Landlord and Tenant -- Liability of Landlord for Personal Injuries Caused by His Failure To Repair

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ration. For this reason the court seemed to feel that the new corporation had not been brought within the exception to the general rule.

In summary, the court thus far in its decisions does not seem to give any substantial weight to the duration of the covenant. However, the covenantee would seem well advised to avoid a covenant that lasts forever, and to limit the covenant to the lives of the parties involved, since the court has used language in its decisions which would give it an adequate peg on which to hang any future finding of unreasonable duration.

In respect to the extent of the territory the covenant is to include, any restriction on the covenanator which is all-encompassing should be avoided. The covenantee, of course, will want to draw up a contract that will include the territory presently covered by the covenantee's business and, at the same time, will include the territory the covenantee will reasonably need protected in the future. Perhaps one means to accomplish this is to separate the territory into various segments so that the court, if it feels the outer limits are unreasonable, can easily enforce the covenant as to a portion without destroying the entire contract.

The covenantee will have no guide as to whether the contract will be in violation of public policy. To say the court looks to the nature of the business and the needs of the public is nebulous and of little help outside fact situations like those ruled on in prior cases. Thus, the matter is largely one of prediction. As a further difficulty, the court does not always make clear in its decisions whether it looks at the reasonableness of the covenant at the time the contract was made or at the time the contract is being litigated. Finally, it should be noted that the court does not seem to consider any one factor of reasonableness alone in arriving at its decisions.

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In a recent case from the Third Circuit, plaintiff, a social guest in the home of a tenant, was injured as she left the premises. She sued the landlord, alleging that, in performing his covenant to make repairs, he negligently installed a light fixture and that as a consequence of this improper installation she was injured. The district court gave summary judgment for the defendant. The circuit court reversed, saying that under New Jersey law, when the landlord undertakes to make repairs, he is bound to perform the work in a reasonably careful manner, and for failure to do so he will be liable in tort to one injured because of his negligence.

The question of liability of the landlord for personal injuries resulting from the disrepair of the demised premises may arise in any of three situations: (1) where, in the absence of a covenant to repair, he does not repair and one is injured; (2) where he fails to perform a covenant to repair and one is injured; (3) where, with or without a covenant to repair, he undertakes to make repairs but does the work negligently and one is injured. Further, in each of these situations, a question arises as to the landlord's liability to different classes of people—for example, tenants, guests of tenants, business visitors and strangers.  

Where There Is No Covenant To Repair

American courts with few exceptions continue to adhere to the common law rule that where there is no covenant to repair the landlord is under no duty to do so; therefore, they conclude that he is not liable for personal injuries sustained by the tenant or his guests because of the disrepair of the premises. The majority reasons that the duty to repair is an incident of control; and since the tenant has control of the premises—including the right to admit or exclude visitors—he has the duty to repair. Since the rights of the tenant's guests are ordinarily the same as those of the tenant, those jurisdictions following the majority view deny the guest recovery. North Carolina appears to be firmly in accord with the majority.  

