University of Baltimore Law Review

Volume 34
Issue 1 *Fall 2004*

Article 6

2004

Comments: Don't Buy... Rent! Maryland Law Provides Limitless Insurance for Tenants against Criminal Activity after Hemmings v. Pelham Wood

Teresa D. Teare
University of Baltimore School of Law

DON'T BUY . . . RENT!

MARYLAND LAW PROVIDES LIMITLESS INSURANCE FOR TENANTS AGAINST CRIMINAL ACTIVITY AFTER *HEMMINGS V. PELHAM WOOD*[1]

I. INTRODUCTION

> Tragic cases may have tragic consequences when sympathy for a plaintiff interferes with a court's ability to analyze the facts and apply the law. Sympathy for the victim of a tragedy should not serve as a substitute for evidence of duty, culpability, and proximate cause.[2]
>
> — *Former Judge Howard S. Chasanow, Court of Appeals of Maryland*

Howard Hemmings was fatally shot in his own apartment on June 13, 1998.[3] About an hour after midnight, an unidentified intruder forcibly entered his Pelham Wood apartment, in Baltimore County, Maryland, where he resided with his wife.[4] The intruder entered the apartment through a sliding glass door in the back of the apartment building.[5] Once inside the apartment, the intruder shot Howard twice in the abdomen.[6] Although he was able to call "911," Howard died from the gunshot wounds later that morning.[7]

Regrettably, senseless violence occurs in our society on a daily basis.[8] The statistical data on crime committed in the State of Maryland is staggering.[9] In 2001, Maryland reported 42,088 violent crimes.[10]

---

1. Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship, 375 Md. 522, 826 A.2d 443 (2003) [hereinafter Hemmings II].
2. Matthews v. Amberwood Assocs. Ltd. P'ship, 351 Md. 544, 584, 719 A.2d 119, 138 (1998) (Chasanow, J., dissenting).
3. *City/County Digest: Hillendale Man Is Victim of Fatal Shooting*, BALT. SUN, June 16, 1998, at 3B.
4. Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship, 144 Md. App. 311, 314, 797 A.2d 851, 853 (2002) [hereinafter Hemmings I], *rev'd*, 375 Md. 522, 826 A.2d 443 (2003).
5. *Id.*
6. Hemmings II, 375 Md. at 528, 826 A.2d at 447.
7. Hemmings I, 144 Md. App. at 314, 797 A.2d at 853.
8. The United States Department of Justice reported 5,341,410 crimes of violence in 2002. *See* United States Department of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States, 2002 Statistical Tables, tbl. 1, at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus02.pdf (Dec. 2003).
9. *See* United States Department of Justice, Bureau of Justice Statistics, *Reported Crime in Maryland, at* http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm (last modified Apr. 14, 2003) (se-

Four hundred and forty-six of those crimes were murder and non-negligent manslaughter.[11]

When violence touches our lives, our instinct is to search for someone to blame.[12] A criminal who perpetrates a crime should be held accountable and deserves punishment for his violent actions.[13] In our overly litigious society, however, it is common for victims and their attorneys to believe that there may be someone else at fault for serious injuries resulting from a criminal's violent actions.[14] Victims and their

---

lect the "Maryland" option to access this report, which provides data on the increasing rate of violent crime in Maryland from 1960-2001).

10. *Id.*
11. *Id.*
12. *See* Lawrence M. Solan, *Symposium: Responsibility and Blame: Psychological and Legal Perspectives: Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003, 1003-04 (2003). Sometimes a person thinks: "Something bad happened because someone did (didn't do) something. (That person should have known better.) I don't want things like this to happen. When I think about the bad thing that happened, I also think about the fact that this person did something to make it happen." *Id.* at 1009. *See generally* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 257 (1987). Kadish stated that:

> In both criminal law and everyday moral judgments the concept of excuse plays a crucial role. This is because the practice of blaming is intrinsically selective. . . . Excuse is one of those central concepts that serve to draw the line between the blameworthy and the blameless and so make a blaming system possible.

Id.

13. The Annotated Code of Maryland states that "[a] person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to: (i) death; (ii) imprisonment for life without the possibility of parole; or (iii) imprisonment for life." *See* MD. CODE ANN., CRIM. LAW § 2-201(b)(1) (2002).
14. The extension of tort law and the shifting of fault began in the 1960s. *See generally* Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1033-35 (2003). Sebok states:

> [T]ort law did not really exhibit pro-plaintiff tendencies until about 1960. The litany of changes are well known. Courts and legislatures abolished immunities for charities, governments and family members. They eliminated auto-guest statutes and guest doctrines. Tort law dissolved the special rules of liability for landowners, sometimes even with regard to trespassers. In medical malpractice, the elimination of the locality rule and the emergence of patient-oriented informed consent made it easier for plaintiffs to overcome physician defenses. Courts recognized new affirmative duties on the part of building owners, therapists and others to prevent injuries to third parties. Bars and liquor stores acquired the obligation to prevent injuries caused by drunk driving, as did, on occasion, social hosts. The expansion and codification of manufacturers' obligations to consumers, which existed since the early part of the twentieth century, catalyzed the emerging doctrine of strict products liability. The emergence of negligent infliction of emotional distress under the bystander rule and intentional infliction of emotional distress created entirely new forms of civil wrong. Comparative fault replaced the defense of contributory negligence, and many courts merged the defense of assumption of risk into

families often ask whether an injury or murder could have been prevented, and who could have prevented it.[15]

It is a long-standing principle of Maryland law that, except for the limited circumstances in which the relationship between the parties creates a special duty, crime victims may not hold third parties responsible.[16] This was also true of landlord-tenant relations. Yet, reversing this long-standing precedent and joining a national trend towards landlord liability, the Court of Appeals of Maryland recently held that there may be someone other than the criminal who bears the responsibility for the incident described above: the landlord of the apartment complex in which Howard Hemmings lived.[17]

In *Hemmings v. Pelham Wood Ltd. Liability Ltd. Partnership* (Hemmings II),[18] a four-to-three decision by the court of appeals, the responsibilities of a landlord were significantly broadened.[19] Specifically, the court held that a landlord can be liable under a negligence theory for the criminal acts of a third party occurring within the leased premises.[20] The majority held a landlord must act to prevent violence perpetrated on a tenant, in the tenant's own apartment, by criminals unknown to the landlord.[21]

This comment explores the court's far-reaching decision in light of the increasing trend in Maryland to impose liability on landlords. Section II explores the historical development of Maryland common law regarding landlords' duties toward their tenants. Section III com-

---

comparative fault. Courts and legislatures relaxed the rules of causation as well, first with the introduction of alternative liability, then with the expansion of the substantial factor test through the introduction of concepts like market-share liability and loss of chance. As Gary Schwartz famously commented, until the early 1980s, the modern cases added to casebooks were "almost all triumphs for the plaintiffs; the collection of these cases could be referred to as 'plaintiffs' greatest hits.'" One popular explanation for the rise of the plaintiff in the 1960s is that the shift of the balance of power away from defendants and toward victims was an extension of the basic concept of negligence that had developed in American law in the nineteenth century.

Id.

15. *See generally* Solan, *supra* note 12, at 1009.
16. *See, e.g.*, Scott v. Watson, 278 Md. 160, 166, 359 A.2d 548, 552 (1976); Moore v. Jimel, Inc., 147 Md. App. 336, 346, 809 A.2d 10, 15 (2002). In Maryland, "a private person is under no special duty to protect another from criminal acts by a third person." *Moore*, 147 Md. App. at 346, 809 A.2d at 15.
17. *See* Hemmings II, 375 Md. at 543, 826 A.2d at 455 (holding that a landlord may be held liable for the criminal acts of third parties perpetrated on a tenant within the tenant's own apartment).
18. 375 Md. 522, 826 A.2d 443.
19. *See id.* at 543, 826 A.2d at 455 (expanding a landlord's duty to use reasonable care to prevent harm to his tenants beyond the common areas of the complex).
20. *See id.*
21. *Id.*

pares the Court of Appeals of Maryland's decision in Hemmings II to judicial decisions in numerous states regarding the same issue. Section III also argues that Maryland should have followed the rationale of other states by refusing to extend to landlords the duty to protect tenants from the criminal acts of third parties. Section IV explains the broader social and economic ramifications of the Hemmings II decision and its probable effect on landlords and tenants alike. Section V concludes this comment by rejecting the notion that landlords should be the ultimate insurance policy for tenants. This section further opposes the court's continued movement to decrease individual responsibility and impose overbroad duties absent statutes or certain special relationships. In the Hemmings II decision, a split court of appeals established yet another legal avenue for litigious individuals to shift moral blame to third parties when tragedy occurs.[22]

II. HISTORICAL ANAYLSIS OF MARYLAND CASE LAW REGARDING THE DUTIES OF LANDLORDS

A. *The Easy Days Gone By*

In the past it was relatively simple for attorneys to advise landlord clients regarding the Maryland law: no duty was owed to tenants once the owner parted with control of the leased premises.[23] For over one hundred years, Maryland law was well settled that the tenant had the burden of maintaining the premises in the absence of an agreement

22. *See generally* Hemmings II, 375 Md. 522, 826 A.2d 443; Sebok, *supra* note 14, at 1033-35 (discussing the shift of blame in American tort law).

