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THE TENANT AS CONSUMER: APPLYING STRICT LIABILITY PRINCIPLES TO LANDLORDS

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INTRODUCTION

Theories of landlord liability to tenants have undergone radical changes in recent years. A lease, once viewed as a conveyance of an estate in real property, is now considered a contract with implied covenants.¹ Similarly, the traditional tort immunity of landlords has been stripped away as a result of their new duties.²

These fundamental changes have affected landlord obligations in two major contexts: where a tenant has suffered injury either due to a lack of adequate security in the leased premises or due to a physical defect on the leased premises.³ The changes also raise two sub-issues: whether a landlord's liability should extend to injuries resulting from both patent and latent defects or from defects that exist at the inception of the lease or arise during the term of the lease.

Although most courts have eradicated common law immunity for landlords in both contexts, and have applied the traditional negligence standard of liability, few have adopted strict liability.⁴

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¹ See Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 92-93.

² See, e.g., Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 100-12 (1982) (discussing development of landlord's duty); Davis & De La Torre, *A Fresh Look at Premises Liability as Affected by the Warranty of Habitability*, 59 WASH. L. REV. 141, 142-45 (1984) (discussing origin of tenant liability and expansion into landlord liability); Love, *supra* note 1, at 91-111 (stating new developments in landlord liability).

³ Most commentators focus on one of these contexts only. See, e.g., Recent Development, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity*, 33 VAND. L. REV. 1493, 1510-11 (1980) (discussing issue overlaps).

⁴ Several courts have addressed the question of whether to adopt strict liability for landlords in one of these two contexts, but have declined to do so. See, e.g., *Bidar v. Amfac, Inc.*, 66 Haw. 547, 556-57, 669 P.2d 154, 161 (1983) (declined to adopt strict liability for physical defects); *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 228-29, 531 N.E.2d 1358,

The New Jersey Supreme Court, however, has held landlords strictly liable for injuries resulting from inadequate security of the leased premises,⁵ while the California Supreme Court has held landlords strictly liable for injuries resulting from physical defects on leased premises.⁶ Each court has utilized a different theory to hold landlords strictly liable, but both have left unresolved the extent of the liability.

In *Trentacost v. Brussel*,⁷ the New Jersey Supreme Court held that a landlord impliedly warrants to a tenant that the common areas of the leased premises are safe and will remain safe throughout the term of the tenancy.⁸ If the tenant is injured by a third party because of the landlord's failure to take reasonable security measures, irrespective of whether the landlord has been notified of the specific safety problem, the landlord may be held liable for breach of an implied warranty.⁹ The court did not address the issue of whether a landlord would be held strictly liable for a safety problem of which she could not have been aware.

In *Becker v. IRM Corp.*,¹⁰ the California Supreme Court held that a landlord "engaged in the business of leasing" may be strictly liable for injuries sustained by a tenant resulting from a latent physical defect in the premises that existed at the inception of the lease.¹¹ Although the court noted that it was not called upon to decide whether landlords would be liable for patent defects as well, it cited an earlier case, *Luque v. McLean*,¹² which held that strict liability covered patent as well as latent defects.¹³

Ironically, however, in New Jersey, although the concept of implied warranty of habitability originated in a case dealing with a

1370 (1988) (declined to adopt strict liability for defects in security).

⁵ See *Trentacost v. Brussel*, 82 N.J. 214, 228, 412 A.2d 436, 443 (1980); see also *Kline v. 1500 Massachusetts Ave. Apt. Corp.*, 439 F.2d 477, 486-88 (D.C. Cir. 1970) (arguably held landlords strictly liable for defects in security, but application limited because of significant facts: high level of security existing at inception of tenancy, decrease in security, and landlord's notice of previous crimes in building); *infra* notes 43-44 and accompanying text (discussing applications of *Kline*).

⁶ See *Becker v. IRM Corp.*, 38 Cal. 3d 454, 464, 698 P.2d 116, 122, 213 Cal. Rptr. 213, 219 (1985).

⁷ 82 N.J. 214, 412 A.2d 436 (1980).

⁸ *Id.* at 228, 412 A.2d at 443.

⁹ *Id.*

¹⁰ 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

¹¹ *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

¹² 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

¹³ *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219; *Luque*, 8 Cal. 3d at 141-46, 501 P.2d at 1166-70, 104 Cal. Rptr. at 446-50.

physical defect,¹⁴ a tenant who suffers injuries as a result of a physical defect in the leased premises must prove negligence in order to sustain an action for breach of the implied warranty of habitability.¹⁵ And although California is in the forefront of imposing strict liability for injuries resulting from a physical defect, a tenant who suffers injuries as a result of an attack by a third party due to a lack of adequate security in the common areas of the leased premises must prove negligence to prevail.¹⁶

A review of the principles behind the extension of strict liability to landlords for injuries sustained by tenants, whether in tort or in contract, indicate that strict liability is warranted and that no logical distinction can be drawn between a defect in security and a defect in the physical environment of the leased premises. Likewise, the distinctions between patent and latent defects and between defects that occur at the inception of the lease and those that occur during the term of the lease are untenable. Thus, it is the thesis of this Article that, although the New Jersey and California Supreme Courts have taken an important step forward in delineating the proper scope of landlord responsibility for injuries suffered by tenants, neither court has extended strict liability to the extent necessary.

Part I of this Article discusses briefly the doctrines of the implied warranty of habitability and strict liability in tort generally, concentrating specifically on the development of these concepts in New Jersey and in California. The Article will then focus on the application of these theories of liability to both physical defects and defects in security and the reasoning underlying these developments. Part II will suggest that the rationales supporting these decisions compel the expansion of both contract and tort theories of strict liability for injuries caused by any physical defect or defect in security, whether patent or latent, in the leased premises from inception and throughout the term of the lease. Further, it will conclude that it is time for other jurisdictions to follow the lead of California and New Jersey and to extend strict liability to the landlord-tenant relationship. Finally, in Part III of the Article,

¹⁴ See *Marini v. Ireland*, 56 N.J. 130, 144-45, 265 A.2d 526, 534 (1970).

¹⁵ See, e.g., *Dwyer v. Skyline Apartments, Inc.*, 123 N.J. Super. 48, 56, 301 A.2d 463, 467 (no landlord liability for unknown latent defect not reasonably discoverable), *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973).

¹⁶ See *O'Hara v. Western Seven Trees Corp. Intercoast Mgmt.*, 75 Cal. App. 3d 798, 802-04, 142 Cal. Rptr. 487, 489-91 (1977).

the developments in landlord liability in New York will be analyzed, and the applicability of a new framework for landlord liability will be presented, based on the principles underlying *Trentacost* and *Becker*, to other jurisdictions.

I. BACKGROUND—THE INCONSISTENT PAST

A. *The Development of the Implied Warranty of Habitability*

Sixteenth century England characterized a lease as a conveyance of property to which the doctrine of *caveat emptor*, more appropriately termed "*caveat lessee*," applied.¹⁷ Because the sixteenth century tenant was an agrarian leaseholder whose leased premises consisted mainly of unimproved land of relatively simple design, discovery of defects prior to the inception of the lease was most likely not difficult. In addition, defects that arose during the term of the lease were probably of the kind which the tenant had the skill and the financial resources to repair. Therefore, the doctrine of *caveat lessee* was presumably of little concern to those tenants.¹⁸

As the urban tenant replaced the agrarian leaseholder, the rule of *caveat lessee* became less suitable for the landlord-tenant relationship; in response, courts began to develop exceptions to the rule. In the mid-nineteenth century, English courts held that when a furnished house or apartment was leased for a short term, an implied warranty of habitability existed.¹⁹ The courts reasoned that in such cases the premises were intended for immediate occupancy, allowing no time for a tenant to inspect the premises adequately or to put them in a habitable condition.²⁰ In addition, it was far more difficult for tenants to detect defects in a furnished dwelling than in an unfurnished dwelling.²¹ Several American courts have adopted this exception to the general rule of *caveat lessee*;²² others have adopted an alternative theory which recog-

¹⁷ See Love, *supra* note 1, at 26-28.

¹⁸ *Id.* at 28.

¹⁹ See *Sarson v. Roberts*, 2 Q.B. 395, 398-99 (1895); *Smith v. Marrable*, 152 Eng. Rep. 693, 694 (Ex. 1843).

²⁰ See Love, *supra* note 1, at 29.

