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The Landlord's Liability for Criminal Injuries--The Duty to Protect

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THE LANDLORD'S LIABILITY FOR CRIMINAL INJURIES—THE DUTY TO PROTECT

I. INTRODUCTION

The recent expansion of the landlord's tort liability to include injuries inflicted by third party criminals against tenants and their invitees and licensees[1] is an area of law embroiled in controversy. Only in this century have American courts been willing to impose a duty on a landlord to maintain and repair portions of leased premises under the landlord's control.[2] More recently, however, an accelerating trend away from immunizing landlords and toward expanding their potential tort liability has allowed tenants to recover for injuries resulting from foreseeable criminal acts. In order for liability to be imposed, the tenant's injury must be proximately caused by the landlord's breach of a duty. The proximate cause requirement is fulfilled when the landlord's failure to maintain the premises in a safe condition occasions the criminal act resulting in injury to the tenant.

Courts have derived this new duty to provide security from several different bases: the warranty of habitability implied in the lease, statutes governing safety and security in multiple family dwellings, the special landlord-tenant relationship, the landlord's contractual control over portions of the premises, and the landlord's assumption of a duty to provide security. Courts have expanded the landlord's liability to varying degrees, depending on which of the principles they chose to apply, as well

1. For brevity's sake, the term "tenant" will hereinafter be used to denote not only tenants in privity with the landlord, but also their families and those using the property in right of the tenant. *See generally* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 217 (2d ed. 1975). Regarding the subject of privity of contract, the court in Faber v. Creswick, 31 N.J. 234, —, 156 A.2d 252, 255 (1959) stated:

> [I]t is utterly unrealistic to say that when the head of a family leases premises and bargains for an agreement on the part of the lessor to maintain them in good repair, the parties do not recognize that the pact is in the interest and for the protection of members of his household and others who enter thereon in his right.

Id., *quoted in* J. CRIBBET, *supra*, at 217.

2. *See* J. CRIBBET, *supra* note 1, at 205. The general rule was that there was no implied covenant that the premises to be let would be in a tenantable condition, nor that the physical condition of the premises should remain unchanged, except for waste, during the term of tenancy. In fact, even if the landlord volunteered to make repairs, the landlord was not empowered to do so because the lease gave the tenant exclusive possession, and that possession terminated the former right of the landlord to enter the premises to ascertain defects and make necessary repairs. *Id.*

as the strictness and exclusiveness of the application itself. Consequently, some states require that landlords virtually insure their tenants' safety, while other states leave tenants unreasonably vulnerable to criminal attack. The Oklahoma Supreme Court has avoided either extreme, striking an equitable balance between the competing interests of landlords and tenants by applying a traditional tort negligence duty analysis.

II. HISTORICAL DEVELOPMENT OF LANDLORD TORT LIABILITY

A. *Traditional Landlord Tort Liability*

Medieval courts viewed the lease as a contract which effected the conveyance of a property interest.[3] The contract charged the landlord with giving the tenant a legal right to possess the land free from interference by the landlord or by third parties acting under the landlord's authority,[4] except when necessary to prevent waste or decay of the premises.[5] The resulting landlord-tenant relationship gave rise to the doctrine of caveat emptor, which relieved the landlord of any duty to maintain the premises.[6]

Until the mid-twentieth century, the tenant was responsible for all maintenance, repairs, and security regardless of whether the lease involved residential or commercial property. If the parties intended otherwise, the respective rights and obligations had to be expressed in the lease itself.[7]

B. *Exceptions to the Traditional Rule*

With the advent of the industrial revolution, the leasehold market

3. Browder, *The Taming of a Duty — The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 100 (1982) ("In fact, leases have always been contracts, which is not to say that every lease in the past was also a contract.").

4. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 72 (2d ed. 1987). The idea was that the tenant took the premises "as is." The landlord's principal obligations were to deliver the land unencumbered and then to leave the tenant alone. *Id.*

5. J. CRIBBET, *supra* note 1, at 209. The lessee is obligated to treat the premises in such a manner as to prevent any injury or substantial change in the property during the term, unless agreed to otherwise. *Id.*

6. *See* Note, *Landlord Liability for Criminal Acts Perpetrated Against Tenants: The Pennsylvania Approach*, 91 DICK. L. REV. 779, 780 n.14 (1987) (citing 2 R. POWELL, REAL PROPERTY ¶260.3A (Rohan ed. 1986)). Although the landlord had no general duty to repair prior to commencement of the tenancy, or maintain the premises during the tenancy, there were common law exceptions to the caveat emptor rule. These included short term leases of furnished dwellings, leases of buildings under construction, and fraudulent misrepresentation or concealment of the condition of the property. *See also* Stevens v. Pierce, 151 Mass. 207, 209, 23 N.E. 1006, — (1890); 1 AMERICAN LAW OF PROPERTY §§ 3.45, 3.78 (1952).

7. C. MOYNIHAN, *supra* note 4, at 72.

shifted from largely unimproved agricultural lands to urban multi-storied apartment complexes and office buildings.[8] Courts began to reconsider the landlord's responsibility in light of the fact that an urban lease had necessarily evolved into a contract for "a well known package of goods and services."[9]

The modern-day lease is a complex instrument. The urban landlord may have ongoing responsibilities to provide heat, air conditioning, trash removal, parking facilities, and other amenities which far exceed the simple provision of raw land for farming purposes.[10] In order to insure that the needs of the urban tenant are met, courts have had to fashion new doctrines, and legislatures have been forced to pass new laws.[11]

Gradually, exceptions to the traditional rule of caveat emptor emerged.[12] The most generally adopted exceptions required landlords to maintain premises under their control,[13] disclose latent physical defects,[14] deliver the premises in a tenantable condition,[15] and exercise reasonable care in repair when they had expressly covenanted to repair.[16]

8. *See* Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 445 (1972).

9. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

10. For a general discussion of the complexity of the modern-day lease, see C. MOYNIHAN, *supra* note 4, at 69-73. Moynihan states that the lease may also include elevator service, janitorial service, repairs, window cleaning, lessor's reservation of right to terminate upon tenant's default or breach, a definition of the rights of the parties in the event of accidental destruction, and various other obligations of the landlord and tenant. *Id.*

11. *See generally* C. MOYNIHAN, *supra* note 4, at 76-77.

