc. 834, 300 N. Y. S. 942 (1938).

40. GA. CODE ANN. 1937, secs. 61-111, 61-112; LA. CIV. CODE ANN. arts. 670, 2322, 2693, 2694, 2695 (1945). For discussion of the civil law background of the Louisiana statutes see Note, 4 TUL. L. REV. 610 (1930).

41. Cf. *Tucker v. Wagner*, 132 Misc. 402, 229 N. Y. S. 769 (1928) (wife); *Klein v. Young*, 163 La. 59, 111 So. 495 (1927) (roomer); *Byrd v. Spyro*, 170 So. 384 (La. App. 1936) (mother-in-law).

42. *Bates v. Blitz*, 205 La. 536, 17 So. 2d 816 (1944).

43. *Paul v. Nolen*, 166 So. 509 (La. App. 1936). See also the dictum in *Poss v. Brown*, 73 So. 2d 661 (La. App. 1954).

44. RESTATEMENT, TORTS sec. 358 (1934). The basis for this liability was thus described by Chief Justice Holmes: "As the landlord makes no

Only occasionally is the lessor held liable on this theory;⁴⁵ more commonly his liability is denied, either because it is not shown that the lessor had knowledge of the defective condition;⁴⁶ or because the defective condition was in fact known to the lessee⁴⁷ or because the required factor of "concealment" was absent because the defect was of such an obvious character.⁴⁸

It seems some animadversion was implied when the theory was rejected that the landlord should be held liable because "he could have known, by the exercise of ordinary care and caution" of an alleged latent defect.⁴⁹

MISFEASANCE OF THE LANDLORD IN THE MAKING OF REPAIRS

If a lessor, whether bound to act or acting voluntarily,⁵⁰ undertakes to make repairs, alterations or improvements in the premises and the job is done carelessly with resultant injury to the lessee, the lessor is liable for the damages to the lessee.⁵¹ This extends to members of the lessee's family,⁵²

contract concerning the condition of the premises at the time of leasing, the only ground on which he can be held is that he unconscionably is leading the other party into a trap." *O'Malley v. Twenty-five Associates*, 173 Mass. 555, 60 N. E. 387 (1901).

45. *Robinson v. Tate*, 34 Tenn. App. 215, 236 S. W. 2d 445 (1950) (latent defect in a radiator which was not apparent to the lessee). The theory has been extended to include liability for concealment of the fact that the premises were infected with a contagious disease. See *Earle v. Kuklo*, 26 N. J. Super. 471, 98 A. 2d 107 (1953).

46. *Newman v. Sears Roebuck & Co.*, 77 N. D. 466, 43 N. W. 2d 411 (1950); *Luedtke v. Phillips*, 190 Va. 207, 56 S. E. 2d 80 (1949).

47. *Atlantic Terrace Co. v. Rosen*, 56 So. 2d 444 (Fla., 1952).

48. *Powell v. Stivers*, 108 Cal. App. 2d 72, 238 P. 2d 34 (1951).

49. *Hamilton v. Baugh*, 335 Ill. App. 346, 82 N. E. 2d 196 (1948), which concerned the defective condition of an outdoor privy. But see *Shuey v. Frierson*, 193 Tenn. 318, 270 S. W. 2d 883 (1954).

50. The courts of Massachusetts have differentiated between repairs made pursuant to a binding agreement and those made gratuitously. Misfeasance in the former case imposes liability upon the lessor where "negligence" is shown, while misfeasance in the latter case imposes liability only on a finding of "gross negligence." *Greenway Wood Heel Co. v. John Shea Co.*, 313 Mass. 177, 46 N. E. 2d 746 (1943); *Collins v. Goodrich*, 324 Mass. 251, 85 N. E. 2d 771 (1949).

51. RESTATEMENT, TORTS sec. 362 (1934); *Nashua Gummed & Coated Paper Co. v. Noyes Buick Co.*, 93 N. H. 348, 41 A. 2d 920 (1945) (in the course of making repairs, fire was caused by the use of an acetylene torch); *Theakston v. Kaszak*, 152 Pa. Super. 576, 33 A. 2d 46 (1943) (imperfectly repaired bannister gave way); *Vollum v. School Lane Apts., Inc.*, 380 Pa. 252, 110 A. 2d 251 (1955) (door being repaired in vestibule of apartment house fell on tenant).