23. *See* Marshall v. Price, 162 Md. 687, 689, 161 A. 172, 172 (1932) (holding that the landlord was not liable for injuries to a guest of a tenant who fell into a pit). In *Marshall*, the Court of Appeals of Maryland stated that "[t]he law is well settled that, when the owner has parted with his control, the tenant has the burden of the proper keeping of the premises, in the absence of an agreement to the contrary; and for any nuisance created by the tenant the landlord is not responsible." *Id.* (citations omitted). According to earlier notions of landlord-tenant law, the tenant took the leased property as he found it, and the landlord was not responsible for any defect on the property or injury sustained by the tenant while on the property. *See, e.g.*, Smith v. State *ex rel.* Walsh, 92 Md. 518, 529-30, 48 A. 92, 93 (1901). For example, if the property was to fall down, the landlord was under no obligation to repair it, unless expressly stated by contract; however, the tenant was still under an obligation to pay rent. *Id.* As one commentator eloquently stated:

> It all made sense back in those days with the landlord off on the hunt or drinking port in the quiet of the evening, and the tenant asking only to be left alone to tend his fences and to shear his sheep. . . . The model landlord was the one who did the least. The tenant, in turn, was expected to run the farm, to be the omnicompetent man fully prepared to see to his own shelter, heat and light.

Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 231 (1970).

to the contrary.[24] The landlord's obligation extended only as far as turning over possession of the property to the tenant and an agreement to leave that tenant in peaceful possession.[25]

Maryland cases repeated language to that effect.[26] Specifically, the cases held that mere ownership of land or buildings did not render the owner liable for injuries sustained by tenants or invitees rightfully on the premises because the owner was not considered an insurer of such persons.[27] This doctrinal theory was based on the notion that the lease was a conveyance of interest in the property,[28] and not a contractual undertaking of the landlord.[29]

B. Common Areas Must Be Maintained to Protect Tenants from Personal Injury

Over the years, landlords were given more responsibility under leases,[30] and the Court of Appeals of Maryland modified the common law according to the changing nature of the tenant.[31] Based on such changes, landlords owed tenants the duty to exercise ordinary care to render the premises reasonably safe, regardless of an express contract.[32] A landlord's duty was ordinary care and diligence to maintain

24. *See, e.g., Marshall*, 162 Md. at 689, 161 A. at 172; Miller v. Fisher, 111 Md. 91, 94, 73 A. 891, 892 (1909); *Smith*, 92 Md. at 529-30, 48 A. at 93; Owings v. Jones, 9 Md. 108, 108-09 (1856).
25. Quinn & Phillips, *supra* note 23, at 227 n.2.
26. *See, e.g., Marshall*, 162 Md. at 689, 161 A. at 172; *Miller*, 111 Md. at 94, 73 A. at 892.
27. *See Marshall*, 162 Md. at 689, 161 A. at 172; *Miller*, 111 Md. at 94, 73 A. at 892.
28. Quinn & Phillips, *supra* note 23, at 228 n.4.
29. *See id.* at 229 n.5 (explaining that the "duty of the landlord was imposed by the law through the device of an implied covenant").
30. *See* Miriam J. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299, 301-03 (1981) (explaining the historical development of landlord-tenant common law throughout the United States). Specifically, Haines stated that:

> During the Industrial Revolution, with the growing urbanization of the population, the agricultural lease declined in importance. Structures on the leased land became increasingly significant in the lease transaction. Specific covenants were inserted in leases apportioning the responsibility between, and protecting the rights of, landlord and tenant. Thus, "the typical lease began to look more like a contract than a deed of real estate," raising anew the question of how it should be treated.

Id. at 303.
31. *See* Landay v. Cohn, 220 Md. 24, 27-28, 150 A.2d 739, 741 (1959) (discussing the duty of a landlord to his tenant in Maryland in 1959).
32. *See id.*, at 27, 150 A.2d at 740 (stating that "[w]here a landlord leases separate portions of a property to different tenants and reserves under his control halls, stairways or other parts of the property for use in common by all the tenants, he must use ordinary care and diligence to maintain the retained parts in reasonably safe condition"). The court in *Landay* found that "[t]he duty stems from the responsibility engendered in the landlord by his having extended an invitation, express or implied, to use the portions of

the common areas.[33] Ordinary care and diligence did not include protecting tenants from criminal acts of third parties; rather, it was ordinary care that would ensure the property, buildings, and land were safe for the tenants in their intended use.[34]

Beginning in the 1960s, the Court of Appeals of Maryland furthered its expansion of the common law doctrine regarding landlords' duties towards tenants.[35] For example, in *Langley Park Apartments v. Lund*,[36] the court extended the landlord's general duty to maintain common areas to include the removal of snow and ice when the landlord was aware or should have been aware of the dangerous condition.[37] The court, however, was reluctant to make landlords "insurers" of tenants' safety.[38] In *Langley Park Apartments*, the court of appeals carefully stated, "We do not mean to suggest that the mere fact that snow has accumulated will in and of itself result in liability upon the landlord, for that would make him virtually an insurer."[39] The court implicitly recognized that to place landlords in the position of ultimate insurer of tenants' safety would be an enormous burden for landlords, while taking away all accountability from tenants for their own action or inaction.[40] In this decision, the court of appeals expressly rejected the role of landlord as an insurer.[41]

C. *Security Gates and Locked Doors Become Necessary to Keep Criminals from Entering Common Areas*

Twelve years after the decision in *Langley Park Apartments*, the Court of Appeals of Maryland answered three certified questions from the United States District Court for the District of Maryland.[42] In *Scott v. Watson*,[43] the court faced the controversial question of whether a landlord had a duty to protect tenants "from the criminal acts of third parties committed in common areas within the landlord's con-

---

the property retained by him." *Id.* at 27, 150 A.2d at 741 (citations omitted).

33. Elmar Gardens, Inc. v. Odell, 227 Md. 454, 457, 177 A.2d 263, 265 (1962) (citing Long v. Joestlein, 193 Md. 211, 216, 66 A.2d 407, 409 (1949); Yaniger v. Calvert Bldg. & Constr. Co., 183 Md. 285, 288, 37 A.2d 263, 264 (1944)).
34. *See id.*
35. *See generally* Langley Park Apartments v. Lund, 234 Md. 402, 407-10, 199 A.2d 620, 623-24 (1964).
36. 234 Md. 402, 199 A.2d 620 (1964).
37. *Id.* at 410, 199 A.2d at 624.
38. *Id.* at 409-10, 199 A.2d at 624.
39. *Id.*
40. *See generally id.*
41. *See id.*
42. *See* Scott v. Watson, 278 Md. 160, 161-62, 359 A.2d 548, 550 (1976).
43. 278 Md. 160, 359 A.2d 548 (1976).

trol . . . ."[44] The court came to two distinct conclusions regarding the landlord's duty in *Scott*.[45]

First, the court answered the question of whether a landlord had a *special* duty to protect tenants from the criminal acts of third parties committed in common areas within the landlord's control.[46] The court declined to impose a special duty "upon the landlord to protect his tenants against crimes perpetrated by third parties on the landlord's premises."[47] The court reasoned that such a "general rule is a subsidiary of the broader rule that a private person is under no special duty to protect another from criminal acts by a third person, in the absence of statutes, or of a special relationship."[48] The Court of Appeals of Maryland, therefore, "decline[d] to impose a special duty on a landlord to protect his tenants from criminal activity since to do so would place him perilously close to the position of insurer of his tenants' safety."[49] Such language, repeated almost verbatim from earlier cases,[50] suggests that the court was steadfast in its holding that a landlord should not be responsible for his tenants' safety.[51]

Second, the *Scott* court was presented with the issue of whether a *general* duty would "be imposed if the landlord had knowledge of increasing criminal activity on the premises."[52] The court held that "[i]f the landlord knows, or should know, of criminal activity against persons or property in the common areas, he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity."[53] The court explained that the "duty arises primarily from criminal activities existing on the landlord's premises, and not from knowledge of general criminal activities in the neighborhood."[54]

Although the court noted that finding a landlord has breached his duty to protect tenants from the criminal activities of third parties does not alone overcome the hurdle of causation,[55] *Scott* clearly set the precedent for expansion of landlord liability.[56] The court attempted to limit when a landlord may be liable for the criminal acts of another;

---

44. *Id.* at 161-62, 359 A.2d at 550.
45. *See id.* at 167, 169, 359 A.2d at 553-54.
46. *Id.* at 166, 359 A.2d at 552.
47. *Id.*
48. *Id.* (summarizing the general principle set forth in the RESTATEMENT (SECOND) OF TORTS § 315 (1965)).
49. *Id.* at 167, 359 A.2d at 553.
50. *See, e.g., Langley Park Apartments*, 234 Md. at 410, 199 A.2d at 624.
51. *Scott*, 278 Md. at 167, 359 A.2d at 553.
52. *Id.* at 162, 359 A.2d at 550.
53. *Id.* at 169, 359 A.2d at 554.
54. *Id.*
55. *Id.* at 171, 359 A.2d at 555 (stating that "the determination of proximate cause is subject to considerations of fairness and social policy as well as mere causation").
56. *See id.* at 169, 359 A.2d at 554.

however, the limitation was murky at best.[57] Accordingly, landlords became targets for negligence cases of all kinds.[58]

D. Dogs Days for Landlords

An example of the wave of new negligence cases occurred in 1998, when the court of appeals heard two similar cases involving a landlord's duty to his tenants in the same term.[59] Coincidentally, both cases involved injuries inflicted by canines present on the leased premises.[60] More importantly, both holdings stretched Maryland's landlord liability in an unexpected manner.