12. *See* Browder, *supra* note 3, at 102-05. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 399-412 (4th ed. 1971) (detailed discussion of tort liability in landlord-tenant law); Geesing v. Pendergrass, 417 P.2d 322, 325 (Okla. 1966) (A landlord has the duty to use ordinary care to maintain the common portions of leased premises.).

13. *See* Lay v. Dworman, 732 P.2d 455, 459 (Okla. 1986) (premises under the landlord's control may include not only the common areas which do not pass to the tenant, but also aspects of the premises such as door and window locks or alarm devices, and all areas maintained for the tenant's benefit). *See also* RESTATEMENT (SECOND) OF PROPERTY § 17.3 comment c (1977).

14. *See* RESTATEMENT (SECOND) OF TORTS § 358 (1965). Section 358 provides that if the landlord has or should reasonably have information about a dangerous condition and conceals it from the tenant, the landlord will be subject to liability to the tenant for any physical harm resulting from the condition. *Id.* Cribbet stated that courts could apply this exception to the caveat emptor rule only when (1) the landlord had actual knowledge of such defect, (2) the defect was such that the tenant could not be expected to discover it even upon reasonable inspection of the premises, and (3) the landlord did not disclose knowledge of the defect. J. CRIBBET, *supra* note 1, at 205. *See also* Borggard v. Gale, 205 Ill. 511, 68 N.E. 1063 (1903).

15. *See, e.g.*, Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968). (In both cases, unsafe and unsanitary conditions existing at the commencement of the term which were known to the landlord voided a lease. Whereas the landlord's failure to disclose a latent defect affords a tort remedy, failure to deliver the premises in a habitable condition affords the tenant a contractual remedy.).

16. For a discussion of the landlord's contract to repair and negligence in making repairs as it relates to the landlord's tort liability, see Browder, *supra* note 3, at 104-05. The modern trend is to

Under common law, courts considered the nonpayment of rent to be independent of the landlord's breach of a substantial covenant. Therefore, the landlord who breached a substantial covenant, such as an express promise to repair the premises, was still entitled to collect the full rent. The tenant's sole remedy was to promptly vacate the premises, and then claim constructive eviction.[17]

The case of *Javins v. First National Realty Corp.*[18] led the race toward abandonment of the caveat emptor rule. The decision allowed a breach of an implied warranty of habitability to be a defense to the landlord's eviction notice for nonpayment of rent.[19] The implied warranty of habitability required the landlord to put and maintain the premises in

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hold the landlord liable in tort for the tenant's injuries which are proximately caused by the landlord's breach of a contract to repair. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 357 (1965). Section 357 provides:

> A lessor of land is subject to liability for physicial harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract.

Id.

17. J. CRIBBET, *supra* note 1, at 206. Under landlord-tenant law, an express covenant to paint, repair, etc. is not treated as a dependent substantial covenant whereby the landlord's performance was a condition precedent to collecting the rent. Rather, landlords could collect the rent while failing to keep their part of the bargain, unless the landlord's promise was expressed as a condition precedent to the tenant's duty to pay rent. The lone traditional escape route for the tenant was the doctrine of constructive eviction. Suppose, for example, that the landlord made an independent promise to heat an office building and failed to do so. If the tenant protested and the premises remained too cold to occupy, the tenant could move out promptly, claim constructive eviction, and contend that no rent was due because of constructive eviction. Nevertheless, the tenants still acted at their own peril because a court might later hold that the alleged breach was not so substantial as to amount to constructive eviction. In such a case, the tenant remained liable for the rent. *Id.*

18. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). The *Javins* court characterized the modern urban tenant as follows:

> Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before.

Id. at 1078 (footnotes omitted).

19. *Id.* at 1082. The tenants defaulted on rent payments alleging numerous violations of the housing regulations. The court stated:

> In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

Id. at 1076-77 (footnotes omitted).

such a condition as to meet the standards set out in the Housing Regulations for the District of Columbia.[20] The remedies for breach of the implied warranty include termination or rescission of the rental agreement, suit for damages, and the right to take a rent abatement.[21]

Prior to the abandonment of the caveat emptor rule, an important principle developed in the tort law arena: the principle that an actor who creates a situation which affords a third person the opportunity to commit a crime against another might be liable for the injuries sustained as a result of the third person's conduct. This principle is an exception to the general rule that an intervenor's intentional act that is a substantial cause in fact of the injury supersedes the original actor's negligence. In order to find fault under this exception, the injured party must prove that the original wrongdoer had prior actual or constructive knowledge of the likelihood of the criminal conduct and consequent injury.[22]

This tort liability principle is best illustrated in the 1943 decision, *Neering v. Illinois Central Railroad Co.*[23] In *Neering*, a twenty-three year-old woman was abducted from a train platform and later beaten, robbed, and raped. Despite the woman's earlier complaints, the railroad had taken no action to dispel tramps who continually loitered about the station. Although the railroad was in compliance with the safety rules of the Illinois Commerce Commission, the Illinois Supreme Court found the railroad liable. The court held that the railroad could have reasonably anticipated the assault and taken reasonable precautions for the protection of its passengers.[24] No evidence of previous assaults on passengers is found in the facts of the opinion. Therefore, the court must have considered the railroad's knowledge of mere loitering as adequate

20. 2 D.C. Register 47 (1955) (formerly designated the Housing Regulations of the District of Columbia (1956)).

21. C. MOYNIHAN, *supra* note 4, at 80-81. If the tenant wishes to terminate the lease, the tenant must first give notice and then vacate the premises. The tenant then ceases to be liable for future rent, but will still be liable for the fair rental value of the defective premises during the term of occupancy. The tenant, in seeking a rent abatement, will normally assert the breach as a defense in recoupment or as a counterclaim to the landlord's suit for rent or eviction. *Id.*

22. *See* RESTATEMENT (SECOND) OF TORTS § 302B (1965). Section 302B states:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonble risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Id.

23. 383 Ill. 366, 50 N.E.2d 497 (1943).