52. *Shaw v. Butterworth*, 327 Mo. 622, 38 S. W. 2d 57 (1931); *Good v. Van Hemert*, 114 Minn. 393, 131 N. W. 466 (1911); *Oglesby v. Rutledge*, 67 Ga. App. 656, 21 S. E. 2d 497 (1942).

and others on the premises in his right.⁵³ Misfeasance is the theoretical basis of liability in these cases rather than nonfeasance and it has been held that the lessor incurs no liability under this rule when he falsely tells the lessee that he has repaired the defect about which lessee has complained. Such a case was considered one of nonfeasance by the Oklahoma Court.⁵⁴ The Restatement, however, takes the opposite position.⁵⁵

The main problems which arise in this type of case are contributory negligence⁵⁶ and the effect of the hiring of an "independent contractor" by the lessor. The independent contractor doctrine which insulates the contractee from liability has been held to be inapplicable when the act creates a danger which the lessor has a duty not to create,⁵⁷ when the lessor owed a duty to the lessee which the contractor failed to perform in his behalf,⁵⁸ or when the work done is itself a nuisance or necessarily operates to cause damage to the lessee.⁵⁹

NEGLIGENCE OF THE LANDLORD AS TO CONDITION OF PREMISES WITHIN HIS CONTROL

There is a great body of authority with respect to this category, namely, cases in which the lessor is claimed to be liable to the lessee because of the lack of due care in his exercise of retained control over part of the premises.⁶⁰ Generally,

53. *Ginsberg v. Wineman*, 314 Mich. 1, 22 N. W. 2d 49 (1946) (plaintiff was an employee); *Blocher v. Duerbeck*, 333 Mo. 359, 62 S. W. 2d 553 (1933) (plaintiff was a guest).

54. *Wick v. Wasson*, 193 Okla. 209, 142 P. 2d 124 (1943).

55. RESTATEMENT, TORTS sec. 362, Comment b (1934).

56. *Bartlett v. Taylor*, 351 Mo. 1060, 174 S. W. 2d 844 (1943); *Miller v. Howard*, 206 Md. 148, 110 A. 2d 683 (1955).

57. *Bailey v. Zlotrick*, 149 F. 2d 505 (D. C. Cir. 1945).

58. *Glaude v. Nash*, 46 A. 2d 542 (D. C. 1946).

59. *Shapiro v. Vautier*, 36 A. 2d 349 (D. C. 1944). There is dictum that the doctrine is inapplicable when the injury results from the acts of an independent contractor which acts were specifically authorized by the lessor. *Collins v. Goodrich*, 324 Mass. 251, 85 N. E. 2d 771 (1949). But see *Newman v. Sears, Roebuck & Co.*, 77 N. D. 466, 43 N. W. 2d 411, where the court held the doctrine applicable and the lessor not liable.

60. The Restatement of Torts has two sections concerning this topic. RESTATEMENT, TORTS sec. 360 (1934): "A possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe."

RESTATEMENT, TORTS sec. 361 (1934): "A possessor of land, who leases a part thereof and retains in his own control any other part which

his duty is restricted to the maintenance of as good conditions as existed when the relationship of lessor-lessee began.⁶¹ But, in extent, his retained control has been held to exist as to the structure's roof,⁶² external walls,⁶³ its hallways, stairways, porches, etc., used by the lessee in common with other tenants,⁶⁴ its service systems (*e. g.*, heat, water, gas, light, elevator system, and the like), that are used in common by the lessee with others,⁶⁵ and its fire escapes.⁶⁶

The main problem besetting the courts is determining when the lessor has in fact exercised due care. Some hold the lessor not to be liable until he has knowledge of the defect, or is charged with knowledge because of the lapse of time.⁶⁷ As was stated before,⁶⁸ Louisiana, by statute, has done away with the requirement of knowledge by the lessor. Other courts stress the lessor's duty to inspect, so as to keep familiar with the condition of the premises as to which he has retained control.⁶⁹ Courts also differ as to what parts of the premises the lessor can be said to have "retained control." Reserving to the lessor the privilege of entering for inspection or for the making of needed repairs was sufficient justification for

is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care

(a) could have discovered the condition and the risk involved therein, and

(b) could have made the condition safe."

61. *Carter v. Carolina Realty Co.*, 223 N. C. 188, 25 S. E. 2d 553 (1943).

62. *Gill Building Co. v. Central Garage Co.*, 258 Wis. 76, 44 N. W. 2d 905 (1950).