In *Shields v. Wagman*,[61] two individuals sustained injuries when attacked by a pit bull owned by a tenant of a strip mall.[62] The court held that the landlord of the commercial property could be held liable for injuries sustained in the common area caused by a dog kept on the leased premises.[63] Specifically, the court held that because "the landlord had knowledge of the potential danger and the ability to rid the premises of that danger by refusing to re-let the premise," the landlord could be held liable.[64] The holding in *Shields* was foreseeable considering that the rationale of the court was similar to previous landlord liability cases regarding common areas, specifically *Scott*.[65] The *Shields* court reasoned that because the landlord had control over the common area of the property and knowledge of the viciousness of the dog, the landlord could be held liable for the injuries sustained.[66]

In the second "canine" case, *Matthews v. Amberwood Associates Ltd. Partnership*,[67] a sixteen-month-old child was attacked and killed by a pit bull owned by a tenant of an apartment complex.[68] In a four-to-three

57. *See id.*
58. *See id.*
59. *See* Shields v. Wagman, 350 Md. 666, 714 A.2d 881 (1998); Matthews v. Amberwood Assocs. Ltd. P'ship, 351 Md. 544, 719 A.2d 119 (1998), two cases heard in the September Term, 1997, considering a landlord's duty when a tenant's dog bites someone on his premises.
60. *Shields*, 350 Md. at 668-69, 714 A.2d at 882; *Matthews*, 351 Md. at 548, 719 A.2d at 120.
61. 350 Md. 666, 714 A.2d 881.
62. *Id.* at 669, 714 A.2d at 882.
63. *Id.* at 668-69, 714 A.2d at 882.
64. *Id.* at 669, 714 A.2d at 882.
65. *See Scott v. Watson*, 278 Md. 160, 165-69, 359 A.2d 548, 552-54 (1976); *see also Shields*, 350 Md. at 673-77, 714 A.2d at 884-86. The court in *Shields* discussed Maryland cases regarding common areas and specifically stated:
> [W]here a landlord leases separate portions of his property to different tenants and reserves under his control the passageways and stairways, and other parts of the property for the common use of all the tenants[,] he must then exercise ordinary care and diligence to maintain the retained portions in a reasonably safe condition.

Id. at 673-74, 714 A.2d at 884 (citations omitted).
66. *Id.* at 690-91, 714 A.2d at 892-93.
67. 351 Md. 544, 719 A.2d 119 (1997).
68. *Id.* at 548-51, 719 A.2d at 120-22.

decision, the majority held that the landlord owed a duty of care to visitors when the landlord had knowledge of the violent animal within the tenant's apartment and the ability to take reasonable steps to protect against the animal's attack.[69] The court reasoned that although the attack occurred within the leased premise of a residential building—within the tenant's apartment—the landlord could have taken steps to retake possession of the apartment.[70]

The *Matthews* court found that because "[t]he landlord retained control over the presence of a dog in the leased premises by virtue of the 'no pets' clause in the lease," the landlord could have brought a breach of lease action to evict the tenant.[71] The court further stated that prior to bringing such an action, the landlord should have informed the tenant that harboring the pit bull was a violation of the lease upon receiving notice of the presence of a canine.[72] Naively, the court believed that if the landlord had taken such steps, the tenant would have removed the canine from the leased premise.[73] But because the landlord took no action, the court found that the landlord was negligent and affirmed the decision of the circuit court, awarding over five million dollars in damages.[74]

Comparing *Scott* and *Shields* with *Matthews*, there is an obvious deviation in the holding of *Matthews*, which usurps the court's previous holdings. Specifically, the *Matthews* court reasoned that a duty exists even though the injury occurred *within the leased premises*,[75] in direct contrast with the holdings in *Scott* and *Shields*, that a landlord may only be liable for injuries that occur in *common areas*.[76] The court attempted to downplay this change, stating that the key is to determine if the landlord has control over whether the tenant can remain in the

69. *Id.* at 570, 719 A.2d at 131-32.
70. *Id.* at 558, 719 A.2d at 125-26. The dissent quickly points out that the landlord had no ability to repossess the property for numerous reasons. *Id.* at 590-91, 719 A.2d at 142 (Chasanow, J., dissenting).
71. *Id.* at 558, 719 A.2d at 125-26.
72. *Id.* at 558, 719 A.2d at 126.
73. *Id.*
74. *Id.* at 522, 583, 719 A.2d at 122, 138. In *Matthews*, the jury awarded damages as follows: $5,018,750 to Matthews (the mother of the victim) and $562,100 to the father of victim for the wrongful death of Tevin; $600,000 non-economic damages and $4,147.52 compensatory damages to Tevin's estate under the survival action; and $1,110,000 to Matthews as damages for intentional "infliction of emotional distress." *Id.* at 552, 719 A.2d at 122. "The court granted the defendants' motion for judgment notwithstanding the verdict on the intentional infliction of emotional distress count, reduced the non-economic damages award in the survival action to $350,000, and denied all other motions." *Id.* at 552, 719 A.2d at 122-23.
75. *Id.* at 564-65, 719 A.2d at 129.
76. *See Shields*, 350 Md. at 673-77, 714 A.2d at 884-86; *Scott*, 278 Md. at 165-66, 359 A.2d at 552.

leased premise.[77] This change, however, is a drastic shift in reasoning which the court casually adopts.

E. Landlords, Policemen—Same Thing?

Those familiar with the holdings of the court in *Matthews*, *Shields*, and *Scott*, were likely not surprised by the headline appearing in *The Daily Record* on June 17, 2003.[78] The headline read: "Landlord May Be Liable for Murder in Apartment."[79] The holding in Hemmings II raises many questions. How can a landlord protect his or her tenants from murders perpetrated by third parties within the tenants' own apartments? Are landlords now law enforcement agents? Are landlords insurers of safety? Not only is the holding far-reaching, the majority does what the Court of Appeals of Maryland stated many times that it refrained from doing: it turns landlords into the ultimate insurers of tenants' safety.

1. The Facts of Hemmings II and the Midnight Burglar

Howard Hemmings and his wife, Suzette, resided on Lynfair Court in a two-bedroom apartment unit located on the second floor just above the ground level apartment.[80] The second-floor apartment sat adjacent to the woods.[81] "As with all of the apartments in the development, unit A-2 was equipped with deadbolt locks and 'Charlie-bars,' which secured the sliding glass doors of the apartment balconies."[82] In the middle of the night on June 13, 1998, an unidentified person entered the apartment through the back sliding glass door and fatally shot Howard.[83] He died shortly thereafter.[84]

The intruder was likely not someone Howard and Suzette Hemmings knew. Suzette Hemmings' complaint stated that the intruder entered the apartment by forcing open the locked sliding glass door located on the second floor balcony at the back of the building.[85] Evidence obtained through subsequent on-scene investigation was consistent with a forced entry.[86]

---

77. *Matthews*, 351 Md. at 565, 719 A.2d at 129. The majority stated that "[t]he 'control' factor upon which the Court relied in *Shields* was not the traditional landlord control over common areas. Rather, as in the instant case, it was the landlord's control over the tenant's remaining in the leased premises." *Id.*
78. *See* Lawrence Hurley, *Landlord May Be Liable for Murder in Apartment*, DAILY RECORD, June 17, 2003, at 1B.
79. *Id.*
80. Hemmings II, 375 Md. at 528, 826 A.2d at 446.
81. Hemmings I, 144 Md. App. at 314, 797 A.2d at 853, *rev'd*, 375 Md. 522, 826 A.2d 443.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

