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Tort Liability of Landlord Under Covenant to Repair

Sylvester B. Sinacore

TORT LIABILITY OF LANDLORD UNDER COVENANT TO REPAIR.

A covenant to repair is an agreement usually made between the lessor and a lessee obligating one to adjust or correct defects on the premises leased, during a term of years. Obviously, there being privity merely between these two parties, said covenant cannot enure to the benefit of a stranger who sustains injury due to its breach.[1] While the landlord owes a duty to repair to the tenant, he owes no such duty to a stranger to the covenant.[2]

However, it has been often decided that if the lessor agrees with the lessee to make repairs and a third person is injured by defects, which would not have existed if the lessor had performed his agreement, such person may recover against the lessor.[3] This principle has been urged where the person sustained injury either on the public highway [4] or in premises leased for a public purpose.[5]

The rule was first suggested over a century ago in England, where it was held that in order to discourage "circuity of action" the third party should recover directly from the landlord on his covenant to repair.[6] An Illinois case [7] has followed this decision, but fails to make any judicial discussion of the theory of liability or of the view that such a liability exists. Authorities contend that it is a mistaken theory to hold the landlord liable to a third person on a contract made between himself and his tenant.[8] One author remarks,[9]

> "Prima facie, it would be difficult to say that a contract between the landlord and the tenant could give third persons a right to sue the landlord."

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[1] Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987 (1892).

[2] Odel v. Soloman, 99 N. Y. 635, 1 N. E. 408 (1885).

[3] Gridley v. City of Bloomington, 68 Ill. 47 (1873); Boyce v. Tallerman, 183 Ill. 115, 55 N. E. 703 (1899); City of Lowell v. Spaulding, 58 Mass. 277, 50 Am. Dec. 775; Inh. of Milford v. Holbrook, 91 Mass. 17, 85 Am. Dec. 735; Szarthmary v. Adams, 166 Mass. 145, 44 N. E. 124 (1896); Frichbergh v. Harter, 173 Mass. 22, 52 N. E. 1086 (1899); Fleichner v. Citizen's Real Estate & Inv. Co., 25 Ore. 119, 35 Pac. 174 (1893); Nelson v. Liverpool Brewery Co., 2 C. P. 311 (1877).

[4] Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193 (1899); Klepper v. Seymour House Corp., 246 N. Y. 85, 158 N. E. 29 (1927).

[5] Peil v. Reinhart, 127 N. Y. 381, 27 N. E. 1077 (1891); Dullard v. Roberts, 130 N. Y. 269, 29 N. E. 104 (1891); Idel v. Mitchell, 158 N. Y. 134, 52 N. E. 740 (1899); Goleb v. Pisirsky, 178 N. Y. 458, 70 N. E. 973 (1904); Campbell v. Elsie S. Holding Co., Inc., 251 N. Y. 446, 167 N. E. 582 (1929); Lynch v. Swan, 167 Mass. 564, 46 N. E. 51 (1897).

[6] Payne v. Rogers, 2 H. Bl. 350.

[7] Boyce v. Tallerman, *supra* note 3.

[8] TIFFANY, LANDLORD AND TENANT (1912) §107; Williston, *Contracts for the Benefit of Third Person* (1902) 15 HARV. L. REV. 803; HAMMON, CONTRACTS 714.

[9] Per Coleridge, *J.*, Russell v. Shenton, 2 Q. B. 449.

Another says,[10]

> "The contract by the landlord cannot be regarded as made for the benefit of any person who may happen to be injured by a condition on the premises which would have been obviated had the contract been performed, and consequently the person injured would have no right of action upon the contract."

Although it is apparent that there should not be any contract liability, yet courts in different jurisdictions have held the lessor liable to strangers, on one theory or another.[11] Some decisions do not even state the theory of liability,[12] while others extend it beyond reason.[13] Negligence has been offered as one ground to hold the owner, if he failed to make repairs within a reasonable time after he knew of their need:[14] while others have accepted the nuisance theory, since the landlord was in control of the defect.[15] However in some states, a recovery against the landlord is totally denied.[16] Notice should be given to the fact that where a ground of liability has been developed, it is found in tort, although the wrong arises out of contract.

