

PROPERTY OWNER'S LIABILITY FOR NEGLIGENCE IN CREATING A CONDITION CONDUCTIVE TO CRIMINAL ASSAULT

In *Johnston v. Harris*¹ an elderly tenant of defendant's four-unit apartment building in Detroit's inner city brought a negligence action to recover damages for injuries sustained when he was assaulted, struck and robbed by an unknown youth in the poorly-lighted, unlocked vestibule of his apartment building. The Supreme Court of Michigan held that a tenant's action may lie against a landlord on the theory that the landlord was negligent in creating a condition conducive to criminal assault by failing to provide adequate lighting and locks.² The court concluded that plaintiff had presented a prima facie case: the landlord had a duty to provide adequate porch and vestibule lighting and to maintain the lock on the front door in good repair, and he had breached that duty.³ The controlling issue was whether the landlord's breach of duty was the proximate cause of plaintiff's injuries.⁴ The lower court's directed verdict for defendant was reversed and remanded for a new trial.⁵

With no discussion, the Supreme Court of Michigan imposed upon the landlord the duty to provide some protection against criminal attack. Traditionally, however, an individual has no duty to act affirmatively to prevent injury to another caused by a third person,⁶ nor any obligation to anticipate third-party criminal activity.⁷ The scope of the landlord's duty does not normally embrace the kind of injury resulting from such third-party acts.⁸ Without a showing of a

1. 387 Mich. 569, 198 N.W.2d 409 (1972).

2. *Id.* at 575, 198 N.W.2d at 411.

3. *Id.* at 575-76, 198 N.W.2d at 411.

4. *Id.* at 572-73, 198 N.W.2d at 410.

5. *Id.* at 576, 198 N.W.2d at 411.

6. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

7. *See, e.g., Tirado v. Lubarsky*, 49 Misc. 2d 543, 544, 268 N.Y.S.2d 54, 56 (N.Y.C. Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (App. T. 1966).

8. *Kobeski v. Judkowitz*, 57 Lack. Jur. 37, 39-40 (C.P. Lackawanna County, Pa. 1956).

breach of statutory,⁹ or contractual obligation,¹⁰ or of negligence constituting proximate cause of injury, an action cannot lie. No question of breach of statutory or contractual obligation was raised in *Johnston*, and the issue of whether the landlord-tenant relationship imposes a duty upon the landlord to provide his tenants with reasonable security from predictable crimes has in fact received little judicial inquiry. Those few cases that have considered the problem generally absolved the landlord by finding either an absence of legal duty¹¹ or lack of proximate cause.¹²

Perhaps the overriding reason for refusal to impose liability was that the landlord-tenant relationship was still so intimately tied to property law concepts as to negate the idea that the *relationship itself* created a duty of care.¹³ Under the traditional principles of property law, a lease is not thought of as creating a relationship wherein

9. Statutes or regulations requiring landlords to maintain their premises in a "safe" condition have been construed to refer exclusively to the *physical* condition of the premises. Generally, therefore, no statutory duty has been imposed upon the landlord to provide protection against the criminal activities of third persons. See *Williams v. William J. Davis, Inc.*, 275 A.2d 231 (D.C. Mun. Ct. App. 1971); *New York City Housing Authority v. Medlin*, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (N.Y.C. Civ. Ct. 1968); *DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (N.Y.C. Civ. Ct. 1965).

10. Using a contract theory, one court held a landlord obligated to maintain security measures equivalent to those in effect at the commencement of the lease term. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). Other courts, however, have rejected the contention that a landlord's duty to protect his tenants against criminal activity was imposed by express or implied contractual terms. See *Teall v. Harlow*, 275 Mass. 448, 176 N.E. 533 (1931); *New York City Housing Authority v. Medlin*, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (N.Y.C. Civ. Ct. 1968).

11. No duty to protect was found in: *Goldberg v. Housing Authority*, 38 N.J. 578, 186 A.2d 291 (1962); *New York City Housing Authority v. Jackson*, 58 Misc. 2d 847, 296 N.Y.S.2d 237 (N.Y.C. Civ. Ct. 1968); *Kobeski v. Judkowitz*, 57 Lack. Jur. 37 (C.P. Lackawanna County, Pa. 1956).