²¹ *Id.*

²² See, e.g., *Horton v. Marston*, 352 Mass. 322, 324, 225 N.E.2d 311, 313 (1967) ("*caveat lessee*" not applicable to injury incurred during short term rental of furnished cottage); *Minton v. Hardinger*, 438 S.W.2d 3, 7 (Mo. 1968) (one month lease of furnished apartment within exception to *caveat lessee*).

nizes an implied warranty of merchantability covering furniture.²³ Although these exceptions have been applied only in the limited circumstances described above, landlords have been held strictly liable for damages, even where the landlord did not have actual or constructive notice of the defects.

In addition, as it became increasingly clear that the traditional principles governing landlord-tenant law did not reflect the realities of modern urban society, courts reformulated the fundamental rules governing landlord-tenant law. Courts redefined the relationship as one of contract rather than one of property conveyance.²⁴ In so doing, courts acknowledged that the common-law assumption that a tenant could bargain for an express warranty of habitability of fitness had become entirely unrealistic given the shortage of low-cost housing and the disparity in bargaining power between landlords and residential tenants in an urban society.²⁵ Therefore, courts began to imply a warranty of habitability into residential leases, which commenced at the inception of the lease and continued throughout its duration.²⁶

Traditionally, the implied warranty of habitability did not apply to criminal acts of third parties. The criminal act was consistently held to be a superseding cause, against which one had no duty to protect another unless there was a special relationship between the parties.²⁷ The relationship of landlord and tenant was not considered to fit into this category.²⁸

²³ See, e.g., *Fakhoury v. Manger*, 25 Cal. App. 3d 58, 63-64, 101 Cal. Rptr. 473, 476-77 (1972) (landlord held liable for injury to tenant in furnished apartment for breach of implied warranty of habitability); *Toole v. Franklin Inv. Co.*, 158 Wash. 696, 700, 291 P. 1101, 1102-03 (1930) (same).

²⁴ See *Love*, *supra* note 1, at 92-93.

²⁵ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.) (limited leverage of modern tenant), *cert. denied sub. nom. First Nat'l Realty Corp. v. Javins*, 400 U.S. 925 (1970); *Green v. Superior Ct.*, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974) (housing shortages).

²⁶ See *Davis & De La Torre*, *supra* note 2, at 160-73; *Mallor*, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ. L. REV. 637, 646-49 (1984); Note, *Recovery Under the Implied Warranty of Habitability*, 10 FORDHAM URB. L.J. 285, 285 (1982).

²⁷ See *Smith*, *The Landlord's Duty to Defend His Tenants Against Crimes on the Premises*, 4 WHITTIER L. REV. 587, 592 (1982); Note, *California Landlords' Duty to Protect Tenants From Criminals*, 20 SAN DIEGO L. REV. 859, 860-61 (1983); Recent Development, *supra* note 3, at 1503 (1980); Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275, 277-78 (1971).

²⁸ See RESTATEMENT (SECOND) OF TORTS § 314A (1966). The special relationships where a duty to protect has been recognized include innkeeper-guest, common carrier-passenger, business invitor-invitee, and custodian-ward. *Id.*

*Kline v. 1500 Massachusetts Avenue Apartment Corp.*²⁹ was the first case to apply the warranty of habitability to defects in security and to recognize a special relationship between the landlord and tenant.³⁰ In *Kline*, the plaintiff was the victim of a criminal assault and robbery in the hallway of her apartment building, a 585-unit apartment complex in Washington D.C.³¹ At the time the plaintiff had moved into the complex, seven years before the assault and robbery, there had been a doorman at the main entrance and a clerk at the lobby desk, each on twenty-four hour duty, and two garage attendants positioned so that they could observe the remaining entrances.³² During the plaintiff's tenancy, the incidence of crime in the building increased.³³ Although the landlord was aware of this increase, the doorman was removed, and the desk of the lobby often was left unattended, as was one of the entrances.³⁴ At trial, the plaintiff testified that she originally had moved into the building because she had been concerned about security and had been impressed by the precautions taken at the main entrance.³⁵ The district court held, as a matter of law, that the landlord had no duty to protect tenants from foreseeable criminal acts by third parties, and entered judgment for the landlord.³⁶

The Court of Appeals for the District of Columbia Circuit reversed,³⁷ holding that such a duty does indeed exist on three different grounds. First, the duty arises from the "logic of the situation."³⁸ Second, the implied contract between a landlord and tenant obliges the landlord to provide those protective measures that are reasonably within her capacity.³⁹ Third, the court analogized the landlord-tenant relationship to the innkeeper-guest and landowner-invitee relationships.⁴⁰ The court noted that the reason for imposing a duty on innkeepers to protect patrons from an assault by a third party is that the ability of one of the parties to

²⁹ 439 F.2d 477 (D.C. Cir. 1970).

³⁰ *Id.* at 481-83.

³¹ *Id.* at 478-79.

³² *Id.* at 479.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 479 n.1.

³⁶ *Id.* at 478.

³⁷ *Id.*

³⁸ *Id.* at 483.

³⁹ *Id.* at 485.

⁴⁰ *Id.*

provide for her protection has been limited by her submission to the control of the other.⁴¹ The court reasoned that the tenant's ability to protect herself in the common areas of the premises is similarly limited and, therefore, a duty arises on the part of the landlord.⁴²

Most jurisdictions have declined to adopt the reasoning of *Kline* and have limited the warranty of habitability to physical defects on the premises.⁴³ In so doing, some courts have limited their interpretation of *Kline* to situations in which a high degree of security in the leased premises existing at the time that the plaintiff entered into the lease was subsequently decreased during the tenancy.⁴⁴

1. The Development of the Implied Warranty of Habitability in New Jersey

The New Jersey Supreme Court first recognized the implied warranty of habitability in residential leases in *Marini v. Ireland*.⁴⁵ In *Marini*, the landlord instituted a summary dispossession action for nonpayment of rent. The tenant had paid a plumber to repair a leaking toilet and had deducted the cost of the repair from her rent. She alleged that she repeatedly had attempted to inform her landlord about the problem without success. The trial court held that the landlord had no duty to make repairs and entered a default judgment for the rent in question.⁴⁶

The supreme court reversed, noting the change to viewing leases as contracts rather than conveyances and emphasizing that the purpose of a residential lease is to furnish the tenant with habitable living quarters.⁴⁷ Based on this reality, the court held that in residential leases there is an implied covenant of "habitability and

⁴¹ *Id.* at 483 (submission of control to innkeeper).

⁴² *Id.* at 484 (landlord in better position to protect).

⁴³ The New Jersey Supreme Court is the only state court of last resort to adopt the reasoning of *Kline* thus far. See *Trentacost*, 82 N.J. at 231-32, 412 A.2d at 445. Some lower courts have adopted its reasoning. See, e.g., *Villalobos v. University of Oregon*, 47 Or. App. 103, 107-08, 614 P.2d 107, 108-09 (1980) (court applied contractual standard of implied warranty of habitability in case brought on behalf of student murdered in university dormitory).

⁴⁴ See, e.g., *Trice v. Chicago Hous. Auth.*, 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 209 (1973) (confining *Kline* to its specific facts); *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 159, 207 S.E.2d 841, 845 (1974) (security measures not decreased; therefore *Kline* inapplicable).

⁴⁵ 56 N.J. 130, 265 A.2d 526 (1970).

⁴⁶ *Id.* at 135, 265 A.2d at 528.

⁴⁷ *Id.* at 144, 265 A.2d at 534.

livability fitness . . . that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises . . . [and] that these facilities will remain in usable condition during the entire term of the lease."⁴⁸

The New Jersey Supreme Court shed some more light on the scope of the implied warranty of habitability in *Berzito v. Gambino*.⁴⁹ In *Berzito*, the tenant initiated an action to recover the difference between the rent she had paid to her landlord and the value of the apartment, given its poor condition. The supreme court, stating that the covenant to pay rent and the covenant to maintain the premises in a habitable condition are mutually dependent, discussed the type of defect that should be deemed a breach of the covenant of habitability.⁵⁰ The court listed eight factors to guide courts in making this determination. These factors include: a violation of any applicable housing code or building or sanitary regulations; the nature of the deficiency or the defect's effect upon a vital facility; the potential or actual effect upon safety and sanitation; its duration; the age of the structure; the amount of the rent; the existence of any waiver by the tenant; and the extent of the tenant's responsibility, if any, for the defective condition.⁵¹

In *Dwyer v. Skyline Apartments*,⁵² the New Jersey Appellate Division refused to expand the warranty of habitability beyond the context of the summary dispossession proceeding.⁵³ In *Dwyer*, the tenant, who had lived in the leased multiple-family garden apartment development for fifteen years, suffered burns when scalding water gushed out from a corroded bathtub faucet. Because the corroded portion of the faucet was concealed behind a wall, the tenant had been unaware of the defect and was, therefore, unable to complain about it to her landlord. The trial court ruled that the implied warranty of habitability rendered the landlord strictly liable for the plaintiff's injuries despite the absence of actual or constructive notice of the defect.⁵⁴ The appellate division reversed, finding no authority for this expansion of the implied warranty of habitability and commented that the application of strict liability to the land-

⁴⁸ *Id.*

⁴⁹ 63 N.J. 460, 308 A.2d 17 (1973).

