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Landlord's Retention of Power to Control Premises

*Jan S. Moskowitz**

AS A GENERAL RULE, a landlord is not responsible for personal injuries to persons in leased premises occurring during the term of the lease as a result of the condition of the leased premises.¹ In order to be held liable for such injury one must possess one of the attributes of ownership, namely possession or control of the premises.² When a tenant leases the premises these attributes of ownership are ordinarily transferred to him,³ and the landlord retains only a reversionary interest in them. Once the tenant acquires complete control, he is, as far as third persons injured on the premises are concerned, the owner, and they must look to him for damages.⁴ Ordinarily, the tenant takes the premises in the condition in which they exist at the time he enters into possession, and he assumes the risk of personal injury that may arise as a result of any defects that are present.⁵ However, if the owner or landlord of the property has possession and control over it, he has a duty to keep it in a reasonably safe condition, and is liable to persons injured as a result of his failure to do so.⁶ This duty usually applies to common areas,⁷ and is extended to protect not only the tenant but also those lawfully on the premises in the right

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¹ Prosser, *Law of Torts* 412 (3d ed. 1964).

² *Cooper v. Roose*, 151 Ohio St. 316, 85 N.E. 2d 545 (1949); *Artman v. Cities Service Oil Co.*, 83 Ohio L. Abs. 123, 164 N.E. 2d 750 (Ohio App. 1960).

³ *Cooper v. Roose*, *supra* n. 2.

⁴ *Grieser v. Huntington National Bank of Columbus*, 176 Ohio St. 291, 199 N.E. 2d 556 (1964); *Artman v. Cities Service Oil Co.*, *supra* n. 2; *Kauffman v. First-Central Trust Co.*, 151 Ohio St. 298, 85 N.E. 2d 796 (1949).

⁵ *Civale v. Meriden Housing Authority*, 150 Conn. 594, 192 A. 2d 548 (1963); *Continental Oil Co. v. Ryan*, 392 P. 2d 492 (Okla. Sup. Ct. 1963); *Yaeger v. Parkgate Realty Co.*, 88 Ohio L. Abs. 385, 179 N.E. 2d 156 (Ohio App. 1962).

⁶ *Jacobs v. Mutual Mortgage & Investment Co.*, 2 Ohio App. 2d 1, 206 N.E. 2d 30 (1965) *rev'd* on other grounds 6 Ohio St. 2d 92, 216 N.E. 2d 49 (1966); *Pitts v. Cincinnati Metropolitan Housing Authority*, 160 Ohio St. 129, 113 N.E. 2d 869 (1953); *Brown v. Cleveland Baseball Co.*, 158 Ohio St. 1, 106 N.E. 2d 632 (1952).

⁷ See "When Landlord Has Control," *infra*.

of the tenant,⁸ such as members of his family,⁹ his employees,¹⁰ his invitees,¹¹ and his guests.¹²

It is well settled that the possession and control necessary to impose liability in tort for injury implies that the landlord must have the power and the right to admit people to or exclude them from the premises.¹³ If he does not have such power and right, he is not liable for injury. It has been held that where the landlord does not have full control, but has exercised substantial occupation and control, he is still under the obligation imposed upon him.¹⁴

An exception to the rule that the landlord is not liable for injuries when he does not have possession and control arises in the situation where he leases premises upon which a dangerous condition or nuisance existed at the time of the lease.¹⁵ In the case of *Shindelbeck v. Moon*¹⁶ the Ohio Supreme Court stated:

The owner of premises who leases them when they are in such a want of repair or bad condition as to be a nuisance, or when, from the ordinary course of events, they must become so, and receives rent for their use, is liable to a third person for injury happening in consequence of this defective condition or nuisance.

This rule is predicated on the fact that the landlord had control of the property at the time the cause of the injury originated,

⁸ *Bostian v. Jewell*, 254 Iowa 1289, 121 N.W. 2d 141 (1963); *Turnipseed v. McGee*, 236 Miss. 159, 109 So. 2d 551 (1959); *Ross v. Belzer*, 199 Md. 187, 85 A. 2d 799 (Ct. App. 1952).

⁹ *Price v. Smith*, 373 P. 2d 242 (Okla. Sup. Ct. 1962); *Harper v. Vallejo Housing Authority*, 104 Cal. App. 2d 621, 232 P. 2d 262 (1951); *Primus v. Bellevue Apartments*, 241 Iowa 1055, 44 N.W. 2d 347 (1950).