63. *Howe v. Howe*, 266 App. Div. 799, 42 N. Y. S. 2d 15 (1943).

64. *Jones v. Perlstein*, 138 Conn. 381, 85 A. 2d 254 (1951) (defective common hallway); *Ball v. Murray*, 91 Ga. 686, 86 S. E. 2d 706 (1955) (defective step in stairway); *Nelson v. D'Agastino*, 135 Conn. 384, 64 A. 2d 539 (1949) (defective railing on porch). See also the extensive annotations in 25 A. L. R. 2d 496 (1952); 25 A. L. R. 2d 444 (1952); 25 A. L. R. 2d 364 (1952); 26 A. L. R. 2d 468 (1952); 26 A. L. R. 2d 610 (1952).

65. *Germain v. Flick*, 45 N. Y. S. 2d 693 (N. Y. 1943) (heating system); *White v. Kaufman*, 131 F. Supp. 213 (E. D. Va. 1954) (boiler explosion); *Garret v. Eugene Med. Center*, 190 Ore. 155, 224 P. 2d 563 (1950) (elevator kept in unsafe condition); *Gladden v. Walker & Dunlop*, 168 F. 2d 321 (D. C. Cir. 1948) (electric system). See Annot., 25 A. L. R. 2d 576 (1952).

66. *Zito v. Weitz*, 62 Cal. App. 2d 161, 144 P. 2d 409 (1944).

67. *Armstrong v. Zibell*, 98 Cal. App. 2d 296, 219 P. 2d 812 (1950).

68. *Bates v. Blitz*, 205 La. 536, 17 So. 2d 816 (1944).

69. *White v. Thacker*, 80 Ga. 656, 80 S. E. 2d 699 (1954); *Klahr v. Kostopoulos*, 138 Conn. 653, 88 A. 2d 332.

some courts to find such control.⁷⁰ Other courts infer such control from the fact that the lessor did in fact repair the defect after the injury for which suit is brought.⁷¹ Again a nice question is raised when the lessor hires an independent contractor to remedy some defect in a part of the premises over which he has retained control. Does this insulate the lessor from liability for the contractor's negligence? The courts have held both ways.⁷²

LESSOR'S FAILURE TO PERFORM AN AGREEMENT TO REPAIR

In this last category, even where the lessor's agreement to repair is unequivocal in the original contract of the parties, there is sharp division among the states. Under the older view the possibility of a recovery in tort based upon breach of a contractual obligation was denied, the courts saying that tort damages were either "too remote" or not expectable consequences of such a breach.⁷³ One jurisdiction following this view has allowed damages in an action for breach of contract in the amount of medical expenses incurred by the lessee as a result of injuries sustained by a child of the lessee.⁷⁴ However, the view which has been growing in favor allows the lessee to recover in tort for injuries caused by the lessor's failure to perform his agreement. Section 357 of the Restatement of Torts embodies this position⁷⁵ and bases it on the existence of a "tort duty based on the fact that the contract

70. *Antonsen v. Bay Ridge Savings Bank*, 292 N. Y. 143, 54 N. E. 2d 338 (1944). *Contra Flynn v. Pan American Hotel Co.*, 143 Tex. 219, 183 S. W. 2d 446 (1944). A typical clause in a lease whereby such "retained control" might be found reads: "The lessor and his representatives shall have the right to enter said premises at any time during reasonable hours to make needed repairs or alterations or to exhibit said premises."

71. *Noble v. Marx*, 298 N. Y. 106, 81 N. E. 2d 40 (1948); *Guyer v. Horgan*, 96 N. H. 288, 75 A. 2d 325 (1950).

72. Denying insulation for the lessor: *Brown v. George Pepperdine Foundation*, 23 Cal. 2d 256, 143 P. 2d 929 (1943); *Hussey v. Long Dock R. R. Co.*, 100 N. J. L. 380, 126 Atl. 314 (1924). Granting insulation for the lessor: *Jolly Motor Livery Corp. v. Allenberg*, 188 Tenn. App. 452, 221 S. W. 2d 513 (1949).

73. *Leavitt v. Twin County Rental Co.*, 222 N. C. 81, 21 S. E. 2d 890 (1942); *Cullings v. Goetz*, 231 App. Div. 109, 241 N. Y. S. 109, *aff'd*, 256 N. Y. 287, 176 N. E. 397 (1931).

