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A FRESH LOOK AT PREMISES LIABILITY AS AFFECTED BY THE WARRANTY OF HABITABILITY

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For centuries, the law of landlord premises liability was marked by consistency and predictability. Not only were authorities in agreement as to the content of the law, but there was also universal consent as to the underlying rationales. This state of the law, developed in feudal England, was transported to this country and remained basically unchanged until well into the current century.

Recent years, however, have been marked by upheaval and instability. The law of premises liability, once so firmly based on the estate conveyance theory, is now being unsettled by concepts of contract, warranty, negligence, and strict liability. As a result, the landlord in many jurisdictions can no longer rely on traditional immunity but instead must respond to increased duties owing to tenants. In many jurisdictions, courts face a considerable task in defining the scope of these increased duties, since they must struggle to accommodate the various available bases.

This article will present the different positions that courts have taken during these recent years of experimentation in landlord premises liability, discuss how courts have become muddled in sorting out the various theories, and propose a system of liability that would be fair and soundly based on modern policy considerations. We shall first place the question in context by considering the traditional theories of liability. We will then discuss the statutory impact on landlord responsibility and consider the recent tort and warranty theories that set the stage for the period of experimentation.

Our ultimate objective is to arrive at a proposal that we feel is workable, combining and reconciling various theories that courts have recently considered. Specifically, we shall propose a theory of liability that is not based solely on the question of who had control over the defective item causing the injury, but one that also considers the discoverability of the

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defect and whether the defect arose before or after the beginning of the lease. This will present a system of premises liability that is more rational and less arbitrary than the traditional view. It will be a step toward resolving the confusion that has arisen in recent years in this area of premises liability.

I. CLASSIC TORT THEORY

Although leases of real property were initially considered contractual arrangements,[1] the view soon developed that a lease was essentially the conveyance of an estate. As early as the sixteenth century courts had determined that the lease was primarily a matter of property, not contractual, significance.[2] This characterization led directly to several principles of landlord-tenant law that went fundamentally unexamined for much of the next four hundred years.[3]

A significant effect of this development took place in the general area of premises liability, the legal responsibility to answer for damage or harm that occurred on leased property. As the lease came to be regarded as a conveyance of premises, the tenant came to be viewed as the "owner" of those premises, subject to many of the responsibilities of ownership. The landlord retained only a reversionary interest, and had no more right to enter the premises without permission of the tenant than a stranger.[4] Possession and control of the premises were entirely the tenant's. Because the premises were "sold" for the term, courts applied the doctrine of caveat emptor to the transaction, leaving the landlord with no responsibility for defective conditions that may have existed at the time of

1. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], at 179 (rev. ed. 1973); 1 AMERICAN LAW OF PROPERTY § 3.11, at 202 (A.J. Casner ed. 1952) [hereinafter cited as ALP]; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 36 (1898).

2. 2 R. POWELL, *supra* note 1, ¶ 221[1], at 179; 1 ALP, *supra* note 1, § 3.11, at 202.

3. From this characterization was derived the notion that lease covenants were independent of each other. Breach of a covenant by one of the parties did not excuse breach of a different covenant by the other party. *E.g.*, Brown v. Bragg, 22 Ind. 122 (1864) (the lessor may not terminate the lease for failure to pay rent); Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938) (breach of a landlord's covenant to repair no defense to an action for rent); Fowler v. Bott, 6 Mass. 58 (1809) (the obligation to pay rent in a lease continues although the building is destroyed).

Since leases were not considered to be contractual agreements, the doctrine of anticipatory breach was inapplicable. The landlord, by this view, could not sue for rent until after it became due. Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 P. 178 (1930); Hermitage Co. v. Levine, 248 N.Y. 333, 162 N.E. 97 (1928).

Also, a landlord had no duty to mitigate damages when the tenant abandoned the premises. Contrary to the requirement of mitigation in contract law, the landlord could allow the property to remain vacant and sue for rent as it accrued. Becar v. Flues, 64 N.Y. 518 (1876), is a leading case.

4. Borders v. Roseberry, 216 Kan. 486, 532 P.2d 1366 (1975); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63, at 400 (4th ed. 1971).

the lease. The tenant-owner was, of course, responsible for maintenance and repair during the term. The upshot of these circumstances and conclusions was that the landlord was generally immune from liability for tortious occurrences on the premises.

The conceptual basis of this immunity was reinforced by the social and economic realities of the transaction. The medieval tenant was an agrarian specialist, undoubtedly more competent in inspecting the premises and effecting necessary repairs than his manor-born landlord. Generally, no sophisticated or complicated technological aspects of the premises required specialized knowledge, but if such knowledge was necessary, the tenant would have been as likely to possess it as the landlord. The objects of repair were totally accessible to the tenant, and because he leased for an extended term the tenant logically had a strong interest in keeping the premises in good repair. Most importantly, the principal interest of the tenant was to obtain a productive tract of land for farming purposes, with the existence or condition of any improvements of incidental importance.

While landlord immunity was thus born from the conceptual notion of lease as conveyance and nurtured by the economic and social conditions of Tudor England, it grew strong and hardy through the addition of a fairness argument peculiar to the premises liability sector of landlord-tenant law. The landlord should not be responsible, the courts held, because he had no control over the premises.[5] Surely, even today it seems overwhelmingly equitable to shield the owner of premises from liability for what happens after another person takes possession of the premises, especially if the owner has divested himself of his entire interest in the parcel, including the right of entry. The one obvious flaw is the existence of a condition on the premises, known to the landlord but undiscoverable by the tenant, that later leads to harm or injury. That one flaw led to the first exception to the general immunity rule: the "known but concealed condition" exception. Under that exception, the landlord could be held liable for damage or injury resulting from a latent defect of which the landlord was aware but which he failed to disclose to the tenant.[6] The rationale for this exception may have had a fraud-based origin, but it was soon reconciled with the caveat emptor doctrine through holdings that the

5. Korach v. Loeffel, 168 Mo. App. 414, 151 S.W. 790 (1912); Hollman v. Kayell Realty Co., 120 Misc. 546, 199 N.Y.S. 39 (1923); Berlin v. Wall, 122 Va. 425, 95 S.E. 394 (1918).

6. Anderson v. Shuman, 257 Cal. App. 2d 272, 64 Cal. Rptr. 662 (1967); Miner, Read & Garrette v. McNamara, 81 Conn. 690, 72 A. 138 (1909); Wright v. Peterson, 259 Iowa 1239, 146 N.W.2d 617 (1966); RESTATEMENT (SECOND) OF TORTS § 358 (1965); RESTATEMENT (SECOND) OF PROPERTY § 17.1 (1976); *see also* Eldredge, *Landlord's Tort Liability for Disrepair*, 84 U. PA. L. REV. 467 (1936); Note, *Landlord and Tenant—Liability of Landlord to Persons on the Premises—The "Concealed Defects" Exception*, 49 MICH. L. REV. 1082 (1951).

tenant retained the burden of inspecting the premises and discovering reasonably discoverable defects.[7]

This "known but concealed" exception was one of a small handful of exceptions that emerged over the years.[8] In developing each of these exceptions, courts demanded that the exception be reconciled with the control theory. Courts even found a way to tie the covenant to repair exception to the control theory, although the two initially seemed inconsistent. Their rationale was that, when the landlord undertakes the obligation to repair, he also retains the privilege to enter the premises in order to assess the need for repairs and to effect them.[9] With respect to this and to each of the other exceptions, courts felt compelled to preserve the caveat emptor underpinnings of the landlord-tenant relationship by finding some element of control.

The general immunity doctrine and its few exceptions constituted the evolving common law for several centuries. The landlord was immune unless one of the exceptions could be proved. As will be seen, these doctrines retain significant vitality even today.[10] But change finally came, first in the economic and social conditions underlying the conceptual basis of immunity, and later in the law itself. Twentieth-century tenants often live in multiple-unit dwellings where inspection of even the significant systems serving them is not possible. Short-term leases predominate, undermining the incentive to repair. Highly technical, centralized systems defy amateur repair and require significant capital expenditures. Most important, the basic expectation of the great majority of modern tenants is "a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat,

7. Daulton v. Williams, 81 Cal. App. 2d 70, 183 P.2d 325 (1947); Shegda v. Hartford-Connecticut Trust Co., 131 Conn. 186, 38 A.2d 668 (1944); Kurtz v. Pauly, 158 Wis. 534, 149 N.W. 143 (1914); *see also* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?*, 1975 WIS. L. REV. 19, 51.

8. *See generally* Love, *supra* note 7, at 49–78; *see also* W. PROSSER, *supra* note 4, §§ 56–64, at 339–412. These exceptions are stated by the RESTATEMENT (SECOND) OF TORTS (1965) as follows: (1) where the lessor contracts to repair (§ 357); (2) where the injury results from an undisclosed dangerous condition known to the lessor (§ 358); (3) where the premises have been leased for purposes involving admission of the public (§ 359); (4) where the injury results from a defective part of the premises retained by the lessor but which the lessee is entitled to use (§ 360); (5) where the defective part is retained by the lessor but is necessary to the safe use of the leased part (§ 361); and (6) where the injury results from a negligent repair by the lessor (§ 362).

9. Fiorntino v. Mason, 233 Mass. 451, 124 N.E. 283, 283–84 (1919); *accord* Crowe v. Bixby, 237 Mass. 249, 129 N.E. 433 (1921) (applying rule set forth in *Fiorntino*); Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 673–74 & n.40 (1949).

10. *See infra* notes 77–80, 127–37, and accompanying text.

light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."[11]

These changes and the reactions to them, first by legislatures, then by courts, have occupied most of the history of landlord-tenant law in this century. For the first fifty years, legislatures predominated, with courts trailing along to insure that nothing created by statute worked to undermine seriously the several centuries of development in the common law.

II. 1900–1950: STATUTORY CHANGES CONCERNING PREMISES LIABILITY

In the first half of this century, state legislatures enacted statutes imposing duties upon landlords concerning the maintenance of leased premises. These duties ranged from a general duty to keep the premises in good repair[12] to such specific duties as maintenance of a burning light in common hallways[13] or provision of "a suitable privy or water closet."[14] Because many of these statutes were enabling rather than self-executing, the question soon arose whether these statutes could be the basis for the eradication of aspects of the landlord's traditional immunity.

Judicial responses took one of two general forms. *Johnson v. Carter*[15] is often cited as the prototype of that strong majority of cases holding that landlord immunity was unaffected by such legislation. In *Johnson* the plaintiff's claim for personal injury, based on the alleged violation of such a statute, was rejected. The Supreme Court of Iowa noted the com-

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

12. *E.g.*, Chambers v. Lowe, 117 Conn. 624, 169 A. 912, 913 (1933) ("each building used as a tenement, lodging or boarding house and all parts thereof shall be kept in good repair"); Palmigiani v. D'Argenio, 234 Mass. 434, 125 N.E. 592, 592 (1920) ("every structure and part thereof and appurtenant thereto shall be maintained in such repair as not to be dangerous"); Annis v. Britton, 232 Mich. 291, 205 N.W. 128, 129 (1925) ("every dwelling and all parts thereof shall be kept in good repair by the owner"); *see also* Goldkopf v. Metropolitan Life Ins. Co., 149 Misc. 663, 268 N.Y.S. 126 (1933); Tucker v. Wagner, 132 Misc. 402, 229 N.Y.S. 769 (1928).

13. McGowan v. Morgan, 160 A.D. 588, 145 N.Y.S. 787 (1914); *accord* Harris v. Joffe, 28 Cal. 2d 418, 170 P.2d 454 (1946) (statute requiring lessor to keep common passageway lighted).

14. Hamilton v. Baugh, 335 Ill. App. 346, 82 N.E.2d 196 (1948); *accord* Hull v. Bishop-Stoddard Cafeteria, 26 N.W.2d 429 (Iowa 1946) (statute requiring lessor to keep elevators in safe operating condition).

15. 218 Iowa 587, 255 N.W. 864 (1934). The pertinent statute required that the leased premises "be kept in good repair by the owner" and that "the roof shall be kept so as not to leak and all rain water shall be so drained and conveyed therefrom as not to cause dampness in the walls or ceilings." IOWA CODE § 6392 (1931) (repealed Jan. 1, 1981). Plaintiff alleged that a basement wall of his leased home had been negligently repaired and further weakened by water seepage. The wall eventually collapsed, injuring the plaintiff. The plaintiff sued in tort, but the trial court granted the defendant's demurrer and the Supreme Court of Iowa affirmed.

mon-law rule of nonliability, looked to the statute[16] for any changes in this rule, and found that "the only liability imposed for violation of this provision of the statute is penal in its nature."[17] Similarly, in *Chambers v. Lowe*[18] the Connecticut Supreme Court of Errors, while admitting that statutory language requiring premises "to be kept in good repair" was theoretically broad enough to provide a tort claim for personal injury, nevertheless applied the common-law rule.