¹⁰ *White v. E. & F. Construction Co.*, 151 Conn. 110, 193 A. 2d 716 (1963); *Netherland v. Pacific Employers Insurance Co.*, 101 Ga. App. 837, 115 S.E. 2d 122 (1960); *White v. Ellison Realty Corp.*, 5 N. J. 228, 74 A. 2d 401 (1950).

¹¹ *Brown v. Cleveland Baseball Co.*, *supra* n. 6; *Rogers v. Columbus Bank & Trust Company*, 111 Ga. App. 792, 143 S.E. 2d 438 (1965).

¹² *Hardin v. Elvitsky*, 232 Cal. App. 2d 357, 42 Cal. Rptr. 748 (1965); *Young v. Saroukos*, 185 A. 2d 274 (1962), *aff'd* 189 A. 2d 437 (Del. Sup. Ct. 1963); *Geislinger v. Village of Watkins*, 269 Minn. 116, 130 N.W. 2d 62 (1964).

¹³ *Artman v. Cities Service Oil Co.*, *supra* n. 2; *Pitts v. Cincinnati Metropolitan Housing Authority*, *supra* n. 6; *Brown v. Cleveland Baseball Co.*, *supra* n. 6, where the lessee was required to employ ushers, ticket sellers and ticket takers regularly employed by the lessor.

¹⁴ *Brown v. Cleveland Baseball Co.*, *supra* n. 6; *Honeycutt v. Cincinnati Metropolitan Housing Authority*, 114 Ohio App. 311, 175 N.E. 2d 116 (1961).

¹⁵ *Baldassare v. Crown Furniture Co.*, 207 N.E. 2d 268 (Mass. 1965); *Moreno v. Relkin*, 24 Misc. 2d 230, 197 N. Y. S. 2d 293 (N. Y. Munic. Ct. 1960); *Trowbridge v. Barry*, 17 Ill. App. 2d 494, 150 N.E. 2d 842 (1958).

¹⁶ 32 Ohio St. 264, 269, 30 Am. Rep. 584, 587 (1877).

and thus could have remedied the situation at that time.¹⁷ He cannot discharge himself from liability in such a case by letting the premises to another.¹⁸

It should be noted that the test to determine who is charged with the duty to keep the premises in a safe condition is based upon who had *possession and control* at the time of the injury, rather than upon mere ownership of the property. Hence, one who assumes to be the owner and controls the property cannot escape liability by showing that he is not the owner.¹⁹ This also applies to the case where the owner employs an agent to exclusively manage and operate his property.

Standard of Care Required

As to the parts of the premises over which the landlord has retained possession and control, his duty is based upon the law of invitation rather than upon the law of landlord-tenant.²⁰ His duty is that of an owner or possessor of property who invites others upon it,²¹ and he is obligated to use reasonable care to see that such property is in a reasonably safe condition for the purposes intended.²² He has the duty to repair any defects or remove any obstructions which would reasonably be anticipated as likely to cause injury.²³ This duty extends to defects of which he had actual or constructive notice, i.e., defects which he would have discovered had he exercised reasonable

¹⁷ *Ibid.*

¹⁸ *Id.*

¹⁹ *Taylor v. New Jersey Highway Authority*, 22 N. J. 454, 126 A. 2d 313 (1956); *Ziulkowski v. Kolodziej*, 119 Conn. 230, 175 A. 780 (1934); *Bryant v. Schrage*, 75 Ohio App. 62, 60 N.E. 2d 801 (1945).

²⁰ 52 C. J. S. 26, Landlord and Tenant, § 417; *Bostian v. Jewell*, *supra* n. 8; *Landay v. Cohn*, 220 Md. 24, 150 A. 2d 739 (Ct. App. 1959); *Jackson v. Land*, 391 P. 2d 904 (Okla. App. 1964).

²¹ *Bostian v. Jewell*, *supra* n. 8; *Jackson v. Land*, *supra* n. 20.

²² *Klein v. United States*, 339 F. 2d 512 (2d Cir. 1964); *Green v. Kahn*, 391 S.W. 2d 269 (Mo. Sup. Ct. 1965); *Jacobs v. Mutual Mortgage & Investment Co.*, *supra* n. 6; *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W. 2d 835 (1964); *White v. Ellison Realty Corp.*, *supra* n. 10.

