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Covenant to Repair as Evidence of Landlord's Control

Edmund Button*

STATED AS A GENERAL RULE of law, liability as well as privilege accompanies ownership of land.¹ Liability as such is predicated on a duty imposed upon those with occupation or control of property, requiring them to maintain it in a safe condition so as not to injure those lawfully upon the premises.² The duty is commonly expressed by the maxim *sic utere tuo ut alienum non laedas*. This duty and concomitant liability may rest with the landlord or with the tenant, depending on who has the necessary occupation or control of the property.³

Ordinarily, when the owner of real property contracts to lease it, the lessee takes sufficient possession and control to release the owner-landlord from liability for personal injuries sustained by the lessee-tenant or those in privity with him.⁴ For all intents and purposes the tenant in possession and control is, as to persons lawfully on the premises, the true owner,⁵ and those injured because of defective conditions on the premises must look to the lessee for their remedy.⁶

However, there are exceptions to this rule. One such exception is where the landlord fraudulently or otherwise conceals an existing defective condition, or one that he has reason to know will become dangerous and which the tenant would not ordinarily discover in the course of his inspection of the premises.⁷ If the landlord knowingly conceals the defective condition, he remains, as to the tenant and those in privity with him, liable for injuries proximately caused by the concealed defective condition.⁸

Another instance when it is generally held that the liability of the landlord is not devolved upon the tenant is when the landlord is found to have retained control over areas of the demised premises used in com-

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¹ Shindelbeck v. Moon, 32 Ohio St. 264, 30 Am. Rep. 584 (1877).

² Burdick v. Cheadle, 26 Ohio St. 393 (1875).

³ Huey v. Barton, 328 Mich. 584, 44 N. W. 2d 132 (1950); Yaeger v. Parkgate Realty Co., 88 Ohio L. Abs. 385, 179 N. E. 2d 156 (Ohio App. 1962).

⁴ Restatement (2d), Torts § 355 (1965); 33 Ohio Jur. 2d, Landlord and Tenant § 196 (1958); Barnes v. Thomas, 72 Ga. App. 827, 35 S. E. 2d 364 (1945); Junkerman v. Tilyou Realty Co., 213 N. Y. 404, 108 N. E. 190 (1915); Verplanck v. Morgan, 55 Ohio L. Abs. 574, 90 N. E. 2d 872 (Ohio App. 1948).

⁵ Lipsitz v. Schechter, 377 Mich. 685, 142 N. W. 2d 1 (1966); Kauffman v. First Central Trust Co., 151 Ohio St. 298, 85 N. E. 2d 796 (1949); Artman v. Cities Service Oil Co., 83 Ohio L. Abs. 123, 164 N. E. 2d 750 (Ohio App. 1960).

⁶ Artman v. Cities Service Oil Co., *supra* n. 5; Burdick v. Cheadle, *supra* n. 2.

⁷ Prosser, Law of Torts 413 (3rd ed. 1964); Lee v. Giosso, 237 Cal. App. 2d 246, 46 Cal. Rptr. 803 (1965).

⁸ Prosser, *ibid*; 3A Thompson, Real Property 155 (1959).

mon.⁹ Included are areas used by other tenants as well as areas shared by the landlord and one or more tenants.¹⁰ For example entrances, hallways, staircases, elevators, and similar areas used in common are generally found to be exclusively controlled by the landlord.¹¹ The landlord may be found liable for injuries to tenants, their families, invitees and employees caused by his failure to maintain these areas.¹² His duty is one of exercising ordinary care in maintaining them in a safe condition.¹³

Another exception to the rule that the tenant and not the landlord is liable for defective conditions of leased premises has for its basis the landlord's promise or covenant to repair. Unlike the aforementioned exceptions, this one is neither well defined nor uniformly applied throughout the states. How the courts construe the landlord's promise to repair as affecting his liability in tort is the concern of this note.