24. *Id.* at —, 50 N.E.2d at 502-03. The court characterized vagrants as "offenders against good order, or persons liable to become a menace to the public peace or a public burden." *Id.* at 50 —, N.E.2d at 502.

notice of the likelihood of a violent attack upon this woman and a sufficient basis for imposing liability.

For almost three decades after *Neering*, the doctrine of caveat emptor continued to immunize the landlord from any similar duty to protect. Finally, in the 1970 decision of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[25] the United States Court of Appeals for the District of Columbia held a landlord liable to a tenant for injuries inflicted by a criminal intruder.

C. Kline v. 1500 Massachusetts Avenue Apartment Corp.

In *Kline*, a woman sued her landlord for injuries sustained when she was assaulted by an intruder in the common hallway of her apartment building. Kline, a tenant of seven years, was satisfied with security measures in place at the beginning of her tenancy. During her tenancy, though, Kline's landlord significantly reduced security personnel and other security measures, resulting in increased criminal activity in and from the common areas of the building.[26]

The *Kline* court began its opinion by recognizing the landlord's duty to take protective measures to guard the entire leased premises as well as the common areas.[27] The court relied on the earlier ruling of *Kendall v. Gore Properties*,[28] a case of negligent hiring in which the landlord's employee attacked the tenant. The common rationale was that the landlord had an obligation to secure the premises in order to protect tenants from criminal attacks, whether perpetrated by employees or unknown intruders. The *Kline* court reasoned that the landlord, as a result of his control over the premises, was the only party with the power to maintain and secure them.[29]

The *Kline* court considered the special landlord-tenant relationship to be a reasonable basis for imposing liability.[30] This special relationship

25. 439 F.2d 477 (D.C. Cir. 1970).

26. *Id.* at 479.

27. *Id.* at 482.

28. 236 F.2d 673 (D.C. Cir. 1956). *See also* Ramsay v. Morrissette, 252 A.2d 509 (D.C. 1969). In *Ramsay*, an intruder forced his way into the tenant's apartment and attacked her. Prior to the attack, the landlord had failed to install a lock on the front door, failed to replace the deceased full time manager, and failed to take any action to prevent strangers from loitering in the building's common areas. In determining whether the landlord was liable for criminal acts of third persons, the court stated that the test is what is reasonable under all the circumstances. *Id.*

29. *Kline*, 439 F.2d at 481. The court also stated that the landlord is even better situated to prevent injuries than the police who are neither equipped, manned, nor empowered to patrol the expansive common areas of multiple family dwellings. *Id.* at 484.

30. *Id.* at 485.

is akin to the innkeeper-guest relationship which courts traditionally relied on to hold innkeepers liable for crimes committed against their guests as a result of the innkeeper's breach of a duty to provide an environment secure against intruders.[31] Likewise, the landlord's duty arose from "the logic of the situation itself"[32] because the landlord was the only one in a position to take the necessary steps to protect the tenant.[33] A duty to exercise reasonable care under the circumstances exists in all special relationships.[34] The *Kline* court held that in the landlord-tenant relationship, the "reasonable" standard of protection should be "that commonly provided in apartments of this character and type in this community."[35]

Finally, the *Kline* court relied on the implied warranty of habitability theory applied in *Javins*.[36] The *Kline* court expanded this warranty to include an implied contractual obligation to provide reasonable protective measures which were within the landlord's capacity to provide.[37] The modern multiple dwelling lease, when viewed as a rental contract for goods and services,[38] entitled Kline to expect that the premises would be maintained at the same level of security which existed at the commencement of the lease.[39] When the landlord reduced the number of security personnel, criminal activity increased. The landlord essentially rendered the premises unsafe and therefore uninhabitable. Consequently, the landlord's nonfeasance constituted a breach of an implied contractual duty to maintain the premises in a safe and secure condition.[40]

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31. *Id.* at 482.

32. *Id.* at 483.

33. *Id.* at 484.

34. *Id.* at 483. In other similar relationships, the court stated, "a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated." *Id.*

35. *Id.* at 486.

36. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

37. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 485-88 (D.C. Cir. 1970).

38. *Id.* at 481. The *Kline* court's reliance on the contractual nature of the lease was best expressed by the court's quotation of *Javins* in characterizing the modern urban lease as "a well known package of goods and services — 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." *Id.* (emphasis in original) (quoting *Javins*, 428 F.2d at 1074).

39. *Id.* at 485.

40. *Id.* (citing *Javins*, 428 F.2d at 1079). *But see* Comment, *Landlord Liability for Crimes Committed By Third Parties Against Tenants*, 21 U. RICH. L. REV. 181, 189 n.42 (1986) (discussion of serious flaws in the majority opinion as pointed out by the dissenting judge. Kline was a month-to-month tenant at the time of her attack). Consequently, there could be no breach of contract because there was no reduction in security during that month preceding the attack. *Kline*, 439 F.2d at 492 (MacKinnon, J., dissenting). Judge MacKinnon also noted that one single instance of assault and robbery was insufficient to support the forseeability of like crimes. *Id.* at 489.

D. *Developments After* Kline

As a general proposition, the landlord-tenant relationship alone is not a sufficient basis for holding the landlord liable for injuries tenants sustain as a result of criminal acts by third parties.[41] However, since *Kline*, many courts have held a landlord liable for negligently failing to implement protective measures or failing to maintain premises in a condition which is safe and reasonably deters criminal activity.[42] In addition to the three theories espoused in *Kline*, courts have applied the assumption of duty theory to extend the landlord's tort liability.[43]

In *Pippin v. Chicago Housing Authority*,[44] the court held that a security guard service which the housing authority had employed assumed the duty of protecting the tenants.[45] The assumption of duty theory generally limits the landlord's duty to protect tenants to the extent of the landlord's undertaking to do so.[46] Therefore, the court held the authority could be liable only for negligent hiring.[47] This theory entitled the tenant to that level of security which could have been reasonably expected from the program offered by the security service.[48]

In *Braitman v. Overlook Terrace Corp.*,[49] the court relied on the landlord's violation of an administrative regulation governing the condition of multiple dwellings as providing at least some evidence of negligence.[50] Two of the court's justices recognized the implied warranty of habitability and the *Kline* theory, that the public interest was served by

41. *Kline*, 439 F.2d at 481. *See generally* Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331, 335 (1972); RESTATEMENT (SECOND) OF TORTS § 314 (1965).