²³ *Anderson v. Marston*, 213 A. 2d 48 (Maine Sup. Jud. Ct. 1965); *Weaver v. Arthur A. Schneider Realty Co.*, 381 S.W. 2d 866 (Mo. Sup. Ct. 1964) where landlord was held to have reasonably assumed that tenant would protect his child from danger; *Benjamin v. Jonathan Woodner Co.*, 22 App. Div. 2d 68, 253 N. Y. S. 2d 649 (1964).

care.²⁴ Constructive notice may be proved by showing that the defect existed for such a length of time that he is charged with the knowledge of its presence.²⁵

The landlord does not owe the duty to use reasonable care to those persons coming onto the premises for a purpose of their own. They are not his invitees, but rather are considered either licensees or trespassers to whom he owes a duty not to trap or to wilfully injure.²⁶

The landlord is not an insurer of the safety of those on the portion of the premises over which he has retained control, but he must use reasonable care with respect to it.²⁷ Consequently, if while in the exercise of such care, he fails to discover and repair a hidden defect, he would not be liable for injuries resulting therefrom.²⁸

The landlord's breach of his duty to use reasonable care gives rise to a tort action for negligence.²⁹ If an injury is not the proximate result of the landlord's negligent acts, he will not be held liable for it.

When Landlord Has Control

Whether or not a landlord has retained possession and control over the premises, or a part thereof, ordinarily depends upon the factual situation of each case. In some instances the landlord may retain control over the premises leased to the tenant,³⁰ while in other situations he may relinquish possession and control over part of the premises and retain them as to the remainder for the benefit of all the tenants.

²⁴ *Rodenbur v. Kaufmann*, 320 F. 2d 679 (D. C. Cir. 1963); *Fincher v. Fox*, 107 Ga. App. 695, 131 S.E. 2d 651 (1963); *Benjamin v. Jonathan Woodner Co.*, *supra* n. 23; *Ross v. Heberling*, 92 Ohio App. 148, 109 N.E. 2d 586 (1952).

²⁵ *Trainor v. Maus*, 126 Cal. App. 2d 295, 271 P. 2d 957 (1954); *Young v. Saroukos*, *supra* n. 12; *Geislinger v. Village of Watkins*, *supra* n. 12.

²⁶ 32 Am. Jur. 567, *Landlord and Tenant*, § 691.

²⁷ *Fincher v. Fox*, *supra* n. 24; *McGuffey v. Dotley*, 381 S.W. 2d 585 (Tenn. App. 1964); *Bruno v. Pendleton Realty Co.*, 240 S. C. 46, 124 S.E. 2d 580 (1962).

²⁸ *Waite v. Thomas Emery's Sons, Inc.*, 32 Ohio L. Abs. 521, 32 N.E. 2d 764 (Ohio App. 1940).

²⁹ *Reynolds v. Cherrington*, 45 Ohio L. Abs. 564, 68 N.E. 2d 136 (Ohio App. 1943); *Flynn v. Katz*, 164 So. 2d 55 (La. App. 1964); *Phelps Roofing Company v. Johnson*, 368 S.W. 2d 320 (Ky. App. 1963); *Geislinger v. Village of Watkins*, *supra* n. 12; *Gaynor v. Nagob*, 204 Pa. Super. 258, 203 A. 2d 525 (1964).

³⁰ *Brown v. Cleveland Baseball Co.*, *supra* n. 6, where landlord did not substantially relinquish occupation and control to the lessee.

A) Common Areas

Where the premises are leased to more than one tenant and each tenant occupies a different portion, but they all use certain portions in common, such as stairs, entrances, and halls, the presumption is that the landlord has control over these areas.³¹ These parts of the premises are not included in the tenant's lease, but their use is necessary to gain access to the demised portions. Consequently a right arises in favor of each tenant and his invitees to use such portions for the beneficial enjoyment of the part demised.³²

B) Employment of Managing Agent

An owner may divest himself of possession and control by employing a management company. However, he must completely divest himself of all control over the premises. If he does not, he will be held to have retained control and will be liable for the negligent acts of said company.