⁵⁰ *Id.* at 469-70, 308 A.2d at 21-22.

⁵¹ *Id.* at 470, 308 A.2d at 22.

⁵² 123 N.J. Super. 48, 301 A.2d 463, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973).

⁵³ *Id.* at 55, 301 A.2d at 466.

⁵⁴ *Id.* at 51, 301 A.2d at 464.

lord-tenant relationship was inappropriate.⁵⁵

In *Braitman v. Overlook Terrace*,⁵⁶ the New Jersey Supreme Court predicted that the narrow view of the warranty of habitability adopted in *Dwyer* would soon be reconsidered.⁵⁷ In *Braitman*, several tenants sued for losses incurred when their apartment was burglarized. The trial court entered a judgment for the plaintiffs, finding "that the dead lock was inoperative, the remaining slip lock did not afford reasonable security, [the landlord] had adequate knowledge of the defect and sufficient time to remedy it, . . . and that the robbery was a foreseeable consequence of [this] condition."⁵⁸ The supreme court affirmed on traditional negligence principles, holding that a residential tenant can recover damages from her landlord upon proper proof that the latter unreasonably enhanced the risk of loss by failing to supply adequate locks after suitable notice.⁵⁹

In a separate opinion, in which Chief Justice Hughes and Justice Sullivan concurred, Justice Pashman suggested that it would be appropriate to impose upon landlords the contractual duty of taking reasonable precautions to safeguard their buildings from crime.⁶⁰ He added that it was not then necessary to decide whether the duty would be based on the landlord's superior position to safeguard her premises or on the implied warranty of habitability.⁶¹

In *Trentacost*, Justice Pashman, writing for the New Jersey Supreme Court, adopted the position foreshadowed in the separate opinion in *Braitman*.⁶² In *Trentacost*, a sixty-one-year-old woman sued her landlord, seeking damages for injuries sustained when she was assaulted and robbed in the common stairway of her apartment building. The victim alleged that the landlord's failure to install a lock on the front door was both negligent and a breach of

⁵⁵ *Id.* at 56, 301 A.2d at 467.

⁵⁶ 68 N.J. 368, 346 A.2d 76 (1975).

⁵⁷ *Id.* at 388 n.16, 346 A.2d at 87 n.16.

⁵⁸ *Id.* at 379, 346 A.2d at 78.

⁵⁹ *Id.* at 383, 346 A.2d at 84.

⁶⁰ *Id.* at 387, 346 A.2d at 86-87.

⁶¹ *Id.* at 388, 346 A.2d at 87. The majority distinguished this case from its decision in *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 186 A.2d 291 (1962), in which the court held that a landlord does not owe tenants or visitors the duty of providing security to protect against assaults, by emphasizing that *Goldberg* did recognize the liability of a landlord for theft of his tenants' property. *Id.* at 588, 186 A.2d at 296.

⁶² *Trentacost*, 82 N.J. at 221-22, 412 A.2d at 440.

the implied warranty of habitability.⁶³ Although the court agreed that the trial record presented sufficient evidence to establish that the landlord should have foreseen the attack and taken reasonable measures to prevent it, the court did not affirm the decision solely on traditional negligence principles. Instead, noting the need for clarification in this area, the court held that the landlord was liable for the tenant's injuries under the theory of breach of the implied warranty of habitability, as well as under traditional negligence principles.⁶⁴

In expanding the implied warranty of habitability to include security, the *Trentacost* court stated: "Unfortunately, crime against person and property is an inescapable fact of modern life. . . . Tenants universally expect some effective means of excluding intruders from multiple dwellings. . . . Under modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from the risk of criminal intrusion."⁶⁵ Furthermore, the court explicitly stated that to prove a breach of the implied warranty of habitability a tenant need not prove notice of a defective or unsafe condition; it is sufficient to show that the landlord did not take reasonable measures for maintaining a habitable residence.⁶⁶

2. The Development of the Implied Warranty of Habitability in California

In *Green v. Superior Court*,⁶⁷ the California Supreme Court first recognized the implied warranty of habitability in residential leases.⁶⁸ In *Green*, the tenant claimed that there were approximately eighty housing code violations in his apartment building. As a result, the tenant refused to pay rent and raised the implied warranty of habitability as a defense to an unlawful detainer ac-

⁶³ *Id.* at 219, 412 A.2d at 439.

⁶⁴ *Id.* at 228, 412 A.2d at 443.

⁶⁵ *Id.* at 227, 412 A.2d at 443.

⁶⁶ *Id.* at 228, 412 A.2d at 443. The majority in *Trentacost* cited *Goldberg* for the proposition that liability for actions of a criminal, which are beyond the landlord's control, will not be precluded if a reasonable person could have foreseen the danger from previous criminal activity. *Id.* at 223, 412 A.2d at 441. In his dissent, Justice Clifford pointed out that *Goldberg* looked beyond the issue of foreseeability to "a fair balancing of the relative interests of the parties, the nature of the risk, and the public interest in the proposed solution." *Id.* at 235, 412 A.2d at 447 (Clifford, J., dissenting).

⁶⁷ 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

⁶⁸ *Id.* at 616, 517 P.2d at 1168, 111 Cal. Rptr. at 704.

tion, but the lower courts refused to consider the defense.⁶⁹ The California Supreme Court reversed and remanded, ruling that the breach of the implied warranty of habitability is a valid defense in an action for unlawful detainer.⁷⁰

Like the *Marini* court, *Green* based its holding on the realities of the modern landlord-tenant relationship. It noted that the modern tenant, unlike the traditional agrarian lessee of the middle ages, enters a lease not for the land surrounding the dwelling but for the dwelling itself.⁷¹ In addition, the court pointed out that modern dwellings are much more complex than those in existence when the traditional common-law rule of *caveat emptor* developed, and that landlords who have had experience with their buildings are in a better position to discover and repair defects on the premises.⁷² Consequently, the court held that it was reasonable to imply into a lease the tenant's expectation that the premises are and will remain in a habitable condition.⁷³

The *Green* court relied on the New Jersey court decision in *Academy Spires, Inc. v. Brown*,⁷⁴ as a "good indication" of the general scope of the warranty of habitability.⁷⁵ The court noted the distinction set forth in *Spires* between the "necessities," without which one cannot be expected to live in a multi-storied apartment building (such as heat, hot water, garbage disposal or elevator service), and the "amenities" (such as lack of water leaks, lack of wall cracks, and adequate painting).⁷⁶ According to *Spires*, failure to supply the former is a breach of the warranty of habitability while failure to supply the latter is not.⁷⁷

The California Supreme Court has not yet addressed the issue of whether the implied warranty of habitability encompasses security. However, one appellate division case, *Kwaitkowski v. Superior Trading Co.*,⁷⁸ held that the warranty of habitability implicitly warrants a secure environment.⁷⁹ In *Kwaitkowski*, the plaintiff was

⁶⁹ *Id.* at 621, 517 P.2d at 1171, 111 Cal. Rptr. at 707.

⁷⁰ *Id.* at 631, 517 P.2d at 1178, 111 Cal. Rptr. at 714.

⁷¹ *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

⁷² *Id.* at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

⁷³ *Id.* at 629, 517 P.2d at 1176, 111 Cal. Rptr. at 712.

⁷⁴ 111 N.J. Super. 477, 268 A.2d 556 (1970).

⁷⁵ *Green*, 10 Cal. 3d at 637 n.22, 517 P.2d at 1182 n.22, 111 Cal. Rptr. at 718 n.22.

⁷⁶ *Id.*

⁷⁷ *Academy Spires*, 111 N.J. Super. at 482-83, 268 A.2d at 559.

⁷⁸ 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).