42. Note, *The Foreseeable Risks of Apartment Living: Pennsylvania Defines a Landlord's Duty to Provide Security*, 31 VILL. L. REV. 627, 627-28 n.3 (1986).

43. *See* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167-68, 159 N.E. 896, 898 (1928). Chief Justice Cardozo best articulated this duty as follows:

> If conduct has gone forward to such a stage that in action [sic] would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. . . . The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.

Id.

44. 78 Ill. 2d 204, 399 N.E.2d 596 (1979).

45. *Id.* at —, 399 N.E.2d at 599-600.

46. *Id.*

47. *Id.*

48. *Id.* at —, 399 N.E.2d at 600.

49. 68 N.J. 368, 346 A.2d 76 (1975).

50. *Id.* at —, 346 A.2d at 85-86.

requiring protection from the growing threat of crime, as potential justifications for imposing liability on the landlord.[51] Unlike the *Kline* and *Pippin* courts, the *Braitman* court made no mention of a breach of warranty as a prerequisite for applying the violation of a statutory duty theory.[52] Because the regulation required installation of a "heavy duty lock set equipped with stopwork for control of the knob and an additional dead bolt or auxiliary latch bolt,"[53] and the apartment door locks were either missing or nonfunctional, there was no need to address the implied warranty of habitability theory. The basis for *Braitman's* negligence analysis was that violation of a statute constitutes a rebuttable presumption of negligence. A problem arises, however, where a statute includes vague requirements that a building be kept "decent, safe, and sanitary."[54] Nevertheless, in such instances, some courts have imposed a statutory duty on the landlord to protect the tenant,[55] while other courts have ruled that such statutes are only applicable to physical defects.[56]

Few courts continue to rely on the *Kline* "special relationship" theory as an independent basis for imposing a duty on the landlord to protect tenants.[57] Courts continue to apply common area[58] and warranty of habitability[59] theories, either in conjunction with other theories or, less

51. *Id.* at —, 346 A.2d at 86-87.

52. *Id.* at —, 346 A.2d at 84-86. The court simply stated, "plaintiffs would have been entirely justified in invoking the Multiple Dwelling Law and the regulations promulgated thereunder as evidence of defendant's negligence." *Id.* at —, 346 A.2d at 86.

53. *Id.* at —, 346 A.2d at 85.

54. *See infra* notes 111-14 and accompanying text.

55. *See infra* notes 94-98 and accompanying text.

56. *See infra* notes 79-98 and accompanying text.

57. *See, e.g.*, Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981) (landlord held liable for failing to repair defective lock based on landlord-tenant relationship); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (landlord failed to protect tenant from a foreseeable rape and might be held liable based on a special relationship between landlord and tenant); Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975) (landlord held liable for not taking reasonable protective measures to reduce risk of harm posed by presence of mental patients on elevators).

58. *See, e.g.*, Spar v. Obwoya, 369 A.2d 173 (D.C. 1977) (liability imposed for defective front door based on common area theory); Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976) (landlord held liable for failing to secure areas under his control); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) (failure to secure common areas); Loeser v. Nathan Hale Gardens, Inc., 73 A.D.2d 187, 425 N.Y.S.2d 104 (N.Y. App. Div. 1980) (landlord must take reasonable precautions to deter foreseeable criminal conduct in common areas).

59. *See, e.g.*, Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (D. Kan. 1980) (duty to maintain security services is founded on an implied warranty of security); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980) (liability based on breach of warranty of habitability, violation of a statute, or traditional negligence principles); Brownstein v. Edison, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (N.Y. Sup. Ct. 1980) (essential security measures fall within the warranty of habitability).

frequently, as independent bases for imposing on the landlord a duty to protect tenants from injuries inflicted by criminal intruders.

III. Modern Approaches to Landlord Liability

Many states have shared in creating, expanding, and applying the various theories of landlord liability, largely overthrowing the doctrine of caveat emptor and the notion that a lease is a conveyance of property. However, in some states the caveat emptor rule still operates as the landlord's cloak of immunity even when the landlord creates a situation which affords a criminal the opportunity to harm a tenant. On the other hand, some courts have stripped the landlord of all common law protections in their haste to remove the ancient cloak of immunity.

A. *Assuming the Duty to Protect*

Notwithstanding the pervasive and unpredictable nature of crime, the landlord may create conditions which afford the opportunity for third persons to commit crimes against tenants. In *Pippin v. Chicago Housing Authority*,[60] two security guards, employees of a contract security service, witnessed yet failed to prevent the attack and murder of the plaintiff's son in an apartment building lobby.[61] Despite the prevalence of crime in the housing project, the court explained that the landlord was obligated to protect tenants only to the extent of the landlord's voluntary undertaking.[62] Because the authority itself had not undertaken to provide the security, it could not be held liable for the possibly negligent conduct of the security guards.[63] According to the court, the authority could at most be liable for negligently hiring the guard service.[64]

Phillips v. Chicago Housing Authority[65] involved a housing project with a history of violent crimes. In this case, an attacker abducted a young woman and took her to a supposedly closed-off floor where he assaulted, raped, and murdered her.[66] The court applied the *Pippin*

60. 78 Ill. 2d 204, 399 N.E.2d 596 (1979).

61. The tenant had first requested the two security guards in the lobby to remove Pippin from her apartment. Upon their refusal, she left the building but returned to the lobby a few minutes later. Pippin then entered the lobby where he and the tenant became involved in an altercation. Only after separating them did the guards realize that Pippin had been stabbed. *Id.* at —, 399 N.E.2d at 597-98.

62. *Id.* at —, 399 N.E.2d at 599.

63. *Id.*

64. The plaintiff alleged that the authority employed the service without proper investigation, raising the possibility of negligent hiring. *Id.*

65. 89 Ill. 2d 122, 431 N.E.2d 1038 (1982).