In the case of *Jacobs v. Mutual Mortgage & Investment Co.*³³ a tenant brought an action against a management company for personal injuries resulting from defective hallway carpeting. The management agreement between the owner and the company stated at the outset that the owner gave the company "the exclusive management and control" of the property. It then went on to describe the company's powers. The court held that the management company was given certain important attributes of control over the property to the exclusion of the owner, and that it had the power to admit people to and exclude them from the premises. *The company, not the owner, was held to be in control.* Consequently, it owed the tenant the ultimate duty to inspect the premises and was liable for its negligence in not performing its obligation.

Thus, the crux of the matter appears to be the question of

³¹ *Bostian v. Jewell*, *supra* n. 8; *Fitzpatrick v. Ford*, 372 S.W. 2d 844 (Mo. Sup. Ct. Div. 1 1963); *Beaney v. Carlson*, 174 Ohio St. 409, 189 N.E. 2d 880 (1963); *Gaynor v. Nagob*, *supra* n. 29; *Schedler v. Wagner*, 37 Wash. 2d 612, 225 P. 2d 213 (1950); *Cooper v. Roose*, *supra* n. 2.

³² *Davies v. Kelley*, 112 Ohio St. 122, 146 N.E. 888 (1925).

³³ 6 Ohio St. 2d 92, 216 N.E. 2d 49 (1966), *revg.* 2 Ohio App. 2d 1, 206 N.E. 2d 30 on the facts, but in so reversing the Ohio Supreme Court did not alter anything in the law of landlord and tenant stated in the opinion of the Court of Appeals. The Ohio Supreme Court merely held that the agent, because of his exclusive possession and control, was "in the posture of a lessee with respect to the events giving rise to this action."

whether the managing agent has *complete* possession and control. Where such agent is *not* in complete possession and control, the *owner-principal* is always liable to injured third parties when the injury is a result of the agent's negligent acts within the course of his employment, while the managing agent, as well as the principal, is liable for his own *active* negligence.³⁴ However, only the owner-principal is liable to the injured party for the agent's non-performance of a duty owed to the principal, when such act is only one of *nonfeasance*.³⁵ The reasoning is that this type of duty, such as the duty to repair defects in common areas, arises out of contract between the owner-principal and the agent. Consequently, there is no privity of contract between the agent and the injured party,³⁶ and the agent is protected by the absence of such privity from direct liability to such party.

However, where as in the *Jacobs* case, the managing agent *does* have *exclusive* power and authority to control and manage the property, he is said to stand "in the owner's shoes," and will be liable to injured parties for his negligence, even if it amounts only to nonfeasance.³⁷

C) Covenant to Make Repairs

It is well settled in a majority of the courts that when the landlord covenants to make repairs in the leased premises, that covenant does not have the effect of reserving either possession or control in the landlord so as to render him liable for injuries resulting from defects in the premises.³⁸ The court, in the case of *De Clara v. Barber Steamship Lines*³⁹ states:

³⁴ *Id.*, in the opinion of the Court of Appeals at 2 Ohio App. 2d 5, 206 N.E. 2d 33.

³⁵ *Jacobs v. Mutual Mortgage & Investment Co.*, *supra* n. 6; *Gardner v. 1111 Corporation*, 286 App. Div. 110, 141 N. Y. S. 2d 552 (1955).

³⁶ *Jacobs v. Mutual Mortgage & Investment Co.*, *supra* n. 6, citing *Henshaw v. Noble*, 7 Ohio St. 226, 232 (1857).

³⁷ *Gardner v. 1111 Corporation*, *supra* n. 35; *Mollino v. Ogden & Clarkson Corporation*, 243 N. Y. 450, 154 N.E. 307 (1926).

³⁸ *Goldstein v. Great Atlantic & Pacific Tea Co.*, 142 So. 2d 115 (Fla. Dist. Ct. App. 1962); *Jankowski v. Crestburn Corp.*, 23 App. Div. 2d 783, 258 N. Y. S. 2d 733 (1965); *Moreno v. Relkin*, *supra* n. 15; *Yaeger v. Parkgate Realty Co.*, *supra* n. 5; *Pitts v. Cincinnati Metropolitan Housing Authority*, *supra* n. 6; *Cooper v. Roose*, *supra* n. 2; *Delphia v. Proctor*, 124 Vt. 22, 196 A. 2d 567 (1963); See Restatement, Torts (2d) § 357 for minority view on this point.

³⁹ 309 N. Y. 620, 132 N.E. 2d 871 at 875 (Ct. App. 1956) citing the opinion of *Cullings v. Goetz*, 256 N. Y. 287, 176 N.E. 397 (1931).

