

CHANGING NOTIONS OF A LANDLORD'S TORT LIABILITY TO HIS TENANT: RE-EVALUATING THE CONTROL DOCTRINE

In *Sargent v. Ross*¹ plaintiff sought recovery for the death of his four-year-old daughter who fell from an outdoor stairway leading exclusively to her baby sitter's second-floor apartment.² Plaintiff brought an action for negligence against the baby sitter's landlord, alleging that the stairs were too steep and that the handrail was inadequate. The jury returned a verdict for plaintiff. On appeal the landlord argued that he owed no duty to the deceased since the stairway was entirely within the control of the tenant. The Supreme Court of New Hampshire rejected the landlord's argument, observing that "the control test is insufficient since it substitutes a facile and conclusive test for a reasoned consideration of whether due care was exercised under all the circumstances."³ Recognizing that the antiquated common law rules governing landlord liability were greatly out of touch with modern realities of apartment living, the court abolished the doctrine of *caveat lessee* and the general rule of a landlord's freedom from tort liability. Henceforth, landlords will be held to the same responsibilities and duties as are ordinary persons in that they must exercise reasonable care not to subject others to an unreasonable risk of harm.⁴

At common law the lessor of land generally owed no duty to the lessee to repair defective conditions existing on the land at the time of letting or developing thereafter.⁵ Likewise, the lessor was not

1. 113 N.H. 388, 308 A.2d 528 (1973).

2. A landlord owes his tenant's invitee the same duty of care as he owes the tenant. See *Macke Laundry Serv. Co. v. Weber*, 267 Md. 426, 429-30, 298 A.2d 27, 29 (1972); *Lopez v. Gukenback*, 391 Pa. 359, 365, 137 A.2d 771, 775 (1958); 49 AM. JUR. 2d *Landlord & Tenant* §§ 810-11 (1970) [hereinafter cited as *Landlord & Tenant*].

3. 113 N.H. at, 308 A.2d at 531.

4. *Id.* at, 308 A.2d at 534.

5. *Kowinko v. Salecky*, 5 Conn. Cir. 657, 661, 260 A.2d 892, 896 (App. Div. 1969); *Lopez v. Gukenback*, 391 Pa. 359, 364, 137 A.2d 771, 774 (1958); RESTATEMENT (SECOND) OF TORTS §§ 355, 356 (1965) [hereinafter cited as RESTATEMENT]. But see text at note 16 *infra* (concealed latent defect exception).

liable to the lessee in tort for personal injuries caused by such defective conditions. The tenant took the premises as he found them.⁶

Historically, the landlord's freedom from responsibility is easily explained by his dominance in almost all phases of medieval English society.⁷ While the feudal landlord usually possessed great wealth, power and influence, the tenant was commonly a menial servant with limited choice in selecting his home. Furthermore, many common law judges were themselves landlords. As a result, the landlord's duty was limited to surrendering possession to the tenant, in return for which the tenant covenanted to pay rent.⁸ The system did have certain advantages for the tenant, who, in an agrarian society, was interested primarily in the exclusive use and peaceful enjoyment of the land, rather than the structures upon it.⁹ The tenant was content to be free from inspections and other forms of landlord interference.¹⁰ Accordingly, common law courts accommodated both parties by treating the lease as a sale of the demised premises for a term of years.¹¹ The tenant was thus provided with standing and remedies to protect his interest against both the landlord and third-party wrongdoers.¹² An additional result, however, was to impose

6. *City of Fairbanks v. Schaible*, 375 P.2d 201, 205 (Alas. 1962); *Manns v. Stein*, 99 Ill. App. 2d 398, 402, 241 N.E.2d 691, 693 (1968); *Burelle v. Pienkofski*, 84 N.H. 200, 148 A. 24 (1929); *Yaeger v. Parkgate Realty Co.*, 88 Ohio L. Abs. 385, 387, 179 N.E.2d 156, 158 (Ct. App. 1962); *Lopez v. Gukenback*, 391 Pa. 359, 364, 137 A.2d 771, 775 (1958).

7. See generally Harkrider, *Tort Liability of a Landlord* (pts. 1-3), 26 MICH. L. REV. 260, 383, 531, at 260-61 (1928) [hereinafter cited as Harkrider]; Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 669 (1949) [hereinafter cited as *Lessor's Duty to Repair*].