12. There was a failure to establish proximate cause in the following cases: *Applebaum v. Kidwell*, 12 F.2d 846 (D.C. Cir. 1926); *DeFoe v. Sloane*, 99 A.2d 639 (D.C. Mun. Ct. App. 1953); *Goldberg v. Housing Authority*, 38 N.J. 578, 186 A.2d 291 (1962); *McCappin v. Park Capitol Corp.*, 42 N.J. Super. 169, 126 A.2d 51 (App. Div. 1956); *Levin v. Eleto Realty Corp.*, 160 Misc. 141, 289 N.Y.S. 667 (App. T. 1936); *New York City Housing Authority v. Jackson*, 58 Misc. 2d 847, 296 N.Y.S.2d 237 (N.Y.C. Civ. Ct. 1968); *Tirado v. Lubarsky*, 49 Misc. 2d 543, 268 N.Y.S.2d 54 (N.Y.C. Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (App. T. 1966); *DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (N.Y.C. Civ. Ct. 1965).

13. Comment, *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 16 VILL. L. REV. 779, 782 (1971).

one party becomes subservient to the other, but rather is considered to be only a single transaction in which one party conveys an estate in land to another for a specified term. This traditional rationale, however, becomes untenable in the modern multiple-dwelling context where a continuing relationship is a necessity due to the tenant's continuing need for services and the landlord's exclusive control in providing them.¹⁴ Although traditionally a tenant takes the premises as he finds them,¹⁵ *Johnston* adopted the rationale, used in *Kline v. 1500 Massachusetts Ave. Apartment Corp.*,¹⁶ that the landlord was the "only party who has the power to make the necessary repairs or to provide the necessary protection,"¹⁷ in order to include the landlord-tenant relationship in the category of "special relationships" and to impose the duty of due care to protect tenants from predictable criminal acts.

Where there is a legal obligation to protect a "subservient party" from criminal attack, social necessity and judicial determination have recognized certain special relationships.¹⁸ When such a relationship is found to exist, liability is based on the fact that the ability of one party to protect himself has been limited by his submission to the control or ownership in another. As a result, the party possessing superior control is burdened with a duty of exercising reasonable care to protect the subservient party.¹⁹ Special relationships in which the duty has been imposed include landowner-invitee,²⁰ innkeeper-guest,²¹ business proprietor-patron,²² employer-employee,²³ carrier-

14. *Id.*

15. *See* *Civale v. Menden Housing Authority*, 150 Conn. 594, 192 A.2d 548 (1963).

16. 439 F.2d 477 (D.C. Cir. 1970).

17. *Id.* at 481.

18. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965), comment b, quoted at note 26 *infra*.

19. *See* Comment, *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, *supra* note 13, at 781.

20. *See, e.g.*, *Harry Foretsky & Sons, Inc. v. Hurwitz*, 235 F.2d 295 (4th Cir. 1956).

21. *See* *McFadden v. Bancroft Hotel Corp.*, 313 Mass. 56, 46 N.E.2d 573 (1943); *Coca v. Arceo*, 71 N.M. 186, 376 P.2d 970 (1962).

22. *See* *Williams v. Essex Amusement Corp.*, 133 N.J.L. 218, 43 A.2d 828 (Sup. Ct. 1945); *Connelly v. Kaufmann & Baer Co.*, 349 Pa. 261, 37 A.2d 125 (1944).

23. *See* *Lillie v. Thompson*, 332 U.S. 459 (1947).

passenger,²⁴ and school district-pupil.²⁵ Liability, however, was not meant to be confined to these narrow categories.²⁶

Johnston followed a path set by *Javins v. First National Realty Corp.*²⁷ when it recognized the changed nature of the landlord-tenant relationships. Unlike *New York Housing Authority v. Jackson*,²⁸ which had denied the existence of a legal duty to supply police protection in the absence of some "relationship" between the parties creating a duty to use due care, *Johnston* impliedly recognized that a tenant in a typical multiple-family dwelling relies upon the control and power of the landlord to assure his security in the common areas of the building at least as much as the "subservient party" in any of the above-recognized "special relationships." The imposition of a duty on the landlord to provide for reasonable protection of his tenants is an important step in the changing judicial conception of the modern landlord's obligations.

To aid the finding of a special relationship exception to the general rule, *Johnston* utilized the doctrine of a landlord's "exclusive control" to impose liability on the landlord. The doctrine was clearly extended to include injuries from foreseeable criminal acts, in addition to injuries caused by physical defects on the premises, in *Kline v. 1500 Massachusetts Ave. Apartment Corp.*²⁹ Some courts impose a duty on the landlord to exercise reasonable care in keeping common areas in a safe condition,³⁰ the rationale being that a landlord is

24. See *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1967), cert. denied, 393 U.S. 979 (1968).

25. See *McLeod v. Grant County School Dist.*, 42 Wash. 2d 316, 255 P.2d 360 (1953).

26. RESTATEMENT (SECOND) OF TORTS § 314A (1965), comment b states: "The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. *The relations listed are not intended to be exclusive.*" (Emphasis added.)

27. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

28. 58 Misc. 2d 847, 849, 296 N.Y.S.2d 237, 239 (N.Y.C. Civ. Ct. 1968).

29. *Kline* caused a flurry of case comments, including 1970 DUKE L.J. 1046; 59 GEO. L.J. 1153 (1971); 55 MINN. L. REV. 1097 (1971); 45 N.Y.U. L. REV. 943 (1970); 49 TEXAS L. REV. 586 (1971); 32 U. PITT. L. REV. 267 (1971); 5 U. SAN FRANCISCO L. REV. 378 (1971); 24 VAND. L. REV. 195 (1970); 15 VILL. L. REV. 195 (1970); 16 VILL. L. REV. 779 (1971).

30. E.g., *Levine v. Katz*, 407 F.2d 303 (D.C. Cir. 1968); *Mayer v. Housing Authority*, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), aff'd per curiam, 44 N.J. 567, 210 A.2d 617 (1965). Some of the relevant factors of reasonable care under all the circumstances are: the crime rate in the city, in the area, and on the landlord's premises; tenants' complaints; number of tenancies; the amount

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presumed to have retained control over those parts of the premises used in common by the tenants.³¹ Therefore, if the landlord "[k]nows, or in the exercise of ordinary care ought to know, of a possibly dangerous situation and fails to take such steps as an ordinarily prudent person, in view of existing circumstances, would have exercised to avoid injury to his tenant, he may be liable."³² The emerging trend is to impose a duty to provide some reasonable measure of care and protection to tenants with respect to foreseeable criminal conduct.³³ Thus, where the landlord is the only party who has the power to make the necessary security provisions without which criminal activity is foreseeable,³⁴ or where the property owner has knowledge that his property is frequented by dangerous characters,³⁵ or has knowledge of other conditions which are likely to result in an assault or constitute a potential source of danger of criminal attack,³⁶ the duty of reasonable care has been imposed.

The *Johnston* court directed itself primarily to a discussion of the second of the two basic issues, proximate causation.³⁷ The court was concerned with two aspects of proximate cause. First, was the landlord's failure to secure the premises a proximate cause of the tenant's

of rent paid; nature and quality of accommodations; and expressed and implied warranties as to the safety of the premises. Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153, 1180 (1971).

31. See *Primus v. Bellevue Apartments*, 241 Iowa 1055, 44 N.W.2d 347 (1950).

32. This test was adopted in *Kline*, 439 F.2d at 484-85, as it had been set out in *Kendall v. Gore Properties, Inc.*, 236 F.2d 673, 680 (D.C. Cir. 1956) (landlord held liable when his employee, whom the landlord had failed to investigate, strangled the young woman tenant whose apartment he was painting).

33. See *Ramsay v. Morrissette*, 252 A.2d 509 (D.C. Mun. Ct. App. 1969) (landlord said to be under a duty to exercise reasonable care with respect to the prevention, deterrence, or control of foreseeable criminal conduct within those parts of the apartment building used in common by all tenants). See also *Bass v. City of New York*, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969) (municipal housing authority liable in tort for the death of a nine-year-old girl who was raped, tortured and dropped to her death while the lone policeman assigned to the crime-ridden complex was out to lunch). The case was later reversed on the grounds of governmental tort immunity, 38 App. Div. 2d 407, 330 N.Y.S.2d 569 (1972).

34. 439 F.2d at 481.

35. See *Lillie v. Thompson*, 332 U.S. 459 (1947).

36. See *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 50 N.E.2d 497 (1943); *Abbott v. New York City Pub. Library*, 263 App. Div. 314, 32 N.Y.S.2d 963 (1942).

37. For cases finding lack of proximate cause see note 12 *supra*.

injuries? Secondly, did the intervening criminal attack constitute a superseding cause,³⁸ severing the causal connection between the tenant's injury and any breach of the landlord's duty? Whether liability was imposed depended on whether the court took a narrow or broad view of proximate cause.