66. *Id.* at —, 431 N.E.2d at 1039. The plaintiff alleged that there had been previous crimes of

court's assumption of duty theory and held that the plaintiff did have a cause of action against the authority for negligently performing its voluntary undertaking to close off and secure certain floors. The court limited the duty of care imposed on the landlord to the extent of the landlord's undertaking, which was to secure certain floors. The fact that the landlord did not assume a general duty to police the project did not preclude the plaintiff's recovery for wrongful death.[67] Apparently, in Illinois the landlord's only motivations to provide security to tenants in an overcrowded, crime-infested housing market are the landlord's own sense of goodwill or the more practical opportunities to sell security as an additional benefit and raise rents.

In *Feld v. Merriam*,[68] the Pennsylvania Supreme Court established a bright line rule which essentially allowed landlords to decide not only when they would assume the duty to protect, but also what the limits of that duty were.[69] The Felds, tenants in a large apartment complex, were abducted at gunpoint from an adjacent parking garage. Prior to the attack, the tenants' association complained to the landlords about the increase in criminal activity despite the presence of trained doormen and stationary and patrolling guards. The landlords refused to implement the tenants' proposed security measures. The supreme court reversed the superior court's affirmance of the trial court's judgment in favor of the tenants, and admonished the superior court for departing from the general rule that a person cannot be held liable for the criminal acts of third parties.[70] Furthermore, the superior court had failed to recognize the crucial distinction between the risk of injury sustained at the hands of a third party intervenor and that resulting from a physical defect. According to the supreme court, to impose a duty in the former situation "would effectively require landlords to be insurers of their tenants [sic] safety."[71]

The *Feld* court found no general duty to protect tenants against criminal intruders, unless the landlord provides or volunteers to provide a program of security.[72] The court defined a program of security as "an

rape in the closed-off areas, and that the keys to the closed-off floors were kept in a place that was known and accessible to the general public. Additionally, elevators could be stopped at closed-off floors. The authority had also failed to insure that the locks securing the floors were properly working to bar access. *Id.*

67. *Id.* at —, 431 N.E.2d at 1041.
68. 506 Pa. 383, 485 A.2d 742 (1984).
69. Note, *supra* note 6, at 803.
70. *Feld*, 506 Pa. at —, 485 A.2d at 746.
71. *Id.*
72. *Id.* at —, 485 A.2d at 747.

extra precaution, such as personnel specifically charged to patrol and protect the premises."[73] The *Feld* court never specified when the duty to protect might begin.[74] Whether the duty arises at the time the landlord advertises or offers the program, at the commencement of the lease, after partial installation or implementation, or only at the time of full program implementation is not clear. Commentators have suggested that the *Feld* court meant to impose a duty from the moment the tenant initially relied on the promise to implement or at the actual implementation of a program of security, whichever came first.[75]

The *Feld* court stated that a tenant may reasonably expect a program of security to provide only those measures identified and offered as part of the program and nothing more. The irony of the *Feld* court's rationale is that a program of security need not effectively deter crime; it need only be exercised in a non-negligent manner.[76] The *Feld* decision may have been an overreaction to a ruling in the neighboring state of New Jersey[77] which held that a landlord's duty of reasonable care to guard against criminal activity may be based solely on an implied warranty of habitability.[78]

By applying the assumption of duty theory as a sole basis for expanding the landlord's duty to include protection of tenants, courts have potentially increased the tenants' susceptibility to criminally inflicted harm. If liability is based solely on the negligent exercise of the landlord's security program, it follows that a landlord who offers nothing incurs no duty to protect tenants. If this logic is taken to its extreme, the landlord may foresee tragic consequences yet allow the continued existence of dangerous conditions which invite criminal activity in order to insulate himself from liability. Moreover, when a tenant is attacked, these courts will relegate this landlord to the status of a mere "bystander."[79]

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73. *Id.*

74. The duty to provide a program may arise either when it is promised, or when it is implemented. What about a test program or one that is never agreed to by the tenants? Is a landlord liable for providing the full program as promised from the moment that the first phase is implemented? In other words, when and how might a landlord "incur a duty voluntarily or by specific agreement?" *Id.* at —, 485 A.2d at 747.

75. *See* Note, *supra* note 6, at 802-03.

76. *Feld*, 506 Pa. at —, 485 A.2d at 747.

77. Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980).

78. *Id* at —, 412 A.2d at 443. The New Jersey Supreme Court was the first to recognize the implied warranty of habitability as an independent basis for imposing liability on landlords for injuries resulting from third party criminal acts. *See generally* Comment, *Landlord Liability for Crimes Committed by Third Parties Against Tenants*, 21 U. RICH. L. REV. 181, 199-200 (1986).

79. In Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970), the

B. *The Warranty of Habitability*

In *Trentacost v. Brussel*,[80] an assailant attacked and robbed a sixty-one-year-old woman at the top of a common stairway inside her apartment building. At the time of the attack, the building's front door had no lock. Additionally, considerable criminal activity had occurred within the vicinity of the apartment. The victim had reported an attempted break-in on one occasion, and at other times had notified the landlord about intruders in the hallways. In holding the landlord liable to the tenant for her injuries, the court partially relied on the landlord's contractual obligation, concluding "that the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises."[81] However, many courts have limited the application of this rationale to cases with fact patterns similar to that of *Kline*.[82] Such facts would typically include a publicized security program with its cost reflected in higher than average rents for comparable dwellings without such programs.

In *Braitman v. Overlook Terrace Corp.*,[83] the predecessor to *Trentacost* and also a deadbolt lock case, the court posited landlord liability upon traditional negligence theory. The court, however, declined to resolve whether the implied warranty of habitability was "flexible enough to encompass appropriate security devices."[84] In other words, in the absence of housing codes which specify security systems, services, and devices, the landlord is in a dilemma as to what measures might reasonably deter a criminal. Furthermore, some commentators feel that such omissions portend a tendency of juries to sympathize with the helpless crime victim and view any safeguard short of insuring total safety as less than reasonable under the circumstances.[85]

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court stated that "[t]he landlord is no insurer of his tenants' safety, but he certainly is no bystander." *Id.* at 481.

80. 82 N.J. 214, 412 A.2d 436 (1980).

81. *Id.* at —, 412 A.2d at 443. The court also found liability on the alternative ground of conventional negligence. *Id.* at 445.