2. The Majority's Reasoning in Hemmings II

As previously mentioned, the majority held that the landlord may be liable for the tragic death of Howard Hemmings.[87] Similar to the holdings in *Matthews*, where the injuries were tragic, the court found a reason to create an exception to the once well-established rule that the landlord is not the insurer of tenants' safety.[88] In Hemmings II, the court's caveat is similar to the one in *Matthews*. The majority stated that "a landlord is not necessarily immune from liability because a tenant's injury occurred within the leased premises."[89] Rather, a landlord's duty to use reasonable care for the tenant's safety within the common areas also applies to injuries suffered from criminal acts within the leased premises.[90] A landlord's duty stems from the fact that he is in a better position to control the security measures and from the fact that he may have knowledge that criminal activity on the premises has created a dangerous condition.[91] Accordingly, the landlord must take reasonable measures to eliminate the criminal activity.[92]

The Hemmings II court held that "[o]nce a landlord takes reasonable security measures to eliminate conditions that contribute to criminal activity on the premises, all of its duties . . . have not been fulfilled necessarily."[93] Instead, "a landlord has a continuing obligation to properly carry out the security measures it provides."[94] This means a landlord must "maintain and regularly inspect the devices implemented to deter criminal activity."[95] For example, in Hemmings II, the landlord had implemented several security devices.[96] The court held, however, that if the landlord failed to adequately maintain these security measures, the landlord may have breached its duties towards its tenants and Howard Hemmings.[97]

87. *See supra* text accompanying notes 18-21.
88. Hemmings II, 375 Md. at 542, 826 A.2d at 455.
89. *Id.*
90. *Id.* at 543, 826 A.2d at 455.
91. *Id.* at 542-43, 826 A.2d at 455.
92. *Id.* at 543-44, 826 A.2d at 455-56.
93. Hemmings II, 375 Md. at 546, 826 A.2d at 457. *But see infra* Part IV.C.
94. Hemmings II, 375 Md. at 546, 826 A.2d at 457.
95. *Id.* at 547, 826 A.2d at 458.
96. Specifically, there was "exterior lighting around the property" and the apartment had "a regular door lock on its front door as well as a dead bolt door lock." *Id.* at 528, 826 A.2d at 446. Additionally, "[f]or the apartments with patio doors, like the Hemmings', the Landlord provided . . . 'a charlie bar,' a horizontally mounted bar securing the sliding glass door." *Id.* at 528, 826 A.2d at 446-47. "'[T]he [apartment] windows ha[d] locks on them,' and there was 'interior lighting in the common area hallways.'" *Id.* Ground level apartments had alarm systems, which would generate a "strong and loud noise" if activated. *Id.* at 528, 826 A.2d at 447.
97. *Id.* at 547-48, 826 A.2d at 458.

3. Judge Raker's Dissenting Opinion

Judge Raker's dissent, which was joined by Judge Cathell and Judge Harrell, addressed the flaws in the majority's holding. Judge Raker stated unequivocally that the only way in which the majority reached the "desired result [was] to cobble together the line of cases in Maryland imposing a duty for liability for physical harm which occurred in the common areas with the line of cases finding liability for demised premise damage resulting from a cause originating in the common area."[98] Judge Raker reiterated that "[a] landlord is not the *insurer* of the safety of persons within the demised premises, or for that matter, in the common areas of the property."[99] Most importantly, she acknowledged that the majority's holding "is a novel theory, unsupported by any authority or case law in the country."[100] It is unsupported precisely because of its unreasonableness in tort theory and property law, and because of its undeniably broad consequences for landlords and tenants alike.[101]

III. A COMPARISON VIEW: OTHER STATES EXPRESSLY REFUSE TO EXPAND THE LIABILITY OF LANDLORDS

As discussed above, the extension of landlord liability for injuries sustained by the criminal acts of others is a relatively novel concept, not only in Maryland, but in other jurisdictions. The first decisive case regarding the matter was the 1970 decision of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[102] In *Kline*, a tenant was injured when she was attacked and robbed in the common area of her apartment complex.[103] Finding that the landlord could be held liable for criminal attacks sustained by tenants in the common areas, the court stated that although "[t]he landlord is no insurer of his tenants' safety . . . he certainly is no bystander."[104] The *Kline* court held that it is not unwarranted "to place upon the landlord a duty to take those steps which

98. Hemmings II, 375 Md. at 556-57, 826 A.2d at 463 (Raker, J., dissenting). Judge Raker wrote:

> The entire basis of the majority opinion rests upon inadequate lighting in the rear of the apartment building. The majority holds that because the landlord provided exterior lighting at Pelham Wood as a security measure intended to deter criminal activity, it had a duty to adequately maintain that lighting. . . . From this duty to maintain adequate lighting in the common area, the majority makes the unjustified leap in logic that somehow the landlord is then responsible for violent criminal activity that occurred within the demised premises and not within the common area.

Id. at 551, 826 A.2d at 460 (Raker, J., dissenting).

99. *Id.* at 552, 826 A.2d at 461 (Raker, J., dissenting).
100. *Id.* at 557, 826 A.2d at 463 (Raker, J., dissenting).
101. *See infra* Parts III-IV.
102. 439 F.2d 477 (D.C. Cir. 1970).
103. *Id.* at 478.
104. *Id.* at 481.

are within his power to minimize the predictable risk to his tenants."[105] In holding the landlord owed that duty to his tenants, the court found that the following circumstances had occurred: the landlord had "notice of repeated criminal assaults and robberies, ha[d] notice that the crimes occurred in the portion of the premises exclusively within his control, ha[d] every reason to expect like crimes to happen again, and ha[d] the exclusive power to take preventive action."[106]

Although jurisdictions vary in their approach to the issue, many states have refused to adopt the holding in *Kline*, imposing liability on landlords in certain cases involving criminal acts of third parties occurring within the leased premises.[107] In fact, many states have addressed situations almost identical to Hemmings II,[108] yet declined to extend landlord liability as far as the Court of Appeals of Maryland.[109]

A. Failure of the Landlord to Secure Doors or Windows

The following states have refused to expand landlord liability in actions involving crimes against the person occurring within the tenant's apartment. Specifically, the following cases involve a third party criminal entering the victim's apartment, allegedly due to the landlord's failure to secure the doors or windows of the residential apartment building.

---

105. *Id.*

106. *Id. See also* Haines, *supra* note 30, at 314-22 (discussing the *Kline* decision and landlords' developing duty to protect tenants from foreseeable criminal acts).

107. *See* discussion *infra* Part III.A-B.

108. In Hemmings II, the allegations of negligence included the landlord's failure to maintain adequate lighting and secure the locks of the sliding glass door. *See* Hemmings II, 375 Md. 522, 532, 826 A.2d 443, 449. Other states that have addressed similar cases include Arkansas, Illinois, Massachusetts, New York, Ohio, South Carolina, and Wisconsin. *See* discussion *infra* Part III.A-B.

109. According to one critic:

> The recent cases are not unanimous; and there are recent decisions which follow the common law majority rule and reject the idea of imposing liability on the landlord for the wrongful acts of third parties. A number of rationales are put forth in support of majority rule including, among others, (i) the idea that the intentional criminal act of a third person is a superseding cause of harm to the tenant, (ii) the difficulty of determining the foreseeability of the criminal act, and (iii) judicial reluctance to modify traditional landlord-tenant concepts.

DAVID S. HILL, LANDLORD AND TENANT LAW IN A NUTSHELL 79 (West Publishing Co. 1986) (1979). *See also* discussion *infra* Part IV.

1. Illinois

In *Martin v. Usher*,[110] a tenant brought an action against her landlord for damages, charging that she was injured in her apartment as a result of being shot by an intruder who robbed and attempted to rape her.[111] The Illinois court held there was no duty on behalf of the landlord to protect the tenant from the criminal acts of a third party.[112] The court expressly refused to impose a legal duty on the landlord.[113]

2. Massachusetts

In *Choy v. First Columbia Management, Inc.*,[114] a tenant brought an action against her former landlord asserting claims of negligence and breach of contract arising from her brutal beating and rape that occurred in her apartment.[115] The tenant alleged "that locks on the doors to the building were constantly broken or unlocked providing easy access to the intruders."[116] The United States District Court for the District of Massachusetts, applying Massachusetts law, held that the causal connection between the asserted negligence and the injury was too attenuated to allow a jury to find more likely than not that the assailant gained access to the complex in this manner.[117]

---

110. 371 N.E.2d 69 (Ill. App. Ct. 1977).
111. *Id.* at 70.
112. *Id.*
113. *Id.* (quoting Smith v. Chi. Hous. Auth., 344 N.E.2d 536, 540 (Ill. App. Ct. 1976)). Specifically, the Illinois court adhered to the Restatement (Second) of Torts that the court characterized as setting forth:

> [Under § 315] there is no duty to control the conduct of a third person to such a degree as to prevent him from causing physical harm to another, unless a special relationship exists between the actor and the other. Sections 314 and 320 of the Restatement list certain special relationships, such as common carrier-passenger, business invitor-invitee and innkeeper-guest. In Illinois the landlord-tenant relationship has not been considered a special relationship which could create the existence of a duty.