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[10] TIFFANY, LANDLORD AND TENANT, at 701.

[11] *Supra* note 3.

[12] Sontag v. O'Hare, 73 Ill. App. 432; Stillwell's Adm'r v. South Louisville Land Co., 22 Ky. Law Rep. 785, 58 S. W. 696 (1900); Campbell v. Portland Sugar Co., 52 Me. 552, 16 Am. Rep. 503 (1859); Olson v. Schultz, 67 Minn. 494, 70 N. W. 779 (1897); Barron v. Leidloff, 95 Minn. 474, 104 N. W. 289 (1905).

[13] Moore v. Steljes, 69 Fed. 518 (C. C. S. D. N. Y. 1895).

[14] Thomas v. Kingsland, 108 N. Y. 616, 14 N. E. 807 (1888); Ahern v. Steele, *supra* note 4; Altz v. Leibenson, 233 N. Y. 16, 134 N. E. 703 (1922); May v. Ennis, 78 App. Div. 552, 79 N. Y. Supp. 896 (2d Dept. 1903); Pratt, Hurst & Co. v. Tailer, 114 App. Div. 574, 100 N. Y. Supp. 16 (1906); Eisen v. Baudouine, 169 App. Div. 549, 155 N. Y. Supp. 496 (1st Dept. 1915); Thompson v. Clemens, 96 Md. 196, 53 Atl. 919 (1903); Hutchinson v. Cummings, 155 Mass. 329, 31 N. E. 127 (1892); McLean v. Fiske Wharf Co., 158 Mass. 472, 33 N. E. 499 (1893); Marley v. Wheelwright, 172 Mass. 530, 52 N. E. 1066 (1899); Pheon v. Staff, 9 Mo. App. 309.

[15] Ahern v. Steele, *supra* note 4; Sterger v. Van Sickler, *supra* note 1; Quay v. Lucas, 25 Mo. App. 7 (1887).

[16] Sterger v. Van Sicklen, *supra* note 1; Frank v. Mandell, 76 App. Div. 413, 78 N. Y. Supp. 855 (2d Dept. 1902); Sherlock v. Rushmore, 99 App. Div. 598, 91 N. Y. Supp. 152 (2d Dept. 1904); Stelz v. Van Dusen, 93 App. Div. 358, 87 N. Y. Supp. 716 (1904); Miller v. Rinaldo, 21 Misc. 470, 47 N. Y. Supp. 636 (1897); Dodd v. Rothschild, 31 Misc. 721, 65 N. Y. Supp. 214 (1900); Flynn v. Hattan, 43 How. Pr. 333 (N. Y. 1872); Miles v. Janvrin, 196 Mass. 431, 82 N. E. 708 (1907); Brady v. Klein, 133 Mich. 422, 95 N. W. 557 (1903); Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220 (1907); Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767 (1898); Quay v. Lucas, *supra* note 15; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767 (1875); Wilcox v. Hines, 100 Tenn. 524, 45 S. W. 781 (1898); Cavalier v. Pope, App. Cas. 428 (1906).

Judge Cooley, in discussing nuisances states:[17]

> "In general, that party only is responsible for the continuance of a nuisance who has possession and control where it is, and upon whom, therefore, the obligation to remove seems properly to rest. It follows, that as between the landlord and tenant, the party presumptively liable is the tenant. But, the facts when developed, remove many cases from this presumption, for the very satisfactory reason that there are many cases in which the party out of possession is either in part or exclusively the party in fault."

It appears that the above authority has in mind either the contracting away of his liability by a tenant under a covenant to repair, or the retaining of control by the landlord of certain parts of the leased premises. In such cases, it would appear that the tenant is not liable.[18] Yet, where the tenant himself or some other on the premises under his permission is injured by defects due to lack of repairs, the landlord will not be held on his covenant.[19]

To hold the owner responsible on the theory that he had control of the nuisance, the tenant or the third person injured on the premises must show that landlord had such control over the defects as implies not only "the right or liability to repair the premises" but "the power and the right to admit people to the premises and to exclude people from them."[20] However, where the person injured was a passerby on the public highway a different rule applies.[21]

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[17] 2 COOLEY, TORTS (3rd ed. 1906) c. 19, p. 1282.