⁷⁹ *Id.* at 333, 176 Cal. Rptr. at 500.

raped, assaulted, and robbed in the dimly lit lobby of a building located in a high crime area; the building's front door lock was defective. The landlords had notice of a previous assault and robbery of another tenant in a common hallway. In addition, the plaintiff had notified one of the landlords one month before the attack that nonresidents were entering the building and loitering in the lobby.⁸⁰ The appellate division concluded that the landlords' knowledge and failure to repair the lock affirmatively had placed the plaintiff in danger of injury of the same general type as those sustained by the other tenant in the previous attack; the landlords, therefore, owed the plaintiff a duty based on the special relationship between a landlord and her tenants, the foreseeability of the criminal attack, and the warranty of habitability.⁸¹

A more recent appellate division decision, *Penner v. Falk*,⁸² however, specifically rejected the view of the *Kwaitkowski* court. In *Penner*, the plaintiff had been assaulted by two intruders in the common hallway of the leased premises. The plaintiff alleged that the defendant had not provided adequate security, despite notice of its necessity, and that this failure was the proximate cause of the plaintiff's injuries and, therefore, a breach of the warranty of habitability.⁸³ In upholding the lower court's dismissal of the action, the *Penner* court noted that "*Kwaitkowski* [was] not authority for the existence of a cause of action for breach of implied warranty of habitability owing to failings in security of the leased premises."⁸⁴ *Kwaitkowski*, thus, did not contain any discussion of the parameters of the warranty of habitability or of the breach of the warranty.⁸⁵ The *Penner-Kwaitkowski* conflict remains unresolved.⁸⁶

B. *The Development of Strict Liability*

In response to the complexities of our modern industrial society, strict liability has emerged as a major basis of liability in the

⁸⁰ *Id.* at 326, 176 Cal. Rptr. at 495.

⁸¹ *Id.* at 333, 176 Cal. Rptr. at 500.

⁸² 153 Cal. App. 3d 858, 200 Cal. Rptr. 661 (1984).

⁸³ *Id.* at 863-64, 200 Cal. Rptr. at 664.

⁸⁴ *Id.* at 868, 200 Cal. Rptr. at 667.

⁸⁵ *Id.*

⁸⁶ *Cf. Secretary of Hous. and Urban Dev. v. Layfield*, 88 Cal. App. 3d 28, 30, 152 Cal. Rptr. 342, 343 (1978) (trial court erred by declining to receive into evidence handbook issued by landlord containing assurances on security of premises).

twentieth century.⁸⁷ First, courts held that a manufacturer is strictly liable for the physical harm proximately caused by its new products shown to have been defective and unreasonably dangerous when sold.⁸⁸ This rule was soon extended to all commercial sellers in the chain of distribution.⁸⁹ Further extensions occurred when courts held that strict liability encompassed commercial product lessors.⁹⁰

Gradually, courts began to apply the doctrine of strict liability to the area of real estate.⁹¹ The major impediment to the inclusion of real estate under the strict liability umbrella was the notion that the term "product" did not apply readily to real property.⁹² Additionally, courts assumed that purchasers of real property were as able to inspect for defects as the sellers.⁹³ However, with the introduction of mass-production techniques in the housing industry following World War II, courts came to realize that individual purchasers were typically in no better position to inspect for defects in houses than for defects in other products.⁹⁴ Therefore, strict liability is frequently applied today to commercial sellers of new housing.⁹⁵

⁸⁷ See, e.g., Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100-03 (1960) (discussing development of strict liability in twentieth century); Note, *Products Liability at the Threshold of the Landlord Lessor*, 21 HASTINGS L.J. 458, 460-66 (1970) (same).

⁸⁸ See, e.g., *Hiigel v. General Motors Corp.*, 190 Colo. 57, 65, 544 P.2d 983, 988 (1975) (inadequate warning renders product "defective"); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 333, 154 N.W.2d 488, 496 (1967) (inadequate warning); *Kohler v. Ford Motor Co.*, 187 Neb. 428, 436, 191 N.W.2d 601, 606 (1971) (effort of manufacturer to limit its liability by rules applying to warranties ineffective).

⁸⁹ See, e.g., *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 50-52, 46 Cal. Rptr. 552, 556-59 (1965) (wholesaler); *Cottom v. McGuire Funeral Serv., Inc.*, 262 A.2d 807, 809-10 (D.C. 1970) (retailer and wholesaler); *Walker v. Decora, Inc.*, 225 Tenn. 504, 514-15, 471 S.W.2d 778, 782-83 (1971) (distributor).

⁹⁰ See Note, *supra* note 87, at 464-66; see, e.g., *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 454, 212 A.2d 769, 778-79 (1965) (lessor of truck held to strict liability in tort).

⁹¹ See Note, *supra* note 87, at 470-73.

⁹² Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1045 (1980).

⁹³ *Id.*

⁹⁴ *Id.* at 1045-46.

⁹⁵ See, e.g., Comment, *The Expanding Scope of Liability in the Home Construction Enterprise*, 5 LAND & WATER L. REV. 637, 645-49 (1970) (discussion of strict liability as possible remedy for home buyers); Note, *Builder-Vendor Liability for Construction Defects in Houses*, 55 MARQ. L. REV. 369, 375-78 (1972) (discussing strict liability as it applies to sellers of new homes).

1. The Development of Strict Liability in New Jersey

The New Jersey Supreme Court first held manufacturers strictly liable in tort in *Henningsen v. Bloomfield Motors, Inc.*⁹⁶ In *Henningsen*, the plaintiff was injured while driving a vehicle manufactured by the Chrysler Corporation, when it went out of control and crashed into a wall. The plaintiff sued Chrysler for negligence and breach of express and implied warranties.⁹⁷ The court refused to uphold the traditional notion that the lack of privity between the manufacturer and the plaintiff prevented recovery. Instead, it ruled that under modern marketing conditions, when a manufacturer places a new automobile into the stream of commerce and promotes its purchase by the public, an implied warranty that the automobile is suitable for its intended use accompanies it.⁹⁸ In addition, the court ruled that Chrysler's attempted disclaimer of the implied warranty of merchantability was invalid, noting that warranties originated in the law to safeguard the buyer and not to limit the liability of the seller or manufacturer as a matter of public policy.⁹⁹

The court expanded the scope of strict liability to include lessors of automobiles in *Cintrone v. Hertz Truck Leasing & Rental Service*.¹⁰⁰ In *Cintrone*, the plaintiff was injured while he was a passenger in a truck leased by his employer from the defendant.¹⁰¹ In reversing the trial court's dismissal of the plaintiff's breach of warranty claim, the supreme court held that the leasing agreement gave rise to a continuing implied warranty that the leased truck would be fit for its anticipated use for the duration of the lease and that the bailor was strictly liable for the breach of this warranty.¹⁰²

In reaching this determination, the court relied on traditional rationales for adopting strict liability. It noted that a bailor in the business of renting vehicles puts them into the stream of commerce in a fashion not unlike a manufacturer or retailer.¹⁰³ Indeed, the court pointed out that "[t]he very nature of the business [was] such that the bailee, his employees, passengers and the . . . public

⁹⁶ 32 N.J. 358, 161 A.2d 69 (1960).

⁹⁷ *Id.* at 365, 161 A.2d at 73.

⁹⁸ *Id.* at 384, 161 A.2d at 84.

⁹⁹ *Id.* at 405-08, 161 A.2d at 95-97.

¹⁰⁰ 45 N.J. 434, 212 A.2d 769 (1965).

¹⁰¹ *Id.* at 438, 212 A.2d at 771.

¹⁰² *Id.* at 452, 212 A.2d at 778-79.

¹⁰³ *Id.* at 450, 212 A.2d at 777.

are exposed to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer."¹⁰⁴ In addition, the court stressed that the operator of a rental business should be strictly liable because of her degree of expertise and because she is in the best position to detect or anticipate flaws or defects in the leased product.¹⁰⁵ The court further stated that if defects are not discoverable by ordinary inspection, the operator of the rental business should bear responsibility for the harm caused because she put the items into the stream of commerce.¹⁰⁶ Finally, the court explained that it is reasonable to have the warranty continue throughout the leasing period because it serves the public interest and the cost can be treated as an incident of the business enterprise.¹⁰⁷

The New Jersey Supreme Court expanded the application of strict liability to the area of real estate in *Schipper v. Levitt & Sons, Inc.*¹⁰⁸ In *Schipper*, the plaintiff was burned by excessively hot water from the faucet of the bathroom sink of a home developed by the defendant.¹⁰⁹ In reversing the trial court's dismissal of the proceeding, the supreme court relied on the reasoning of *Henningesen* to hold that there are no meaningful distinctions between the mass production and sale of automobiles and that of homes because the overriding policy considerations are the same.¹¹⁰ The court recognized the significance of this change in the law: "Law as an instrument for justice has infinite capacity for growth to meet changing needs and mores,"¹¹¹ and "distinctions which make no sense in today's society . . . should be readily rejected."¹¹²

To date, the New Jersey Supreme Court has not applied the doctrine of strict liability in tort in the landlord-tenant context. *Dwyer v. Skyline Apartments*,¹¹³ which rejected the notion of applying strict liability in tort to landlords,¹¹⁴ still prevails on this

¹⁰⁴ *Id.* (emphasis in original).