82. *See, e.g.*, Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 209 (1973); Gulf Reston Inc. v. Rogers, 215 Va. 155, 159, 207 S.E.2d 841, 845 (1974). *See also* Brownstein v. Edison, 103 Misc. 2d 316, 318, 425 N.Y.S.2d 773, 775 (N.Y. Sup. Ct. 1980); Tynan v. Willowdale Commercial Corp., 69 Misc. 2d 221, 222-23. 329 N.Y.S.2d 695, 696-97 (N.Y. Civ. Ct. 1972) (In the latter two cases, landlords assumed the duty to protect when they provided a minimum level of security by installing security devices.).

83. 68 N.J. 368, 346 A.2d 76 (1975).

84. *Id.* at —, 346 A.2d at 87. ("[W]hether the concept of an implied warranty of habitability of residential premises . . . is flexible enough to encompass appropriate security devices . . . is a question we need not resolve today.").

85. *See, e.g.*, Graham v. M & J Corp., 424 A.2d 103, 108 (D.C. 1980) (Nebeker, J., dissenting).

The very nature of a warranty precludes the landlord's ignorance of danger from being a defense to liability. As a result, the *Trentacost* decision correctly asserted that the injured party need not prove that the landlord was on notice as to the risk of danger.[86] The court viewed the landlord's knowledge of, or ability to reasonably foresee, the dangerous situation as irrelevant to finding a duty to protect. The elimination of the notice requirement, however, de-emphasized the importance of foreseeability as a vital element in determining the scope of the duty and the limits of proximate cause. Because the warranty theory operates on such a loose notion of foreseeability, the landlord is subject to nothing short of absolute liability for the criminal acts of third parties directed against tenants.[87]

Admitting the importance of foreseeability in finding a duty, the dissenting justice in *Trentacost* also stressed that "a fair balancing of the relative interests of the parties, the nature of the risk, and the public interest in the proposed solution" are all vital elements of the inquiry.[88] The court unreservedly imposed strict liability on landlords when it rejected these elements and embraced the warranty of habitability as a sole basis for establishing a duty to protect tenants. The *Trentacost* ruling may represent a response to the growing prevalence of crime in overcrowded, inner-city housing projects.[89] The court, in its haste to impose

But see Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106-07 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) (There is sufficient flexibility in the standard of reasonable care applied for juries to avoid harshness through the application of common sense in following the court's charge.).

86. Trentacost v. Brussel, 82 N.J. 214, —, 412 A.2d 436, 443 (1980). The court stated that "[s]ince the landlord's implied undertaking to provide adequate security exists independently of his knowledge of any risks, there is no need to prove notice of such a defective and unsafe condition to establish the landlord's contractual duty." *Id.*

87. This decision could have been based entirely on traditional negligence theory since the entire court concluded that the attack and subsequent mugging were a foreseeable result of the landlord's negligence. *Id.* at —, 412 A.2d at 441.

88. *Id.* at —, 412 A.2d at 447 (Clifford, J., dissenting).

89. The unique situation in New Jersey may have been an open invitation for the supreme court to apply breach of warranty theory to expand the landlord's tort liability to include criminal acts against tenants. Crime was prevalent in an overcrowded housing market. If a tenant vacated an apartment because of lax security and criminal activities on the premises, the landlord might retain the security deposit and immediately fill the vacancy from a waiting list of prospective tenants. The landlord had no incentive to correct security deficiencies, and most tenants were not disposed or empowered to do so. Then in 1968, the state legislature enacted a comprehensive building code which provided that "[b]uilding entrance doors and exterior exit doors be equipped with heavy duty lock sets." N.J.A.C. 5:10-6-6(d)(7) (also published in: Regulations for the Construction and Maintenance of Hotels and Multiple Dwellings, Article 605-3(f)(2)(ii)). In *Trentacost*, the court initially established that the landlord's violation of the clear standard set out in the regulation constituted a rebuttable presumption of negligence. At this juncture, the temptation to resort to breach of warranty theory as a sole means of imposing a duty upon the landlord to protect his tenants proved too great for the court to resist. *Trentacost*, 82 N.J. at —, 412 A.2d at 447 (Clifford, J., dissenting). *See generally* Recent Development, *Expanding the Scope of the Implied Warranty of Habitability: A*

a duty of protection on landlords, ignored the unfair implications for landlords by applying the warranty theory.

The *Trentacost* decision presents yet another difficulty in that the traditional contractual remedies available for a breach of warranty claim are inappropriate when the tenant injured by a criminal intruder seeks to recover in tort.[90] The court circumvented this difficulty by recognizing that when the landlord breaches the warranty, the tenant has the right to deduct the costs of repairing a "vital facility" from the monthly rent.[91] The court then categorized "provisions for the tenant's security" as a vital facility.[92]

Relying on tort law, the court concluded that the warranty was "flexible enough" to cover these provisions and that their omission constituted a breach of the implied warranty of habitability.[93] Because the minimum provisions for security were so clearly specified by the New Jersey legislature, the court may have reasoned that a plaintiff could now more easily furnish proof that the landlord had violated this clear standard. In other words, by applying the warranty of habitability theory, the court expedited the imposition of a duty and thus simplified and streamlined the tort recovery process.

Given vague statutory language, the lack of any relevant statute, or a court's refusal to apply the statute, the landlord may be held liable for all crimes committed on the premises whether the landlord could reasonably foresee them or not. In *Flood v. Wisconsin Real Estate Investment Trust,*[94] the United States district court found a breach of an implied warranty in the absence of a statute. In that case, a contract security guard reduced his evening patrol activities during the plaintiff's tenancy.[95] A criminal intruder attacked the tenant during this period. The court held that an implied warranty to keep the premises in the same condition of safety as existed at the inception of the lease was in effect.

Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity, 33 VAND. L. REV. 1493 (1980) (the breach of warranty theory used for imposing a duty in *Trentacost* fails to delimit the scope of that duty and the security standards which a landlord is required to maintain).

90. Recent Development, *supra* note 89, at 1518-19.

91. Trentacost v. Brussel, 82 N.J. 214, —, 412 A.2d 436, 443 (1980).

92. *Id.*

93. *Id.*

94. 503 F. Supp. 1157 (D. Kan. 1980).