Under the Common Law

A majority of the courts adhere to the common law rule that a landlord's breach of a promise or covenant to repair does not afford the tenant or those in privity with him an action against the landlord for personal injuries proximated by the breach.¹⁴ The landlord's covenant to repair is held to be a contractual obligation to perform a service imposing no legal duty on the landlord.¹⁵ As was stated in *Samuelson v. Cleveland Iron Mining*:¹⁶ "Legal wrongs must spring from neglect of legal duties." Hence, the landlord's breach of a covenant to repair is a mere nonfeasance for which an action in tort does not lie.¹⁷ The tenant's remedy for the landlord's failure to make promised repairs is an action at law for damages.¹⁸ The measure of damages is "the difference between

⁹ 33 Ohio Jur. 2d, *op. cit. supra* n. 4 at § 193; 32 Am. Jur., Landlord and Tenant §§ 662, 671 (1941); 3A Thompson, *op. cit. supra* n. 8 at 152; Daulton v. Williams, 81 Cal. App. 70, 183 P. 2d 325 (1947).

¹⁰ Gula v. Gawel, 71 Ill. App. 2d 174, 218 N. E. 2d 42 (1966); Price v. Smith, 373 P. 2d 242 (Okla. 1962).

¹¹ Mularski v. Brzuchalski, 117 Ohio App. 486, 192 N. E. 2d 669 (1961); Rice v. Ziegler, 128 Ohio St. 239, 190 N. E. 560 (1934).

¹² Ross v. Heberling, 92 Ohio App. 148, 109 N. E. 2d 586 (1952); Lipsitz v. Schechter, *supra* n. 5; Price v. Smith, *supra* n. 10.

¹³ 3A Thompson, *op. cit. supra* n. 8 at 211; Allen v. Genry, 39 Ala. App. 281, 97 So. 2d 828 (1957); Gula v. Gawel, *supra* n. 10; Rice v. Ziegler, *supra* n. 11; Price v. Smith, *supra* n. 10; Lipsitz v. Schechter, *supra* n. 5.

¹⁴ 163 A. L. R. 301 (1946); 78 A. L. R. 2d 1243 (1961); Kuyk v. Green, 219 Mich. 423, 189 N. W. 25 (1922); Huey v. Barton, *supra* n. 3; Berkowitz v. Winston, 128 Ohio St. 611, 193 N. E. 343 (1934); Pitts v. Cincinnati Metropolitan Housing Authority, 160 Ohio St. 129, 113 N. E. 2d 869 (1953).

¹⁵ Bowman v. Goldsmith Brothers Co., 63 Ohio L. Abs. 428, 109 N. E. 2d 556, app. dismissed 158 Ohio St. 121, 107 N. E. 2d 114 (1952).

¹⁶ 49 Mich. 164, 13 N. W. 499, 504 (1882).

¹⁷ Kuyk v. Green, *supra* n. 14; Daulton v. Williams, *supra* n. 9; Smith v. Hallock, 210 Ala. 529, 98 So. 781 (1924); Bowman v. Goldsmith Brothers Co., *supra* n. 15; But, cf. Proper v. Kesner, 104 So. 2d 1 (Fla. 1958).

¹⁸ 33 Ohio Jur. 2d, *op. cit. supra* n. 4 at § 184; Kuyk v. Green, *supra* n. 14.

the value of the premises in repair and the value out of repair.”¹⁹ Persons on the premises in the right of the tenant have no better standing than the tenant in a tort action against the landlord for personal injuries.²⁰ Furthermore, since they are usually not in privity with the landlord they have no standing to bring an action on the contract.²¹

Ohio is in complete accord with the majority rule, as evidenced by the court's decision in *Yaeger v. Parkgate Realty*²² where it announced:

It has been definitely established in Ohio that an owner of real estate who has surrendered possession thereof to a lessee is not liable to such lessee, his employees or invitees, for personal injuries resulting from a defective condition of the premises even though he had promised the lessee to make repairs.