¹⁰⁵ *Id.* at 450-51, 212 A.2d at 778.

¹⁰⁶ *Id.* at 451, 212 A.2d at 778.

¹⁰⁷ *Id.*

¹⁰⁸ 44 N.J. 70, 207 A.2d 314 (1965).

¹⁰⁹ *Id.* at 74, 207 A.2d at 316.

¹¹⁰ *Id.* at 90, 207 A.2d at 325.

¹¹¹ *Id.* at 89, 207 A.2d at 324.

¹¹² *Id.* at 90, 207 A.2d at 325.

¹¹³ 123 N.J. Super. 48, 301 A.2d 463, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973).

¹¹⁴ *Id.* at 55, 301 A.2d at 467.

issue.¹¹⁵

2. The Development of Strict Liability in California

The California Supreme Court followed a pattern of strict liability similar to that in New Jersey. First, the court recognized the strict liability of product manufacturers in *Greenman v. Yuba Power Products, Inc.*¹¹⁶ In *Greenman*, the plaintiff was injured when a piece of wood flew out of a lathe and struck him on the forehead.¹¹⁷ The plaintiff sued the retailer and the manufacturer of the lathe for negligence and breach of express and implied warranties. The manufacturer contended that the plaintiff's action for breach of warranty was barred by section 1769 of the Civil Code because the plaintiff did not give notice of the breach of the express warranty within a reasonable time.¹¹⁸ The court held that it was not necessary for the plaintiff to establish an express warranty because a manufacturer is held strictly liable in tort when it places an article on the market with an injury-causing defect, knowing that use will occur without inspection.¹¹⁹ In adopting strict liability, the court stated that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."¹²⁰

The California Supreme Court expanded strict liability to apply to retailers in *Vandermark v. Ford Motor Co.*¹²¹ In *Vandermark*, the court noted that "[r]etailers like manufacturers are engaged in the business of distributing goods to the public . . . [and are therefore] an integral part of the overall produc[tion] and marketing . . . [system] that should bear the cost of injuries resulting

¹¹⁵ It is ironic that the New Jersey Supreme Court has not addressed this issue given that in *Trentacost*, it specifically identified the confusion that has occurred since *Braitman* and its desire to provide guidance in the realm of landlord-tenant liability. Although the court referred in this regard to a Note in the Rutgers Law Review, see Note, *The 1975-1976 New Jersey Supreme Court Term*, 30 RUTGERS L. REV. 492, 696-702 (1977), which concentrates on the need for clarification of the law surrounding liability for security, it ignored the fact that the Note refers to confusion regarding liability for physical defects as well. See *Trentacost*, 82 N.J. at 224, 412 A.2d at 441.

¹¹⁶ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

¹¹⁷ *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.

¹¹⁸ *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

¹¹⁹ *Id.* at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.

¹²⁰ *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

¹²¹ 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

from defective products."¹²² It further noted that "[i]n some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff."¹²³ It concluded that "[imposing] [s]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, . . . [because] they can adjust the costs of such protection between them in the course of their continuing business relationship."¹²⁴

The court continued to expand the scope of strict liability by applying the principle to lessors of personal property in *Price v. Shell Oil Co.*¹²⁵ In *Price*, the plaintiff, an aircraft mechanic employed by Flying Tiger, was injured while climbing a movable ladder mounted on a gasoline truck leased by his employer from Shell.¹²⁶ The court held Shell strictly liable for the plaintiff's injuries, finding that "the paramount policy to be promoted by [strict liability] . . . is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them."¹²⁷ It found no difference in this regard between sellers and non-sellers of property, because, in each instance, the seller or non-seller places the article in the stream of commerce knowing that it is to be used without inspection for defects.¹²⁸

The Supreme Court of California affirmed the application of the theory of strict liability to the sale of newly constructed real property in *Pollard v. Saxe & Yolles Development Co.*¹²⁹ In *Pollard*, the court noted that, historically, the laws governing the sale of real property have developed along different lines than those governing commercial goods.¹³⁰ However, the court pointed out that the traditional application of the doctrine of *caveat emptor* was no longer appropriate and that many of the principles governing chattel transactions have been adopted in the law of real property.¹³¹ Accordingly, the court held that builders and sellers of

¹²² *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.

¹²³ *Id.*

¹²⁴ *Id.* at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900.

¹²⁵ 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

¹²⁶ *Id.* at 248, 466 P.2d at 723, 85 Cal. Rptr. at 179.

¹²⁷ *Id.* at 251, 466 P.2d at 725-26, 85 Cal. Rptr. at 181-82.

¹²⁸ *Id.* at 251, 466 P.2d at 726, 85 Cal. Rptr. at 182.

¹²⁹ 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

¹³⁰ *Id.* at 377, 525 P.2d at 90, 115 Cal. Rptr. at 650.

¹³¹ *Id.* at 377-78, 525 P.2d at 90, 115 Cal. Rptr. at 650.

newly constructed homes should be held to what is impliedly represented—that the completed structure was designed and constructed in a workmanlike manner.¹³²

Although each of the above cases dealt with a latent defect, in *Luque v. McLean*¹³³ the court clarified that the doctrine of strict liability is equally applicable to products with patent defects.¹³⁴ It noted that although the great majority of decisions dealing with products liability have involved latent defects, there was no indication that the latent-patent distinction was sound.¹³⁵ To the contrary, the court noted that any question in this regard had been resolved¹³⁶ in *Pike v. Frank G. Hough Co.*¹³⁷ In upholding its decision in *Pike*, the court noted that the policies underlying strict liability compel the conclusion that recovery should not be limited to cases involving latent defects, as the “purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”¹³⁸ If it were to require that defects be latent in order for plaintiffs to recover, there would be few cases in which the financial burden would be shifted to the manufacturer.¹³⁹ Moreover, the court pointed out the anomaly that would result from holding manufacturers strictly liable for latent defects, while allowing them to escape liability for patent defects.¹⁴⁰

In *Becker v. IRM Corp.*,¹⁴¹ the California Supreme Court applied the rationale of its earlier strict liability cases to the landlord-tenant context.¹⁴² In *Becker*, the plaintiff slipped and fell

¹³² *Id.* at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651.

¹³³ 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

¹³⁴ *Id.* at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449 (“policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects”).

¹³⁵ *Id.* at 144, 501 P.2d at 1169, 104 Cal. Rptr. at 449.

¹³⁶ *Id.*

¹³⁷ 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

¹³⁸ *Luque*, 8 Cal. 3d at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449 (quoting *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)).

¹³⁹ *Id.*

¹⁴⁰ *Id.* The court noted that “[t]he result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects.” *Id.*

¹⁴¹ 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

¹⁴² *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

against a frosted shower door made of untempered glass.¹⁴³ The door broke and severely lacerated his arm.¹⁴⁴ It was "undisputed that the risk of serious injury would have been substantially reduced if the shower door had been made of tempered glass. . . ."¹⁴⁵ The plaintiff alleged causes of action in strict liability and negligence. The supreme court reversed the trial court's entry of summary judgment for the defendant as to each cause of action, and held that landlords engaged in the business of leasing could be held strictly liable in tort for injuries resulting from latent defects existing at the inception of the lease.¹⁴⁶

Writing for the majority, Judge Broussard noted that California follows a stream of commerce approach to strict liability in tort and extends liability to all those who are part of the "overall producing and marketing enterprise that should bear the cost of injuries from defective products."¹⁴⁷ He further noted that the doctrine of strict liability in tort has been applied not only to manufacturers, but to various other links in the commercial marketing chain, and where appropriate, to those engaged in the real estate business.¹⁴⁸ After reviewing the change in landlord-tenant law evinced in looking upon the modern lease as a contract rather than a conveyance, Judge Broussard reasoned that it was proper to extend strict liability to landlords, since they impliedly represent that the premises are fit for habitation.¹⁴⁹

II. APPLYING STRICT LIABILITY CONSISTENTLY

As the case law described above demonstrates, there is no legitimate reason for continuing to distinguish physical defects from defects in security for the purpose of analyzing landlord liability. Indeed, the distinction between these two kinds of defects has caused unnecessary confusion and inconsistency in current landlord-tenant law. Such troublesome complications would largely be eliminated by the judicial recognition that any distinction between security defects and physical defects is outmoded and by the sub-

¹⁴³ *Id.* at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

¹⁴⁷ *Id.* at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216 (quoting *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).