[18] Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295 (1874); Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. 424 (1888); Hussey v. Ryan, 64 Md. 426, 2 Atl. 729 (1886); Todd v. Flight, 9 C. B. (N. S.) 377; Rich v. Basterfield, 4 C. B. 783; Russell v. Shenton, *supra* note 9.

[19] Cullings v. Goetz, 256 N. Y. 287, 176 N. E. 397 (1931); Lafredo v. Bush Term. Co., 261 N. Y. 323, 185 N. E. 398 (1933); Potter v. N. Y., O. & W. R. R. Co., 261 N. Y. 489, 185 N. E. 708 (1933); Schick v. Fluschhauer, 26 App. Div. 210, 49 N. Y. Supp. 962 (1st Dept. 1898); Van Tassel v. Read, 36 App. Div. 529, 55 N. Y. Supp. 502 (2d Dept. 1899); Golob v. Pasinsky, 72 App. Div. 413, 76 N. Y. Supp. 388 (1st Dept. 1902) (Tenant cannot recover even where goods are damaged through such defects); Pratt, Hurst & Co. v. Tailer, *supra* note 14; Rauth v. Daverport, 60 Hun 70, 14 N. Y. Supp. 69 (N. Y. 1891); Levey v. Roosevelt, 131 App. Div. 81, 115 N. Y. Supp. 475 (1st Dept. 1909); Philips v. Ehrmann, 8 Misc. 39, 28 N. Y. Supp. 519 (1894); Valentine v. Woods, 59 Misc. 471, 110 N. Y. Supp. 990 (1908); Cavalier v. Pope, *supra* note 16.

[20] Lafredo v. Bush Term. Co., *supra* note 19; Cavalier v. Pope, *supra* note 16.

[21] Ahern v. Steele, *supra* note 4; Trustees of Canandaigua v. Foster, 156 N. Y. 354, 50 N. E. 971 (1898); Klepper v. Seymour House Corp., *supra* note 4; Schmutz v. Firm Realty Co., 168 N. Y. Supp. 18 (1st Dept. 1918) Nelson v. Liverpool Brewery Co., *supra* note 3.

Professor Bohlen states the rule thusly: [22]

> "The owner has a duty to maintain his property in such a condition that it shall not be dangerous to the public, whether as travelers on the highway upon which it abuts, or as owners of adjacent property, or as persons upon such property in the owner's right quite independent of his or the occupier's consent. His duty may be suspended, when in a legally permissible way, he parts with his right to enter it and so loses his power to perform his duty to maintain it in safe condition; but when by a covenant to repair, he retains the right of entry and the power for performance, the reason for the suspension of his duty fails."

In *Trustees of Canandaigua* v. *Foster*,[23] the Court of Appeals said in conjunction with the landlord's duty to maintain the premises in good condition,

> "As the duty is imposed by law for the public safety, its extent is measured by whatever public safety requires. Anything less than alienation of the entire property, either permanently, as by deed, or temporarily, as by lease, would leave the public without adequate protection."

In a recent case [24] our court of last resort had occasion to apply these principles to facts. It appears that the plaintiff, a passerby, was injured by the fall of a window from the landlord's building. The latter had leased the premises to a tenant, but reserved to himself a covenant to repair. It was held that the landlord was liable, but not on the covenant.

It was conceded by the court that the contract did not run to the benefit of the passerby, that it did not enure to his benefit,[25] or that the owner owed him any duty based on the covenant.[26] Yet, the landlord's duty "was not a contractual, but was a tort duty based on the fact that the contract gave the lessor the ability to make the repairs and control over them.[27] Although it has been held that the mere retention of the right or ability to make repairs does not impose a duty to make them,[28] or that the reservation of the right to

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[22] BOHLEN, STUDIES IN THE LAW OF TORTS 210, cited in Appel v. Muller, 262 N. Y. 278, 186 N. E. 785 (1933).