The reasoning for denying a tort action when the landlord fails to make promised repairs seems to be founded upon two major premises. The first holds that a promise or covenant to repair is insufficient to show a retention of control by the landlord.²³ In the absence of control the landlord is not liable in tort for injuries sustained on the premises.²⁴ The second premise maintains that in the breach of a promise or covenant to repair, personal injuries are not ordinarily anticipated as the probable consequences.²⁵

Control

Courts have consistently held that, where premises are leased to the exclusive use of the tenant, a promise or covenant to repair is insufficient to show retention of control by the landlord.²⁶ In the case of *Cinat v. Great Atlantic & Pacific Tea Company*²⁷ it was said:

A landlord's covenant to repair, standing alone, imposes on the landlord no liability in tort either to the tenant or to a third party. Such a liability is an incident to occupation and control, which is not deemed reserved by a covenant to repair.

The fact that the landlord reserves the right to enter the premises for the purpose of inspection or to make repairs,²⁸ and in fact makes the

¹⁹ *Moldenhauer v. Krynski*, 62 Ill. App. 2d 382, 210 N. E. 2d 809 (1965).

²⁰ *Cullings v. Goetz*, 256 N. Y. 287, 176 N. E. 397 (1931); *Hall v. Myers*, 49 Ohio L. Abs. 345, 77 N. E. 2d 81 (Ct. App. 1947); *Roan v. Brucker*, 180 Neb. 399, 143 N. W. 2d 108 (1966).

²¹ *Huey v. Barton*, *supra* n. 3; *Soulia v. Noyes*, 111 Vt. 323, 16 A. 2d 173 (1940).

²² 88 Ohio L. Abs. 385, 388, 179 N. E. 2d 156, 158 (App. 1962).

²³ See "Control" *infra*.

²⁴ *Huey v. Barton*, *supra* n. 3.

²⁵ See "Remoteness of Consequences" *infra*.

²⁶ *Berkowitz v. Winston*, *supra* n. 14; *Cullings v. Goetz*, *supra* n. 20; *Lafredo v. Bush Terminal Co.*, 261 N. Y. 323, 185 N. E. 398, rehearing den., 262 N. Y. 522, 188 N. E. 48 (1933); *But, cf. Barron v. Liedoff*, 95 Minn. 474, 104 N. W. 289 (1905).

²⁷ 2 App. Div. 2d 859, 155 N. Y. S. 2d 956, 957 (1956).

²⁸ *Brown v. Cleveland Baseball Co.*, 158 Ohio St. 1, 106 N. E. 2d 632 (1952); *Behr v. Dana Realty Corp.*, 17 N. Y. 2d 701, 216 N. E. 2d 706 (1966); *Kauffman v. First Central Trust Co.*, *supra* n. 5; *Land v. Brotherhood of Locomotive Engineers Bldg. Ass'n.*,

(Continued on next page)

repairs,²⁹ either voluntarily or in accordance with a promise,³⁰ does not demonstrate his retention of control of the premises.³¹ The case of *Cullings v. Goetz*³² is noted as a landmark case on the issue of "control." In that case Cardozo relied on the case of *Cavalier v. Pope*³³ in which it was stated: "The power of control necessary to raise the duty . . . implies something more than the right or liability to repair premises."

What powers must the landlord possess in order for a court to find that he has retained control? It is a well-established rule that in order for the lessor to be held to have retained control of leased premises it must be shown that he had the power to exercise the right of admitting and excluding people from the premises.³⁴ The test, as was stated in the case of *Ripple v. Mahoning National Bank*,³⁵ is whether or not the landlord has the "right of control to the exclusion of any control by the tenant if the former elected to exercise such right."