95. *Id.* at 1160. The tenant was assaulted and raped when she surprised burglars in her apartment. At the commencement of the lease term, a security officer was employed by the apartment complex to patrol the area at night. Subsequently, the guard took a daytime job and acquired additional security accounts during his night patrol. The landlords did not hire additional night guards. *Id.* at 1159-60.

The jury, therefore, could reasonably infer that the landlord failed to maintain the premises in a safe condition.[96]

The *Flood* opinion's antithesis is demonstrated in a District of Columbia Court of Appeals case where the court refused to require the landlord to increase security on the rationale that a tenant cannot require an increase in security above that which existed at the inception of the lease term.[97] The landlord had already satisfied his contractual obligation which did not require him to insure the tenant's safety. The tenant's proposed security measures were simply not part of the bargain.[98]

C. *The Oklahoma Approach*

No Oklahoma court addressed the issue of landlord liability for the criminal acts of third parties until 1986. In *Lay v. Dworman*,[99] a criminal intruder assaulted and raped Lay inside her apartment. Even though the landlords knew of criminal activities, including other rapes, in the apartment complex, they failed to repair a defective lock on the sliding glass door to Lay's apartment through which the attacker eventually gained entrance.

The *Lay* court rejected *Kline* as unnecessarily expansive, defining the duty as one "to use reasonable care to maintain the common areas of the premises in such a manner as to insure that the likelihood of criminal activity is not unreasonably enhanced."[100] The duty is derived from a combination of the landlord's contractual retention of control over the premises, and the tort principle that a negligent actor's liability is not always superseded by a third person's intentional tort.[101] The court stated that the tenant first had to notify the landlord of a defect if the

96. *Id.* at 1160. The *Flood* opinion also found the landlord potentially liable for the tenant's injury based on a breach of express warranty to maintain the agreed level of security during the term of the tenancy. However, the court clearly stated that "[t]he jury could reasonably infer that the defendants failed to maintain the level of security imposed at the beginning of plaintiff's lease term, resulting in a breach of an implied warranty to maintain the conditions." *Id.* Under the implied warranty theory and absent any statutory standard by which a jury might judge the landlord's conduct, it is doubtful that the jury was able to infer otherwise.

97. Williams v. William J. Davis, Inc., 275 A.2d 231 (D.C. 1971).

98. *Id.* at 232. The *Williams* court applied a version of *Pippin's* assumption of duty theory in an action where the tenant merely sought a contractual remedy. The court first rejected the tenant's violation of statute argument noting that the terms "safe" and "safety" did not refer to security conditions. The tenant, living in a building where there had been numerous robberies and continuous loitering, was denied a contractual remedy because the landlord had *not* undertaken to do anything to alleviate the situation. The rationale was that proposed security measures would not be covered by the tenant's rental payments and were therefore not part of the bargain. *Id.*

99. 732 P.2d 455 (Okla. 1986).

100. *Id.* at 458.

101. *Id.*

landlord was not already aware of it.[102] Only then would an "extant duty" flow from the landlord's knowledge of criminal activities and knowledge of the defective condition.[103] The court continued by explaining that the landlord's control over security aspects of the premises produced the tenant's reliance on the landlord to promptly correct defective conditions which might endanger the tenant.[104]

The *Lay* court adhered to a traditional negligence analysis as it addressed the various theories upon which courts have imposed a landlord's duty to protect tenants. The court was firm in its rejection of the *Kline* court's use of the landlord-tenant relationship as the sole basis for expanding tort liability to the extent of making the landlord a "quasi-guarantor of the tenant's safety."[105] The court characterized the landlord's assumption of a duty to protect as either gratuitous, for consideration, or arising out of the contractual nature of the lease.[106] In *Lay*, the tort negligence analysis appears to settle the imbalance of landlord versus tenant interests confronted in *Pippin* and *Trentacost*.

The *Lay* court, however, expressed an opinion on only one of the two breach of warranty theories of recovery.[107] The petition included

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102. *Id.*

103. *Id.* at 459. The *Lay* opinion focused on traditional principles of negligence in the landlord-tenant relationship as well as the landlord's duty to prevent the enhancement of opportunities for the infliction of criminal acts upon tenants. This duty results from the merging of two duties: (1) The landlord's obligation to exercise due care not to allow dangerous conditions to exist in those areas over which the landlord has contractually retained control, and (2) the landlord's extant duty flowing from knowledge of the dangerous condition or defect which might enhance the likelihood of criminal activity directed at tenants. *Id.* at 458.

104. *Id. See also* Lambert, *Tom on Torts*, 30 ATLA L. REP. 110 (1987). Lambert best tied the principle of the tenant's reliance to the negligence analysis when he summarized the impact of *Lay* as follows:

> The bottom line in *Law* [sic], *supra*, is to add to the armamentarium of the tenant-victim of sexual assault by third-party assailants a tort-based negligence remedy against the landlord arising from the tenant's reasonable *reliance* on an implied contractual representation of protective security by the landlord, where the *tenant's reliance* is both reasonable and foreseeable and the tenant is harmed by landlord's negligent failure to do what was represented or promised.

Id. at 111 (emphasis added).

105. Lay v. Dworman, 732 P.2d 455, 460 (Okla. 1986).

106. *Id.* at 458-59.

107. In *Lay*, the tenant-victim alleged that the landlords breached both the warranty made to the general public and to herself to provide security, as well as the implied warranty of habitability. However, the court rejected the breach of warranty theory as a basis for extending landlord liability in cases where the tenant has been criminally injured by a third party:

> To find a cause of action arising from the mere fact that appellees allegedly *stated* the complex to be secure . . . runs directly afoul of the factors which we considered in limiting a landlord's possible tort liability by the application of traditional tort concepts . . . .
>
> We also reject the concept that a *statement* regarding the security of a complex, in and of itself, establishes a landlord's liability for criminal activites within the complex . . . .