Both decisions pointed out that the statutes in question failed to provide expressly for a civil cause of action for the tenant. Most courts concurred that such an omission was a reflection of legislative intent not to deviate from common-law landlord immunity.[19] But *Chambers* also made clear that the control doctrine was an equally important basis for the decisions. In *Chambers* the court determined that regulation of "tenement, lodging and boarding houses" did not affect responsibilities for the apartments within those buildings because those were areas over which the landlord had no control.[20]

The courts of New York and Michigan offered a contrasting view of the general issue. Beginning with the landmark case of *Altz v. Leiberson,*[21] a series of New York decisions imposed civil liability upon landlords for breach of statutory duties leading to damage or injury.[22] In *Leiberson,* in which plaintiff sought damages for personal injury, Judge Cardozo declared that the New York tenement house law had "changed the ancient rule."[23] As in other states, this statute simply required that the premises be kept in good repair. Nevertheless, Cardozo found that this statutory requirement undermined the control doctrine which provided the basis for immunity. It followed that the legislature must have been motivated to change the common law.

The court went on to substantiate its decision by finding that the statute also implicitly allowed a civil cause of action:

16. IOWA CODE § 6392 (1931) (repealed Jan. 1, 1981).

17. *Johnson,* 255 N.W. at 866.

18. 117 Conn. 624, 169 A. 912 (1933).

19. Most of the statutes provided for penal, but not civil, liability. No state had an express provision for personal injury or property damage liability. Some cases emphasized this, stating that the penal measures were the exclusive means of enforcement. *E.g.,* Hallock v. Smith, 207 Ala. 567, 93 So. 588 (1922); Vallen v. Cullen, 238 Mass. 145, 130 N.E. 216 (1921); Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).

20. *Chambers,* 169 A. at 913.

21. 233 N.Y. 16, 134 N.E. 703 (1922).

22. Morris v. City of New York, 146 Misc. 36, 261 N.Y.S. 228 (1932); Tucker v. Wagner, 132 Misc. 402, 229 N.Y.S. 769 (1928); Wechsler v. United Produce Dealers Ass'n, 126 Misc. 563, 214 N.Y.S. 136 (1926). *Contra* Israel v. Toonkel, 134 Misc. 327, 235 N.Y.S. 285 (1929); Block v. Baldan Realty Co., 129 Misc. 906, 223 N.Y.S. 518 (1927).

23. *Leiberson,* 134 N.E. at 704.

> We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.[24]

Despite the stature of the author of the *Leiberson* opinion and its consistent following in that state, the New York position has been a relatively lonely one, although it has received some support from Michigan. Three years after *Leiberson,* the Michigan Supreme Court also held that a plaintiff had a cause of action for personal injury for breach of a statute requiring landlords to keep their premises in good repair.[25] That court held that the statute imposes a duty of care on the landlord, the breach of which constitutes negligence per se.[26]

Even at the midpoint of the century, however, most courts continued to adhere to the common law in the face of increasingly specific statutes.[27] Plaintiffs continued to urge that these statutes imposed a duty of care upon the landlord, the breach of which provided the basis for a civil cause of action for personal injury. Most states continued to disagree, opting to adhere to the common law unless compelled to do otherwise by the express language of the statute:

> Unless there is a direct liability imposed upon the landlord these statutes are generally held not to alter the common law relationship of landlord and tenant, but merely to give the tenant a right of action to enforce better housing conditions. It is generally held that such statutes are not to be extended by implication.[28]

Except in New York and Michigan, the traditional immunity rule held firm despite the many legislative enactments. The majority rule could have been otherwise, however, for the control doctrine does not ineluctably lead to the conclusions reached by the majority. But midway through the the twentieth century *Johnson v. Carter* and its kin were clearly the rule, and *Altz v. Leiberson* clearly the exception. The New York and Michigan views would prove to be prophetic, however, as changes in the next two decades would confirm their more liberal position.

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24. *Id.*

25. Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925).

26. *See also* Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1950); Malosh v. Thompson, 265 Mich. 320, 251 N.W. 346 (1933).

27. *See, e.g.,* Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).

28. 43 N.W.2d at 416; *see also* Callahan v. Loughran, 102 Cal. 476, 36 P. 835 (1894); Palmigiani v. D'Argenio, 234 Mass. 434, 125 N.E. 592 (1920).

III. 1950–1970: CHANGING ASSUMPTIONS WITHIN COMMON-LAW TORT THEORY

During the 1950's and 1960's, much occurred to alter the relative positions of landlord and tenant. The landlord, at one time protected from liability by the shield of caveat emptor, found himself subject to increased responsibility as more and more courts came to apply first tort and then "warranty" principles to premises liability cases. The tenant, formerly the victim of a control doctrine that allowed recovery only under narrow exceptions, came to be the beneficiary of what many courts saw as a less mechanical view taking into account all circumstances. Courts began to base civil causes of action for personal injury on statutes that imposed duties on landlords regarding upkeep of leased premises, even when the statutes did not expressly provide for such causes of action.

This movement for expanded landlord liability was induced in part by the proliferation during that period of municipal housing codes. While the first code was adopted in 1901 by the City of New York, the move to widespread adoption took place after 1954. The move began when the administrator of the Housing and Home Finance Administration interpreted a congressional mandate that communities applying for certain urban renewal and other funds have a "workable program" for community betterment to require that the applicant community adopt a housing code.[29] This connection with slum prevention and prevention of other forms of physical blight reflected the view that such codes were intended to protect buildings, not the people within—an outlook consonant with previous interpretations of state dwelling repair laws.[30] This view was reinforced by omission from standard codes of any reference to private rights.[31] Nevertheless, a series of decisions evolved holding that private relationships were indeed altered.

A. *1950–1970: The Growing Effect of Statutes and Ordinances on Tort Responsibility of the Landlord*

The United States Court of Appeals for the District of Columbia issued a significant early opinion signaling change in this area of landlord-tenant relations. In *Whetzel v. Jess Fisher Management Co.*[32] the court stated:

29. Housing Act of 1954, ch. 649, § 303, 68 Stat. 623 (codified as amended at 42 U.S.C. § 1451(c) (1978)); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM L. REV 1254, 1260 n.19 (1966).

30. Gribetz & Grad, *supra* note 29, at 1259–60.

31. *E.g.*, Tenement House Act, 1901 N.Y. Laws ch. 334.

32. 282 F.2d 943 (D.C. Cir. 1960). In this case, the plaintiff-tenant occupied one unit in an apartment house owned by the defendant in the District of Columbia. Four months prior to the plain-

"A penal statute which is imposed for the protection of particular individuals establishes a duty of care based on contemporary community values and ethics. The law of torts can only be out of joint with community standards if it ignores the existence of such duties."[33] In the court's view, the law of torts had been "out of joint" for a number of years. Many other courts soon agreed.[34] The *Whetzel* court started from the proposition that

> where legislation prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk, and harm to the interest sought to be protected comes about through breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities.[35]

This principle of general tort law was long established.[36] Remarkably, during the previous half century this principle had seldom been considered in premises liability cases, much less applied or expressly rejected. Under this principle the *Whetzel* court might have held that a statutory violation constituted negligence per se.[37] The court, however, stopped short of that result. It held instead that violation of a statutory duty to repair is evidence of negligence.[38] Other courts were willing to go further to hold expressly that violation of a municipal housing code was negligence per se.[39]

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tiff's possession, the plaster had been pronounced in sound condition by a contractor hired by the defendant to inspect and repair. Housing regulations for the District of Columbia required the landlord to put the premises in a safe condition prior to rental, and required the tenant to refrain from occupying the unsafe premises. The plaintiff, after four months of occupation, was injured when the bedroom ceiling fell. The plaintiff brought an action for damages, but the trial court granted summary judgment for the defendant. On appeal, the court of appeals reversed the trial court and remanded the case for a new trial, stating that the housing code was a police regulation which affected the landlord's tort responsibility. *Id.* at 950. A violation was not necessarily negligence per se, but was at least evidence of negligence. Thus, if the plaintiff established a prima facie case showing a violation, the court must send the case to the jury with instructions on statutory negligence and evidence of negligence. *Id.*

33. *Id.* at 946.

34. *See, e.g.*, Morgan v. Garris, 307 F.2d 179 (D.C. Cir. 1962); National Bank v. Dixon, 301 F.2d 507 (D.C. Cir. 1961); McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); Saracino v. Capital Properties Assocs., 50 N.J. Super. 81, 141 A.2d 71 (1958); Frion v. Coren, 13 Wis. 2d 300, 108 N.W.2d 563 (1961).

35. *Whetzel*, 282 F.2d at 946 (quoting 2 F. HARPER & F. JAMES, TORTS 997 (1956)).

36. W. PROSSER, *supra* note 4, at § 36; RESTATEMENT (SECOND) OF TORTS §§ 285–86 (1965); *see generally* Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1932); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233 (1960).

37. W. PROSSER, *supra* note 4, § 36, at 200.

38. *Accord* Soles v. Franzblau, 352 F.2d 47 (3d Cir. 1965), *cert. denied*, 383 U.S. 911 (1966); Gula v. Gawel, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966); Montgomery v. Engel, 179 N.W.2d 478 (Iowa 1970); Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 246 N.E.2d 798 (1969).

39. Crawford v. Palomar, 7 Mich. App. 21, 151 N.W.2d 236 (1967) (relying on Morningstar v.

The essence of these decisions is that a landlord will be held to a standard of due care and that a violation of a municipal code at least indicates that the standard has been breached. This move toward a fault-based analysis brought with it a significant amount of related tort law. It soon became clear, for example, that landlords held to a negligence standard could avail themselves of traditional negligence defenses, including contributory negligence[40] and assumption of the risk.[41] *Whetzel* itself raised the confusing possibility that a tenant could be contributorily negligent simply by occupying premises he knows do not comply with housing regulations.[42] Courts have also applied the principles of proximate causation, requiring that the injury be a reasonably foreseeable result of the landlord's statutory violation.[43] Courts have discussed the degree of knowledge of the dangerous condition that must be attributable before liability can be imposed,[44] and determined whether the landlord had a duty to inspect to discover violations.[45]

Following *Whetzel,* other federal courts similarly began to base tort liability on violations of housing codes and other protective legislation.[46] In the meantime, state courts were steadily arriving at the same point of view. New York and Michigan were, of course, already there.[47] Others soon followed.[48]

Strich, 326 Mich. 541, 40 N.W.2d 719 (1950)); *see also* Panaroni v. Johnson, 158 Conn. 92, 256 A.2d 246 (1969).

40. Ziskin v. Confietto, 137 Conn. 629, 79 A.2d 816 (1951) (tenant who knowingly used defective premises guilty of contributory negligence at law if danger is obvious); Prudhomme v. Berry, 69 So. 2d 620 (La. Ct. App. 1953) (tenant contributorily negligent as to injuries received when floor caved in, since defect was apparent due to hole in floor and fact that floor shook when she walked on it); *see also* Nelson v. Parkhurst, 304 So. 2d 72 (La. Ct. App. 1974); Awad v. McColgan, 357 Mich. 386, 98 N.W.2d 571 (1959).

41. Green v. Southern Furniture Co., 94 So. 2d 508 (La. Ct. App. 1957); Howe v. Gambuzza, 15 N.J. Super. 368, 83 A.2d 466 (1951); Settles v. Stobridge Lithographing Co., 101 Ohio App. 479, 136 N.E.2d 925 (1956).

42. *Whetzel,* 282 F.2d at 950.

43. Klein v. Price, 331 F.2d 800 (D.C. Cir. 1964) (where wife during scuffle pushed husband through railing of second-story porch, landlord is not liable, for he need not provide a "safe arena" for such altercations); Blue Grass Restaurant Co. v. Franklin, 424 S.W.2d 594 (Ky. 1968) (court found lack of handrail on stairway was proximate cause of plaintiff's injuries from falling); Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 246 N.E.2d 798 (1969) (violation of ordinance requiring automatic sprinkler systems does not in itself give rise to cause of action, but is only evidence of negligence).