Although the covenant to repair alone is not held to be evidence of control,³⁶ coupled with other circumstances such as the terms of the lease or subsequent acts of the landlord,³⁷ the issue of control may become a question for the jury. Thus, where the landlord covenanted to repair, and three days after the tenant's injury the landlord repaired the defective condition, the court held this to be sufficient to justify a judgment for damages based on the landlord's control.³⁸ In the case of *Auferheide v. Thal*,³⁹ evidence showing that the owner carried insurance covering an elevator was admissible for consideration as to whether or not he retained control over the elevator. And where the lessor of a ballpark was found to have control of the management of the demised premises including the employing, paying and discharging of all employees, he was held to retain control thereof and was charged with the duty of exercising ordinary care in maintaining the premises.⁴⁰

(Continued from preceding page)

21 Ohio L. Abs. 462 (Ct. App. 1936); *Stone v. Sullivan*, 300 Mass. 450, 15 N. E. 2d 476 (1938).

29 *Land v. Brotherhood of Locomotive Engineers Bldg. Ass'n.*, *ibid.*

30 *Pitts v. Cincinnati Metropolitan Housing Authority*, *supra* n. 14.

31 *Brown v. Cleveland Baseball Co.*, *supra* n. 28; *Kauffman v. First Central Trust Co.*, *supra* n. 5; *Land v. Brotherhood of Locomotive Engineers Bldg. Ass'n.*, *supra* n. 28.

32 256 N. Y. 287, 176 N. E. 397 (1931).

33 2 K. B. 757 (1906).

34 *Artman v. Cities Service Oil Co.*, *supra* n. 5; *Berkowitz v. Winston*, *supra* n. 14; *Brown v. Cleveland Baseball Co.*, *supra* n. 28; *Cooper v. Roose*, 151 Ohio St. 316, 85 N. E. 2d 545 (1949); *Lairedo v. Bush Terminal Co.*, *supra* n. 26; *Pitts v. Cincinnati Metropolitan Housing Authority*, *supra* n. 14.

35 143 Ohio St. 614, 620, 56 N. E. 2d 289, 291 (1944).

36 *Dick v. Sunbright Steam Laundry Corp.*, 307 N. Y. 422, 121 N. E. 2d 399 (1954); *Berkowitz v. Winston*, *supra* n. 14.

37 *Gula v. Gawel*, *supra* n. 10.

38 *Noble v. Marx*, 298 N. Y. 106, 81 N. E. 2d 40 (1949).

39 77 Ohio App. 96, 63 N. E. 2d 329 (1945).

40 *Brown v. Cleveland Baseball Co.*, *supra* n. 28.

Remoteness of Consequences

Aside from the theory of "no control," a number of courts have denied a tort action for personal injuries for breach of a covenant to repair on the grounds that such injuries are not the probable consequences of the landlord's failure to repair.⁴¹ The possibility that someone might sustain injury because the landlord fails to keep his promise to repair is not ordinarily contemplated by the parties to the agreement.⁴² As was stated in *Jacobson v. Leaventhal*:⁴³

A person who contracts to repair a building in possession and control of another, even though it be his tenant, if he fails to perform his contract is liable in an action on the contract for consequences that may reasonably be anticipated, but is not, by reason of breach of his contractual duty liable to an action of tort for negligence.

A Trend

As stated earlier, a majority of courts follows the common-law rule, holding that after the tenant takes possession and control of the premises the landlord is ordinarily released from any liability for personal injury caused by defective conditions arising on the premises. This rule has survived despite the landlord's promise or covenant to repair. In the last forty years there has developed a minority trend that imposes liability in a tort action when the landlord has breached his covenant to repair.⁴⁴ This has come about through judicial decision as well as legislative enactment. Several states have passed legislation requiring the landlord to put the premises in repair and to maintain them in a safe condition, and further providing for a termination of the lease or a tort action for damages if a failure to comply results in injury.⁴⁵ While some states provide for a termination of the lease and no tort action, others provide for both.⁴⁶

The American Law Institute⁴⁷ has adopted the view that a lessor may be liable for personal injuries caused by his failure to perform a promise or covenant to repair. It provides⁴⁸ for the lessor's liability in tort for damages for personal injury to the tenant and those in privity with

⁴¹ *Goff v. United States*, 159 F. Supp. 415 (D. Maine, S. D. 1958); *Cooper v. Roose*, *supra* n. 34; *Huey v. Barton* *supra* n. 3; *Jordan v. Miller*, 179 N. C. 73, 101 S. E. 550 (1919); *Smith v. Hallock*, *supra* n. 17.