This note will be limited to the question of liability of the landlord to the tenant and to the tenant's social guests. The writer will not attempt to deal with such things as the so-called "business visitor" rule which governs liability for injury to an innocent third party who is on the premises at the invitation of the tenant where, at the time of making a lease for a public or semi-public purpose, conditions exist on the premises making them unfit for their intended purpose. As to the "business visitor" rule see Webel v. Yale Univ., 125 Conn. 515, 7 A.2d 215 (1939); Wood v. Prudential Ins. Co., 212 Minn. 551, 4 N.W.2d 617 (1942); Reese v. Piedmont, Inc., 240 N.C. 391, 82 S.E.2d 365 (1954); Prosser, Business Visitors and Invitees, 26 Mil. L. Rev. 573 (1942).
This view, however, has not gone without criticism. Several writers have felt a need for protecting the large and ever-increasing “tenant” segment of our population by placing on the landlord a duty to repair. Several factors have led to this view, among them the following: greater mobility of population resulting in greater use of the short-term lease, changes in construction principles necessitating larger financial outlays for repairs, and increased urbanization causing concentration of people in one dwelling. The duty to repair has been placed on the landlord primarily through legislation. Such legislation has tended to fall into three basic classes: (1) statutes requiring the landlord to repair and imposing a penalty for his failure to do so; (2) statutes requiring the landlord to repair and providing that if he fails to do so the tenant may deduct the cost of repairs from the rent or terminate the contract; (3) statutes requiring the landlord to repair and imposing tort liability for personal injuries arising because of his failure to do so. The courts are not in agreement as to whether statutes of classes (1) and (2) place tort liability on the non-repairing landlord. Thus, of the jurisdictions having a class (1) type statute, some hold that the common law has been abrogated by the statute and that the landlord is liable for negligent failure to repair, while others hold that, even though the landlord has the duty to repair, he is not liable for personal injury. Those jurisdictions having a class (2) type statute uniformly hold that the landlord is not liable for personal injuries arising from violation of his statutory duty. Of course, in those jurisdictions having a class (3) type statute the courts hold that the landlord is subject to liability for...


8 Ibid.

9 Ibid.


It appears that a few jurisdictions, without the aid of a statute, have imposed a duty on the landlord to exercise due care in keeping the premises reasonably safe and have held him liable for injuries resulting from the breach of this duty. It appears that a few jurisdictions, without the aid of a statute, have imposed a duty on the landlord to exercise due care in keeping the premises reasonably safe and have held him liable for injuries resulting from the breach of this duty.

Breach of Covenant To Repair

Most American writers say that the majority of American jurisdictions hold, in accord with the common law rule, that where the landlord covenants to repair but fails to do so he will not be held liable for personal injuries arising from such failure.

Courts adhering to this view hold that the landlord is not liable in tort or in contract. The reason for denying recovery in tort is generally that the mere reservation of a right to enter to make repairs does not in itself give the landlord the degree of control necessary for imposing a legal duty. The same courts conclude that no contract liability for personal injuries arises because such damages cannot be said to have been fairly within the contemplation of the parties at the time that they entered into the contract. Thus, the only cause of action is one arising in favor of the tenant for breach of the contract with damages limited to the cost of repairs or the depreciation in the value of the property. Since the landlord is not liable in tort or contract for personal injuries, it follows, and the courts adhering to this view so hold, that those persons other than the tenant

2 Harper & James, Torts § 27.16 (1956); Prosser, Torts § 80 (2d ed. 1955); Note, 10 N.C.L. Rev. 397 (1932).

The scope of the term "tenant" is not readily ascertainable from the cases. Strictly construed, "tenant" does not include members of the lessee's family, and some courts so hold. Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932); Cavalier v. Pope, [1906] A.C. 428. Other courts have included the family within the scope of the term. Kimmons v. Crawford, 92 Fla. 652,
injured because of the disrepair are also precluded from recovery. In *Jordan v. Miller*, where the landlord breached a covenant to repair and an employee of the tenant was injured because of the disrepair of the premises, the court said that a tenant, his family, servants, or guests personally injured because of a defect in the premises, existing because of the landlord’s failure to comply with his agreement to repair, may not recover indemnity from the landlord, since such damages are too remote and cannot be said to be fairly within the contemplation of the parties.

It appears, however, that non-liability is by no means the prevailing view in this country. On the contrary, an increasing number of jurisdictions have come to hold the landlord liable in tort or in contract for personal injuries resulting from his breach of a covenant to repair. Generally these courts hold the landlord liable in tort on the theory that his duty to act is fixed by the contract. However, even among the courts which hold the landlord liable for personal injury on a tort theory, there is no uniformity as to the requisites of such action. Thus, some courts hold that in order for a duty to be imposed on the landlord the contract must be such that he promises to keep the premises safe. One court holds that the agreement must be one to make specific repairs and must be supported by consideration. It is usually held that in

109 So. 585 (1926); Fried v. Buhrmann, 128 Neb. 590, 259 N.W. 512 (1935). As the text indicates, the distinction is of no practical consequence in this situation.