Id. (citations omitted); *see also* RESTATEMENT (SECOND) OF TORTS §§ 314, 315, 320 (1965).
114. 676 F. Supp. 28 (D. Mass. 1987).
115. *Id.* at 29.
116. *Id.*
117. *Id.* While the court declined to answer the question of whether the landlord owes a duty to the tenant, it found that "the plaintiff ha[d] produced no evidence from which a jury could rationally decide that the defendants' negligence caused the plaintiff's injuries." *Id.* at 29-30. The court recognized that "[c]ausation is an essential element of the plaintiff's case in an action for negligence. Proof that the defendant breached a duty owed to plaintiff is not enough to establish liability. To recover for her injuries, the plaintiff must prove a causal connection between the defendant's negligence and plaintiff's harm." *Id.* at 30 (citing Canon v. Sears, Roebuck & Co., 374 N.E.2d 582, 584 (Mass. 1978)).

3. New York

Pagan v. Hampton Houses, Inc.[118] involved the tragic occurrence of a tenant found murdered in her apartment.[119] In *Pagan*, reports indicated that violence had occurred within the building, that a security guard was not always present, and that locks to various entrances were broken.[120] The New York court, however, held that the "plaintiff ha[d] failed to come forward with evidence that negligence, if any, on the part of the landlord . . . was the proximate cause of the [tenant]'s injuries and death."[121]

In *Perry v. New York City Housing Authority*,[122] another New York case, a tenant's ex-boyfriend attacked her with a knife after forcibly entering her apartment.[123] The tenant brought an action against the landlord alleging that the landlord's negligent failure to provide adequate locks resulted in her injuries.[124] The court noted that "with regard to the allegation that the outside doors to the building were unlocked, the [tenant] offers no evidence that her assailant took advantage of the unlocked doors to enter the building."[125] The tenant "raised no factual issue as to whether the unlocked doors were a proximate cause of her injuries."[126] The landlord was entitled to summary judgment.[127]

4. Ohio

In *Carmichael v. Colonial Square Apartments*,[128] a tenant who had been assaulted in his apartment brought an action against his landlord alleging that the landlord's failure in providing adequate security for the common areas constituted negligence.[129] The court affirmed summary judgment for the landlord holding that the landlord had only a duty to provide reasonable security to tenants and was "not an insurer of the premises against criminal activity."[130] Moreover, the court held that, "assuming [the landlord] breached a duty to provide reasonable security, [the tenant] has failed to present any evidence

118. 589 N.Y.S.2d 471 (N.Y. App. Div. 1992) (mem.).
119. *Id.* at 472.
120. *Id.*
121. *Id.*
122. 635 N.Y.S.2d 661 (N.Y. App. Div. 1995) (mem.).
123. *Id.* at 662.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 663.
128. 528 N.E.2d 585 (Ohio Ct. App. 1987).
129. *Id.* at 586.
130. *Id.* at 586-87 (quoting Sciascia v. Riverpark Apartments, 444 N.E.2d 40, 42 (Ohio Ct. App. 1981)).

upon which reasonable minds could differ that its failure was the proximate cause of his injuries."[131]

5. Wisconsin

In *Rowinski v. Recht-Goldin-Siegl Construction, Inc.*,[132] a tenant brought an action after being raped in her apartment.[133] The tenant alleged that the landlords were negligent in failing to provide a locked entrance with an intercom system or security personnel.[134] The court, while finding the negligence action supportable, rejected the tenant's claim based on Wisconsin's safe place statute.[135] The court pointed out that "an owner of a public building is liable only for structural defects and unsafe conditions associated with the structure."[136] The court found that "[f]ailure to provide an electronic monitoring system at the entranceway to an apartment complex does not constitute a structural defect within the meaning of the safe place statute."[137]

B. Failure of the Landlord to Repair or Replace Lights

The following states have held that landlords cannot be held liable for damages suffered by the tenant as a result of the criminal acts of a third party. Specifically, these cases involve situations in which entry into the victim's apartment was allegedly due to improper lighting or the failure of the landlord to repair or replace lights.

1. Arkansas

In *Bartley v. Sweetser*,[138] a tenant filed an action against her landlords for negligence.[139] The tenant alleged that the landlords breached their duty of care by failing to implement reasonable security measures to prevent foreseeable criminal acts.[140] The tenant argued that the landlords had, *inter alia*, failed to provide adequate lighting of the common areas.[141] The court held that "a landlord, under Arkansas law, is not the insurer of the safety of tenants or others upon the

131. *Id.* at 587.
132. No. 82-1695, 1983 WL 161541, at *1 (Wis. Ct. App. 1983) (per curiam).
133. *Id.* at *1.
134. *Id.* at *2.
135. *Id. See also* WIS. STAT. ANN. § 101.11 (West 2004). The safe place statute establishes that employers and landlords must provide a safe environment for their employees or tenants. *Id.* § 101.11(1). The statute applies only to unsafe physical conditions of the premises, not to activities conducted on premises. *See id.* § 101.11(1)-(2); *see also* Korenak v. Curative Workshop Adult Rehab. Ctr., 237 N.W.2d 43, 47 (Wis. 1976).
136. *Rowinski*, 1983 WL 161541, at *2.
137. *Id.*
138. 890 S.W.2d 250 (Ark. 1994).
139. *Id.* at 250.
140. *Id.*
141. *Id.*

premises."[142] Thus, the landlord did not owe the tenant a duty to protect the tenant from criminal acts.[143]

2. South Carolina

Cramer v. Balcor Property Management, Inc.,[144] involved a wrongful death action brought by the personal representative of a tenant murdered in her apartment by an intruder.[145] The intruder entered her apartment by prying open a sliding glass door.[146] The plaintiff argued that the landlord had not maintained sufficient lighting on the property.[147] The United States District Court for the District of South Carolina, applying South Carolina law, held that the landlord had no special duty to protect tenants from the criminal acts of third parties.[148] The court reasoned that even though "a landlord has a duty to maintain the common areas of a leased property in a safe condition," the rule had "never been applied in South Carolina to anything except physical injuries resulting directly from the *condition* of the premises themselves."[149]

IV. LANDLORDS AS INSURERS: THE LEGAL, SOCIAL, AND ECONOMIC CONSEQUENCES OF THE HEMMINGS II DECISION

The decision of the majority in Hemmings II clearly went too far in holding that landlords must be insurers against possible criminal activity.[150] As stated by the court numerous times, there is no general duty to protect another person from the criminal acts of a third party absent a special duty.[151] Based on obvious public policy reasons,

142. *Id.* at 252.
143. *Id.*
144. 848 F. Supp. 1222 (D.S.C. 1994).
145. *Id.* at 1223.
146. *Id.* at 1223-24.
147. *Id.* at 1225.
148. *Id.* at 1224 (quoting Cramer v. Balcor Prop. Mgmt., Inc., 441 S.E.2d 317, 319 (S.C. 1994)).
149. *Id.* at 1225 (quoting Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1211 (D.S.C. 1990)). The court states that "the Supreme Court of South Carolina has expressly ruled that a landlord has no duty to a tenant to provide security in and around a leased premises to protect the tenant from criminal activity of third parties." *Id.*
150. *See* Hemmings II, 375 Md. at 545, 826 A.2d at 457.
151. *See* Scott v. Watson, 278 Md. 160, 166, 359 A.2d 548, 552 (1975) (holding that "there is no special duty imposed upon the landlord to protect his tenants against crimes perpetrated by third parties on the landlord's premises"); *See also* W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 56 (5th ed. 1984) (discussing consistent refusal to impose a duty to rescue); Haines, *supra* note 30, at 306-07. Haines stated:

> Courts did impose a duty for third party criminal acts where certain recognized "special relationship[s]" were found. These relationships were seen to be of such character that public policy dictated that one party should have an obligation to use reasonable care to protect the other from third party criminal acts. The relationships

"[c]ourts have generally held . . . that it is not fair to impose upon the landlord a duty to protect the tenant from criminal activity within the demised area."[152] The reason for not imposing liability on landlords for the criminal acts of others perpetrated on tenants has been summarized as follows:

> Judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and the conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.[153]

Such policy considerations must be carefully analyzed when changing the common law by imposing such an encumbering duty upon landlords.[154] The majority in Hemmings II, however, failed to address these policy considerations in imposing the ultimate duty of insurer on landlords in Maryland.

A. *Judicial Reluctance to Tamper with the Traditional Common Law Concept of the Landlord-Tenant Relationship*

As discussed above, under the common law in Maryland[155]—and throughout the United States—it was well-established that a landlord

---

in which such a duty has been imposed include innkeeper-guest, possessor of premises open to the public-invitee, common carrier-passenger, employer-employee, school district-pupil, and hospital-patient.

Id. at 307-08.

152. Hemmings II, 375 Md. at 559, 826 A.2d at 465 (Raker, J., dissenting) (citing Bartley v. Sweetser, 890 S.W.2d 250, 251 (Ark. 1994)); ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 4:14 (1980).