⁴² *Cooper v. Roose*, *supra* n. 34; *Huey v. Barton*, *supra* n. 3; But cf. *Moldenhauer v. Krynski*, *supra* n. 19.

⁴³ 128 Me. 424, 148 A. 281, 282 (1930).

⁴⁴ 163 A. L. R. 303 (1946); 78 A. L. R. 2d 1252 (1961); *Kratovil*, Real Estate Law § 616 (4th ed. 1964).

⁴⁵ 17 A. L. R. 2d 705 (1951); *Kratovil*, *id.* at § 617; *Daniels v. Brunton*, 9 N. J. Super. 294, 76 A. 2d 73, *affd.* 7 N. J. 102, 80 A. 2d 547 (1951).

⁴⁶ *Kratovil*, *ibid.*

⁴⁷ *Restatement (2d)*, Torts § 357 (1965).

⁴⁸ *Ibid.*

him caused by a condition of disrepair which the lessor has covenanted to repair.⁴⁹ He is liable for conditions of disrepair present at the time of leasing as well as for those arising thereafter.⁵⁰ Of course, the injury complained of must be attributable to the lessor's failure to perform the contract.⁵¹ In substantiating its view the Institute⁵² takes into account the lessor's obligation in return for which he is paid rent,⁵³ the relationship between the parties,⁵⁴ and the fact that the lessor retains a reversionary interest in the demised property, thereby giving him a degree of control that would imply some responsibility for keeping the premises safe.⁵⁵ As to those premises which he has promised to keep in repair, the lessor is charged with the duty to exercise reasonable care to make them safe⁵⁶ for the tenant and persons on the land in the tenant's right.⁵⁷

A minority of the courts has discarded the harsh traditional rule and now holds the landlord liable for personal injuries caused by his failure to make the promised repairs.⁵⁸ Thus, where the landlord in leasing a house covenanted to make all repairs, and after being notified of the defective condition of a window sill, he failed to repair and the tenant's child was injured when an air conditioner pulled loose striking him, the court found the landlord to have been negligent in failing to act as promised.⁵⁹ Most of the courts holding under the minority rule tend to adopt the view of the American Law Institute,⁶⁰ concluding that by virtue of the landlord's contractual obligation to repair he has the necessary control of the premises to impose upon him the duty and concomitant liability for breach of the promise.⁶¹ The duty applies to those in privity with

⁴⁹ The rule in Restatement (2d), Torts § 357 (1965), which is virtually the same as Restatement Torts § 357 (1934), was followed in: *Faber v. Creswick*, 31 N. J. 234, 156 A. 2d 252 (1959); *Mariotti v. Berns*, 114 Cal. App. 2d 666, 251 P. 2d 72 (1952); *Scholey v. Steele*, 59 Cal. App. 2d 402, 138 P. 2d 733 (1943).

⁵⁰ Restatement, *op. cit. supra* n. 47.

⁵¹ *Mariotti v. Berns*, *supra* n. 49.

⁵² American Law Institute.

⁵³ Restatement, *op. cit. supra* n. 47 comment b (1) at 241.

⁵⁴ *Id.* comment b (2) at 242.

⁵⁵ *Id.* comment b (3).

⁵⁶ *Id.* comment d.

⁵⁷ Restatement, *op. cit. supra* n. 47.