According to the narrow view, the injury must be a natural and continual sequence of the wrongful act complained of, "unbroken by any new cause . . . and without which that even would not have occurred."³⁹ Following this view, it has been held that the landlord's failure to repair a front-door lock was insufficient evidence to establish proximate cause of an assault and robbery.⁴⁰ In another decision it was found that the unlawful act of an incendiary, rather than the negligence of a landlord who allowed trash to accumulate in a hallway, was the proximate cause of smoke and soot damage to a tenant's property, and that the landlord had neither control over nor responsibility for the unlawful acts of others.⁴¹

In *Johnston*, the lower court apparently treating the action as based solely upon the narrow theory that the landlord's failure to provide proper locks and lighting alone caused plaintiff's injuries, held in favor of the landlord. The Supreme Court of Michigan, in reversing, took the broader view that foreseeable intervening forces are within the scope of original risk and therefore within the scope of the landlord's duty,⁴² even if that foreseeable intervening force is

38. The *Johnston* court relied on the definition of superseding cause in RESTATEMENT (SECOND) OF TORTS § 448 (1965).

39. *Tirado v. Lubarsky*, 49 Misc. 2d 543, 544, 268 N.Y.S.2d 54, 56 (N.Y.C. Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (App. T. 1966), *citing* *Laidlaw v. Sage*, 158 N.Y. 73, 99, 52 N.E. 679, 688 (1899).

40. *Tirado v. Lubarsky*, 49 Misc. 2d 543, 268 N.Y.S.2d 54 (N.Y.C. Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (App. T. 1966).

41. *DeFoe v. W. & J. Sloane*, 99 A.2d 639 (D.C. Mun. Ct. App. 1953). *See* *Applebaum v. Kidwell*, 12 F.2d 846 (D.C. Cir. 1926); *Stelloh v. Cottage 83, Inc.*, 52 Ill. App. 2d 168, 201 N.E.2d 672 (1964), in which a complaint was held defective because of the tenant's failure to allege that the landlord knew or that the tenant did not know of the prior series of break-ins, burglaries and rapes in the project. In addition, the court was doubtful that the giving of such warning about the prior incidents would have lessened the probability of the crime. *See also* *Benjamin v. Brooklyn Trust Co.*, 185 Misc. 296, 57 N.Y.S.2d 816 (App. T.), *appeal denied*, 269 App. Div. 939, 57 N.Y.S.2d 846 (1945), in which it was held that the landlord could not foresee that one of its employees would find a missing passkey and enter the apartment to take some of plaintiff's personal property.

42. *See* W. PROSSER, LAW OF TORTS § 44, at 273 (4th ed. 1971).

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the criminal act of some third person.⁴³ The court adopted the broad view of causation of *Crammer v. Willston Operating Co.*⁴⁴ in response to the argument that an omission could not be a cause of an event if the particular event could have occurred without it. *Crammer* stated that although the skating injuries involved therein *could* have happened with better supervision, the evidence justified the inference that "better policing of the rink would have deterred the . . . skaters from conduct injurious to others."⁴⁵ Where an omission was a "substantial factor" causing the injury,⁴⁶ or where the occurrence was one "which the defendant should have foreseen and better guarded against,"⁴⁷ or was a "danger . . . reasonably to be anticipated,"⁴⁸ proximate cause has been found.

It is recognized that proximate cause, in many cases, is what a court wills it to be. One court says that, at best, it is a theory under which the courts justify or shield from liability those that the court finds, in a particular case, should or should not be responsible for a given result.⁴⁹ A court will thus incorporate its policy and its ideas of reasonableness and fairness into the concept of proximate cause.

It has been said that "in every . . . case the basic question is one of policy;"⁵⁰ that whether one person owes a duty or protection to another is "ultimately a question of fairness."⁵¹ Some of the factors

43. 387 Mich. at 572-73, 198 N.W.2d at 410.

44. 19 N.J. Super. 489, 88 A.2d 630 (App. Div. 1952), wherein a patron at a skating rink unwittingly upset two young ladies. The question raised was whether there were sufficient ushers present to protect patrons from skating conditions which were hazardous because of the crowd.

45. *Id.* at 492, 88 A.2d at 632.

46. *Lee v. National League Baseball Club*, 4 Wis. 2d 168, 89 N.W.2d 811 (1958) (defendant held negligent in failing to have an usher at his assigned position when spectators stampeded to recover a foul ball. The usher's absence was held to constitute a "substantial factor" in the ultimate event).

47. *Wallace v. Der-Ohanian*, 199 Cal. App. 2d 141, 146, 18 Cal. Rptr. 892, 895 (Dist. Ct. App. 1962) (court sustained recovery from a camp operator by a child who had been attacked by an intruder).