44. National Bank v. Dixon, 301 F.2d 507 (D.C. Cir. 1961); Benjamin v. Kimble, 43 Misc. 2d 497, 251 N.Y.S.2d 708 (1964).

45. *Dixon,* 301 F.2d 507; McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961).

46. *E.g.,* Soles v. Franzblau, 352 F.2d 47 (3d Cir. 1965), *cert. denied,* 383 U.S. 911 (1966).

47. *See supra* notes 22, 25–26, and accompanying text.

48. Panaroni v. Johnson, 158 Conn. 92, 256 A.2d 246 (1969); Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 246 N.E.2d 798 (1969); Saracino v. Capital Properties Assocs., 50 N.J. Super. 81, 141 A.2d 71 (1958); Michaels v. Brookchester, 26 N.J. 379, 140 A.2d 199 (1958); Haar-

The result generally was to move the issue of premises liabililty from the rigid categories of the past to a more flexible consideration of reasonableness standards.[49] At the same time, courts were considering the inclusion of traditional defenses to tort liability[50] and incorporating other tort principles as well. Liability to third parties, with accompanying considerations of proximate cause, became an active issue.[51] Some courts held landlords liable for failing to provide adequate security measures, despite the absence of statutory or express lease provisions compelling such an obligation, and despite the fact that some of these occurrences took place in private dwelling areas rather than in common areas.[52] Clearly, the touchstone requirement of control was losing its force.

Like most movements, this one was neither unanimous nor universal. Some courts continued to hold to the traditional view.[53] But the momentum was strong in the other direction. More and more courts recognized that tenants were within the class of persons intended to be protected by housing quality legislation,[54] and that legislatures must have intended for tenants to have causes of action in case of breach to assure effective enforcement of those standards.[55]

B. The Introduction and Implications of the Warranty of Habitability

Into this world of changing assumptions came the collateral idea that the landlord "warrants" that leased premises are, and will be, suitable for inhabitation. To some extent this development flowed naturally from two other trends. The first was the law of sales contracts for personal property. In 1906 the Commissioners of Uniform State Laws adopted the Uni-

meyer v. Roth, 113 Ohio. App. 74, 177 N.E.2d 507 (1960); Frion v. Coren, 13 Wis. 2d 300, 108 N.W.2d 563 (1961).

49. McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 246 N.E.2d 798 (1969); Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1950); Daniels v. Brunton, 9 N.J. Super. 294, 76 A.2d 73 (1950).

50. *See supra* notes 40–41.

51. *E.g.*, Crawford v. Palomar, 7 Mich. App. 21, 151 N.W.2d 236 (1967); *see* Pinsky, *Real Property*, 15 RUTGERS L. REV. 276, 278 (1961).

52. Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (1969), *rev'd on other grounds*, 38 A.D.2d 407, 330 N.Y.S.2d 569, *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973); Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); *see infra* notes 109–18 and accompanying text.

53. Where a tenant died as a result of fumes from an unvented gas stove in the housekeeping room of a boarding house, one court stated that a statute requiring that "[a]ll public buildings which may be used as a place of . . . occupancy . . . and all other buildings or parts and appurtenances thereof . . . shall be so constructed, erected, equipped, and maintained that they shall be safe and sanitary for their intended use and occupancy," was too vague to alter the common-law duties imposed upon a landlord. Branham v. Fordyce, 103 Ohio App. 379, 145 N.E.2d 471, 475 (1957).

54. *E.g.*, McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal Rptr. 260, 263 (1961).

55. *Id.*

form Sales Act, which stated that sales of "goods" by a "seller" included an implied warranty of merchantability if the purchase had been made by description.[56] The Commissioners' comment noted that this standard was chosen in lieu of a less stringent one covering only "latent" defects about which the seller had been negligent,[57] a harbinger of some problems that currently infect warranty questions in the landlord-tenant field.[58] The Uniform Sales Act was replaced in the 1950's and 1960's by the Uniform Commercial Code, which required that a warranty of merchantability be implied in every sale of goods by a merchant.[59] The official comment to the warranty section makes clear that this provision was intended to broaden the scope of coverage provided by the Uniform Sales Act[60]—a result that has, in fact, taken place.[61]

The second force leading to the notion that contracts to lease dwelling units contain an implied warranty of habitability was a change in judicial attitudes toward the nature of such leases. The principle that landlords offered no implied guarantees regarding the condition or fitness of their leaseholds was a pillar of the common law of property.[62] One strength of this doctrine came from its consistency with the common-law view of the leasehold as an estate in land.[63] Just as sellers of other interests in real property did not—and do not—warrant anything not included in the four corners of the transferring document,[64] neither did the lessor. A lease interest was considered in the same manner as any other estate, and any protections the buyer-lessee wanted had to be explicitly set out in the contract.[65] Nothing would be implied.

During the nineteenth century, however, a small loophole appeared. This exception to the "no warranty" rule required landlords of furnished dwellings, whether the lease was for "a few days, a few weeks, or months,"[66] to warrant that such premises were "in a proper condition for immediate use as a dwelling."[67] The reasons given for the exception were that lessees of such property did not have the customary opportunity

56. UNIF. SALES ACT § 15(2) (1906).
57. *Id.* § 15 commissioners' comment.
58. *See infra* Parts IV & V.
59. U.C.C. § 2-314 (1976).
60. *Id.* § 2-314 official comment.
61. *See generally* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE §§ 9.6–.8 (2d ed. 1980).
62. 1 ALP, *supra* note 1, § 3.78, at 346.
63. *Id.* §§ 3.11–.12, at 202–05.
64. 3 *id.* §§ 12.124–.126, at 454–60.
65. 1 *id.* §§ 3.11–.12, at 202–07.
66. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892); Smith v. Marrable, 11 M. & W. 5, 152 Eng. Rep. 693 (Ex. 1843).
67. *Ingalls*, 31 N.E. at 287.

to inspect, and that these lessees deserved unusual protection because they were more interested in the dwelling itself than the land beneath.[68] Eventually, similar considerations were invoked to justify implication of such a warranty in sales of new homes.[69] For decades commentators noted the similarity between housing subject to this short-term lease exception and many other kinds of dwelling units.[70] But not until over seventy years later, when a New York family rented what proved to be a rat-infested luxury home on Diamond Head, did a court recognize the applicability of the exception to anything but "temporary" housing.[71]

Then the floodgates opened. Within five years a host of appellate courts had decided that the trends cited above led inexorably to the conclusions that housing leases should be treated as contracts rather than estates, and that a warranty of habitability should be implied into each of those contracts.[72] Reference was often made to local housing codes in order to provide the substantive content of the warranty.[73] Within another five years, over half the country's legislatures had joined the surge.[74] The warranty of habitability had become an accomplished fact.

Yet in the final rush to adjudicate, then legislate, an implied warranty of habitability in leases, the public bodies collectively ignored both the past and the future. The prime foundation for implying a warranty in both real and personal property transactions had been the buyer's lack of opportunity to examine effectively before lease or sale. The focus was personal, limited in time, and limited solely to protection from undiscoverable defects. But when the new warranty of habitability began to be widely adopted a rationale of a more global and impersonal nature was established—the need to preserve a dwindling stock of low-cost urban housing.[75] This deviation led directly to a larger, more substantive one.

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68. *Id.*

69. *See* cases collected in Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S. ILL. L.J. 178.

70. *E.g.*, Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960).

71. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1964); *see also* Annot., 40 A.L.R.3d 646 (1971).

72. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 915 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Foisy v. Wyman, 83 Wn. 2d 22, 515 P.2d 160 (1973).

73. *See, e.g., Javins*, 428 F.2d at 1072–73; *Mease*, 200 N.W.2d at 796.

74. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD-TENANT §§ 3.30–.45 (1980).

75. The *Javins* court stated:

> The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to

While a need to protect buyers from undiscoverable defects naturally wanes as the product is used over time, the need to preserve urban housing never lessens. The warranty was thus quickly extended throughout the tenancy in the form of a duty to maintain and repair, regardless of the duration of the lease. Thus another bastion of the common law fell; never before had tenants been afforded an implied right to have their landlords repair the leased premises.

Thus, within a very short period of time the courts undercut all of the basic premises upon which the allocation of traditional tort responsibility between the landlord and the tenant had rested, and simultaneously shifted the central emphasis of landlord-tenant relations from property to contract. Moreover, the courts chose the term "warranty" to describe the duty to the tenant, without recognizing that this term carried with it a considerable history and a well-defined meaning in its modern, personal property context. These fundamental changes created the possibility of modifications in matters traditionally the sole province of tort law, such as the source and scope of responsibility for damage or injury, the ability to waive that responsibility, remedies, and most basically, the relationship of responsibility to fault. Yet few of the courts adopting the implied warranty of habitability recognized this radical change in the traditional doctrine, and the Commissioners on Uniform State Laws did so only indirectly in the Uniform Residential Landlord-Tenant Act (URLTA).[76] Confusion was invited, and it came, with some jurisdictions sticking fast to tort law, some turning to contract-based warranty law, some using a bit of each separately or in tandem.

IV. PREMISES LIABILITY LAW SINCE 1970: TORT

The jurisdictions that use tort law as the vehicle for determining premises liability issues have broken into two general camps. Some retain the traditional rule of nonliability and its related control doctrine. The others employ a more flexible approach based on a general negligence test of reasonableness under the total circumstances.

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competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.

428 F.2d at 1079 (footnotes omitted). *See also* Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 6, 15, 36–37 (1967); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (The Kerner Report) 468–69 (1968).

76. UNIF. RESIDENTIAL LANDLORD-TENANT ACT (1972) [hereinafter cited as URLTA].

An example of the former is Kansas.[77] In 1975 the Kansas Supreme Court delineated the traditional exceptions to the landlord immunity rule and found none applicable.[78] The court reached this conclusion without consideration of whether a reasonable landlord would have done anything to remedy an allegedly dangerous condition, or whether the landlord had unreasonably created the damage by failing to finish certain repairs he had begun.[79] In a later case, the court again rejected the opportunity to adopt a negligence standard, relying once more on the control doctrine.[80]

Kansas is not alone. Other courts have maintained their allegiance to the immunity rule.[81] But the trend in those jurisdictions that continue to use a tort-based analysis seems clearly toward a negligence standard, either through interpretation of a specific statutory requirement or, as in many cases, absent any legislative mandate.

The New Hampshire Supreme Court provided a leading example of this trend toward a negligence standard in *Sargent v. Ross*.[82] Though clearly related to a warranty analysis,[83] *Sargent* is a prime example of the more flexible tort-based analysis. The primary basis for the decision is the court's recognition that the underpinnings of the traditional immunity rules no longer exist under current urban conditions. The court found the traditional exceptions not totally irrelevant, but applicable "only inasmuch as they bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm."[84] The court said that the plaintiff no longer must fit his case into a specific exception. Instead, the plaintiff must show that the landlord breached a general duty of care. The inquiry would be shifted "from the traditional question of 'who had control?' to a determination of whether the landlord, and the injured party, exercised due care under all the circumstances."[85] Consistent with *Sargent*, other courts were prompted to adopt a negligence standard by the recent acceptance of the warranty of habitability.[86]

The effect of legislation, presaged by the early cases in New York and

77. *See* Borders v. Roseberry, 216 Kan. 486, 532 P.2d 1366 (1975).
78. 532 P.2d at 1369–72.
79. *Id.*
80. Moore v. Muntzel, 231 Kan. 46, 642 P.2d 957 (1982).
81. Dunson v. Friedlander Realty, 369 So. 2d 792 (Ala. 1979) (landlord liable for voluntary repairs made negligently, for concealed defects known to him, and for failure to eliminate defects after he agreed to do so); Wingard v. McDonald, 348 So. 2d 573 (Fla. App. 1977); Watson v. McSoud, 566 P.2d 171 (Okla. App. 1977).
82. 113 N.H. 388, 308 A.2d 528 (1973).
83. *See infra* text accompanying notes 138–43.
84. *Sargent*, 308 A.2d at 534.
85. *Id.* at 535.
86. *E.g.*, Pagelsdorf v. Safeco Ins. Co., 91 Wis. 2d 734, 284 N.W.2d 55 (1979).