24 179 N.C. 73, 101 S.E. 550 (1919).


order for the landlord to be liable he must have notice of the disrepair and have a reasonable time in which to correct it. On the other hand, some courts hold that the landlord has a duty to make a reasonable inspection. The reason usually given for imposing tort liability is that by a covenant to repair the landlord reserves control of the premises for that purpose and that such reservation of control is sufficient basis for imposing a legal duty to repair. It is suggested that the courts would be on firmer ground if they simply stated the policy reasons for holding the landlord. Indeed, most courts fail to mention either control or policy, simply saying that the landlord's duty to act is fixed by the contract, and, applying general negligence principles, hold him liable. Thus, in a Connecticut case where the landlord breached his covenant to repair and the tenant was injured because of the disrepair of the premises, the court held the landlord liable saying that the covenant imposed a duty on him to exercise a certain degree of care to avoid injury to others. The court stated that this duty arises where one is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once know that if he did not use ordinary care in regard to those circumstances danger of injury to the other would result. These courts have had no difficulty in extending the landlord's liability to the guests of the tenant, though, }

\[\text{Alaimo v. Du Pont, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954); McKenzie v. Egge, 207 Md. 1, 113 A.2d 95 (1955); Ashmun v. Nichols, 92 Ore. 223, 180 Pac. 510 (1919).}


\[\text{Smith v. Housing Authority, 144 Conn. 13, 127 A.2d 45 (1956); Patten v. Bartlett, 111 Me. 409, 89 Atl. 375 (1914); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N.W. 489 (1914). The New York Court of Appeals has relaxed the rule of a leading case, Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931), which held that a covenant to repair did not impose a legal duty on the landlord, to the extent that a covenant to repair with reservation of control gives sufficient control to the landlord to make him liable in tort. De Clara v. Barber S.S. Lines, Inc., 309 N.Y. 620, 132 N.E.2d 871 (1956), 23 Brooklyn L. Rev. 142 (1957).}

\[\text{PROSSER, TORTS § 80 (2d ed. 1955), states that these courts indulge in a legal fiction in saying that a covenant to repair gives the landlord control of the premises since he does not have the right to admit and exclude visitors.}

\[\text{See Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958), where the court says that, while the common law principle of non-liability for failure to repair was suitable for the agrarian setting in which it was conceived, to adhere to it now is to lag behind changes in dwelling habits and economic realities.}

\[\text{Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935); Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N.W. 877 (1915); Ashmun v. Nichols, 92 Ore. 223, 180 Pac. 510 (1919); Merchant's Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916).}

\[\text{Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935).}

since the duty is fixed by the contract, it would seem that an argument could be made that his duty is limited to the tenant.\(^{36}\)

A few courts have refused to recognize a landlord's tort liability but have held that he may be liable for personal injury in contract.\(^{37}\) However, the ordinary rules of contract damages are applied, i.e., the landlord must have contemplated that personal injuries were likely to result from the breach as a natural consequence thereof or must have been on notice of such likelihood at the time the contract was made.\(^{38}\) Note that the only difference in the reasoning of these courts and that of those which deny recovery for personal injury in contract is that the latter refuse to recognize that personal injuries may be foreseeable under the circumstances when the contract was made. It would seem arguable that, since these courts apply the strict contract rules of damages, persons other than the tenant who were injured would be barred by lack of privity.\(^{39}\) However, such a holding should not absolve the landlord entirely; if a third party is injured and such injury was foreseeable at the time the contract was made, then, in the event that the tenant is held liable to the third party in a suit for damages, the tenant's loss should be held to have been foreseeable by the landlord and the landlord should be held liable to the tenant in contract.

