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Torts -- Responsibility of Landlords for Criminal Acts of Third Persons

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legal maneuvers in which the plaintiff must indulge.[41] Congress should act in this situation to allow an individual to sue directly in a federal court. However, until Congress does act, a suit that is brought directly in a federal court should be retained by the court and disposed of on non-federal grounds under the concept of pendent jurisdiction.

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Torts—Responsibility of Landlords for Criminal Acts of Third Persons

In *Ramsay v. Morrisette*[1] the District of Columbia Court of Appeals decided that it was appropriate to re-evaluate the scope of a landlord's duty to protect his tenants from the criminal acts of third persons. The plaintiff, a tenant in the defendant's apartment house, was assaulted by a man who broke into her apartment. She alleged that the landlord was negligent in not taking reasonable steps to protect his tenants in light of his knowledge of prior criminal activity. Specifically, she alleged that the defendant-landlord was negligent for his failure to supply a full time resident manager, to lock the front door, and to prevent intruders from sleeping in the halls of the apartment house.[2] The trial court granted the landlord's motion for summary judgment. The court of appeals reversed,

[41] Although no pattern has been discerned that will support a hard and fast rule, a caveat is appropriate at this point. It is notable that in cases in which removal was allowed, none was found in which the federal officer was found liable on the claim against him. It would be erroneous to conclude, however, that the "color-of-office" requirement necessary for removal under 28 U.S.C. § 1442 is sufficient to give a federal officer tort immunity, *i.e.*, to conclude that if the federal officer was acting under "color of office" sufficient to allow removal, then he was acting under "color of office" sufficient to allow tort immunity. While a federal officer can be acting under "color of office" sufficient to allow removal, it is recognized that his acts may be so in excess of his authority that he can be held individually liable for them. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), wherein the Court stated:

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Id. at 701-02.

See also Willingham v. Morgan, 395 U.S. 402 (1969), in which the Court said that "one of the most important reasons for removal is to have the validity of the defense of official immunity *tried* in a federal court." *Id.* at 407 (emphasis added).

[1] 252 A.2d 509 (D.C. App. 1969).

[2] *Id.* at 512.

holding that the tenant's allegations of negligence were sufficient to preclude summary judgment.[3]

In deciding whether a landlord should be held responsible for the criminal acts of third persons, the court could have approached the problem in various ways. There is case law holding that the landlord has a duty to use reasonable care in keeping safe for his tenants those areas over which he has retained control.[4] However, mere ownership of the premises does not make the landlord an insurer of tenants' safety.[5] Instead, the standard is one of due care in light of the circumstances. Liability based upon the principle of retained control has generally been confined to responsibility for *physical defects* in the premises.[6] The acts of third persons was the central issue in *Ramsay*, and, arguably, the principle of retained control should not be extended to include liability for the criminal acts of third persons:

> That liability predicated on the "dangerous conditions" theory should be limited to defects in the land becomes clear when one examines the considerations which gave rise to a duty in such situations: Where repair is necessary, it is only the landlord who is able to remedy such defects. . . . His control and ability to remedy are exclusive. Where the source of injury is not inherent in the land and where control is not exclusive—where the considerations involved are not those of land ownership but rather those of social relationships—the essential meaning of the principle of control is inapplicable.[7]

A second approach often used by the courts faced with a criminal act by a third person is an inquiry into "proximate causation." The traditional rule is that one is not bound to anticipate the criminal acts of others[8] unless he could have foreseen such a result as the consequence

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[3] *Id.*

[4] *E.g.*, Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946). *See generally* W. PROSSER, LAW OF TORTS 418 (3d ed. 1964) [hereinafter cited as PROSSER].

[5] *E.g.*, Elmar Gardens, Inc. v. Odell, 227 Md. 455, 177 A.2d 263 (1962).

[6] *E.g.*, Taneian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954); *see* PROSSER 418-21. *But cf.* Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), in which the court relied upon the theory of retained control in finding a landlord liable for the act of a third person. In *Mayer* a child was hit by a rock while playing on the housing authority's playground. The court held that the jury could find the housing authority had been negligent in failing to provide adequate supervision for the playground and consequently was liable for the child's injury.

[7] 20 RUTGERS L. REV. 140, 143 (1965). The note criticizes the application of the retained-control theory in *Mayer*.