Michigan in the first half of the century,[87] and the growing strength of the general negligence doctrine, were recently demonstrated in Ohio. In 1980 the Ohio Supreme Court refused to impose tort liability on a landlord even though he had failed to comply with a statute requiring maintenance of the premises.[88] The court stated that there was "no express statutory establishment of a cause of action in tort,"[89] a position reminiscent of *Johnson v. Carter*[90] and *Chambers v. Lowe*.[91]

Within only sixteen months, the Ohio court reversed its position. In *Shroades v. Rental Homes, Inc.*,[92] plaintiff tenant was injured when an outside stairway leading to her apartment collapsed. At trial the court found that the stairway was under the tenant's exclusive control and was not a common area. Under the traditional view the landlord would have been immune. The supreme court nevertheless affirmed a judgment for plaintiff, following the growing trend toward a flexible negligence approach. The court went even further than some of its predecessors,[93] holding that the violation of the statute was negligence per se. The court was not bothered by the fact that the statutory listing of remedies did not include a civil action for tort damages; in the court's view, this listing was "cumulative" rather than exhaustive.[94]

The control test was also losing force in jurisdictions where no legislation imposed an obligation on the landlord to maintain the premises. In *Brennan v. Cockrell Investments,* the California Court of Appeals departed from the traditional immunity rule without reference to any statute other than a general law requiring all persons to use ordinary care in their activities.[95] The landlord in *Brennan* urged a determination in his favor based upon lack of possession or control. The court specifically rejected the argument, stating that the degree of control should be only one factor in deciding whether the landlord had acted reasonably under all the circumstances.[96] Other courts, also without any compulsion from a warranty of habitability, have agreed.[97]

In the decisions that adopt a general negligence test, certain issues are more significant than they were under the former rule of landlord immu-

87. *See supra* notes 21–26 and accompanying text.
88. Thrash v. Hill, 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980).
89. 407 N.E.2d at 498.
90. 218 Iowa 587, 255 N.W. 864 (1934).
91. 117 Conn. 624, 169 A. 912 (1933).
92. 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).
93. *See supra* notes 21–26, 32–55, and accompanying text.
94. *Shroades*, 427 N.E.2d at 777.
95. 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973).
96. *Id.* at 800–01, 111 Cal. Rptr. at 125.
97. *E.g.*, Presson v. Mountain States Properties, Inc., 18 Ariz. App. 176, 501 P.2d 17 (1972); Corrigan v. Janney, 626 P.2d 838 (Mont. 1981).

nity. These include questions of contributory negligence, proximate cause, and liability to third parties. Courts considered contributory negligence even under the traditional landlord immunity rule; an injured plaintiff who managed to fit his case under one of the recognized exceptions could still be barred from recovery if he had himself acted negligently.[98] But application of contributory negligence principles seems more appropriate and more doctrinally consistent when general negligence principles are applied to the conduct of both landlord and tenant. This recognition has no doubt sped the movement toward greater use of the doctrine.

All of the states adopting a general negligence test have followed the New Hampshire lead in regarding the element of control not as dispositive, but only as a factor in deciding the question of negligence. "Matters of control," the Massachusetts court said, "can be components of familiar negligence analysis [in that] they can affect such questions as reasonableness and foreseeability."[99] That court also introduced the element of notice into the analysis, stating that "a landlord should not be liable in negligence unless he knew or reasonably should have known of the defect and had a reasonable opportunity to repair it."[100] Under this approach, notice and control are relevant "only insofar as they bear on the ultimate question: Did the landlord exercise ordinary care in the maintenance of the premises under all the circumstances?"[101]

Foreseeability is generally an important element in the assessment of damages. General tort principles allow plaintiffs who establish liability, whether they be tenants or third parties, to collect for personal injuries, damage to personal property, and loss of income due to injury, so long as this harm was foreseeable.[102] But under a general negligence system, foreseeability also plays an active role in the initial determination of liability. Once foreseeability becomes a general component of premises liability analysis, an accompanying danger or opportunity, depending on perspective, exists to expand tenant causes of action. Two areas of recent concern exemplify this potential for expansion: the liability of landlords

98. *E.g.*, Houchin v. Willow Ave. Realty Co., 453 S.W.2d 560 (Ky. 1970); Branham v. Fordyce, 103 Ohio App. 359, 145 N.E.2d 471 (1957).

99. Young v. Garwacki, 380 Mass. 162, 402 N.E.2d 1045, 1050 (1980).

100. *Id.*

101. Pagelsdorf v. Safeco Ins. Co., 91 Wis. 2d 734, 284 N.W.2d 55, 61 (1979).

102. *See* Spar v. Obwoya, 369 A.2d 173 (D.C. 1977); Knapp v. Wilson, 535 S.W.2d 369 (Tex. Civ. App. 1976). In Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976), the court held it appropriate for a jury to consider aggravation of the tenant's alcoholism as a compensable injury.

for mental suffering that results from defective premises,[103] and the duty of landlords to provide security from criminal activity.[104]

Several cases have held landlords liable for mental suffering derived from wrongful eviction,[105] but a more difficult question arises when tenants claim mental suffering because they must continue to live in uninhabitable premises. In a recent Massachusetts case a tenant was allowed to recover on a counterclaim for reckless infliction of emotional distress that resulted when her apartment was repeatedly flooded by sewage water.[106] The Massachusetts high court was satisfied that the conduct of the landlord was "outrageous" and that the resulting emotional distress was "severe."[107] An important factor in the court's decision was that defendant "knew or should have known that emotional distress was the likely result of his conduct."[108]

Expansion of landlord liability has also occurred in the area of responsibility for criminal activity. The general position of the *Restatement (Second) of Torts* has been that the landlord is not required to make special provisions for security in the absense of a special relationship,[109] and several decisions have so held.[110] The rationale of these decisions is that the economic consequences of requiring security measures would ultimately and unfairly fall on the tenant,[111] and also that the action of the person committing the crime constitutes an intervening and superseding cause of the damage.[112] That the prevention of crime is generally consid-

103. Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1470–73 (1974).

104. Smith, *The Landlord's Duty to Defend His Tenants Against Crime on the Premises*, 4 WHITTIER L. REV. 587 (1982); Haines, *Landlords or Tenants: Who Bears the Cost of Crime?*, 2 CARDOZO L. REV. 299 (1981).

105. Richardson v. Pridmore, 97 Cal. App. 2d 124, 217 P.2d 113 (1950); Johnson v. Howard, 92 Ga. App. 96, 88 S.E.2d 217 (1955); Beasley v. Freedman, 256 Pa. Super. 208, 389 A.2d 1087 (1978); Brewer v. Erwin, 287 Or. 435, 600 P.2d 398 (1979); *see also* Annot., 6 A.L.R.4th 528 (1981); Annot., 17 A.L.R.2d 936 (1951).

106. Simon v. Solomon, 385 Mass. 91, 431 N.E.2d 556 (1982); *see also* Fair v. Negley, 257 Pa. Super. 50, 390 A.2d 240 (1978).

107. *Simon*, 431 N.E.2d at 562.

108. *Id.* at 561 (citing Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976)).

109. RESTATEMENT (SECOND) OF TORTS §§ 314, 314A, 315, 320 (1965).

110. Totten v. More Oakland Residential Hous., Inc., 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976); Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962).

111. *Goldberg*, 186 A.2d at 297–98.

112. *Id.* at 297; Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (court states, however, that landlord has duty to take steps to prevent crime in areas under his control if he has received notice); DeFoe v. W. & J. Sloane, 99 A.2d 639 (D.C. 1953); Johnston v. Harris, 30 Mich. App. 627, 186 N.W.2d 752 (1971), *rev'd*, 387 Mich. 569, 198 N.W.2d 409 (1972) (lower appellate court found criminal acts to be superseding cause; supreme court disagreed and reversed).

ered a governmental task has also worked favorably for landlords, as has the severe difficulty of defining the precise limitations of the duty.[113]

But other cases have held for injured tenants, using the standards of foreseeability and general negligence. These courts find that reasonably prudent landlords will provide a secure entrance system, adequate lighting, and proper locks.[114] These criminal activity cases seem to be treated specially by the courts, unrelated to and perhaps inconsistent with their general treatment of landlord tort liability.

Notice is an important factor in the criminal activity cases. It usually takes the form of a requirement that the landlord have reasonable notice of deficient security and recent occurrence of criminal activity. Even among cases holding for tenants there is a spectrum of views on the notice question. One court has required that a defendant landlord have notice of criminal activity on the leased premises themselves.[115] Other courts have found sufficient notice when criminal activity has occurred in the landlord's apartment complex or in the general locale.[116]

While the criminal activity cases are generally decided by applying foreseeability and negligence doctrines, elements of control occasionally creep back into the analysis. Some courts have declined to hold a landlord liable for criminal occurrences in large apartment complexes.[117] Although not expresssly stated, the rationale seems to be that courts believe it unreasonable to expect a landlord to have control over a large building or complex. In a New York case, however, liability was imposed when

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113. A California court rhetorically asked:

> "Does an apartment owner have a duty to install and maintain lighting for security purposes?" If such a duty could be said to exist, the questions that would logically follow are of what candle power? and in what areas? To ask these questions is to demonstrate the futility of attempting to impose and define such a duty.

The 7735 Hollywood Boulevard Venture v. Superior Court, 116 Cal. App. 3d 901, 905, 172 Cal. Rptr. 528, 530 (1981).

114. Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (D. Kan. 1980); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980); Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (1969), *rev'd on other grounds*, 38 A.D.2d 407, 330 N.Y.S.2d 569 (1972), *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973).

115. Stribling v. Chicago Hous. Auth., 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975); *see also* Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1978).

116. In some of the cases holding the landlord liable, the tenant himself had previously notified the landlord of the security deficiency. Stribling v. Chicago Hous. Auth., 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975); Spar v. Obwoya, 369 A.2d 173 (D.C. 1977).

There is no sound reason, however, to require that notice come from the tenant or from any other person. It should be sufficient that a reasonable landlord under the circumstances would have become aware of the situation by the exercise of ordinary diligence, and some cases have so stated. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 447 (D.C. Cir. 1970); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980).

117. Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962); Knapp v. Wilson, 535 S.W.2d 369 (Tex. Civ. App. 1976).

the landlord employed only one policeman to control a sixteen-acre, ten-building complex.[118] The entirely sensible conclusion was that the measures necessary to discharge the duty of reasonable care actually increased with the extensiveness of the premises. Thus the reasonably prudent landlord would provide more, not less, security as he expands the perimeter of his activity.

V. PREMISES LIABILITY LAW SINCE 1970: WARRANTY

While some courts were struggling with the application of traditional common-law tort principles to premises liability questions in light of changing regulatory and social conditions, others began to ponder the implications of the adoption of a warranty of habitability. This division did not prove to be a clean one. Not only did a few states refuse to adopt the warranty,[119] but occasionally courts in states with a statutory warranty failed to notice the possible relationship between the new warranty and premises liability. In Minnesota, for example, the supreme court handled a typical tenant injury case solely by reference to common-law tort principles, assigning liability to the party who "controlled" the area in which the injury occurred.[120] It did so without any recognition of a Minnesota habitability statute passed three years before the injury and six years before the decision. That statute required all residential landlords to keep both rented premises and common areas "fit," and to maintain both to levels set by local housing and safety codes.[121]

A related but more curious example occurred in Kansas. The Kansas Supreme Court decreed a warranty judicially in 1974[122] and the legislature enacted its version of the URLTA in 1975.[123] Nevertheless, during that same period, the supreme court decided two premises liability cases without a flicker of recognition that the outcome might be affected by either the judicial or statutory warranty.[124] The court also failed to con-

118. Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (1969), *rev'd on other grounds*, 38 A.D.2d 407, 330 N.Y.S.2d 569 (1972), *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973).

119. Cohran v. Boothby Realty Co., 379 So. 2d 561, 564 (Ala. 1980); Blackwell v. Del Bosco, 191 Colo. 334, 558 P.2d 563, 565 (1976).

120. Lillemoen v. Gregorich, 256 N.W.2d 628 (Minn. 1977) (citing RESTATEMENT (SECOND) OF TORTS § 360 (1965) to substantiate both its characterization and resolution of the issue).

121. MINN. STAT ANN § 504.18(1) (West Supp. 1982). These duties are not transferable to the tenant without an agreement "supported by adequate consideration and set forth in conspicuous writing." *Id.* § 504.18(2).

122. Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

123. 1975 Kan. Sess. Laws ch. 290 (codified at KAN. STAT. ANN §§ 58-2540 to 58-2573 (1976).