⁵⁸ *Barron v. Liedoff*, *supra*, n. 26; *Berlin v. Southgate Corp.*, 142 So. 2d 362 (Fla. App. 1962); *Collison v. Curtner*, 141 Ark. 122, 216 S. W. 1059 (1919); *Lommori v. Milner Hotels, Inc.*, 63 N. M. 342, 319 P. 2d 949 (1957); *McKenzie v. Atlantic Manor, Inc.*, 181 So. 2d 554 (Fla. App. 1965); *William v. Davis*, 188 Kan. 385, 362 P. 2d 641 (1961); *Propper v. Kesner*, *supra* n. 17; *Scholey v. Steele*, *supra* n. 49.

⁵⁹ *Bice v. Pennsylvania Millers Mut. Ins. Co.*, 188 So. 2d 502 (La. App. 1966).

⁶⁰ Restatement, *op. cit. supra* n. 47.

⁶¹ *Alaimo v. DuPont*, 4 Ill. App. 2d 85, 123 N. E. 2d 583 (1945); *Barron v. Liedoff*, *supra* n. 26; *Baum v. Bahn Frei Mut. Building & Loan Ass'n.*, 237 Wis. 117, 295 N. W. 14 (1941); *Collison v. Curtner*, *supra* n. 58; *Faber v. Creswick*, *supra* n. 49; *Lommori v. Milner Hotels, Inc.*, *supra* n. 58; *Michael v. Brookchester*, 26 N. J. 379, 140 A. 2d 199 (1958); *Ross v. Haner*, 244 S. W. 231 (Tex. Civ. App.), *aff'd*, 258 S. W. 1036 (Tex. Comm'n. of App. 1924); *Scholey v. Steele*, *supra* n. 49; *Scibek v. O'Connell*, 131 Conn. 557, 41 A. 2d 251 (1954).

the tenant.⁶² A few courts have side-stepped the issue of "control" and have found liability in the landlord's failure to perform a covenant to repair as being the breach "of a legal duty that is denominated negligence."⁶³

The courts holding under the minority rule seem to agree that in order for the landlord to be liable under a covenant to repair there must be sufficient consideration for the promise.⁶⁴ If the promise to repair was made gratuitously, or after the lease and without additional consideration, it will be considered a nudum pactum.⁶⁵

Illinois courts, although following the majority view, have made some divergences. They find the landlord liable if the covenant was more than just a promise to repair and was in fact a promise to maintain a condition of safety.⁶⁶ And in the recent case of *Moldenhauer v. Krynski*,⁶⁷ the Illinois court held that where the agreement was for specific repairs and damages were contemplated in the lease, the liability or non-liability of the landlord was for the jury to decide.⁶⁸

In jurisdictions holding the landlord liable for breach of covenant to repair, his duty as to discovery of defective conditions has been held to be "by the use of ordinary care and reasonable inspection."⁶⁹

Negligence In Making Repairs

It should be noted that once the lessor has undertaken the task of making repairs, whether made pursuant to some agreement or gratui-

⁶² *Alaimo v. DuPont*, *supra* n. 61; *Michael v. Brookchester*, *supra* n. 61; *Ross v. Haner*, *supra* n. 61; *Scholey v. Steele*, *supra* n. 49; *Mariotti v. Berns*, *supra* n. 49; *Faber v. Creswick*, *supra* n. 49.

⁶³ *Barwick v. Gendel*, 11 N. J. Super. 6, 77 A. 2d 808, 809 (1950); *Bice v. Pennsylvania Millers Mut. Ins. Co.*, *supra* n. 59.

⁶⁴ *Scibek v. O'Connell*, *supra* n. 61; *Maday v. New Jersey Title Guarantee & Trust Co.*, 127 N. J. L. 426, 23 A. 2d 178 (N. J. App. 1941), modified, 129 N. J. L. 53, 28 A. 2d 104 (1942).