74. *Ackarey v. Carbonaro*, 320 Mass. 537, 70 N. E. 2d 418 (1946).

75. The illustration for this section is as follows: "A leases an apartment in a tenement house to B and agrees to keep the tenement in good internal repair upon notice by the tenant of the necessity of so doing. B notified A that the ceiling of one of the rooms becomes in need of repairs. The condition is not such as to threaten an immediate fall of the ceiling. While B, C, his wife, and D, a friend, are eating supper in the room, the ceiling falls and causes harm to them. A is liable to B,

gives the lessor ability to make the repairs and control over them.”⁷⁶ The New York Court, which rejected the tort liability founded on the covenant to repair in *Cullings v. Goetz*,⁷⁷ has permitted the jury to find “control” on the basis of the mere right to enter and repair.⁷⁸

In most lease forms, (especially where a corporation is the lessor), there is a covenant exonerating the landlord from any liability for injury or damage arising out of the condition of the premises.⁷⁹ However, the reluctance of the courts to absolve the landlord from any such liability is illustrated by the leading case of *Kay v. Cain*⁸⁰ where the lease provided that lessor should not be liable for any damage arising from “any cause” in or about the building or demised premises whether caused by or resulting from bursting, leaking or overflowing of any water or steam pipe or “other cause” whatsoever. The plaintiff was injured when she fell over a bottle on an uncovered and unlighted stairway at night. The court held that the quoted phrases did not refer to negligence in failing to light a public stairway under the principle of *ejusdem generis*. But the court went on to say by way of dicta :

Moreover, it is doubtful whether a clause which did undertake to exempt a landlord from responsibility for such negligence would now be valid. The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy.⁸¹

C, and D, if, but only if, the ceiling fell after A has time, subsequent to receiving B’s notice, to make the repairs, had he exercised reasonable diligence and care.” RESTATEMENT, TORTS sec. 357 at 968 (1934).

76. *Id.*, at 967, Comment a.

77. 231 App. Div. 109, 241 N. Y. S. 109, *aff’d*, 256 N. Y. 287, 176 N. E. 397 (1931).

78. *Noble v. Marx*, 298 N. Y. 106, 81 N. E. 2d 40 (1948); *Antonsen v. Bay Ridge Savings Bank*, 292 N. Y. 143, 54 N. E. 2d 338 (1944). See also Note, 48 MICH. L. REV. 689 (1950), which deals with liability in tort as an incident of occupation and control.

79. An example of such a covenant: “The Lessee agrees to hold harmless and protect Lessor against any claims by himself, his family or the public for damage or injury arising in connection with the use of the within-demised property during this tenancy.”

80. 154 F. 2d 305 (D. C. Cir. 1946).

81. *Id.*, at 306. It is submitted that this dicta, as a holding of law, would undoubtedly be correct under the circumstances. But with all due respect and utmost humility, this writer calls to mind the words of the eminent Professor Corbin concerning public policy: “The loudest and most confident assertion as to what makes for the general welfare and happiness of mankind are made by the demagogue and the ignoramus.

THE LAW IN SOUTH CAROLINA

There is no statutory duty to repair imposed upon the landlord in South Carolina, and it may be stated generally that there is no duty upon the landlord to keep the premises in repair in the absence of an express provision therefor.⁸² Where there is an obligation to repair, a breach by the landlord does not give rise to tort liability on behalf of the tenant, his family, or invitees.⁸³

The leading case in South Carolina on the question of tort liability of the landlord for injuries to his tenant arising from breach of a covenant is *Timmons v. Williams Wood Products Corp.*⁸⁴ In that case, the plaintiff, an infant of tender years, was injured by the falling of a door in the home of her father which had been rented for himself and family from defendant. In sustaining a demurrer to the complaint, the Court held that the landlord is not liable for personal injuries to the tenant or persons entering under the tenant's title and that any breach of a covenant to repair gives rise to a cause of action *ex contractu* rather than *ex delicto*, the only damages recoverable being those reasonably within contemplation of the parties when the contract was made.⁸⁵

Criticism has been levelled at this decision⁸⁶ on the grounds that where an injury can reasonably be foreseen if the repair

The wise man knows that he does not know and therefore speaks softly and less often." 6 CORBIN CONTRACTS, sec. 1375 at 450 (1951).