124. Borders v. Roseberry, 216 Kan. 486, 532 P.2d 1366 (1975); Albanese v. Edwardsville Mobile Home Village, Inc., 215 Kan. 826, 529 P.2d 163 (1974).

sider the effect of the warranty in a decision involving incidents arising before the warranty had been judicially announced.[125] In that same year, however, the intermediate court of appeals did use the Kansas URLTA to resolve a similar premises liability question.[126]

Most appellate courts in states with warranties of habitability have at least recognized some of the issues concerning residential premises liabilty raised by adoption of the warranty. But treatment of those issues has varied widely. To some extent the reactions simply reflect the particular facts before the court. More often, though, they mirror very different attitudes about the scope and purpose of a warranty of habitability, the general relationship of fault principles to premises liability, and applicability of underlying warranty assumptions to damage and injury cases.

A. Status Quo

Courts in two states have considered the effect of an adopted warranty of habitability on residential premises liability issues and concluded that there is none. The Illinois appellate courts have reached this position most systematically.

The Illinois Supreme Court judically established a warranty of habitability in 1972 without indication of possible impact on broader tort issues.[127] This second question arose four years later before the court of appeals. Plaintiff-tenant was injured when he fell down steps at his single-family home, and sued defendant-landlord for damages, alleging breach of warranty of habitability.[128] The court imposed no liability. It based its decision on traditional landlord-tenant tort doctrine, stating that tenants "control" the entire premises in single-family residences. More importantly, the court specifically rejected any notion that the "warranty of habitability . . . [was] intended to change the established law in Illinois governing personal injury suits by tenants against landlords."[129] While noting that some had predicted strict liability for landlords "as one of the normal costs of doing business,"[130] the court found no analogy to the product liability field. It pointed out that the landlord was already liable in tort for injuries or damages arising from the traditional exceptions, and

125. Lemley v. Penner, 230 Kan. 25, 630 P.2d 1086 (1981).

126. New Hampshire Ins. Co. v. Hewins, 6 Kan. App. 2d 259, 627 P.2d 1159 (1981).

127. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (tenant used breach of implied warranty of habitability as defense to forcible entry and detainer action).

128. Dapkunas v. Cagle, 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976).

129. 356 N.E.2d at 579.

130. *Id.* (quoting 64 A.L.R.3d 339, 344 (1975)).

that administrative enforcement of modern building codes provided a second important protection for tenants and third parties.[131]

Texas is apparently the only other state aligned with Illinois in this conservative view. The Texas Supreme Court judicially declared a warranty of habitability for residential leases in 1978 in the case of *Kamarath v. Bennett*.[132] However, cases decided both before and after *Kamarath* held that the warranty of habitability would not apply to personal injury tort actions.[133] In response to *Kamarath* the Texas legislature enacted article 5236f of the Texas code in 1979.[134] Article 5236f both creates a landlord's duty to repair[135] and abrogates the *Kamarath* implied warranty.[136] Thus, the new statute effectively eliminates the operation of premises liability under the warranty of habitability in Texas.[137]

B. The Fault-Affected-by-the-Warranty View

A second group of courts specifically reaffirms that traditional tort rules should govern premises liability questions. But these courts also hold that the adoption of a warranty of habitability should move the examination away from the traditional immunity doctrine toward an analysis based on

131. *Dapkunas*, 356 N.E.2d at 581. The Illinois courts have held fast to this original determination. A second Illinois Court of Appeals decision concerned a fall in a multiunit building. After holding that there was no warranty because the community had no housing code at the time of the incident, the court reaffirmed its earlier statement regarding tort liability. Beese v. National Bank, 82 Ill. App. 3d 932, 403 N.E. 2d 595 (1980). An Illinois Supreme Court decision a year later cast momentary doubt on the lower court's position by reinstating a tenant's counterclaim for personal injury while reversing a decision that the warranty of habitability did not apply to single-family residences. The decision seemed to recognize implicitly that a damage action would lie for breach of warranty. Pole Realty Co. v. Sorrells, 84 Ill. 2d 178, 417 N.E.2d 1297 (1981). But a year later the Illinois Court of Appeals again slammed the door, specifically reiterating that breach of warranty does not give rise to a cause of action for injury or property damage. Auburn v. Amoco Oil Co., 106 Ill. App. 3d 60, 435 N.E.2d 780 (1982). All of these decisions apparently construed only the judicially created warranty, giving no recognition to an arguably applicable Illinois statute. ILL. ANN. STAT. ch. 80, § 91 (Smith-Hurd Supp. 1982) (declaring exculpatory clauses in residential leases to be void as against public policy).

132. 568 S.W.2d 658 (Tex. 1978).

133. Porter v. Lumberman's Inv. Corp., 606 S.W.2d 715 (Tex. Civ. App. 1980); Morris v. Vaylor Eng'g Co., 565 S.W.2d 334 (Tex. Civ. App. 1978) (decided before *Kamarath*).

134. 1979 Tex. Gen. Laws 1978, ch. 780 (codified at TEX. REV. CIV STAT. ANN. art. 5236f (Vernon Supp. 1982)).

135. *Id.* art. 5236f, § 2.

136. *Id.* § 14: "The duties of the landlord and the remedies of the tenant as set forth in this Act shall apply in lieu of existing common law and statutory law regarding the landlord's warranty or duties of maintenance, repair, security, habitability, and nonretaliation, and the tenant's remedies for violations thereof."

137. *See* McSwain & Butler, *The Landlord's Statutory Duty to Repair—Article 5236f: The Legislative Response to* Kamarath v. Bennett, 32 BAYLOR L. REV. 1, 6 (1978) ("Essentially, the Act substitutes the statutory formula for the *Kamarath* implied warranty of habitability.").

whether due care was exercised in light of all circumstances. The New Hampshire approach is the prime example of this view.

The New Hampshire Supreme Court judicially adopted a warranty of habitability in 1971 in *Kline v. Burns.*[138] Two years later, the same court heard a case involving the death of a young child caused by a fall down an outdoor stairway at her parents' apartment building.[139] Evidence at trial tended to prove that the defendant-landlord had not retained control over the stairway. Plaintiff's evidence failed to prove that the stairway was "common." In addition, the court simply refused to accept the argument that the steepness of the stairs (the apparent cause of the accident) was a hidden defect or secret danger, and refused to extend the negligent repairs doctrine to cover negligent construction or design. Thus, had the court applied the traditional immunity doctrine, plaintiff would have lost.

But the court did not apply the traditional doctrine. Instead of following the plaintiff's suggestion to enlarge an exception to the landlord's immunity, the court found it "more realistic instead to consider reversing the general rule of nonliability."[140] As noted previously, the court based its decision in part on the difficulties created for juries by the exceptions, and in significant part on the general trend away from special immunities. But it also found that the "conclusion springs naturally and inexorably from our recent decision in *Kline v. Burns.*"[141] By implying a warranty of habitability in *Kline,* the court stated, it had stricken caveat lessee from the law of the state, and had thereby "discarded the very legal foundation and justification for the landlord's immunity in tort for injuries to the tenant or third persons."[142] The court did not, however, go further to find any effect from the warranty itself on the nature of the landlord's liability. It stated a rule based securely in negligence: "A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk."[143]

New Jersey and Florida have followed the New Hampshire lead, though in different ways. New Jersey was a forerunner in establishing the warranty of habitability, as well as in examining how it affected the contractual relations between the parties.[144] The state's intermediate appel-

138. 111 N.H. 87, 276 A.2d 248 (1971).
139. Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).
140. 308 A.2d at 533.
141. *Id.*
142. *Id.* at 534.
143. *Id.*
144. Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). *Reste* was, arguably, the first

late court had the first opportunity to measure the impact of the warranty on tort responsibility. It embraced the conservative Illinois position:

> The development of this new "bill of rights" for tenants, however, does not necessarily lead to the imposition of liability in tort on a landlord bottomed upon a concept of a continuing warranty of habitability. We are of the opinion that [establishment of the warranty] was not intended to overturn existing principles of law applicable to tort actions for personal injuries . . . .[145]

The case was affirmed without opinion by the New Jersey Supreme Court.[146]

But in a subsequent case the same supreme court moved toward the New Hampshire view.[147] While acknowledging the previous opinion in a footnote,[148] the court mused in obvious dicta that while the "duty" (of security) should be based on "familiar negligence concepts," the duty should also "be founded upon a frank recognition that the landlord is in a superior position to take the necessary precautions . . . or [that] the concept of an implied warranty of habitability . . . is flexible enough to encompass appropriate security devices."[149]

Florida arrived at a similar position by another route. It enacted its version of the URLTA in 1973.[150] The courts deciding the first premises liability cases after passage of the statute seemed to overlook a possible connection between the statutory duties imposed on the landlord and premises liability.[151] But they now recognize the connection, and this recognition has led to the conclusion that breach of the statutory duties is "evidence of negligence."[152]

A recent Florida Supreme Court case set out specific standards for landlord conduct, basing those standards on "reasonableness" and noting that the standards parallel those set by the Florida version of the

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warranty of habitability case. While Pines v. Perssion, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961), is usually cited as the premier case, some argue that it was subsequently overruled. *See, e.g.*, Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB L. ANN 3 (1979).

145. Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463, 466, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973); *see also* Note, *Landlord's Implied Warranty of Habitability Does Not Give Rise to Strict Tort Liability for Tenant's Personal Injuries*—Dwyer v. Skyline Apartments, Inc., 5 SETON HALL L. REV 409 (1974).

146. 63 N.J. 577, 311 A.2d 1 (1973).

147. Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76 (1975).

148. 346 A.2d at 87 n.16.

149. *Id.* at 86–87.

150. 1973 Fla. Laws ch. 73-330 (codified at FLA. STAT. ANN. §§ 83.40–.66 (West Supp. 1982)).

151. *E.g.*, Wingard v. McDonald, 348 So. 2d 573 (Fla. Dist. Ct. App. 1977).

152. Bennett v. Mattison, 382 So. 2d 873, 875 (Fla. Dist. Ct. App. 1980).

URLTA.[153] The decision is also significant because it allows suit by an injured third party, and because it does not mention a notice requirement as a condition precedent to the landlord's liability. Recently, the court of appeals confirmed the negligence basis for liability and extended the right to sue to a third-party plaintiff not in traditional privity with the landlord.[154]

C. The Pennsylvania View

Midway along the spectrum of reactions to the effect of the warranty of habitability on premises liability rests the idiosyncratic view of Pennsylvania. It is midway because it contains portions of views ranging from fault to no-fault, tort to contract. It is idiosyncratic for the same reason. The Pennsylvania position is the first view discussed here that recognizes warranty as essentially a contract notion, although it fails to apply that idea to any area beyond remedies.

Pennsylvania was late in accepting the warranty of habitability, adopting it by intermediate appellate court decision in 1978,[155] and by state supreme court decision in 1979.[156] Shortly after its decision, the appellate court decided a pair of cases in which tenants sought damages from landlords for breach of warranty of habitability.[157] In the lead case, the court held that "the warranty . . . may be used as the basis for a complaint."[158] The court restricted the damages allowed, however, to normal loss-of-bargain recovery plus foreseeable economic losses.

The court enhanced the contract flavor of this decision by establishing a strict notice requirement and, particularly, by discussing extensively whether the warranty of habitability could be waived. A clause in the lease agreement stated that the premises were taken "as is" and listed deficiencies of which the tenant acknowledged awareness, one of which was the ultimate source of the lawsuit. The trial court had analogized the warranty of habitability to section 2-316 of the Uniform Commercial Code,[159] and based on that analogy concluded that the warranty could be

153. Mansur v. Eubanks, 401 So. 2d 1328 (Fla. 1981).

154. Thompson v. Rock Springs Mobile Home Park, 413 So. 2d 1213 (Fla. Dist. Ct. App. 1982). The dissent in this case argues that the URLTA is clearly meant to affect only the contractual relations between landlord and tenant; thus, its breach cannot form the basis of a cause of action in tort.

155. Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979).

156. Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979).

157. Fair v. Negley, 257 Pa. Super. 50, 390 A.2d 240 (1978); Beasley v. Freedman, 256 Pa. Super. 208, 389 A.2d 1087 (1978).

158. *Fair*, 390 A.2d at 242.