8. See generally *Lipsitz v. Schechter*, 377 Mich. 685, 687, 142 N.W.2d 1, 2 (1966); Harkrider, *supra* note 7, at 261; Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227-28 (1969) [hereinafter cited as Quinn & Phillips].

9. *Clarke v. O'Connor*, 435 F.2d 104, 111 (D.C. Cir. 1970); *Kline v. Burns*, 111 N.H. 87, 90-91, 276 A.2d 248, 250-51 (1971); Harkrider, *supra* note 7, at 260-61; Quinn & Phillips, *supra* note 8, at 227-28, 231.

10. See generally Quinn & Phillips, *supra* note 8, at 228.

11. *Lemle v. Breeden*, 51 Hawaii 426, 429, 462 P.2d 470, 472 (1969); *Lipsitz v. Schechter*, 377 Mich. 685, 687, 142 N.W.2d 1, 2 (1966); *Kline v. Burns*, 111 N.H. 87, 90, 276 A.2d 248, 250 (1971); Harkrider, *supra* note 7, at 260-61; *Lessor's Duty to Repair*, *supra* note 7, at 669.

12. *Kline v. Burns*, 111 N.H. 87, 90, 276 A.2d 248, 250 (1971); Harkrider, *supra* note 7, at 261.

upon the tenant the duty to inspect and make minor repairs on the premises,¹³ and the liability to third persons for injuries caused by a breach of that duty.¹⁴

A number of exceptions soon developed to the general rule of landlord non-liability.¹⁵ A landlord is liable for a tenant's injuries if, at the time of letting, the landlord had actual knowledge of a concealed latent defect of which the tenant was not aware, nor likely to discover in the exercise of reasonable care, and that the landlord knew, or should have known, involved an unreasonable risk of bodily harm.¹⁶ Furthermore, the landlord may be liable to the general public when the property is leased for a public use and the landlord knows, or should know, of a dangerous defect and has reason to believe that the lessee will not correct it.¹⁷ A landlord may also be liable if he voluntarily undertakes to repair but does so negligently, thereby causing injury to the tenant.¹⁸ The final

13. 1 AMERICAN LAW OF PROPERTY § 3.78, at 347 (A.J. Casner ed. 1952); Harkrider, *supra* note 7, at 260-61; *Lessor's Duty to Repair*, *supra* note 7, at 669-70. In an agrarian society maintenance and repairs were not nearly so complex and expensive when tenants had to be jacks-of-all-trades. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250-51 (1971); 1 AMERICAN LAW OF PROPERTY, *supra*, § 3.78, at 347; *Quinn & Phillips*, *supra* note 8, at 231; Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153, 1156 (1971) [hereinafter cited as *Landlord's Duty*].

14. *Rahn v. Beurskens*, 66 Ill. App. 2d 423, 427, 213 N.E.2d 301, 304 (1966).

15. See generally *Masterson v. Atherton*, 149 Conn. 302, 306-07, 179 A.2d 592, 595 (1962); *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528, 531 (1973); *Lopez v. Gukenback*, 391 Pa. 359, 364-65, 137 A.2d 771, 775 (1958); W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 47 (3d ed. 1965); 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 27.15-17 (1956) [hereinafter cited as HARPER & JAMES]; 2 POWELL ON REAL PROPERTY § 234 (rev. ed. 1973); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63 (4th ed. 1971) [hereinafter cited as PROSSER]; Comment, *Liability of Landlord and Tenant to Persons Injured on Premises*, 39 WASH. L. REV. 345, 352-62 (1964).

16. *Kowinko v. Salecky*, 5 Conn. Cir. 657, 662, 260 A.2d 892, 896 (App. Div. 1969); *Flournoy v. Kuhn*, 378 S.W.2d 264, 268 (Mo. Ct. App. 1964); *Lapp v. Rogers*, 265 Ore. 586, 588-89, 510 P.2d 551, 552-53 (1973); *Lopez v. Gukenback*, 391 Pa. 359, 364, 137 A.2d 771, 775 (1958); *Boyce v. Shankman*, 40 Tenn. App. 475, 482, 292 S.W.2d 229, 232 (1953); RESTATEMENT, *supra* note 5, at § 358. Note that the owner is held to have constructive knowledge of latent defects when third-party strangers are involved.