48. *McLeod v. Grant County School Dist. No. 128*, 42 Wash. 2d 316, 322, 255 P.2d 360, 364 (1953) (school district authorities held negligent when a child was attacked in the school gym).

49. *Mozer v. Semenza*, 177 So. 2d 880, 883 (Fla. Dist. Ct. App. 1965).

50. *Feezer & Favour, Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 642 (1940).

51. *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, *supra* note 30, at 1161. *See also Goldberg v. Housing Authority*, 38 N.J. 578, 588, 186 A.2d 291, 296 (1962).

utilized in determining "fairness" are a balancing of the interests of the parties involved and society in general, examining the nature and extent of the risk and weighing the feasibility of the suggested solution.⁵² The Supreme Court of Michigan, however, rather mechanically applied negligence principles to the facts, thereby making a decision that may well have a significant impact on landlord-tenant relations without openly considering important policy implications.

Despite the importance of policy implications, surprisingly few landlord-tenant cases have discussed such factors as reasonableness and fairness.⁵³ In blighted urban neighborhoods the crime rate is typically very high, the total number of crimes being highest in less affluent neighborhoods, where the custom of providing any meaningful security services is virtually non-existent.⁵⁴ *Johnston* implicitly holds that the landlord is the person who should appropriately bear the cost of crime, even though the increased costs for the landlord will inevitably result in increased rent for the tenant. The court in *Kline* noted that better protection had been provided to the tenants previously and admitted that the landlord would be justified in passing on the cost of increased security; but the tenants in *Kline* were in an income bracket that could afford an increase in rent to pay for the increased protection. *Johnston* did not make such a concession, probably because this was a low-income housing area where the tenants could not afford any increase in rent. Individuals moving into a building generally know the amount of security that is provided for the amount of rent they pay. Perhaps the court should have noted the standard of protection in comparably-priced apartments of the same character and type within the community.⁵⁵ It should be noted here, however, that the cost of the improvements provided for by *Johnston*, a new lock on the front door and adequate

52. It is generally agreed among commentators that tort liability ultimately rests on a balancing of several factors, including: (1) the economic burden that liability would impose upon defendant; (2) the extent to which the risk is one normally incident to the activity; (3) the relative capacity of the parties to bear the loss; (4) the public interest in preventing future injuries; and (5) administrative convenience. Comment, *Landowner Owes Invitee No Duty to Provide Police Protection Against Criminal Attack*, 63 COLUM. L. REV. 766, 768 (1963).

53. Discussed in Annot., 10 A.L.R.3d 619, 643 (1966).

54. See *Landlords Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, supra note 30, at 1183-84 nn.187-89 and accompanying text.

55. This standard was noted in the dissent in *Kline*, 349 F.2d at 491-93.

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porch and vestibule lighting, may be nominal. But no matter how nominal, the people who must bear the cost of the increased security and protection are those who can least afford it.

Judge Brennan, in his dissent in the *Johnston* case, took the view that public safety is the business of the government and that the cost of security in high-crime areas should not be transferred to the "unfortunate owners of real property in such places."⁵⁶ One court has suggested that it is the legislature's job to protect tenants from the high rise in the crime rate.⁵⁷ But another court refused to interfere with the legislative-executive decisions of how the resources of the community may be deployed for the proper protection of the people.⁵⁸

It is clear that *Johnston v. Harris* was another in a growing series of cases seeking to advance the landlord-tenant relationship beyond its common law origins. *Johnston* went further than any previous case to impose liability on a landlord for negligent breach of duty to his tenant to provide reasonable protection against third-party criminal acts. It went one step further than *Kline* which held that a tenant may rely upon the maintenance of that degree of security and protection employed by the landlord when the tenant became a resident on the premises. *Johnston* held that the landlord owed a duty to provide reasonable security, and may even require that a landlord *affirmatively improve* the premises after the tenant occupies if put on notice that there is a high-crime rate in the area.

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56. 387 Mich. at 576, 198 N.W.2d at 411.

57. *DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 955, 266 N.Y.S.2d 463, 467 (N.Y.C. Civ. Ct. 1965). Great Britain and California have enacted legislation to provide financial assistance from state funds to victims of crimes of violence and to families of murder victims, thus recognizing that victims of criminal attacks are usually without a civil remedy. Annot., 10 A.L.R.3d 619, 626 (1966).

58. *New York City Housing Authority v. Jackson*, 58 Misc. 2d 847, 851, 296 N.Y.S.2d 237, 241 (N.Y.C. Civ. Ct. 1968).