(A) covenant or agreement to repair "at the request of the lessee," without more, constitutes, "not a reservation by an owner of one of the privileges of ownership," but rather "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."

In such a case, the landlord does not retain the power to admit people to or exclude them from the premises.⁴⁰ Consequently, he will not be liable for personal injuries to the tenant or one in the right of the tenant for breach of his covenant to repair.⁴¹ His only liability for said breach is to the tenant, and it is based on the law of contracts, not torts.⁴² In not holding the landlord liable in tort for the breach of his covenant to repair, it has also been said that it could not be reasonably anticipated that personal injuries would be the probable result of a breach of such a covenant.⁴³ The only remedy of an invitee of the tenant is an action against the tenant, who is under a duty to make the premises safe.⁴⁴

While a mere covenant to repair, standing alone, does not justify the conclusion that the landlord has retained possession or control of the premises, such a covenant, coupled with other circumstances, may justify that conclusion.⁴⁵ Hence, if the landlord in fact does enter the premises and makes repairs, he will be held liable.⁴⁶ He will also be held to have retained control over the premises if he reserves the right to enter the premises at any time to make repairs, and such right is to be exercised at his own discretion rather than at the request of the tenant.⁴⁷

Strangers to the property or members of the public possess a different set of rights than those of the tenant or the tenant's invitees when the landlord has covenanted to make repairs.

⁴⁰ Artman v. Cities Service Oil Co., *supra* n. 2; Cullings v. Goetz, *supra* n. 39; Appel v. Muller, 262 N. Y. 278, 186 N.E. 785 (Ct. App. 1933).

⁴¹ Cullings v. Goetz, *supra* n. 39; Berkowitz v. Winston, 128 Ohio St. 611, 193 N.E. 343 (1934).

⁴² Cooper v. Roose, *supra* n. 2.

⁴³ *Ibid.*

⁴⁴ Van Wye v. Robbins, 48 Cal. App. 2d 660, 120 P. 2d 507 (1941); Cullings v. Goetz, *supra* n. 39; Artman v. Cities Service Oil Co., *supra* n. 2.

⁴⁵ 33 Ohio Jur. 446, Landlord and Tenant, § 206.

⁴⁶ Jankowski v. Crestburn Corp., *supra* n. 38.

⁴⁷ Bliss v. Londner, 20 App. Div. 2d 640, 246 N. Y. S. 2d 296 (1964); Moreno v. Relkin, *supra* n. 15; DeClara v. Barber Steamship Lines, *supra* n. 39.

The landlord's duty to such persons to keep the premises in a reasonably safe condition is generally transferred to the tenant upon the latter's receipt of possession and control.⁴⁸ However, when the landlord covenants to make repairs, it is said that he retains the right of entry and such power as is necessary for making them.⁴⁹ This reservation of control, coupled with his original duty, makes him liable in tort to the general public for injuries occurring during the lease term which are a result of unrepaired defects.⁵⁰

Conclusion

Generally, the landlord is under an affirmative obligation to exercise ordinary care to keep those parts of the premises over which he has retained possession and control in a reasonably safe condition. The test of possession and control is whether or not the landlord has the power and the right to admit people to or exclude them from the premises.

There is a presumption that the landlord retains possession and control over those areas of the premises which all of the tenants use in common. His obligation to keep these areas in a safe condition extends to the tenant and those on the property in the right of the tenant. The landlord may insulate himself from this obligation by employing a managing agent to manage and operate the property, but in so doing he must completely divest himself of all possession and control over the premises.

A mere covenant or agreement to repair, standing alone, is not sufficient evidence to hold that the landlord has retained control over the premises leased to the tenant, thus charging him with the obligation to keep the premises in a reasonably safe condition. Consequently, he will not be held liable for injuries sustained by the tenant or his invitees as a result of defects in the leased premises. However, when he covenants to repair, he will be held liable for injuries sustained by the general public.

⁴⁸ *Lommori v. Milner Hotels*, 63 N. M. 342, 319 P. 2d 949 (1957); *Appel v. Muller*, *supra* n. 40.

⁴⁹ *Appel v. Muller*, *supra* n. 40.

⁵⁰ *Ibid*; *Lommori v. Milner Hotels*, *supra* n. 48.