153. SCHOSHINSKI, *supra* note 151, § 4.14 (quoting Kline v. Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970)) (alteration in original). *See also Bartley*, 890 S.W.2d at 251. The court stated that:

> Although some jurisdictions have held a landlord, under certain circumstances, owes a duty to take reasonable steps to protect a tenant from foreseeable criminal acts committed by intruders on the premises . . . the courts have generally found that, as a matter of public policy, it was not fair to impose this duty of protection on the landlord.

Id. But see Kline, 439 F.2d at 481 (holding that the landlord owed a duty of protection to tenant because landlord was placed on notice of foreseeable criminal acts by third parties but took no preventive action).

154. *See* Hemmings II, 357 Md. at 559, 826 A.2d at 465 (Raker, J., dissenting).

155. *See* discussion *supra* Part II.A-D.

had no duty to protect tenants.[156] Historically, the landlord was not responsible to his tenants based on the idea that the lease was a conveyance of property to the tenant.[157] After the transfer of property and rent occurred, "the landlord's obligation during the term was the passive one of noninterference with the tenant's use or possession" of that leased property.[158] As such, "an obligation to protect the tenant from unauthorized acts by third persons was neither warranted nor imposed" by the courts.[159]

Abiding by this recognized doctrinal notion, courts were reluctant to impose a duty upon landlords.[160] Only within the last thirty years, since the controversial decision in *Kline*,[161] have courts acknowledged the duty of a landlord to protect tenants from the criminal acts of third parties based solely on a negligence theory.[162]

The Court of Appeals of Maryland continued to reject the doctrinal change until the split decision in Hemmings II in 2003.[163] Clearly, in Maryland there was "[j]udicial reluctance to tamper with the [precedent established by the] common law concept of the landlord-tenant relationship."[164] Moreover, evidenced by the split decision, there was reluctance by three of the seven judges sitting on the court of appeals in deciding Hemmings II.[165]

The judicial reluctance most likely stemmed from fundamental notions of American property law. One such notion is the concept of the covenant of quiet enjoyment.[166] A lessee has the right to peacefully inhabit his or her rented premise without undue interference

156. *See* Haines, *supra* note 30, at 309 (stating that "courts historically have not characterized the landlord-tenant relationship as a special relationship").
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 304 (stating that "[t]hrough the 1960's, the courts generally continued to stress property law concepts").
161. *See Kline*, 439 F.2d at 482; *see also* Haines, *supra* note 30, at 301 (stating that "[a]lthough the United States Court of Appeals for the District of Columbia Circuit in *Kline* attempted to portray its decision as a natural outgrowth of precedent and analogy, the opinion actually constituted a significant departure from established rules").
162. *See* Hemmings II, 375 Md. at 540, 826 A.2d at 453 (stating that the court "recognized that general principles of negligence require a landlord to 'exercise reasonable care for the tenant's safety'" (quoting Scott v. Watson, 278 Md. 160, 167, 359 A.2d. 548, 553 (1975)); *see also* Doe v. Dominion Bank of Washington, N.A., 963 F.2d 1552, 1559-60 (D.C. Cir. 1992); Spar v. Obwoya, 369 A.2d 173, 179 n.5 (D.C. 1977); Tenney v. Atl. Assocs., 594 N.W.2d 11, 17 (Iowa 1999).
163. *See* Hemmings II, 375 Md. 522, 826 A.2d 443.
164. *Id.* at 559, 826 A.2d at 465 (Raker, J., dissenting) (quoting *Kline*, 439 F.2d at 481).
165. Hemmings II, 375 Md. at 549, 826 A.2d at 459 (Raker, J., dissenting).
166. *See generally* RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.03 (104th release 2004).

from the landlord.[167] This concept is arguably inherent to all tenants: the renter pays rent in return for the landlord permitting occupancy.

For the most part, tenants do not want or need their landlord to be a vigilante because they value their right to quiet enjoyment. Most individuals rank the right to privacy and property as main facets of the American way of life, and tenants are no different. But because tenants do not own property, are such rights non-existent? Unequivocally, the answer to this question is no. Tenants seek and are given their rights to quiet enjoyment of the leased premises and privacy associated with their property in a manner consistent with the lease.

The courts would never take away rights of tenants because the rights are ingrained in our notions of property; on the other hand, landlords' duties continue to expand.[168] More is expected of landlords, and the judiciary has imposed more responsibility upon them.[169] Such expansion has undoubtedly changed the nature of a landlord. Previously, a landlord's role in the landlord-tenant relationship consisted solely of providing property for tenants to enjoy peacefully, privately, and without unwarranted disruption.[170] With the holdings in Hemmings II and *Matthews*, a landlord can no longer allow their tenants quiet enjoyment; rather, the landlord must become the cliché "big-brother," watching for any sign of harm that may afflict the tenant. Not only does this new role usurp American ideals of privacy and individual responsibility, it overturns traditional common law doctrine.

B. Superseding Cause of Harm Must Be Acknowledged

The Court of Appeals of Maryland failed to address the issue of causation, most likely because it is often an insurmountable issue when dealing with the criminal acts of third parties.[171] The majority's failure to address causation is evidence of the fundamental weakness in holding a landlord liable for the criminal acts of third parties perpetrated upon tenants,[172] as "[c]ausation is an essential element of the plaintiff's case in an action for negligence."[173] Liability cannot be established simply on the grounds that "the defendant breached a duty

167. *See id.* at § 16B.03(1).
168. *See* discussion *supra* Part II.
169. *See* discussion *supra* Part II.
170. *See* Quinn & Phillips, *supra* note 23, at 227 & n.2.
171. *See* Haines, *supra* note 30, at 309 (stating that an "obstacle to finding landlord liability in a tort action has been proof of causation").
172. The court of special appeals, however, did address causation in deciding Hemmings I, stating that "[f]rom the facts presented, a fact finder would be constrained to conclude that there could be no showing that appellees' failure to maintain the common areas was the proximate cause of the fatal event." Hemmings I, 144 Md. App. 311, 323-24, 797 A.2d 851, 859 (2002).
173. Choy v. First Columbia Mgmt., Inc., 676 F. Supp. 28, 30 (D. Mass. 1987).

owed to plaintiff."[174] Rather, "[t]o recover for her injuries, the plaintiff must prove a causal connection between the defendant's negligence and plaintiff's harm."[175] Specifically, the tenant must prove that the landlord's action, or in the case of security, failure to act, was the proximate cause of the tenant's injury.[176]

Consider the circumstances of Hemmings II.[177] One reason the plaintiff provided for the landlord's liability was that there was no exterior lighting in the back of the building.[178] From the fact that there was no lighting in the back of the apartment, as opposed to the front, it does not follow that the landlord is responsible for a criminal breaking into a locked door in the middle of the night. There is no logical leap of causation in this circumstance;[179] the causal connection is too attenuated. Therefore, even though the court of appeals has established that a landlord has a duty to protect his tenants from the criminal acts of others, and that duty would be breached by failing to maintain adequate security measures,[180] the issue of causation will always be virtually impossible to prove when dealing with criminal acts of third parties.[181]

---

174. *Id.*
175. *Id.* (citing Cannon v. Sears, Roebuck & Co., 374 N.E.2d 582, 584 (Mass. 1978)).
176. *See* Haines, *supra* note 30, at 310 (stating that "[t]he problem is whether to treat the landlord's conduct as the proximate cause of the tenant's injury, or to consider the third party's intervening criminal act as a superseding cause, relieving the landlord of liability").
177. *See* Hemmings II, 375 Md. at 528-31, 826 A.2d at 446-49.
178. *Id.* at 532, 826 A.2d at 449. In Hemmings II, several tenants of the apartment building where Mr. and Mrs. Hemmings lived, 5 Lynfair Court, recalled the state of the lighting around their building prior to the incident at the Hemmings' apartment. One indicated that there was "not a light fixture against the wall . . . outside of [her] apartment" in the rear of 5 Lynfair Court. Another who lived immediately below the Hemmings' apartment at the time of the incident, described the lighting at the rear of the building as follows: "Pitch dark. You can't see anything. Even if I would look outside, I couldn't identify anyone in that area because it is really dark." Id. at 529, 826 A.2d at 447. That tenant stated that the front of 5 Lynfair Court was well-lit but that the back of the building was not equipped with a working light and was "too dark." *Id.*
179. *Id.* at 551, 826 A.2d at 460 (Raker, J., dissenting). Judge Raker's dissenting opinion states:

> The entire basis of the majority opinion rests upon inadequate lighting in the rear of the apartment building. . . . From this duty to maintain adequate lighting in the common area, the majority makes the unjustified leap in logic that somehow the landlord is then responsible for violent criminal activity that occurred within the demised premises and not within the common area.

Id.
180. *See id.* at 546, 826 A.2d at 458.
181. *See* Haines, *supra* note 30, at 309-10.