82. *Timmons v. Williams Wood Products Corp.*, 164 S. C. 361, 162 S. E. 329 (1932). But when there are defects of construction amounting to a nuisance, liability may arise. *Id.* at 365.

83. *Id.* at 365. In his excellent opinion for the court, Acting Associate Justice J. Henry Johnson said by way of dictum at page 374: "Because the question for determination is one of novel impression in this jurisdiction, this opinion has perhaps been unduly prolonged, but a careful and exhaustive study convinces us that, with rare exceptions, all of the cases which permit recovery for personal injuries to the tenant or to a member of his family are bottomed (1) upon breach of a statutory duty; (2) where injury results from a defective condition known to the landlord and concealed by him from the tenant; (3) where injury is occasioned by a defect in a portion of the premises reserved by the landlord for the common use of all his tenants; (4) where injury occurs from the defective condition of premises furnished by the landlord for use of the public generally, as theaters, docks, etc.; (5) where the covenant is to keep the premises safe during the term; or (6) where the lessor actually undertakes to make the needed repairs and negligently does so — where there is misfeasance as distinguished from nonfeasance."

84. *Ibid.* See also *Pendarvis v. Wannamaker*, 173 S. C. 299, 175 S. E. 531 (1934).

85. *Timmons v. Williams Wood Products Corp.*, 164 S. C. 361, 365, 162 S. E. 329 (1932).

86. See *Bruton, Landlord and Tenant in South Carolina*, 1 S. C. L. Q. 119 (1948).

is not made, the landlord should be responsible therefor so long as he has covenanted to make the repair.⁸⁷ Nevertheless, the South Carolina Court suggests the remedy that if the landlord does not make the repair, the tenant may do so and recover against the landlord by suffering an action for rent and counterclaiming for such damages as are ordinarily incident to a breach of contract.⁸⁸

Where the tenant can establish negligence as to conditions within the landlord's control,⁸⁹ or misfeasance,⁹⁰ damages may be recovered. But it is no defense to the landlord that others were joint tort-feasors, if a chain of circumstances put in motion by the landlord results directly and proximately in a tenant's injury by reason of his (the landlord's) negligence, and he is not relieved from liability by such a theory.⁹¹

CONCLUSION

It is doubtful whether a majority of the jurisdictions in the United States adhere to the view that the landlord is not liable in tort for personal injuries to his tenant.⁹² But those courts which do hold him liable do so either under the guidance of statute or by means of the following exceptions to the common law principle:

1. Fraudulent concealment by the landlord at the time of leasing;
2. "Misfeasance" (rather than "non-feasance"), in making repairs;
3. Negligence of the landlord as to the condition of the premises within his control;
4. The lessor's failure to perform his agreement to repair.⁹³

In South Carolina, there are no statutes imposing liability and no duty exists as to repairs by the landlord in the absence

87. *Id.* at 127.

88. *Cantrell v. Fowler*, 32 S. C. 589, 10 S. E. 934 (1890).

89. *Binnicker v. Adden*, 204 S. C. 487, 30 S. E. 2d 142 (1944) (hole in cement walkway leading to grocery store owned by defendants but leased to others); *Medlock v. McAlister*, 120 S. C. 65, 112 S. E. 436 (1922) (defective elevator, negligently operated).

90. *Binnicker v. Adden*, *Id.* at 491; *Cf. Kilpatrick v. City of Spartanburg*, 101 S. C. 334, 85 S. E. 775 (1915) (lessors not having directed the placing of a piece of sidewalk removed from the premises to the street, they were not liable when tenant's child was injured by the falling of the piece of sidewalk).

91. *Daniels v. Timmons*, 216 S. C. 539, 599 S. E. 2d 149 (1950), *cert. denied*, *Timmons v. Daniels*, 340 U. S. 841 (1950).

92. *Annot.* 163 A. L. R. 300 (1946).

93. See note 20 *supra*.

of some express provision to that effect.⁹⁴ If injuries arise from breach of such an express provision the only damages recoverable are those that were reasonably within contemplation of the parties when the contract was entered into.⁹⁵ The only other cases allowing recovery are those cases in which the tenant can establish negligence as to conditions within the landlord's control⁹⁶ or misfeasance⁹⁷ on his part.

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94. *Timmons v. Williams Wood Products Corp.*, 164 S. C. 361, 162 S. E. 329 (1932).

95. *Ibid.*

96. See note 89 *supra*.

97. See note 90 *supra*.