159. *Id.* at 243.

waived. But the appellate court found the policy underlying adoption of the warranty so significant that waiver should be disallowed. Additionally, in both cases the court reversed grants of directed verdicts for defendants on counts of intentional infliction of emotional distress arising from breach of warranty, raising the possibility that breach of warranty might be used as the basis for an intentional tort.[160]

The third and final Pennsylvania decision, also from the intermediate appellate court, seems to mix even further the concepts of warranty, contract, fault, and notice. In that case, the injured tenants sued for damages, alleging negligence and breach of implied and express warranties. Directed verdicts were given to the defendant-landlord on all counts. In reversing, the appellate court held that a breach of warranty of habitability occurred whenever the tenant gave the landlord "notice" of a "dangerous" condition that the landlord did not take "reasonable care to repair," and added that the breach rendered the landlord liable for "physical harm caused to the plaintiff."[161] The court also raised as a question of fact whether or not the dangerous condition existed prior to the time when plaintiff took possession, without indicating how it found this relevant to its view.[162] This curious admixture of traditional tort dogma, the strict liability notion of dangerousness, the contractual requirement of notice, and the general overlay of reasonable conduct indicates the collage of factors that insightful courts have addressed.

D. Breach of Warranty as Basis for Tort-Like Action

Not far on the scale from Pennsylvania are those states which have more clearly enunciated that a breach of warranty of habitability will give rise to a cause of action for damage or injury, but which continue to base liability on fault. Massachusetts is the best example of this approach.

Relying in part on limited statutory authority, the Massachusetts Supreme Judicial Court declared a warranty of habitability as part of the common law in 1973,[163] specifically eschewing comment on "any ques-

160. *Id.* at 246; *Beasley*, 389 A.2d at 1088–89.

161. Rivera v. Selfon Home Repairs & Improvements Co., 294 Pa. Super. 41, 439 A.2d 739, 742–43 (1982).

162. The court based its decision in significant part on comments a, b, and c to RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1976). But while much of the opinion deals with that section, the section seems to negate any distinction between conditions arising before and after the tenant takes possession.

163. Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973). The court found assistance in reaching its conclusion in a 1965 rent withholding statute (now MASS. ANN. LAWS ch. 239, § 8A (Michie/Law. Co-op. Supp. 1983)), apparently overlooking a later statute specifically dealing with premises liability.

tion of tort liability.''[164] Six years later the court confronted that question. In *Crowell v. McCaffrey,*[165] a tenant sued his landlord for injuries suffered when a porch railing gave way during a New Year's Eve party. He alleged both negligence and breach of warranty of habitability. The high court reversed the trial judge's directed verdicts for defendant on both counts. The court based the reversal on the negligence count exclusively on a traditional ''control'' analysis. But the court also found a separate cause of action for ''tort damages'' arising from breach of warranty, stating that ''extension of the warranty to the ordinary residential tenancy . . . carries with it liability for personal injuries caused by a breach.''[166] The court acknowledged a Massachusetts statute requiring written notice from tenants of any buildings of four units or more as a condition precedent to a personal injury suit,[167] but found that ''the building and sanitary codes'' required that a landlord exercise reasonable care to discover code violations, thereby avoiding the notice requirement while establishing a negligence foundation for breach of warranty action.[168]

Iowa and Missouri have also apparently adopted this stance, though neither has stated the position as distinctly as Massachusetts. The lead Iowa case held that a warranty against latent defects, without proof of the landlord's knowledge, should be declared part of the common law because of the landlord's superior knowledge and bargaining position.[169] Violations of ''applicable'' housing codes were relevant evidence of breach of the warranty. Remedies would be ''the basic contract remedies of damages, reformation, and rescission,'' and would include ''[i]n all events . . . the incidental and consequential damages which fall within the general principles governing the allowance of such damages.''[170] The court continued the contract-based analysis by providing a specific notice requirement and by reviewing the possibility of waiver.[171]

This straightforward contract analysis broke down six years later. In *Duke v. Clark,*[172] tenants sued their landlord for personal injuries arising from a methane gas explosion. They based one count of the complaint on breach of warranty of habitability. The court ultimately denied this count

164. *Hemingway,* 293 N.E.2d at 843 n.13.

165. 377 Mass. 443, 386 N.E.2d 1256 (1979).

166. 386 N.E.2d at 1261.

167. MASS. ANN. LAWS ch. 186, § 19 (Michie/Law. Co-op. Supp. 1983).

168. *Crowell,* 386 N.E.2d at 1261–62. A second Massachusetts case also reviewed the history of landlord responsibility arising from implied warranty, and cited *Crowell* for the proposition that the doctrine was available as the basis for a cause of action for personal injury. Negligence was again the basis of liability. Young v. Garwacki, 380 Mass. 162, 402 N.E.2d 1045 (1980).

169. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

170. *Id.* at 796–97.

171. *Id.* at 797–98.

172. 267 N.W.2d 63 (Iowa 1978).

because the relevant provision of the housing code was not adopted until after the commencement of plaintiffs' lease. But the court also found that the landlord had properly abandoned on appeal his position that breach of warranty could not be the basis for a tort claim. The court found it "well settled [that] the neglect of a duty imposed by contract is a tort for which an action ex delicto will lie."[173] That small bombshell remains the last Iowa pronouncement, and apparently allies that state with Massachusetts as a jurisdiction that offers damages in tort for breach of warranty if fault can be proved.

The single Missouri case concerned an attempt by tenants to collect for both personal injuries and property damage from a fire which began in the basement ceiling wiring of their multiunit building.[174] The tenants alleged breach of warranty of habitability. The Missouri appellate court apparently assumed that such a cause of action could lie, but held for defendants because of lack of notice, even though the wiring was definitely in a common area. The court struggled with the apparent unfairness of the decision, but stated that to hold otherwise would subject the landlord to strict liability. It concluded that a "notice requirement would seem to reduce the concept of implied warranty of habitability to one of negligence."[175] This insightful comment, from a court so tangled in conceptual difficulties that it reached a decision arguably more harsh than one it might have reached under the traditional common law, provides an appropriate bridge to consideration of the last group of jurisdictions. In these cases, courts have confronted and struggled with at least some of the many difficulties inherent in the relationship of strict tort liability, contractual liability, and negligence.

E. Intimations of Strict Liability

Courts in only two states, New York and Indiana, have entertained the possibility that adoption of a warranty of habitability entirely altered the foundations of basic premises liability doctrine. Fundamentally, these cases recognize that speaking of warranty has historically meant speaking of contract, and that speaking of contract means moving away from liability based on fault. Both states have clung to tort roots, at least to the extent that they have become confused over whether the source of liability without fault is tort or contract. But each has wrestled with the basic questions raised by an implied warranty regarding traditional handling of landlord-tenant premises liability issues.

173. *Id.* at 68.
174. Henderson v. W.C. Haas Realty Management, Inc., 561 S.W.2d 382 (Mo. Ct. App. 1977).
175. *Id.* at 387.

The New York decisions come from lower appellate courts. They must be reviewed in the context of New York's unique warranty statute, which simply requires implication of a warranty of habitability in every residential lease, as opposed to the usual model, which sets standards of conduct.[176] The statute includes no notice requirement, prohibits waiver, and provides for "damages."[177]

Kaplan v. Courtson[178] is the leading New York decision adopting a strict liability standard for breach of warranty of habitability.[179] In *Kaplan,* tenants sued for injuries caused by a falling kitchen cupboard. Plaintiffs subsequently filed a motion to amend their complaint to add a cause of action based on breach of warranty of habitability. The action was based on a theory of strict liability, making the landlord liable without proof of notice of defect.[180] After noting the developing connection between warranty law in leases and that in sales of personal property, the court offered a detailed analysis of the policy arguments for and against applying strict warranty liability in residential leases.

The court outlined the differences between residential leases and sales of consumer goods that militate against the application of strict liability in the lease setting: (1) leasing does not involve mass production of goods; (2) landlords to be held responsible usually are not responsible for the construction of the tenement; (3) most landlords have no expertise regarding many potential defects; (4) defects have many possible causes in multiunit buildings; (5) landlords generally make no implied reservations regarding the safety of leaseholds; (6) tenants have no reasonable expectation of the continued absence of hidden defects; and (7) landlords generally have no notice. The court termed these arguments "quite com-

176. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1983) provides:

1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in the section, the court . . . need not require any expert testimony . . . .

177. *Id.*

178. 85 Misc. 2d 745, 381 N.Y.S.2d 634 (1976).

179. The injuries complained of in *Kaplan* occurred in 1974, before the passage of the habitability statute. Consequently, the court relied on the judicial declaration of a common-law warranty of habitability found in Tonetti v. Perrati, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975). *See Kaplan,* 381 N.Y.S.2d at 635.

180. 381 N.Y.S.2d at 634.

pelling." Nevertheless, the court held that strict liability for breach of warranty was a good cause of action, and allowed the plaintiffs to amend their complaint. The court based its decision on persuasive arguments regarding the landlord's superior knowledge and ability to detect defects, reliance, the ability of the landlord to spread the loss, and the difficulties inherent in expecting plaintiffs to prove negligence.[181]

In two other decisions with reasoning similar to the court's rationale in *Kaplan,* New York courts have held that the New York habitability statute allows liability without fault, at least for economic damages. In *Goodman v. Ramirez,*[182] the Civil Court of New York allowed consequential economic damages for breach of warranty of habitability, analogizing to the Uniform Commercial Code, and terming the breach a "wrongful act."[183] In *McBride v. 218 E. 70th Street Associates,*[184] the appellate court allowed liability under the habitability statute without consideration of fault. Plaintiff sought property damage for flooding caused by the inadequacy of the New York City storm sewers. The court found the landlord liable for breach of warranty of habitability upon the finding that damage had occurred and that it was not caused by the tenant.[185]

Were *Kaplan, Goodman,* and *McBride* its only decisions, New York could be said definitely to impose liability without fault. But they are not. The position of the New York Court of Appeals is unclear. In the only court of appeals decision on warranty of habitability, rendered after *Kaplan* and before *Goodman* and *McBride,* the court held that the landlord was liable for breach of the warranty of habitability without regard to fault, but specifically refused to speculate whether available damages would extend beyond loss of bargain.[186] A subsequent case in the appellate division makes a clear move away from strict liability.

In *Curry v. New York City Housing Authority,*[187] a tenant sued his landlord for damages arising from his child's fall from a window ledge in the apartment. While the action was based on three counts, the court termed the count based on strict liability "the most important."[188] The court acknowleged that *Kaplan* and *McBride* had adopted the strict liability position. The court went on to note, however, that courts in other jurisdictions had adopted a negligence-based approach, citing the lead New

181. *Id.* at 636–38.
182. 100 Misc. 2d 881, 420 N.Y.S.2d 185 (1979).
183. 420 N.Y.S.2d at 189.
184. 102 Misc. 2d 279, 425 N.Y.S.2d 910 (1979).
185. 425 N.Y.S.2d at 913.
186. Park W. Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied,* 444 U.S. 992 (1979).
187. 77 A.D.2d 534, 430 N.Y.S.2d 305 (1980).
188. 430 N.Y.S.2d at 306.

Jersey case.[189] In light of the conflict, and the court's perception of an evolving negligence-based approach to landlord liability, the court concluded that it was improbable that the New York legislature intended to introduce a strict liability standard when it enacted the implied warranty statute.[190] The court ultimately refused to decide whether strict liability should apply, because it found the warranty of habitability inapplicable on the facts.[191]

The law in New York is thus unclear. The appellate division has spoken twice, once for strict liability in *McBride* and once, in dicta, for a fault-based system in *Curry*. All lower and intermediate courts await a final court of appeals decision on the issue.

Indiana is the only other jurisdiction to consider directly the prospect of strict liability. Indiana has no series of cases; it addressed the issue only in the case of *Old Town Development Co. v. Langford.*[192] But that discussion is the most insightful and significant to date.

The facts in *Old Town* are simple and tragic. Langford leased an apartment in a new complex from Old Town. Three months later fire broke out in the apartment, killing his wife and two children, severely injuring him, and destroying all of the family's personal property. Langford filed an action on three counts: (1) negligence, (2) breach of implied warranty of habitability, and (3) strict tort liability for renting an apartment with a defective heating system. The jury granted substantial monetary awards on each count. In affirming the jury decision, the Indiana Court of Appeals gave the most thoughtful analysis to date on the possible effects of a warranty of habitability on premises liability law.

After a preliminary tracing of the warranty of habitability in Indiana, the Indiana Court of Appeals announced that it was "readily apparent that there is a basic inconsistency between adoption of a warranty of habitability and retention of the ancient rule of tort immunity and its exception."[193] Noting that in Indiana the remedy for breach of warranty of habitability had been restricted to economic losses, the court stated that this need not be the case. It pointed out that Indiana has always considered the usual contract remedies of "*damages,* rescission, specific performance, reformation, and rent abatement" to include personal injuries that were the natural and proximate result of a breach of contract.[194] The court

189. *Id.* at 306–07 (citing Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (1973)).