Id. at 460 (emphasis added). The use of the words "stated" and "statement" above can only refer to

both the landlord's general warranty to the public as well as the implied warranty of habitability.[108] In rejecting the general warranty, the court refused to consider that a landlord's "statement regarding the security of the complex" might have a causal connection to the injury. To do so would absolutely insure the tenant's safety.[109] The court's rejection of the general warranty theory maintains a balance of fairness for landlords and tenants. On the other hand, the implied warranty of habitability theory was overlooked in the *Lay* decision.[110]

In Oklahoma's next major landlord liability decision, *Mengel v. Rosen*,[111] the assailant gained access to an apartment using a key which the tenant had left in the door. The court ruled that no breach of any duty owed the tenant was the proximate cause of the injury. Rather, the opportunity to enter the tenant's apartment was afforded the intruder by the tenant herself.[112] In *Mengel*, therefore, the court did not apply *Lay's* tort negligence duty analysis, although the court still referred to it as a valid means of establishing the landlord's duty to protect the tenant.[113] This time, the supreme court arrested the appellate court's attempt to expand the landlord's statutory duty to maintain the premises to include protection of tenants against criminal activities. Relying on *Pippin* and other rulings, the court viewed the words "safe," "fit," and "habitable" as imposing only a minimum duty of maintaining the premises.[114]

On the issue of warranties, the *Mengel* court relied on *Lay's* rejection of the general warranties due to the same lack of causation.[115] The

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the express general warranties, and not the implied warranty of habitability because it was not addressed in the opinion.

108. *Id.*

109. *Id.*

110. *See supra* note 107.

111. 735 P.2d 560 (Okla. 1987).

112. *Id.* at 563.

113. *Id.* at 562.

114. *Id.* The *Mengel* court ruled that the words "safe," "fit," and "habitable," as used within the context of such statutes as OKLA. STAT. tit. 41, §§ 101-135 (1981) (also known as the Oklahoma Residential Landlord and Tenant Act), impose a minimum duty of maintenance only and do not create a duty to protect tenants from criminals. The pertinent provisions state:

> A. A landlord shall at all times during the tenancy:
>
> 1. Except in the case of a single-family residence, keep all common areas of his building, grounds, facilities and appurtenances in a clean, *safe* and sanitary condition;
>
> 2. Make all repairs and do whatever is necessary to put and keep the tenant's dwelling unit and premises in a *fit and habitable* condition; . . . .

OKLA. STAT. tit. 41, § 118 (1981) (emphasis added). The *Mengel* court, by limiting the statute's applicability to physical conditions of the premises, rejected the violation of statute theory as a means of extending the landlord's tort liability in Oklahoma. One might view this determination as a tacit rejection of a statutory warranty of habitability imposing an obligation upon the landlord to protect his tenants.

115. *Mengel*, 735 P.2d at 563.

Mengel court may have chosen to overlook the *Lay* court's failure to address implied warranty theory. Whether the court then tacitly rejected the implied warranty theory within what appears to be a sweeping rejection of what the court termed as simply "warranty theory" is unclear. The supreme court may have been reserving its acceptance of the implied warranty theory until the future enactment of *detailed* safety codes and regulations, similar to those in New Jersey, regarding the safety and security of multiple dwellings.[116]

For the time being, Oklahoma's modest expansion of landlord tort liability to include that for criminally inflicted injuries, is couched in a traditional tort negligence analysis. The *Lay* court, for the most part, rejected those controversial theories that tend to tip the scales in favor of either landlord or tenant. The fact that a jury determines the adequacy of security measures after the measures have failed to deter a criminal may not be fair to the landlord who has conscientiously endeavored to render the premises safe. The *Lay* court noted this harsh reality and then proceeded to reject the special relationship and general warranty theories as being heavily weighted in favor of tenants.[117] In *Mengel*, the court very possibly rejected the implied warranty theory. The Oklahoma statute, unlike the New Jersey statute in *Trentacost*, does not impose a duty to provide protection and thus will not suffice as a statutory warranty of habitability imposing such a duty. Finally, in the tenant's favor, the Oklahoma Supreme Court apparently will not embrace the *Pippin* or *Feld* theories of strict assumption of duty. On the contrary, the *Lay* court treated the landlord's undertaking as a "contractual retention of control" over the security aspects of the property.[118]

IV. CONCLUSION

Most courts presently recognize that landlords have a duty to take protective measures to deter criminal attacks against tenants on their leased premises. Courts have gone to opposite extremes to protect either the landlord's or the tenant's interests. Under the strict assumption of duty theory, the tenant remains vulnerable to criminal attack because the

116. *See supra* note 89.

117. Lay v. Dworman, 732 P.2d 455, 459 (Okla. 1986).

118. *Id.* at 458. In *Lay*, the court imposed a duty to protect on the landlord who neither promised nor undertook to remedy the unsafe condition. Absolute nonfeasance infers negligence when control is *already* contractually retained by the landlord. However, under the assumption of duty theory, the absolute nonfeasor, or *Kline* "bystander," is the landlord who does nothing to deter criminal activity on the property and gets away with it.

landlord, fearing any affirmative action might prove negligent, refuses to implement protective measures. Under the breach of implied warranty theory, the landlord may be held responsible for repairing a tenant's inside window latch even though the tenant never brought the defect to the landlord's attention. If failure to repair occasions a criminal intrusion and attack, the landlord is liable for the tenant's injuries.

The traditional tort negligence analysis is the fairest and most efficient means of approaching the issue of a landlord's liability to the tenant for injuries inflicted by a third party criminal. In performing this analysis, most courts will merge contract and tort law principles to find a landlord's duty to exercise reasonable care to secure the premises. Oklahoma's coalescence of the duty to protect operates on the common sense rationale that a landlord alone has the capacity to deter foreseeable criminal intrusions and ought to do so. Oklahoma courts recognize that a landlord contractually retains control over common areas and other aspects of the leased premises. As a result, the landlord has a contractual duty to take reasonable protective measures to deter criminal activities in these areas. The landlord also has a tort-based duty which flows from the landlord's knowledge of a dangerous condition or defect which might enhance the likelihood of a criminal attack if uncorrected.

Legislatures should also play a major role in insuring a minimum level of safety for tenants by enacting uniform codes which impose a duty on landlords to provide basic security measures. However, crime levels vary widely according to locale. A deadbolt lock may be an effective crime deterrent on the east side of town whereas a guard service is required on the west side. Therefore, the language in the statute should clearly specify not only the required security devices, but also inform landlords that they are required to implement whatever additional security measures they deem reasonably necessary to deter criminal activity.

Arthur E. Petersen