C. The Problem of Foreseeability

Criminal behavior and criminal activity may be foreseeable by law enforcement officers in some rare instances, but no one has the capacity to accurately predict when, where, and how a violent criminal will act. There would be no crime if that were the case. Furthermore, does the absence of security measures outside an apartment make the occurrence of criminal activity within the leased premise more probable? While the majority in Hemmings II asserts that "[k]nowledge is essential to establishing a landlord's duty,"[182] the idea that a landlord can foresee criminal activity *inside* an apartment and subsequently act to prevent it forces the landlord into a vigilante role.

The majority in Hemmings II believes that a landlord should realize that a lack of security devices or deterrents may *enhance* the likelihood that a tenant will be the victim of a criminal attack.[183] Yet the failure to maintain lighting, provide security guards, install surveillance cameras, or invest in alarm systems does not necessarily "make a murder within the leased premises foreseeable,"[184] nor does it reduce the likelihood of crime. The court simply assumes that the landlord's failure to provide security will certainly lead to crime.[185] The majority, however, lacks any concrete evidence to support the contention that if landlords maintain security devices, less crime will occur on the premises; rather, the majority's reasoning is only based on anecdotal evidence and speculation.[186]

Moreover, if the landlord can foresee criminal activity, is it unreasonable to assume that tenants recognize that there is criminal activity within their neighborhood? Tenants do not unknowingly decide to live in an area that is high in crime. For example, before Howard Hemmings was murdered, there were records of complaints regarding

182. Hemmings II, 375 Md. at 540, 826 A.2d at 454.
183. *Id.* at 541, 826 A.2d at 454.
184. *Id.* at 561, 826 A.2d at 466 (Raker, J., dissenting).
185. According to one study,

> 'crime prevention today as in the past has a tendency to be driven more by rhetoric than reality.' However, effective public policy and practice need to be based on scientific evidence. This is an approach that has garnered much support in medicine and other fields dedicated to the betterment of society. This is not, however, the practice usually adopted in criminology or criminal justice. Anecdotal evidence, program favorites of the month, and political ideology seemingly drive much of the crime policy agenda. As a result, we are left with a patchwork of programs that are of unknown potential in preventing crime. Crime prevention programs may or may not work or worse yet may produce harmful or iatrogenic results.

Brandon C. Welsh & David P. Farrington, *Toward an Evidence-Based Approach to Preventing Crime*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 159 (2001) (internal citation omitted).

186. *See id.* at 159 (discussing the lack of crime prevention policies based on scientific—rather than anecdotal—evidence).

criminal activity within the apartment complex.[187] Pelham Wood, located in Baltimore County, was not a peaceful neighborhood.[188] Rather, "[t]he Police Department had filed crime reports for twenty nine burglaries or attempted burglaries and two armed robberies that had occurred at Pelham Wood over the two-year period preceding the incident involving [Howard] Hemmings."[189] The violent nature of this community was arguably known to members of this community based on the types of crimes committed. Specifically, "[o]ne of the alleged armed robberies took place inside an apartment unit; the other involved an assailant who, bearing a sub-machine gun, approached the victim from the woods near an apartment building."[190] Residents notice these types of activities.

When tenants choose to live in high crime areas, they assume the risk that crime will occur.[191] Individual tenants are able to make choices regarding where they live.[192] If a tenant feels unsafe, he or she has the ability to relocate, to call the police, to change the locks on the doors and subsequently bill the landlord, or take other remedial measures to protect him or herself from crime.[193] When a tenant has adequate knowledge of criminal activity, as in the case of Howard

187. Hemmings I, 144 Md. App. at 315, 797 A.2d at 854. The complaints concerned the following:

> robbery, threats at gun point by an estranged husband, a shooting incident at the apartment complex; the 'constant stream of questionable visitors, or the tormenting by wild young children,' vandalism, apartment break-ins, storage break-ins, theft from balconies, theft from common areas, robbery outside of a tenant's apartment allegedly due to poor lighting, drug use in the common areas, possible intruders peeping into tenant windows or patio doors, requests for locks on patio screen doors, complaints that young men were using the apartment entrance for suspicious activities, complaints about increasing fears due to lack of maintenance and unlocked doors.

Id. at 316 n.2, 797 A.2d at 854 n.2.

188. *See* Hemmings II, 375 Md. at 530-31, 826 A.2d at 448.

189. *Id.* at 530, 826 A.2d at 448.

190. *Id.*

191. Assumption of risk is normally a complete bar to an action for negligence. *See* Brady v. Ralph M. Parsons Co., 82 Md. App. 519, 535, 572 A.2d 1115, 1123 (1990).

192. *See* Shelly Ross Saxer, *"Am I My Brother's Keeper?": Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 543 (2001), the author stated that

> [f]ault for injuries suffered from a third party criminal act may . . . be apportioned between the landowner and the victim in situations where the victim fails to take appropriate protective action. If the victim fails to use proper door locks, somehow provokes or initiates the attack, or is aware of the danger or risk and does not take appropriate precautions against injury, the victim's compensation may be reduced according to such fault.

193. *See id.*

Hemmings, and takes no steps to remedy the situation or protect himself, he too bears the responsibility for his injuries.[194]

D. Duty to Warn Tenants?

Another issue that arises regarding the foreseeability element[195] is whether landlords have a duty to warn prospective tenants of the possibility of crime within the leased premises. The majority in Hemmings II fails to acknowledge that their far-reaching decision may impose far greater duties on landlords than intended. Specifically, if the landlord has knowledge of criminal activity, must the landlord disclose information about the criminal tendencies in, on, or about the premises?[196] The Court of Appeals of Maryland did not address this issue, but it seems likely to arise in the future.

According to one scholar, the landlord may face liability if he or she misrepresents the safety of the premises to a tenant.[197] Specifically, "if a prospective tenant asks the landlord about the safety of the premises or whether the property is subject to criminal activity, the landlord must answer truthfully or be subject to liability for misrepresentation."[198] Of course landlords should not misrepresent whether the premises are safe; however, if the tenant does not inquire about safety, a landlord may be under an obligation to disclose such information or be subject to liability. After the holdings in Hemmings II and *Matthews*, if the landlord had knowledge of the potential dangerous situation and did not act to remedy it, liability follows. Landlords now must diligently warn potential tenants of criminal activity.

Another issue arises if the threat of criminal activity is not an outside force, but rather another tenant. Does a landlord have a duty to warn other tenants within the building or premises? For example, if the landlord knows there is a registered sexual offender residing in the building, should the landlord disclose such information in an attempt to protect other tenants?[199] Such a dilemma raises additional

194. *See id.*
195. *See* discussion *supra* Part IV.C.
196. *See* Saxer, *supra* note 191, at 549-50 (discussing this concept in a section entitled "Lessor's Duty to Disclose Potential Danger to Prospective Tenants During Rental Process for Lease of Premises").
197. *Id.* at 550.
198. *Id. See also* Yuzefovsky v. St. John's Wood Apartments, 540 S.E.2d 134, 140-41 (Va. 2001) (holding that tenant's allegations of misrepresentation regarding the security of the premises did not establish one of the narrow exceptions to the general rule that a landlord was not required to warn or protect tenants from the criminal acts of third parties occurring on the landlord's property).
199. *See* Saxer, *supra* note 191, at 562 (stating that "[i]n jurisdictions where a landlord owes a duty to protect tenants against third party criminal acts, a landlord may be faced with a decision either to warn tenants about the criminal propensities of another tenant, or to evict the potentially offending tenant in order to avoid harm to others").

legal issues for the landlord, for example, liability for disclosure of possible confidential information, liability for invasion of privacy, or liability for defamation.[200] Furthermore, the landlord runs the risk of tenants vacating the premises.

With the extended responsibilities that result from the holding in Hemmings II, landlords may resort to screening tenants for possible criminal tendencies or vulnerability to criminal attacks.[201] In order to screen out potential criminals, landlords may interview potential tenants and reject applicants with criminal records or those who pose a risk as "potential criminals."[202] Although "[u]sing a criminal record to reject a tenant should not [result in] potential liability for the landlord,"[203] it places the landlord in a position in which he can discriminate arbitrarily and with discretion "so long as excluding the tenant does not violate public policy or civil rights."[204] There is no way to ensure that landlords are not subconsciously basing their screening on criteria that violates public policy or civil rights.[205] For example, "[t]he landlord's biases regarding race, age or sex may contribute to the selection process."[206] As such, the court of appeals has made it more likely that landlords will subconsciously discriminate in order to make the premises safer in an effort to avoid liability.