17. *Blair v. Berlo Vending Corp.*, 287 A.2d 696, 697 (Del. Super. Ct. 1972); *Lopez v. Gukenback*, 391 Pa. 359, 364-65, 137 A.2d 771, 775 (1958); PROSSER, *supra* note 15, at 403; RESTATEMENT, *supra* note 5, at § 359.

18. *Fitzpatrick v. Ford*, 372 S.W.2d 844, 851 (Mo. 1963); *Flournoy v. Kuhn*, 378 S.W.2d 264, 268 (Mo. Ct. App. 1964); *Hunkins v. Amoskeag Mfg. Co.*, 86 N.H. 356, 357, 169 A. 3, 4 (1933); RESTATEMENT, *supra* note 5, at § 362.

deviation from the general rule is the control or common use exception whereby liability is based on the assumption that when a landlord leases a building to several tenants he is deemed to have retained control over those passageways, stairways and other areas that are used in common by the tenants as appurtenant to their respective leaseholds.¹⁹

In *Sargent* the court totally abolished the doctrine of *caveat lessee*, primarily through its attack on the control exception. Previously, New Hampshire law was in accord with the great majority of American jurisdictions in endorsing the common law rules of landlord-tenant tort liability,²⁰ particularly with regard to the control doctrine.²¹ The underlying notion of the control exception is that because common areas belong to all the tenants, in effect they belong

19. See, e.g., *City of Fairbanks v. Schaible*, 375 P.2d 201, 205 (Alas. 1962); *DiMare v. Cresci*, 58 Cal. 2d 292, 297, 373 P.2d 860, 863, 23 Cal. Rptr. 772, 775 (1962); *Panaroni v. Johnson*, 158 Conn. 92, 98, 256 A.2d 246, 251-52 (1969); *Manns v. Stein*, 99 Ill. App. 2d 398, 402, 241 N.E.2d 691, 693 (1968); *Trimble v. Spears*, 182 Kan. 406, 409, 320 P.2d 1029, 1032 (1958); *Parson v. Whitlow*, 453 S.W.2d 270, 272 (Ky. 1970); *Macke Laundry Serv. Co. v. Weber*, 267 Md. 426, 429-31, 298 A.2d 27, 29-30 (1972); *Fitzpatrick v. Ford*, 372 S.W.2d 844, 849 (Mo. 1963); *Dubreuil v. Dubreuil*, 107 N.H. 519, 521, 229 A.2d 338, 340 (1967); *Yaeger v. Parkgate Realty Co.*, 88 Ohio L. Abs. 385, 388, 179 N.E.2d 156, 158 (Ct. App. 1962); *Lopez v. Gukenback*, 391 Pa. 359, 365, 137 A.2d 771, 775 (1958); *Smith v. Monmaney*, 127 Vt. 585, 588, 255 A.2d 674, 676 (1969); *Taylor v. Virginia Constr. Corp.*, 209 Va. 76, 79, 161 S.E.2d 732, 734 (1968); RESTATEMENT, *supra* note 5, at § 360. See generally Annot., 26 A.L.R.2d 468 (1952); Annot., 25 A.L.R.2d 364, 444 (1952).

20. *Dubreuil v. Dubreuil*, 107 N.H. 519, 522, 229 A.2d 338, 340 (1967). See also cases cited note 19 *supra*.

21. *Hunkins v. Amoskeag Mfg. Co.*, 86 N.H. 356, 357, 169 A. 3, 4-5 (1933); *Rowe v. Ayer & Williams, Inc.*, 86 N.H. 127, 128-29, 164 A. 761, 762 (1933); *Burette v. Pienkofski*, 84 N.H. 200, 200-01, 148 A. 24 (1929). The classic statement of the control exception for New Hampshire and most jurisdictions appears in *Gobrecht v. Beckwith*, 82 N.H. 415, 135 A. 20 (1926):

It is generally held that, where he (the landlord) retains possession of a portion of the leased premises for the use in common of different tenants, a duty is by law imposed upon him to use ordinary care to keep in safe condition this particular part of the leased premises, and, if he is negligent in this regard and a personal injury results to a tenant by reason thereof, he is liable therefor.