⁶⁵ *Scibek v. O'Connell*, *supra* n. 61, "If the promise is made to induce the tenant to remain for a new or longer term, it is based upon a sufficient consideration"; *Scholey v. Steele*, *supra* n. 58; *Maday v. New Jersey Title Guarantee & Trust Co.*, *supra* n. 64; *Moldenhauer v. Krynski*, *supra* n. 19; *Underwood v. Moloney*, 397 S. W. 2d 18 (Mo. App. 1965).

⁶⁶ *Alaimo v. DuPont*, *supra* n. 61, citing *Cromwell v. Allen*, 151 Ill. App. 404, wherein three exceptions to the common-law rule of non-liability were announced:

(a) if the covenant carries the obligation to maintain the premises in a safe or reasonably safe condition, or

(b) if the covenant is made under circumstances which indicate that tort damages were to be recoverable for injuries resulting from a breach of the covenant, or

(c) if there is a duty to repair apart from the contract.

Cf., *Gula v. Gawel*, *supra* n. 10; *Bifield v. Bruner-Ritter*, 144 Conn. 747, 137 A. 2d 751 (1958), following *Dean v. Hershowitz*, 177 A. 262 (Conn. Sup. Ct. of Errors 1935), where liability was founded upon landlord's promise to "keep that area . . . reasonably safe for normal use."

⁶⁷ 62 Ill. App. 2d 382, 210 N. E. 2d 809 (1965).

⁶⁸ *Cf.* *Gula v. Gawel*, *supra* n. 10.

⁶⁹ *Collison v. Curtner*, *supra* n. 58, 216 S. W. at 1061.

tously, he must exercise reasonable care in so doing and will be held liable for injuries caused by the negligent execution of the work.⁷⁰ In *Verplanck v. Morgan*⁷¹ the landlord gratuitously assumed the responsibility of repairing the tenant's stove. The stove exploded causing injury to the tenant and the landlord was held liable for those injuries upon a finding that the repairs were made negligently.

Conclusion

In the case of *Bruszczynaska v. Ruby*,⁷² in speaking of the common-law rule that denies a tort action against the landlord who has breached his covenant to repair, the New York court said: "This rule, we realize, appears harsh; but we did not make it; it is the well settled law of this state; and in view of the decisions of the court of appeals, we have no power to change it."

It is conceded that this rule as applied by a majority of the courts is founded upon well-established principles of tort and contract law, but it must also be noted that the rule was formulated at a time when laws were made to protect wealthy landowners. In many instances the application of this rule in today's society has harsh and inequitable consequences. Slum landlords who lease property in a state of disrepair and fail to maintain it in a safe condition, even though better able financially to do so, escape liability under this rule. The tenant relying on the landlord's promise to repair is more apt to await his performance. On the other hand, the landlord is usually aware that his failure to perform will not render him liable for injury caused by his breach.

A number of jurisdictions and the American Law Institute now maintain the view that the landlord who fails to perform his agreement to repair may be found liable for resulting injury. Other courts, in search of some middle-ground while still clinging to the common-law rule, have found the landlord liable in tort on other grounds. Several states have recognized the need to place some responsibility on the landlord for the safety of his tenants and have passed laws to that effect. Perhaps this trend is an indication that more courts need to re-evaluate their positions on this rule.

⁷⁰ *Southern Apartments, Inc. v. Emmett*, 269 Ala. 584, 114 So. 2d 453 (1959); *Ginsberg v. Wineman*, 314 Mich. 1, 22 N. W. 2d 49 (1946); *Johnson v. Dumech*, 52 Ohio L. Abs. 161, 82 N. E. 2d 297 (Ct. App. 1948).

⁷¹ 55 Ohio L. Abs. 574, 90 N. E. 2d 872 (Ohio App. 1948).

⁷² 267 App. Div. 539, 47 N. Y. S. 2d 788, 792 (1944), rehearing den. 267 App. Div. 975, 48 N. Y. S. 2d (1944), rev'd. on other grounds 294 N. Y. 22, 60 N. E. 2d 26 (1945).