190. *Curry,* 430 N.Y.S.2d at 307.

191. *Id.* at 308.

192. 349 N.E.2d 744 (Ind. App. 1976), *appeal dismissed,* 267 Ind. 176, 369 N.E.2d 404 (1977).

193. 349 N.E.2d at 760.

194. *Id.* at 761.

also cited the availability of such damages under section 2-715(2)(b) of the Uniform Commercial Code.[195]

The court then turned to "tort recovery," and the plot began to thicken. It immediately asked the right question: "If [the landlord] is no longer immune from tort liability . . . is he strictly liable or liable only in the event of his negligence?"[196] After a review of both primary[197] and secondary[198] authorities, the court concluded that the tort standard must be one of due care, in accord with New Hampshire's modified culpability standard. The obvious difficulty was that the court did not decide whether the landlord was responsible for breach of warranty without fault in contract, or for negligence in tort, but that he was responsible for personal injuries in either case. The court at least understood its own dilemma, stating that "[p]ersonal injury and personal property recovery are thus available regardless of which theory a tenant pursues."[199]

The question remained whether strict liability should be imposed for leasing a tenement with a defective heater. The court specifically recognized that a point of confluence existed between warranty liability arising in contract and strict liability arising in tort, but found no cases in the premises liability area that did not require fault. The court listed similar policies underpinning adoption of a warranty of habitability on the one hand and strict product liability on the other, then set out the differences.[200] The differences include, the court stated, the lack of "goods" and a "seller" in the warranty situation, and none of the privity problems that led to adoption of strict liability in the product field.[201] Consequently, although the court sensed that "the wind in Indiana blows in the direction of strict liability in tort for a landlord leasing residential premises on a

195. *Id.*

196. *Id.* at 762.

197. "*A landlord must act as a reasonable person under all of the circumstances* including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." *Id.* at 762–63 (quoting Sargent v. Ross, 113 N.H. 388, 308 A.2d 528, 534 (1973)). The court went on to state:

> [T]he nexus between duty and liability is proof of negligence. Negligence in this context requires not only proof of the condition which causes the injury but that the condition was known or should have been known by the landlord prior to the occurrence so that he had an opportunity to correct it.

Old Town, 349 N.E.2d at 763 (quoting Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463, 465 (1973)).

198. *See* Love, *supra* note 7; Note, *The Fall of Landlord Tort Immunity*—Sargent v. Ross, 35 OHIO ST L.J. 212 (1974).

199. *Old Town*, 349 N.E.2d at 765.

200. *Id.* at 767 & n.28, 768.

201. *Id.* at 768.

short term lease,"[202] it deferred to the legislature or state supreme court as the proper body to take such a step.

A final relevant aspect of the case was the court's analysis of the need for notice. It stated that notice had generally been considered a precondition to an action (or defense) for breach of warranty of habitability. However, it also noted that a court could find hidden conditions present at the beginning of a leasehold to be within the landlord's knowledge on a constructive notice theory. The court recognized that this idea "carries strong overtones of strict liability,"[203] observing that such a conclusion is reasonable by analogy to the Uniform Commercial Code. But it again deferred to the legislature or higher court, although only to the extent of requiring some notice, "either actual or *constructive*."[204]

So there the opinion dangles, caught somewhere between fault and no-fault, notice and no-notice. The Indiana Supreme Court muddied matters further by setting aside the decision in a very short and rather inscrutable per curiam opinion.[205] The decision in *Old Town* is made even more unclear by the landlord's status as a builder-owner, although the appellate court made little of that issue outside of its consideration of notice. Warts and all, however, *Old Town* remains the fullest exposition of many of the warranty and premises liability issues. It also is one of the finest examples of the conceptual problems accompanying those issues.

VI. CLARITY AND CONFUSION IN CURRENT LAW—THE COMMON ISSUES

To restate the current national law of premises liability is obviously impossible. A few jurisdictions remain completely unaffected by the activity of the past two decades, clinging steadfastly to common-law immunity with its traditional exceptions.[206] Other courts have undertaken basic alterations in tort law, moving away from traditional immunity to a negligence standard based upon the circumstances of each case.[207] A growing number have recognized an inherent connection between the adoption of a warranty of habitability and premises liability questions.[208] Some of these have concluded that breach of the warranty can affect tort liability;[209] others have used breach of warranty itself as the basis for a cause of

202. *Id.*
203. *Id.* at 775.
204. *Id.* at 776.
205. Old Town Dev. Co. v. Langford, 267 Ind. 176, 369 N.E.2d 404 (1977).
206. *See supra* notes 77–81 and accompanying text.
207. *See supra* notes 81–118 and accompanying text.
208. *See supra* notes 138–54 and accompanying text.
209. *See supra* notes 138–54 and accompanying text.

action.[210] A final group has understood the potentially vast ramifications of use of the warranty in premises liability questions, and has openly discussed—and occasionally employed—a strict liability standard.[211]

The degree to which any jurisdiction has changed its premises liability rules has not necessarily been related to the adoption of a warranty of habitability. Several courts have decided that the traditional source of law for such questions is unaffected by adoption of such a warranty.[212] More confusion is added by a hybrid view under which contract, warranty, and negligence notions all play a role, allowing for the possibility of liability for personal injury while limiting recovery to loss of bargain and imposing strict notice requirements.[213]

Yet, with the possible exception of those few jurisdictions that have both adopted warranties and have consciously continued to resolve premises liability questions through use of traditional tort doctrine, all courts seem to be struggling, consciously or unconsciously, with the same set of questions. The degree to which one or more of these questions is emphasized in a particular case determines the direction that a particular court will take.

While the formerly determinative control factor has diminished in importance in many jurisdictions, it has not disappeared. Opinions still recognize the inherent unfairness in expecting a party to be responsible for activity in an area outside that party's control. A frequently ignored question is whether expectations regarding control have been altered by judicially created or statutorily imposed warranties of habitability. Some cases have addressed the question, finding that the landlord's duty carries with it the inherent right to inspect and repair, thus giving the landlord the requisite "control." And the URLTA specifically grants the landlord the right to come to the premises "to inspect the premises, [and to] make necessary . . . repairs."[214] Tied closely to the control issue is the question of the continuing importance of when the defect arose. The landlord's degree of responsibility for repair seems the same whether the defect arose before or after leasing. But regardless of how the responsibility question is resolved, the fact remains that the landlord has greater access

210. *See supra* notes 163–75 and accompanying text.

211. *See supra* notes 176–205 and *infra* notes 212–15 and accompanying text.

212. Lemley v. Penner, 230 Kan. 25, 630 P.2d 1086 (1981); New Hampshire Ins. Co. v. Hewins, 6 Kan. App. 2d 259, 627 P.2d 1159 (1981); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Lillemoen v. Gregorich, 256 N.W.2d 628 (Minn. 1977).

213. Rivera v. Selfon Home Repairs & Improvements Co., 294 Pa. Super. 41, 439 A.2d 739 (1982); Fair v. Negley, 257 Pa. Super. 50, 390 A.2d 240 (1978); Beasley v. Freedman, 256 Pa. Super. 208, 389 A.2d 1087 (1978); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978).

214. URLTA § 3.103(a) (1972).

to the premises prior to leasing. The tenant, on the other hand, never has access to discover defects until after commencement of the lease.

All this is in turn related to a matter to which several courts have given their attention—notice. Notice is, at least by analogy, a warranty-contract doctrine, unrelated to tort. Yet even states with tort-based analyses fumble with the difficulty of imposing liability without notice.

The contract-versus-tort difficulty also raises questions of waiver and remedy. While presumably the contract-based warranty can be waived without legislative authorization, the same cannot be said of exculpatory clauses in residential leases.[215] The remedy problem is simply stated: should one receive different damages depending upon which name a court attaches to a landlord's failure to meet his responsibility?

The fundamental underlying issue is whether courts will approach these problems as contract- or tort-based questions, especially with regard to the degree of culpability courts will expect from the charged party. The closer a court moves toward a traditional analysis, the more the conduct of each party becomes relevant, and the more "fault" becomes the central issue. A classic warranty analysis, on the other hand, would look primarily to the agreement of the parties and ignore culpability questions. The principal task for the court now is to determine which of these approaches, if either, offers a satisfactory framework for a fair and efficient jurisprudence of premises liability.

VII. THE FOREST AND A PATH

While common issues can be found, in premises liability questions the present farrago of traditional tort law, negligence, contract, and strict liability concepts has overwhelmed courts and commentators alike. Examples abound.

A. The Current Confusion

A few states have taken the curious position that traditional tort immunity is entirely unaffected by a judicially or legislatively imposed duty requiring landlords to guarantee habitability both before and after leasing.[216] The Pennsylvania jumble of tort and contract ideas is impenetrable.[217] But more widely accepted positions are equally, if less obviously, unhelpful. The Massachusetts-Iowa view that tort damages are available for breach of warranty both destroys the warranty analogy and

215. Annot., 49 A.L.R.3d 321, 325–27 (1973).
216. *See supra* note 212.
217. *See supra* note 213.

discards centuries of distinction between tort and contract remedies. Even the popular New Hampshire position, retaining negligence as the basic standard while considering breach of warranty as evidence of negligence, breaks down at the crucial point. The lead case states that the landlord's degree of responsibility should be determined by the circumstances because "[i]t is appropriate that the landlord . . . should bear the cost of repairs necessary to make the premises safe,"[218] a duty apparently unqualified by fault.

The two principal commentators on these questions have also found the task of appropriate resolution a mercurial one.[219] Professor Browder's recent piece insightfully recognizes many of the substantive and semantic traps within these issues, but in the end suggests that in most cases "the breach [of the warranty of habitability] is a simple breach of contract, to which the usual contract-tort relations produce liability for negligence"[220]—hardly a formula for eliminating confusion. In the other major piece, Professor Love's otherwise superb exposition of the problem collapses at the critical moment with a statement that typifies the widespread muddle: "A failure to exercise caution in [discovering defects] . . . will result in holding a landlord strictly liable."[221] In other words, if one is negligent, one is strictly liable.

While the *Restatement (Second) of Property* makes some considerable strides toward resolving these problems, it too fails in the end. The Restatement rule makes landlords responsible if they have both violated a warranty of habitability or "a duty created by statute or administrative regulation" and "failed to exercise reasonable care to repair . . . [a dangerous] condition."[222] This provision applies without regard to when the condition arose. Further, the comments state that the landlord can only be liable for conditions of which he was aware or should have been aware.[223] Tenant knowledge of dangerous conditions can be a defense under the rubric of contributory negligence or assumption of the risk.[224]

Nothing is inherently wrong with requiring an injured party to prove both breach of contract (or violation of a statute) and negligence in order to have a cause of action, although the requirement would never be considered the apotheosis of clarity. Greater problems lie with the infusion of

218. Sargent v. Ross, 113 N.H. 388, 308 A.2d 528, 535 (1973) (quoting Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 251 (1971)).

219. *See* Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV 99 (1982); Love, *supra* note 7.

220. Browder, *supra* note 219, at 136.

221. Love, *supra* note 7, at 125.

222. RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1976).

223. *Id.* comment c.

224. *Id.* comment b.

the notion of "dangerousness" into the formula, as well as the Restatement's unsatisfactory treatment of the notice question. "Dangerousness" has already proved an elusive standard in its natural environment,[225] and its injection into an area already plagued with rampant conceptual troubles should not be welcomed. More basically, the requirement is not a fair one. If a tenant or third party can prove (1) that the landlord breached either a warranty of habitability or statutory duty, (2) that the landlord was negligent in repairing a condition resulting from his breach, and (3) that the failure caused personal injury, why, it is reasonable to ask, should the landlord be able to defend the suit on the basis that the condition was not "dangerous"? What nondangerous conditions hurt people? The Restatement comments are silent on the question.

The Restatement notice provisions are perplexing. The comments provide that the landlord can be held responsible only for conditions of which he was or should have been aware "in the exercise of reasonable care."[226] A serious difficulty is evaded in the next sentence, which provides that "ordinarily" the landlord would be charged with notice of conditions existing prior to leasing.[227]

The related problem of tenant notice is also jumbled. One comment indicates that a tenant's uncommunicated knowledge of a dangerous condition does not necessarily prevent an action against the landlord.[228] The following comment requires notice from the tenant within a reasonable period of time to repair as a precondition to liability.[229] Also, to say that uncommunicated knowledge should be allowed as a negligence-based defense leaves unanswered the question of its effect on actions by third parties, which by the terms of the comment are also covered.[230]

B. A Possible Solution

The principal source of confusion in all of these approaches is the almost universal predisposition toward a fault-based jurisprudence, with the accompanying fear of a system based on liability without regard to fault, and the difficulty of squaring that predisposition with the contract-

225. *See, e.g.*, Swartz, *The Concepts of "Defective Condition" and "Unreasonably Dangerous" in Products Liability Law*, 66 MARQ. L. REV. 280 (1983); Smith, *Status of the "Unreasonably Dangerous" Element In Product Liability Actions*, 15 FORUM 706 (1980).