¹⁴⁸ *Id.* at 460, 698 P.2d at 119, 213 Cal. Rptr. at 216.

¹⁴⁹ *Id.* at 460-61, 698 P.2d at 119-20, 213 Cal. Rptr. at 217.

sequent development of a coherent analytical framework applicable to any defect in leased premises.

The confusion caused by these inconsistencies in landlord-tenant law is evident in the New Jersey courts' analyses of the scope of the implied warranty of habitability doctrine. As discussed above, while *Dwyer* dealt with a corroded faucet, both *Braitman* and *Trentacost* dealt with defects in security; yet the analysis pertaining to liability was the same. The discussion in all three cases centered not on the kind of defect involved, but on the underlying reasons for establishing liability.

In *Dwyer*, the court analyzed the history of implied warranty in New Jersey and concluded that it would not overturn existing principles of law applicable to tort actions for personal injuries brought by tenants against their landlords. In addition, the court looked at the principles underlying strict liability in other contexts and concluded that they were not relevant to the landlord-tenant context. Thus, based on factors irrelevant to whether the defect was physical or related to security, the *Dwyer* court chose not to hold landlords strictly liable.

Similarly, Justice Pashman, in his majority opinion in *Braitman*, made clear that the developing principles governing building security were also applicable to physical defects. Indeed, Justice Pashman stated that if the implied warranty were found flexible enough to encompass security, "the latter theory as a source of the landlord's duty to safeguard his tenant from crime in his building would, of course, require a reconsideration of the court's conclusion in *Dwyer*."¹⁶⁰

Again, in *Trentacost*, the court indicated that its ruling expanding the scope of the implied warranty of habitability was not limited to considerations pertaining solely to security, but rather that it should be extended to all aspects of the modern tenancy. Justice Pashman explained:

When engaged in the business of providing shelter, present day landlords do not furnish merely four walls, a floor and a ceiling. They have come to supply, and tenants now expect, the physical requisites of a home. An apartment today consists of a variety of goods and services. At a minimum, the necessities of a habitable residence include sufficient heat and ventilation, adequate light,

¹⁶⁰ *Braitman*, 68 N.J. at 388 n.16, 346 A.2d at 87 n.16.

plumbing and sanitation and proper security and maintenance.¹⁵¹

Thus, according to Justice Pashman, tenants are entitled to the same protection from defects in security as from physical defects.

Although *Trentacost* established that strict liability is based solely on the implied warranty of habitability, the considerations underlying the decision are certainly appropriate to a holding of strict liability in tort as well. The New Jersey Supreme Court's failure in *Trentacost* to overturn *Dwyer* directly and to repudiate the dictum in *Dwyer* regarding the inappropriateness of strict liability in the landlord-tenant setting has created confusion. More importantly, it has provided support to those jurists who believe that strict liability is inappropriate in the landlord-tenant context. For example, in his dissent in *Becker*, Judge Lucas cited *Dwyer* as support for his argument that the California Supreme Court erred in holding landlords strictly liable for injuries proximately caused by latent physical defects in the leased premises at the inception of the tenancy.¹⁵²

The California courts also have vacillated between relying upon the implied warranty of habitability and upon strict liability in tort when providing relief to tenants injured by a physical defect in the leased premises. In his discussion of strict liability in tort in *Becker*, for example, Judge Broussard noted the observation in *Green* that the modern urban tenant is in the same position as any other consumer of goods, and that a tenant may therefore reasonably expect that the product purchased is fit as a living unit.¹⁵³ He further reasoned that, as *Green* indicated, a tenant purchasing housing for a limited period of time is in no position to inspect for latent defects in a complex modern apartment building or to bear the expense of repair; the landlord is in a much better position to inspect for and repair latent defects.¹⁵⁴ Thus, Judge Broussard expanded strict liability in tort to landlords largely on the same notions which had supported the expansion of the implied warranty of habitability.

Ironically, however, by failing to maintain the concept of the

¹⁵¹ *Trentacost*, 82 N.J. at 225, 412 A.2d at 442.

¹⁵² *Becker*, 38 Cal. 3d at 479, 698 P.2d at 138, 213 Cal. Rptr. at 235 (Lucas, J., dissenting); see also *Williams v. Gorman*, 214 N.J. Super. 517, 521-23, 520 A.2d 761, 763-65 (App. Div. 1986) (construing *Trentacost* as emphasizing negligence and foreseeability aspects of *Braitman*), cert. denied, 107 N.J. 111, 526 A.2d 182 (1987).

¹⁵³ *Becker*, 38 Cal. 3d at 462, 698 P.2d at 121, 213 Cal. Rptr. at 218.

¹⁵⁴ *Id.*

implied warranty of habitability separate from that of strict liability in tort, the California Supreme Court provided tenants with less, rather than more, protection. Thus, whereas *Green* held that a landlord warrants habitable premises for the term of the lease, *Becker* held only that a landlord is strictly liable for defects occurring at the inception of the lease. Moreover, whereas *Green* specifically included patent defects in the warranty of habitability, *Becker* limited strict liability in tort to latent defects.

The inconsistencies described above are not limited to the states of New Jersey and California. In Louisiana, for example, a jurisdiction which has imposed strict liability for physical defects by statute since the early 1800's,¹⁵⁵ a tenant must prove negligence in order to recover for injuries resulting from an intruder's attack.¹⁵⁶ In direct contrast, in the District of Columbia, a landlord may be held strictly liable for breach of the implied warranty of habitability for a defect in security,¹⁵⁷ but the plaintiff must prove negligence to recover for defects in security.¹⁵⁸

It is time to reconcile these inconsistencies and to establish one standard of liability for both physical and security defects. Although many courts have applied a negligence standard to both types of defects, no court, to date, has applied strict liability to both. The realities of modern tenancy, which have prompted the move toward the establishment of strict liability for landlords, should be given further recognition. They compel the acceptance of strict liability, both in tort and for the breach of the implied warranty of habitability, for all injuries that are caused by any defect, latent or patent, at any time during the term of the lease.

A widely accepted view is that strict liability is not absolute liability.¹⁵⁹ In strict liability, the plaintiff must establish a defect

¹⁵⁵ See LA. CIV. CODE ANN. art. 2695 (West Supp. 1990). The Louisiana Civil Code provides that the owner of a building is answerable for the damage occasioned by its ruin when this is caused by neglect to repair it, or when it is the result of a vice in its original construction. *Id.*

¹⁵⁶ See, e.g., *Gant v. Flint-Goodridge Hosp. of Dillard Univ.*, 359 So. 2d 279, 282-83 (La. Ct. App.), cert. denied, 362 So.2d 581 (1978). Under Louisiana law, in order for a plaintiff to recover from a landlord for injuries sustained due to failure to provide adequate security, the plaintiff first must prove that the landlord promised such security, and second, that he was negligent in his failure to provide such security. *Id.*

¹⁵⁷ See *Kline*, 439 F.2d at 485.

¹⁵⁸ See *Gladden v. Walker & Dunlop*, 168 F.2d 321, 322 (D.C. Cir. 1948).

¹⁵⁹ See *Chernobyl: Law and Communication Transboundary Nuclear Air Pollution—The Legal Material* (Book Review), 84 AM. J. INT'L L. 809, 811 (1990). Strict liability is a prima facie responsibility which permits the possibility of various defenses or qualifica-

that proximately caused her injury.¹⁶⁰ In proving that a defect exists, the plaintiff must establish that an unreasonably dangerous condition existed.¹⁶¹ In addition, the landlord may be able to assert the defenses of contributory negligence and assumption of risk.¹⁶²

The public policy supporting strict liability in the landlord-tenant context is compelling. As noted earlier, modern tenants, many in multi-story apartment buildings, are often not in the position to take the steps needed to prevent or correct a defect in the leased premises that might cause them harm. A tenant in an apartment building does not have the control over the common areas or the resources and expertise to assure that such areas are reasonably safe. Nor is a tenant in the position to check that the wiring and heating facilities in the building are safe. The modern tenant must rely on her landlord to carry out these responsibilities.