[8] *E.g.*, Andrews & Co. v. Kinsell, 114 Ga. 390, 40 S.E. 300 (1901); *see* PROSSER 173-79.

of his own actions.[9] For example, in *McCappin v. Park Capitol Corp.*,[10] in which the tenant sued the landlord to recover money stolen from the tenant's apartment, the court denied recovery on the grounds that the tenant-plaintiff had failed to establish proximate cause. The thief had apparently stolen a key to the tenant's apartment from the landlord. The court, in basing its decision on proximate cause, did not affirmatively decide whether the landlord had been negligent in the first instance.

Consideration of proximate cause before negligence serves only to obscure the real issue.[11] Legal responsibility or proximate cause deals with the issue of liability of a negligent actor and in proper analysis does not arise until the negligence of the actor has been established. More specifically, proximate cause analysis entails determination of the various policy considerations that go together to define the scope of the negligent defendant's responsibility for his actions. Courts seizing upon proximate cause as a means for disposing of cases similar to *Ramsay* assume without proper evaluation of the facts that the defendant has been negligent.

Few cases have dealt with whether a landlord owes a duty of protection to his tenants in a factual context closely analogous to that in *Ramsay*.[12] The majority of courts that have reached the issue have found no duty on the part of the landlord.[13] One of the major reasons behind this conclusion is the long prevailing argument that the tenant can have in his lease provisions for protection by the landlord against third persons. In *DeKoven v. 780 West End Realty*,[14] for example, the court held that the landlord was under no duty to provide a doorman for his apartment building in the absence of a contractual obligation. The

[9] *See* PROSSER 178.

[10] 42 N.J. Super. 169, 126 A.2d 51 (App. Div. 1956).

[11] *See* Mosley v. Arden Farms Co., 26 Cal. 2d 213, 220, 157 P.2d 372, 376 (1945) (Traynor, J., concurring); Green, *Merlov v. Public Service Co.—A Study in Proximate Cause*, 37 ILL. L. REV. 429 (1943); Note, 24 MINN. L. REV. 666 (1940).

[12] The court in *Ramsay* cited Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956), as supporting a finding of a duty to protect. The case involved a landlord's employee with a criminal record killing a tenant. The court in *Kendall* held that the landlord was negligent in not checking the employee's past criminal record. In reaching its decision the court stated that the tenant, under her lease, paid for both shelter and protection. However, this case is clearly distinguishable since it deals with the crime of an employee.

[13] Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926); De Foe v. Sloane, 99 A.2d 639 (D.C. App. 1953); Goldberg v. Housing Authority, 70 N.J. Super. 245, 175 A.2d 433 (App. Div.), *rev'd*, 38 N.J. 578, 186 A.2d 291 (1962). *But see* Bass v. City of New York, 38 U.S.L.W. 2345 (N.Y. Sup. Ct., Dec. 10, 1969).

[14] 48 Misc. 2d 951, 266 N.Y.S.2d 463 (1965).

landlord had brought an action against various tenants for nonpayment of rent, and the defense offered was that various criminal activities by third persons had been committed within the apartment building because the landlord negligently failed to provide a doorman. The court stated:

> [I]ncidents of crime, perpetrated by third persons within the premises, impose no obligation upon the landlord to provide doorman service, especially where there has been no contractual obligation or obligation imposed by statute to provide the same.[15]

Ramsay, at least implicitly, rejected the theory that if the tenant desires protection from the landlord, he can provide for it in the lease. This theory is clearly unrealistic in the modern world. The landlord is almost always in a superior bargaining position vis-à-vis the tenant. Because the demand for adequate housing continues to rapidly fall farther behind the available supply, it is clear that the tenant will probably never be able to insist on a provision in his lease requiring protection by the landlord. Furthermore, the landlord is in a better position to take protective measures and to absorb their cost through redistributing it. Obviously, judges do not have to close their eyes to the realities of present-day life. They can and probably should take judicial notice of the overall shortage of available housing and the inequality of bargaining power between landlord and tenant.

The fact that the prospective tenant has no power over the lease offered him supports the position taken in *Ramsay*—that it is now time to impose a duty of reasonable care on the landlord to protect his tenant—in short, to make him liable for negligence. Judicial determination that one party

[15] *Id.* at —, 266 N.Y.S.2d at 466. There are several cases that implicity rely upon the view that any duty to protect must be imposed by the lease or not at all. This consideration seemingly underlies the reasoning that the landlord has not committed a wrongful act by his failure to take reasonable steps to protect his tenants. Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926); De Foe v. Sloane, 99 A.2d 639 (D.C. App. 1953). The landlords in both cases were held not liable for criminal activity despite the fact that they had inadvertently provided the opportunity for the crime.