[23] 156 N. Y. at 362, 50 N. E. at 973 (1898).

[24] Appel v. Muller, *supra* note 22.

[25] Sterger v. Van Sicklen, *supra* note 1.

[26] Odel v. Solomon, *supra* note 2.

[27] TORTS RESTATEMENT (Am. L. Inst., Tent. Draft No. 4) §248.

[28] Buitzel v. Rhinelander, 179 App. Div. 735, 167 N. Y. Supp. 343 (1st Dept. 1917); Shiff v. Pottlitzer, 51 Misc. 611, 101 N. Y. Supp. 249 (1906); Meyers v. Pepperell Mfg. Co., 122 Me. 262, 119 Atl. 625 (1923); Neas v. Lowell, 193 Mass. 441, 79 N. E. 810 (1907).

enter and inspect does not carry with it a duty to repair [29] yet this right is sufficient to hold the landlord for damages to a member of the general public.[30] "The landlord's covenant to repair revives his original duty to the public to maintain the structure in safe condition, and his retention of the power to perform that duty, combine to make him liable." [31]

Most of the above theories of the landlord's liability have been criticized. As to the theory of prevention of "circuity of action" it has been asserted [32] that it is "a questionable principle at best, and peculiarly one of last resort, and one whose operation thus broadly applied is counter to every just notion of privity of action." It cannot be said that when one contracts to make repairs, he contracts to indemnify against liability for injuries caused third persons by an omission to repair.[33] Or, that by such a covenant the landlord retains control of the premises so that a duty may be imposed upon him to make him liable.[34] The liability is with the tenant whether or not the owner has covenanted to repair. The tenant is in actual control, since he is in possession. If the tenant is compelled to repair he can always recover against the owner.[35] If through some remedial defect, a third person is injured, although there be a covenant to repair by the lessor, the liability should rest with the tenant, since through his possession he knew of the lack of repairs and was in actual control of them. The tenant's recovery against the landlord in such a case, however, will not be what he was compelled to pay the third party for the wrong but his damage for breach of the covenant.[36]

SYLVESTER B. SINACORE.

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[29] Uggla v. Brokaw, 117 App. Div. 586, 102 N. Y. Supp. 857 (1st Dept. 1907); Meyers v. Pepperell, *supra* note 28.

[30] *Supra* note 21; Burdick v. Cheadle, *supra* note 14.

[31] Per Kellogg, *J.*, in Appel v. Muller, *supra* note 22.

[32] Willard, *Responsibility for the Condition of Demised Premises* (1871) 6 AM. L. REV. 629.

[33] TIFFANY, LANDLORD AND TENANT, at 702.

[34] Cavalier v. Pope, *supra* note 16; Miller v. Hancock, 2 Q. B. 177 (1893).

[35] 3 SUTHERLAND, DAMAGES (4th ed. 1916) p. 3243.

[36] Meyers v. Burns, 35 N. Y. 269 (1866); Hester v. Knox, 63 N. Y. 561 (1876); Thomas v. Kingsland, *supra* note 14; Sterger v. Van Sickle, *supra* note 1; Drago v. Mead, 30 App. Div. 258, 51 N. Y. Supp. 360 (2d Dept. 1898); Reiner v. Jones, 38 App. Div. 440, 56 N. Y. Supp. 423 (2d Dept. 1899); Huber v. Ryan, 57 App. Div. 34, 67 N. Y. Supp. 972 (2d Dept. 1901); Frank v. Mandel, *supra* note 16; Godfrey v. India Wharf Co., 87 App. Div. 123, 84 N. Y. Supp. 90 (2d Dept. 1903); Stelz v. Van Dusen, *supra* note 16; Sherlock v. Rushmore, *supra* note 16; Rose v. Butler, 69 Hun 140, 23 N. Y. Supp. 375 (2d Dept. 1893); Folsen v. Parker, 31 Misc. 348, 64 N. Y. Supp. 263 (1900); Beakes v. Holzman, 47 Misc. 384, 94 N. Y. Supp. 33 (1905); Snow v. W. 65th St. Garage Co., 166 N. Y. Supp. 414 (1917).