This reliance is best protected through the application of strict liability in landlord-tenant law. Although some commentators have questioned whether plaintiffs have fared better under a theory of strict liability,¹⁶³ others have suggested that the theory enables plaintiffs to prove liability more easily.¹⁶⁴ Moreover, there are many secondary benefits to raising the degree of liability imposed on landlords. As Professor Zacharias has indicated, the federal and state governments have been slow to respond innovatively to the increase in crime, and public expenditures have not kept pace with its incidence.¹⁶⁵ If liability were imposed on commercial enterprises, including landlords, the public's attention would focus on

tions, whereas absolute liability is that for which there can be no exculpation. *Id.*

¹⁶⁰ See, e.g., *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700 ("manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being").

¹⁶¹ See RESTATEMENT (SECOND) OF TORTS § 402A comment g (1945). The Restatement defines a defective condition as "unreasonably dangerous." *Id.* "Unreasonably dangerous" is defined as "dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it." *Id.* comment i.

¹⁶² In Louisiana, for example, which imposes strict liability on landlords by statute, see *supra* note 155, both of these defenses are available. See, e.g., *Rau v. Sun Ins. Co. of N.Y.*, 239 So. 2d 481, 483 (La. Ct. App. 1970) (plaintiff assumed risk); *Joyner v. Aetna Casualty & Sur. Co.*, 240 So. 2d 545, 550 (La. Ct. App. 1970) (same), *modified*, 259 La. 660, 251 So. 2d 166 (1971); *Anslem v. Travelers Ins. Co.*, 192 So. 2d 599, 600 (La. Ct. App. 1966) (plaintiff's contributory negligence is defense).

¹⁶³ See Wildman & Farrell, *Strict Products Liability in California: An Ideological Overview*, 19 U.S.F. L. REV. 139, 142 (1985).

¹⁶⁴ See Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 710-13 (1986).

¹⁶⁵ *Id.* at 736 (discussing processing concerns in negligent security litigation).

this problem; if those affected by potential liability banded together, they would act as a catalyst for legislative action.¹⁶⁶

In addition, as Professor Zacharias discusses, the more unwilling courts are to hold landlords liable for failure to provide adequate security, the less likely people are to think that it is morally acceptable not to get involved in helping to prevent crime.¹⁶⁷ Professor Zacharias refers to empirical research which demonstrates that establishing legal norms would encourage the protection of potential victims for a variety of psychological reasons, and that the breakdown of the "I don't want to get involved" syndrome could change the public and legislative views of the need to cooperate with enforcement authorities.¹⁶⁸

An assessment of the realities of the landlord-tenant relationship also indicates that the landlord, as owner of the enterprise, is in the best position to absorb the costs of maintaining the property. The landlord can obtain insurance to protect herself from the impact of liability,¹⁶⁹ and she can raise the rent to defray any added costs encountered in keeping the premises reasonably safe.¹⁷⁰

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 741.

¹⁶⁸ *Id.* at 742.

¹⁶⁹ See Browder, *supra* note 2. One commentator has uncovered several difficulties that tenants would encounter in obtaining insurance. *Id.* at 139. First, the only available insurance for tenants generally is for hospitalization and certain medical expenses and would probably not cover all losses suffered by tenants from injuries on leased premises. *Id.* Moreover,

individuals will have a relative disadvantage with respect to the availability and reliability of the relevant information; a landlord will better understand the likelihood and severity of accidents to be expected from defects in his properties, because he has the benefit of the experience of many different tenants over a longer period of time.

Id. at 140 n.215. Finally, those tenants with the highest risk of injury tend to be those who are least likely to procure affordable insurance. *Id.*

¹⁷⁰ See, e.g., Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299, 351 (1980) (increase in rent need not occur if landlords are only required to take reasonable measures); Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275, 294 (1971) (requiring landlords to take security measures would lead to unaffordable rents for tenants of low and moderate incomes and to abandonment of urban housing in case of rent control).

III. THE APPLICABILITY OF A NEW FRAMEWORK FOR LANDLORD LIABILITY BASED ON *Trentacost* AND *Becker* TO OTHER JURISDICTIONS: LANDLORD LIABILITY IN NEW YORK

In 1975, the New York State Legislature enacted Real Property Law section 235-b, which provides in pertinent part:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.¹⁷¹

A review of the case law construing section 235-b indicates that courts have been inconsistent in determining whether the statute provides tenants with a cause of action based on strict liability.¹⁷²

A. *Strict Liability in the Context of Physical Defects*

Shortly after the passage of section 235-b, Judge Levy was faced with the task of interpreting the scope of landlord liability intended by the legislature. In *Kaplan v. Coulston*,¹⁷³ the plaintiffs Max and Lena Kaplan filed a complaint against their landlord for damages, which were allegedly caused by the landlord's negligence when a kitchen cabinet in their apartment fell and struck Lena Kaplan.¹⁷⁴ The Kaplans also filed a motion to amend their complaint to include a cause of action for breach of the implied warranty of habitability based on strict liability.¹⁷⁵

In determining whether to grant the motion to amend the pleading, Judge Levy analyzed whether the amended complaint stated a cause of action; he concluded that a cause of action existed based on strict liability for breach of the implied warranty of habitability.¹⁷⁶

¹⁷¹ N.Y. REAL PROP. LAW § 235-b (McKinney 1989).

¹⁷² See *infra* notes 175, 182-208 and accompanying text. In this Article, the discussion of strict liability for landlords in New York will be limited to the interpretation of this statute.

¹⁷³ 85 Misc. 2d 745, 381 N.Y.S.2d 634 (N.Y.C. Civ. Ct. Bronx County 1976).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 751-52, 381 N.Y.S.2d at 639.

Judge Levy stated that although persuasive reasons militated against allowing such a cause of action, these reasons were outweighed by the policy considerations underlying strict liability and the policy trend in tort and landlord tenant law.¹⁷⁷ In reviewing these developments, he cited the New Jersey Supreme Court's decision in *Cintrone v. Hertz Truck Leasing and Rental Services*,¹⁷⁸ which held that a truck rental agency, by placing vehicles into the stream of commerce in a fashion not unlike a manufacturer or retailer, warrants that the car will not fail mechanically during the rental period.¹⁷⁹ He also noted the decision of the California Court of Appeals in *Fakhoury v. Magner*,¹⁸⁰ which extended strict liability to a landlord of a furnished apartment.¹⁸¹ Finally, he noted that in *Schipper v. Levitt & Sons, Inc.*,¹⁸² the New Jersey Supreme Court extended the implied warranty of habitability to the sale of realty.¹⁸³

In addition to reviewing these precedents, Judge Levy focused on the applicability of two significant rationales underlying strict liability to the landlord-tenant context. First, he analogized a landlord to a seller of a product; both have superior knowledge, are in a better position to prevent defects, and induce the consumer or tenant to rely on her representations.¹⁸⁴ Second, he discussed the applicability of the view that the seller could better bear and distribute a loss than the buyer, noting that a landlord could purchase liability insurance and pass the cost to all of the tenants.¹⁸⁵ Finally, he discussed how the difficulty of proving negligence stemming from circumstances beyond one's control might prevent a plaintiff from prevailing even though the plaintiff could prove a defect and causation in the landlord-tenant context.¹⁸⁶ Judge Levy found this rationale appropriate because often the defect involved may have been created by an affirmative act of either the landlord or a third person, or by the failure of the landlord to

¹⁷⁷ *Id.* at 749, 381 N.Y.S.2d at 637.

¹⁷⁸ 45 N.J. 434, 212 A.2d 769 (1965).

¹⁷⁹ *Id.* at 450, 212 A.2d at 777-78.

¹⁸⁰ 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

¹⁸¹ *Id.* at 63, 101 Cal. Rptr. at 476 (landlord held strictly liable, not as lessor of real property, but as lessor of furniture).

¹⁸² 44 N.J. 70, 207 A.2d 314 (1965).

¹⁸³ *Id.* at 90, 207 A.2d at 325.