226. RESTATEMENT (SECOND) OF PROPERTY § 17.6 comment c (1976).

227. *Id.*

228. *Id.* comment b.

229. *Id.* comment c.

230. "The landlord remains subject to liability to the tenant or to others on the leased property with the tenant's consent, but he has available all the usual defenses to an action in negligence, including contributory negligence and assumption of risk." *Id.* comment b.

based language of warranty. As one reviews the wreckage, it becomes evident that two related but distinct problems infect the area: first, what should the law be? and second, what should the law be called? The former question is, of course, more important, though the latter has revealed a significant capacity to create chaos. We believe that the proper solution to the substantive problem would go far in eliminating its nomenclatural partner.

The current system should be reformed, either judicially or legislatively, by abandoning the flawed and often indecipherable negligence-based system and moving toward a more predictable and fairer system built around three critical factors common to all premises liability questions: whether or not the condition was discoverable, when it arose, and whether it was located on or off the premises. The first of these questions, we believe, is crucial to resolution of the substantive difficulties. The other two are helpful primarily in creating a proper nomenclature. This suggestion is not a call for a return to an eighteenth-century, outcome-determinative categorization. It is rather a claim that much of the struggle over the past fifteen years in premises liability questions has been caused by the courts' failure to recognize that vastly different policies and questions of equity concern the area depending upon how these three factors are rotated through a matrix.

1. Discoverable Conditions

The most important of the factors, and the only logical starting place for a discussion of them, is the question of whether or not the condition was discoverable. If so, four possibilities follow. The condition might have been (1) off the premises, discoverable before leasing; (2) off the premises, discoverable after leasing; (3) on the premises, discoverable before leasing; or (4) on the premises, discoverable after leasing.

A landlord should be liable without regard to fault for damages or injuries from discoverable conditions off the premises, whether those arose before or after leasing. That was basically the position of the common law,[231] and to apply to off-premises cases a "totality of circumstances" negligence test simply invites both confusion and unfairness. We believe that the landlord should also be liable without fault for discoverable conditions on the premises at the time of leasing. This is arguably a close question, because the tenant theoretically has had an opportunity to inspect for such conditions. But placing the responsibility with the landlord

231. *See* W. PROSSER, *supra* note 4, § 63, at 405–08; RESTATEMENT (SECOND) OF TORTS § 360 (1965); Love, *supra* note 7, at 65–68.

tracks with both modern views of the relative skills and resources of the two parties,[232] and modern sale-of-goods law on the same question.[233]

The landlord should also be liable for discoverable defects on the premises that arose after leasing, but only if he has received proper notice. These are the cases that seem to occur most frequently, and are the type that courts have in mind when they devise the rules they then blindly apply to all cases. These are also the cases that have created much conceptual difficulty on the part of thoughtful courts and commentators who consider the apparent unfairness of liability without notice.[234] The thoughtful parties are correct; such liability is unfair. While courts or legislatures can grant landlords all the access imaginable, the fact remains that the tenant will spend a great deal more time on the premises than the landlord could or should. While harsh results are always possible with a strict notice requirement, to require the tenant to assume some responsibility seems more equitable and reasonable than to require the landlord to make frequent, intrusive inspections, rendering the landlord liable for conditions about which the tenant may well have known and yet not communicated.

Thus, so long as landlords receive notice of on-premises conditions that arise after leasing, they are responsible without regard to fault for foreseeable damages and injuries caused by all biscoverable conditions. Once that conclusion is reached, assigning appropriate names to the landlord's obligations becomes less difficult.

The landlord is responsible for all discoverable conditions arising prior to leasing. It is quite proper, even helpful, then, to pronounce that the landlord *warrants* against such conditions. Like other warranties, the warranty of habitability is a contractual undertaking, implied from the circumstances of the transaction. Like other warranties, a breach of the warranty of habitability is determined without regard to fault. The finding of such a breach leads to recovery for all foreseeable consequential damages, including personal injuries.[235]

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232. The *Javins* court noted:

> [T]oday'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 . . . . In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times.

Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 915 (1970).

233. Failure to inspect is not a defense to a breach of warranty claim. U.C.C. § 2-314 official comment 13 (1981).

234. *See, e.g.*, Love, *supra* note 7, at 105.

235. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 223 (1970); U.C.C. § 2-715(2)(b) (1981).

Cases involving discoverable defects arising after the tenant takes possession are only slightly more difficult. It has been said that for conditions arising after the lease the warranty is more accurately described as a promise to repair. That is correct but incomplete—another reflection of the fact that statements on these questions usually arise from cases concerning on-premises conditions. The promise is more accurately one to "maintain and repair." These are different undertakings. To "repair" connotes that effort needed to fix a condition that is brought to one's attention. To "maintain" connotes an ongoing obligation unrelated to information about defects. If the landlord fails to maintain common areas or other off-premises locations, and discoverable conditions cause damage or injury, the landlord has breached his covenant to maintain. He is then responsible to the tenant or third party for both actual and foreseeable consequential damages arising from his breach. Similarly, after notice from the tenant, the landlord is liable for breach of his implied covenant to repair discoverable defects which arise on the premises. Again, this contract-based analysis requires no inquiry into the culpability of the landlord's action beyond evidence of breach.

2. *Undiscoverable Defects*

The beauty and symmetry of any formula regarding discoverable defects dissolves when applied to undiscoverable ones. There are several reasons for this. It is quite possible to allocate responsibility for discoverable defects between the landlord and the tenant. The same is not true for undiscoverable defects, a point frequently overlooked in discussions of premises liability questions. If the task were limited merely to allocation of responsibility, it would be easy. A superior knowledge of the kinds of structural or system-related conditions likely to be the source of undisclosed conditions, the long-term incentive to maintain against such occurrences, and a better knowledge of and access to insurance all lead to the conclusion that the landlord should be responsible.

However, to analyze this responsibility for undiscoverable defects in the language of "fault" is nonsense. Two previous writers on the subject understand this. Professor Love, while not distinguishing between discoverable and undiscoverable conditions, opts for a Louisiana-like strict liability modified by certain cause-related defenses.[236] Professor Browder, making the discoverable-undiscoverable distinction, adheres to the *Kaplan* court view of the appropriateness of strict liability because of the landlord's ability to insure.[237] The *Old Town* case also recognizes many

236. Love, *supra* note 7, at 157–58.
237. Browder, *supra* note 219, at 135–51.

of the same arguments while concluding that an intermediate court of appeals does not have the prerogative to make such a choice.[238]

Even after deciding that liability, if any, must be unrelated to fault, one still must face the question of whether this liability arises from tort or contract. While doctrinally the differences can be made to disappear, there are such theoretical distinctions to be drawn as the need for "dangerousness," the possible requirement of notice, and the chance for waiver. None of the concepts, however, is especially useful in undiscoverable condition cases. We have already alluded to the apparent uselessness of dangerousness even in cases in which a manufacturer has made the goods and placed them in the stream of commerce.[239] To put the same limitation on a situation usually involving a structure built decades ago that has changed hands on both the ownership and rental side many times is not helpful at all. Nor does it make any sense to discuss the question of notice for conditions that are by definition undiscoverable. And while waiver is theoretically possible, once the burden has been allocated the ability to transfer it would either be the result of price bargaining between the parties or, far more likely, a very lopsided bargain favoring the landlord.

The problem then is to settle upon a terminology to apply to the sensible conclusion that somebody should be liable and that that somebody should be the landlord. Our view, again, is that warranty is the better theory. Use of a contract-based view avoids both the confusing difficulty of employing different standards for discoverable and undiscoverable defects, and the difficulties of "dangerousness." The notice problem dissolves upon analysis because notice is, by definition, impossible.

That leaves the problem of waiver. In most jurisdictions this will already have been disposed of either judicially or legislatively. If the landlord's warranty cannot be waived in reference to his economic relationships with the tenant,[240] to allow the landlord to waive responsibility for injury or damage is certainly unreasonable. Further, this position is consistent with the doctrine that one cannot waive responsibility for breach of public duties,[241] because the substance of the warranty in many cases will likely be derived from local housing codes. Finally, the inability to waive comports with the growing line of cases outside contract law that hold

238. Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 776 (Ind. App. 1976), *appeal dismissed*, 267 Ind. 176, 369 N.E.2d 404 (1977).

239. *See supra* note 225 and accompanying text.

240. Cunningham, *supra* note 144, at 95.

241. "The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor." *Javins*, 428 F.2d at 1081–82.

that exculpatory clauses in residential premises liability cases are highly disfavored.[242]

3. *Reprise*

We suggest, therefore, that the landlord be liable to the tenant, the tenant's guest, or other third parties for damage or injury arising out of the landlord's breach of the warranty of habitability, or the landlord's breach of a continuing covenant to repair or maintain. The only exception to this rule would be that, for discoverable defects arising on the premises after the tenant takes possession, discovery by the landlord or reasonably prompt notice to the landlord by the tenant would be a prerequisite to landlord liability. This general approach gives each party to the agreement a clear notion of his or her responsibilities, reduces the number of facts to be determined, and greatly decreases the flexibility of judges and juries to mandate different results on virtually identical sets of facts. It is easy to administer, predictable, and seems as fair a solution as is practicable.

On the fairness question, one legal and two practical aspects justify what appears to be a lean away from the landlord and toward the tenant. First, undiscoverable conditions are not likely to occur frequently, so the responsibility beyond self-help is not as drastic as it may seem. Second, both Professor Love and Professor Browder's surveys indicate the availability of insurance which, while it should not be the deciding factor, is a comforting one and a secondary policy reason for choosing the landlord as risk spreader.[243] Finally, the foreseeable damages arising from the breach of the contract, while including property damage and personal injury, will be somewhat more restricted than would be the case in a tort-based action.[244]

We believe the impetus for these changes should come from the legislatures. The changes are sweeping enough in most instances to prohibit reliance on judicial activity in virtually any jurisdiction. In the dozen or so years in which the warranty of habitability question has been an active issue, only a few jurisdictions have had enough cases reach the appellate courts to form any kind of jurisprudential configuration. Also, whether the courts pay attention to them or not, most states have some form of duty-creating statute directly affecting these questions. We recommend that the legislatures tinker with those statutes in an effort to set aside the

242. *See supra* note 215 and accompanying text.
243. Browder, *supra* note 219, at 138–39; Love, *supra* note 7, at 116–17.
244. 5 A. CORBIN, CONTRACTS § 1019 (1964).

current morass of premises liability questions and set out a clear, understandable, and fair system for landlords and tenants alike.

VIII. CONCLUSION

The law of premises liability has undergone considerable upheaval over the last two decades. The result of these changes is yet to be determined in many states. A change common to several jurisdictions has been the process of relegating the issue of control, formerly the decisive element, to a humbler, perhaps incidental, status. In place of the traditional rule of landlord immunity has sprung a variety of positions, as notions of contract, warranty, negligence, and strict liability have all come to play a role. Some key questions remain in a state of flux, including the necessity of notice, the role of fault, the effectiveness of waiver, and the measure of damages. The disposition of these and other issues depends heavily, perhaps ultimately, on the theory of liability employed by the particular court.

The present quagmire is due in large part to the courts' failure to recognize that different theories compel different policies and conclusions. By adopting a negligence test, for example, a court is effectively taking the position that the conduct of the parties is the crucial issue. Culpability is less important, and notice more important, under a contract or warranty theory. Confusion and uncertainty result when courts blithely invoke a doctrine by name without paying heed to the full range of policies and conclusions compelled by that doctrine.

In this article, we have attempted to assess the merits of the different positions of the courts by pointing out their shortcomings and inconsistencies and by identifying the different theories available to them. In the end, our goal has been to present an alternative, a system that would explicitly recognize the importance of the key factors: the discoverability, location, and time of onset of the particular defect. Our position is that a blanket rule will not suffice, and that fairness and reason require differing conclusions, depending on the interplay of these three key factors. The result is a system that is fair, predictable, and truly reflective of the modern relationship between landlord and tenant.