**Where the Landlord Is Negligent in Making Repairs**

The majority of American jurisdictions hold the landlord liable for personal injuries to the tenant\(^ {40}\) or a third person\(^ {41}\) which are caused by negligent repairs, whether performed gratuitously\(^ {42}\) or pursuant to a

\(^{36}\)For an example of a court which has recognized the existence of this problem see Colligan v. 680 Newark Ave. Realty Corp., 131 N.J.L. 520, 37 A.2d 206 (1944).

\(^{37}\)Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190 (1941). In O'Neil v. Brown, 158 Ky. 118, 164 S.W. 315 (1914), the Kentucky court said in a dictum that any action must be on the contract, and ordinarily personal injuries are beyond the contemplation of the parties; however, under Hadley v. Baxendale, 9 Exch. Rep. 941, 156 Eng. Rep. 145 (1854), if notice is given, the boundaries of natural consequence may be enlarged.


\(^{39}\)But see Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190 (1941), holding the landlord liable in contract to the tenant's wife. \textit{Quaere:} whether the court considered the tenant's family within the scope of the term "tenant." See the discussion of the conflict of reasoning as to scope of the term "tenant" at note 22 \textit{supra}. At any rate, it seems that the tenant's family could be considered third party beneficiaries more readily than could a social guest.


\(^{41}\)Kimmons v. Crawford, 92 Fla. 652, 109 So. 585 (1926); Barman v. Spencer, 49 N.E. 9 (Ind. 1898). Barrod v. Liedoff, 95 Minn. 474, 104 N.W. 289 (1905); Wilcox v. Hines, 100 Tenn. 524, 45 S.W. 781 (1898).

There are, however, differences in the reasoning of the courts on this matter. North Carolina appears to be in accord with the majority in holding the landlord for simple misfeasance once he undertakes to repair pursuant to a covenant, though there is some question whether there can be a recovery where the repairs are gratuitous. In Hill v. Day, where the landlord negligently repaired and a sub-lessee, who had no knowledge of the repairs, was injured, the Maine court held that before one can recover for injuries resulting from negligent performance of a gratuitous undertaking he must prove reliance on a condition of safety which he believed was created by the landlord's action. The Massachusetts court has held that if the repairs are gratuitously made then only the tenant can recover and he can recover only if the landlord has been grossly negligent. Still another view is that the landlord's act must have left the premises in a more dangerous condition after the repairs than they were before the landlord acted.

CONCLUSION

It appears that the majority of American jurisdictions hold that the landlord is not liable for negligent failure to repair if there is no covenant to repair and no statute imposing a duty on him to do so. Even if there is a statute, most courts do not hold him liable for personal injuries caused by the violation thereof. However, if there is a covenant to repair, there appears to be a growing majority of jurisdictions which hold the landlord liable for injuries resulting from the breach thereof. Also, if the landlord does attempt to repair and does the work negligently, the courts are almost unanimous in holding the landlord liable for injuries resulting to the tenant or his guest.

555, 85 S.W.2d 501 (1935); Verplanck v. Morgan, 90 N.E.2d 872 (Ohio App. 1948).
45 In Livingston v. Essex Inv. Co., supra note 44, the court said that the landlord is not liable for personal injuries caused by defects in the premises unless there is a covenant to repair which he negligently performs. The court, however, by way of dictum, quotes from 16 R.C.L. Landlord and Tenant § 565 (1917), to the effect that gratuitous repairs negligently performed render the landlord liable. The writer has found no North Carolina holding involving gratuitous repairs.
46 108 Me. 467, 81 Atl. 581 (1911); accord, Kuchynski v. Ukryn, 89 N.H. 400, 200 Atl. 416 (1938).
The North Carolina court holds the landlord liable only when he undertakes repairs and makes them negligently. It is suggested that it would be wise for both court and legislature to give careful consideration to the social and economic conditions existing in this state, particularly its low per capita income and increasingly crowded housing conditions. Both of these facts are so well known that they are worthy of judicial notice, and they seem compelling reasons for revision in this area of the law. However, it is submitted that any change, to be effective, must impose on the landlord the duty to repair, regardless of covenant, because the tenants who need this protection lack bargaining power to secure covenants to repair from the landlord.

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