¹⁸⁴ *Kaplan*, 85 Misc. 2d at 750, 381 N.Y.S.2d at 638.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

repair a defective condition. Additionally, the tenant might be unable to prove that the landlord knew or should have known of the defective condition.¹⁸⁷

As courts have struggled to resolve the issue of the appropriate degree of liability under the implied warranty statute, *Kaplan* has served as the basis of much discussion. Although some courts have adopted the reasoning of *Kaplan*, others have declined to do so. In *Curry v. New York City Housing Authority*,¹⁸⁸ for example, the appellate division strongly disagreed with *Kaplan*. The court acknowledged that the language of the warranty in section 235-b was adapted from the law of sales, an area in which strict liability is imposed.¹⁸⁹ However, the court noted that the legislative history of section 235-b clearly indicates that strict liability was not intended.¹⁹⁰ Furthermore, the court relied on *Dwyer* to support its position that *Kaplan* was incorrectly decided.¹⁹¹

To further support its position that section 235-b was intended to codify judicial decisions which protected tenants' rights to live in habitable conditions but was not intended to extend tort liability, the *Curry* court looked to the words of the court of appeals in *Park West Management Corp. v. Mitchell*¹⁹²—the only court of appeals decision thus far to interpret section 235-b. In *Park West*, while considering alleged breaches of the warranty of habitability during a janitorial strike, New York's highest court elaborated upon the history and purpose of the statute. The court noted:

[U]ntil development of the warranty of habitability in residential leases, the contemporary tenant possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential services. Initially by judicial decision (citations omitted) and ultimately by legislative enactment in August, 1975, the obsolete doctrine of the lease as a conveyance of land was discarded A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants [the safety and habitability of the premises].¹⁹³

¹⁸⁷ *Id.* at 750-51, 381 N.Y.S.2d at 638.

¹⁸⁸ 77 A.D.2d 534, 430 N.Y.S.2d 305 (1st Dep't 1980).

¹⁸⁹ *Id.* at 535, 430 N.Y.S.2d at 307.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*, 430 N.Y.S.2d at 306-07.

¹⁹² 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1977).

¹⁹³ *Id.* at 325, 391 N.E.2d at 1292-93, 418 N.Y.S.2d at 314-15.

While holding the landlord liable for alleged breaches of the implied warranty of habitability, the court of appeals acknowledged that it was not possible to document every instance in which the warranty of habitability could be breached. However, the court did establish some guidelines to determine whether a breach has occurred. First, the court noted that the scope of the implied warranty of habitability includes conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy.¹⁹⁴ Second, the court stated that, although violations of a housing code are factors to be considered in determining whether a breach of the warranty has arisen, code violations serve only as a starting point in a court's analysis.¹⁹⁵ In addition, the court indicated that there are certain violations of the warranty that are beyond dispute, such as insect and rodent infestation, insufficient heating and plumbing facilities, highly dangerous electrical outlets or wiring, and inadequate sanitation facilities or other similar services.¹⁹⁶

Significantly, the court of appeals chose not to comment upon the availability of remedies other than the remedy implicated by the facts in the case at hand, which was a reduction in rent.¹⁹⁷ However, the court noted that because a lease is more analogous to a purchase of shelter and services than to a conveyance of an estate, the implied warranty of fitness governing the law of sales is therefore more apt than the antiquated law of property.¹⁹⁸ Since *Park West*, trial courts have been reluctant to follow *Kaplan*.¹⁹⁹ As one court has implied, this reluctance may be attributable partly to the reticence of the court of appeals in *Park West* to address the issue of additional remedies under section 235-b.²⁰⁰

B. *Strict Liability in the Context of Security*

Although the court in *Park West* did not specifically address the issue of whether a failure to provide security would be a breach of section 235-b, it did emphasize that a landlord warrants that

¹⁹⁴ *Id.* at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 328, 391 N.E.2d at 1294-95, 418 N.Y.S.2d at 317.

¹⁹⁷ *Id.* at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

¹⁹⁸ *Id.* at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314.

¹⁹⁹ See *Pezzolanella v. Galloway*, 132 Misc. 2d 429, 431-32, 503 N.Y.S.2d 990, 992 (Utica City Ct. 1986).

²⁰⁰ *Id.* at 431, 503 N.Y.S.2d at 992.

there will be no conditions that endanger the health and safety of her tenants.²⁰¹ Thus, without any discussion, the appellate division in *Carp v. Marcus*²⁰² unequivocally held that, because the warranty protects tenants from dangerous or unsafe conditions, a plaintiff alleging a breach of the warranty in connection with an assault or other nefarious conduct by a third party had stated a valid cause of action.²⁰³

Today, however, courts clearly are limiting landlord liability for a breach of the warranty resulting from defective security to an action in negligence. For example, in *Brownstein v. Edison*,²⁰⁴ the court, although noting the "burgeoning cancer of crime [that] has made our citizens veritable hermits in their homes,"²⁰⁵ indicated that tenants receive protection under the statute when a defendant assumes the duty to provide some degree of protection to tenants such as by the installation of front door locks.²⁰⁶

Similarly, in a recent decision, *Highview Associates v. Kofert*,²⁰⁷ the court, in holding that a landlord violated the implied warranty of habitability in a rural garden complex apartment by providing no security whatsoever, did so only because the defendant had been on notice of a substantial number of thefts and burglaries over the years.²⁰⁸ Indeed, the court noted that prior to the criminal activity, security measures had not been part of the implied warranty.²⁰⁹

In narrowly interpreting section 235-b, courts have not chosen to explore past indications that a more expansive view of landlord liability for defective security might be appropriate. For example, in *Sherman v. Concourse*,²¹⁰ the appellate division, although limiting its holding in that case, demonstrated its interest in the broader holding of *Kline* that a landlord is under a duty to protect tenants from foreseeable criminal acts of third parties given her

²⁰¹ *Park West*, 47 N.Y.2d at 325, 391 N.E.2d at 1292-93, 418 N.Y.S.2d at 314-15.

²⁰² 112 A.D.2d 546, 491 N.Y.S.2d 484 (3d Dep't 1985).

²⁰³ *Id.*, 491 N.Y.S.2d at 486.

²⁰⁴ 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. Kings County 1980).

²⁰⁵ *Id.* at 318, 425 N.Y.S.2d at 775 (citing *People v. Gruenberg*, 67 Misc. 2d 185, 188, 324 N.Y.S.2d 372, 376 (N.Y.C. Crim. Ct. Kings County 1971)).

²⁰⁶ *Id.* at 318, 425 N.Y.S.2d at 774-75.

²⁰⁷ 124 Misc. 2d 797, 477 N.Y.S.2d 585 (Dist. Ct. Suffolk County 1984).

²⁰⁸ *Id.* at 800, 477 N.Y.S.2d at 587.

²⁰⁹ *Id.* at 799, 477 N.Y.S.2d at 586.

²¹⁰ 47 A.D.2d 134, 365 N.Y.S.2d 239 (2d Dep't 1975).

special relationship to her tenants.²¹¹

C. *A New Framework for Liability*

Given the confusion of the lower courts as to the proper interpretation of landlord liability pursuant to section 235-b in the context of physical defects and the courts' narrow interpretation of landlord liability for breach of the implied warranty of habitability in the context of defective security, it is clear that it is time for a new look at the proper interpretation of section 235-b in both the context of physical defects and defects in security. *Park West*, as discussed above, does not in any way support a limited interpretation of the remedies available under section 235-b in either context. Moreover, some of the dialogue as to the correct interpretation of the remedies available pursuant to section 235-b has taken place prior to the developments in New Jersey discussed above. For example, the appellate division in *Curry* relied heavily on *Dwyer*, which has now been overturned implicitly by the New Jersey Supreme Court. These developments demonstrate that the time has come for a new unified approach to landlord liability in both contexts, physical defects and security, in New York and in other states as well.

CONCLUSION

In modern society, landlords, whether or not in the business of leasing, place "a well known package of goods and services [into the stream of commerce]—a package which includes not merely walls and ceilings but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance."²¹² Landlords impliedly represent to their tenants that this package will be fit for the purpose intended. If a defect in the package arises for which the tenant is blameless, the principles of strict liability demand that the landlord compensate the tenant. Courts should hold landlords strictly liable in tort, thereby providing incentives to persons putting products into the stream of commerce to both make those products safe and to fairly distribute the cost of compensating the injuries caused by the products. Above all, courts must recognize that mod-

²¹¹ *Id.* at 140, 365 N.Y.S.2d at 244.

²¹² Davis & De La Torre, *supra* note 2, at 144-45.

ern contract law mandates that the reasonable expectations of consumers must be protected and that, therefore, landlords must be held strictly liable for failures in meeting those reasonable expectations.