In *DeKoven*, *Applebaum*, and *De Foe* the landlords did not have notice of prior criminal activity; thus the cases can arguably be distinguished from the situation in *Ramsay* where the landlord-defendant had notice. However, the question of notice may be a distinction without a difference. *See* Goldberg v. Housing Authority, 70 N.J. Super. 245, 175 A.2d 433, *rev'd*, 38 N.J. 578, 186 A.2d 291 (1962), in which notice of prior criminal activity was disregarded by the court. *But see* Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), in which the court apparently found notice to be a significant factor in imposing liability on the landlord.

owes a duty of protection to another is certainly not novel. Over time the courts have found various social relationships to be of such a nature that public policy justifies the imposition of a duty to protect. These relationships include: carrier and passenger, innkeeper and guest, business proprietor and invitee, school district and pupil, and employer and employee.[16]

The real issue in *Ramsey* and similar cases is whether the landlord breached the duty of reasonable care. The ultimate decision in the determination of negligence is reached by balancing the burden to be imposed on the landlord with the extent of the risk to the tenant.[17] Applying such an analysis, most courts will either direct a verdict for the landlord or will submit the question to the jury for determination. Submission to the jury raises the question of its competence to pass on the various policy questions involved in such cases. Therefore, the jury should be fully informed of those questions either by court instruction or by counsel in argument to the jury.

In considering the application of the formula of due care, it is worth looking to some of the more obvious aspects of a landlord's actions or non-actions that may well be found to fall short of the standard of reasonable care. It is such narrowly defined behavior to which the court and jury must look in determining whether the landlord has in fact exercised due care.

For example, the failure of the landlord to supply adequate locks for apartment doors should be sufficient to show a lack of reasonable care. Provision of adequate lighting, both inside and outside the building, may also be considered a minimum burden for the landlord. Further, a failure to provide a manager (perhaps a resident manager) may also be a failure to use due care in protecting tenants. A manager would have the authority to supervise common areas and prevent the situation that existed in *Ramsay*.

In determining the extent of care that the landlord must exercise to fulfill the duty to protect, it also seems reasonable to consider the location of the apartment house. Landlords in neighborhoods with past histories of criminal activity should be held to a stricter standard of protection than are those in areas in which there has been little or no prior criminal activity.

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[16] PROSSER 177.
[17] *Id.* 152.

It is obvious that any substantial requirement of protection will result in a proportionate increase in rents charged tenants. In other words, the burden of any duty likely will fall on those who can least afford it. This adverse economic consequence undoubtedly will result primarily from increased liability insurance costs and the costs of protective measures.

Another factor that must be considered in weighing the economic consequences of imposing a duty of protection on the landlord is the fact that some areas are subject to rent control. In those areas a landlord will not be able to increase his rents to cover the increase in costs by spreading the risk among all tenants. To conpensate for the increased costs, the landlord may reduce maintenance or other essential services. Moreover, all other things being equal, the decreasing profit margins will undoubtedly lead to a decrease in the supply of housing, clearly an undesirable result.[18]

The importance of the economic ramifications from the imposition of a duty on the landlord to protect his tenants against criminal actions of third persons militates against permitting the jury to decide the question of duty. The jury is simply not prepared to receive and comprehend the economic factors that should be considered thoroughly. The courts are obviously more qualified. The question arises, however, whether even the courts are sufficiently qualified; for it may well be that the resolution of this problem requires the type of intensive inquiry that only the legislatures can provide. The legislature of a state can provide a uniform policy that its courts cannot. If the proper solution of the problem involves governmental expenditures, the legislature is clearly the proper body to consider such measures.

While the actual end-solution to the problem of crime in the cities, if there is one, will depend upon legislative processes, it is not unreasonable for the courts to require a landlord to take some protective measures on behalf of his tenants, especially if he has notice of prior criminal activity on the premises. At the least, tort law should require landlords to provide some forms of minimum protection for individual tenants.

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[18] *See* P. SAMUELSON, ECONOMICS 385-89 (6th ed. 1964).