E. Vagueness of the Security Standard That the Landlord Must Meet

The Hemmings II majority did not discuss the standard for security and protection that the landlord must meet.[207] The majority only reiterates that the security measures be "reasonable."[208] It has been argued that "[g]ate systems, video cameras, security guards, alarms, and other potential mechanisms" may help safeguard tenants from potential third party criminals.[209] Although these are "reasonable measures,"[210] it is unclear whether the landlord is required to maintain all of the security mechanisms or only one of them. The standard will obviously vary from neighborhood to neighborhood, which will be-

200. *See generally id.* at 562-63.
201. "It has also not been established whether a landlord has the duty to screen prospective tenants to protect other tenants from criminal behavior or a duty to warn other tenants of known criminal propensities of an existing tenant." *Id.* at 523.
202. *Id.* at 564.
203. *Id.*
204. *Id.* at 567.
205. *See* Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 155-56 (2003).
206. *Id.* at 156.
207. *See generally* Hemmings II, 375 Md. 522, 826 A.2d 443.
208. *Id.* at 541, 826 A.2d at 454.
209. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 17.08 (585th publication 2000).
210. *See* Hemmings II, 375 Md. at 541, 826 A.2d at 454.

come a mere guessing game for landlords regarding which security measures he or she is obligated to implement.

F. Economic Consequences of the Imposition of the Duty

Tenants expect that landlords have "insurance that will cover most injuries that occur on the property."[211] After the decision in Hemmings II, tenants will expect landlords to have insurance covering injuries inflicted by third party criminals.[212] According to one report, the average "settlement[ ] paid by insurance companies on behalf of landlords for crimes like rape and assault in the U.S. is more than $500,000."[213] Additionally, "[t]he average jury award for cases that actually go to trial is $1.2 million."[214] Thus, in order for a landlord to maintain insurance that adequately covers the risk of million dollar settlements, the cost of that insurance will be redistributed to the tenants through increased rent.[215] As a result, affordable living will decline throughout Maryland. Landlords' new roles as insurers of their tenants' personal safety will have economic ramifications on those who need protection the most, yet cannot afford an increase in rent.

One scholar acknowledges the problem in the allocation of costs, stating:

> [W]hile raising rents for improved security may be feasible in luxury buildings, it is unrealistic to attempt to require tenants in poor, crime-ridden neighborhoods to spend substantial additional sums in rental payments for the most effective crime deterrents available. Moreover, landlords may be unable to raise rents, because of rent control legislation. Thus, faced with a severe financial burden due to greater security requirements, many landlords of deteriorating inner city housing, already operating at low profit margins, may abandon their unprofitable buildings, leading to further urban decay and more crime.[216]

211. Anthony A. Babcock, Peterson v. Superior Court*: What Happened to the Paramount Policy?*, 28 PAC. L.J. 373, 413 (1997).
212. This expectation is based on the rationale expressed in Hemmings II that landlords are in a "better position to abate the danger." *See* Hemmings II, 375 Md. at 539, 826 A.2d at 453.
213. Rental Housing Online, *Landlord Liability for Criminal Acts and Activities, at* http://www.cses.com/manage/liability.htm (last visited Oct. 10, 2004).
214. *Id.*
215. *See* Kevin J. O'Donnell, *Landlord Liability for Crime to Florida Tenants–The New Duty to Protect from Foreseeable Attack*, 11 FLA. ST. U. L. REV. 979, 1002 (1983) (discussing the economic consequences of landlord liability for third party criminal attacks).
216. Haines, *supra* note 30, at 351.

Landlords will be at a disincentive to invest in inner-city housing based on the fact that criminal activity may be more rampant, placing them in a vulnerable position of liability.[217]

Additionally, if landlords' cost of insurance increases based on the liability landlords face after the decision in Hemmings II, it is likely that landlords with few properties will suffer the economic consequences of the decision rather than those landlords who own more property. Larger rental companies can afford insurance coverage and the added cost of security measures to protect tenants from criminal acts. On the other hand, landlords with few properties may not have adequate resources to obtain insurance. In recent years, insurance policy costs have risen for landlords, while the coverage has decreased.[218] The landlords with properties in high crime areas may be unable to afford or receive adequate insurance coverage.[219]

G. *Allocation of the Duty of Protecting Citizens from Criminal Acts Should Remain with the Government, Not the Private Sector*

Judicial decisions "holding a landlord liable for a third party's criminal actions against tenants, represent a shift of the public policing responsibility to landlords."[220] Such duty can be characterized as "a duty of crime prevention."[221] Clearly, "establishing the broader principle—that a landlord can be responsible for criminal activities on leased premises—has opened the door to an extension of the landlord's duty far beyond control and maintenance of the physical premises to direct control of the conduct of others."[222]

---

217. *See id.*

218. Ray A. Smith, *Apartment Owners Face Growing Liability: Rise in Potential Dangers and Resulting Suits Send Insurance Premiums Higher*, WALL ST. J., Apr. 24, 2002, at B8. Specifically, Smith states that "[p]remiums jumped an average 60% to 70% in 2001 from a year earlier, and 50% to 100% for policies expiring at the end of 2002." *Id.* (citation omitted). Smith further states:

> In 1999, the cost of liability insurance for an apartment property averaged $20 per unit with no deductible required. . . . So a company with a portfolio of 5,000 units, for example, would pay a premium of $100,000. Nowadays, that cost averages $45 to $50 per unit, and requires a minimum $5,000 deductible. The average deductible is closer to $25,000. That same company would now pay a premium of $250,000 or more.

Id. (citations omitted).

219. *See* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 791 (1992) (stating that "[b]ecause of the high costs of discharging their duty and the numerous possibilities for exposure to other forms of liability, landlords are likely to abandon the landlord business rather than meet the increased responsibilities").

220. *Id.* at 707.

221. *Id.*

222. *Id.* at 708.

The bottom line question is how can a landlord control the actions of others? Regardless of locks, security gates, charlie-bars, or adequate lighting, a landlord's duty under Hemmings II extends to control the actions of third parties.[223] Likely, this control will fall into the hands of hired security guards; however, hired security guards are not law enforcement officers maintained by the government.[224] Despite the effectiveness of security measures, public policy dictates that the duty to protect from criminal acts of third parties lies with law enforcement officers.[225] Landlords are not police officers; even if landlords hire pseudo-police officers, society has not placed its trust in landlords to maintain public safety.[226] Public safety and protection from criminals remains in the hands of the government through the police force, not landlords.[227]

---

223. *See id.* at 688. Such "tort actions, alleging landlord liability for the criminal actions of third parties, present several inconsistencies beyond the obvious challenge to landlord immunity. For example, such causes of action seem inconsistent with the common law doctrine that there is no duty to rescue or protect another." *Id.*

224. *See id.* at 785-86. Specifically, the author states that:

> The trend of increasing the responsibility of landlords to police their properties encourages this private approach to crime fighting. From 1969 to 1990, the value of private security industries rose from about $2.5 million to $18 billion annually, and the number of employees grew from fewer than 300,000 to nearly two million. Currently private security service personnel outnumber public law enforcement personnel by more than two to one. Despite this growth, private security personnel are virtually unregulated and are generally less trained than their public counterparts.
>
> There is direct evidence that landlords have responded to crime with vigilante-type, private security measures. For example, in Brooklyn, private police forces are 'hired by landlords to oust drug dealers when the police cannot. . . . The company's tools are the same ones employed by its adversaries: violence and intimidation.' In one federally subsidized apartment complex, the Federal Housing and Urban Development Office authorized rent levels high enough to pay $655,200 annually to one such security company. These security services effectively operate to rid dangerous and drug-infested properties of crime. However, the cost of this effectiveness is unrestrained power in the hands of private citizens. As one guard commented, "If they spill one pin drop of our blood, we spill gallons of theirs. . . . The cops have to play by the rules. . . . But no one knows what we do."

Id.

225. *See id.*

226. *See id.* at 791 (stating that "landlords who do undertake these private policing responsibilities present an undesirable risk of unrestrained vigilantism").

227. *See id.* (stating that "treating landlords as cops is not the answer to crime control, but creating incentives for landlords to be responsible property investors and managers may be").

V. CONCLUSION

This comment rejects the notion that landlords should be the ultimate insurance policy for tenants. Although the Hemmings II decision has established a duty, the criminal acts of third parties are the superseding cause of injury, over which the landlord has little or no control. If the question reaches a jury, it follows that the issue of causation will be the most difficult hurdle to overcome.

Moreover, separate incidences of criminal activity are difficult to forecast, notwithstanding a high crime area. If, however, one assumes that criminal activity is easy to foresee, it follows that the tenant has the responsibility to take action to protect him or herself from criminal activity. Individual responsibility must not be discarded through the imposition of duties, as the court in Hemmings II clearly does.

The overarching policy considerations weigh heavily in favor of imposing no duty on landlords. Specifically, the economic consequences for tenants may affect those tenants who can least afford it. If landlords increase rent to cover added insurance costs, the middle-income tenants will not suffer. Rather, the lower income tenants will be displaced.

Finally, citizens place their trust for protection against crime, not in landlords, but in police officers. In allocating a duty upon landlords to protect against third party criminals, the court has usurped public policy.

Teresa D. Teare