Id. at 417, 135 A. at 21. The only variation to this exception is the Massachusetts rule, which only requires landlords to maintain the common areas in as good and as safe a condition as they were, or appeared to be, at the time of letting. *Finn v. Peters*, 340 Mass. 622, 624, 165 N.E.2d 896, 898 (1960); *Banaghan v. Dewey*, 340 Mass. 73, 77, 162 N.E.2d 807, 811 (1959). It should also be noted that several states have expanded the common law duties of the landlord by statute. See Annot., 17 A.L.R.2d 704 (1951).

to none of them. Consequently, the allocation and coordination of responsibility would be difficult, fluctuating constantly as tenants came and went.²² Thus, the common law imposed the duty upon the landlord as the only one possessing the power and resources to make the necessary repairs and provide the necessary protection.²³ The landlord is said to invite the use of common areas by the tenants.²⁴

The landlord's duty to inspect and repair common areas is not, however, absolute. He is by no means an insurer of his tenants' safety.²⁵ Rather, his duty is to use ordinary care to make common areas reasonably safe for his tenants.²⁶ He is held to the standard of a reasonably prudent man concerning what he knows, or should know, in the exercise of ordinary care.²⁷

22. See *Clarke v. O'Connor*, 435 F.2d 104, 112 (D.C. Cir. 1970). See also *Harkrider*, *supra* note 7, at 383, 402.

23. See *Lessor's Duty to Repair*, *supra* note 7, at 670; cf. *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528, 532 (1973), in which the court noted that one problem under the common law arises when the question of control remains unresolved, allowing the intolerable situation in which neither party is willing to take the responsibility for the safe maintenance of an area.

24. *Bowman v. Goldsmith Bros. Co.*, 63 Ohio L. Abs. 428, 433, 109 N.E.2d 556, 558 (Ct. App. 1952); *Taylor v. Virginia Constr. Corp.*, 209 Va. 76, 79, 161 S.E.2d 732, 734-35 (1968).

25. *Gladden v. Walker & Dunlop, Inc.*, 168 F.2d 321, 322 (D.C. Cir. 1948); *DiMare v. Cresci*, 58 Cal. 2d 292, 297-98, 373 P.2d 860, 863, 23 Cal. Rptr. 772, 775 (1962); *Mounsey v. Ellard*, Mass., 297 N.E.2d 43, 53 (1973); *Swingler v. Robinson*, 321 S.W.2d 29, 30-31 (Mo. Ct. App. 1959); *Boyce v. Shankman*, 40 Tenn. App. 475, 481-82, 292 S.W.2d 229, 232 (1953); *Schofield v. Kinzell*, 29 Utah 2d 427, 430-31, 511 P.2d 149, 151 (1973); *Smith v. Monmaney*, 127 Vt. 585, 588, 255 A.2d 674, 676 (1969); *Wagman v. Boccheciampe*, 206 Va. 412, 416, 143 S.E.2d 907, 909 (1965).

26. *DiMare v. Cresci*, 58 Cal. 2d 292, 297-98, 373 P.2d 860, 863, 23 Cal. Rptr. 772, 775 (1962); *Kowinko v. Salecky*, 5 Conn. Cir. 657, 663-64, 260 A.2d 892, 897 (App. Div. 1969); *Trimble v. Spears*, 182 Kan. 406, 409-11, 320 P.2d 1029, 1032-34 (1958); *McCutcheon v. United Homes Corp.*, 79 Wash. 2d 443, 445, 486 P.2d 1093, 1094-95 (1971). Under this duty, the landlord is required to make reasonable inspections at reasonable intervals. *DiMare v. Cresci*, 58 Cal. 2d 292, 297, 373 P.2d 860, 863, 23 Cal. Rptr. 772, 775 (1962). Similarly, the landlord is entitled to a reasonable length of time within which to make repairs. *Klein v. United States*, 339 F.2d 512, 516 (2d Cir. 1964); *Morris v. Oney*, 217 Cal. App. 2d 864, 870, 32 Cal. Rptr. 88, 91 (Dist. Ct. App. 1963); *Schofield v. Kinzell*, 29 Utah 2d 427, 430-31, 511 P.2d 149, 151 (1973).

27. *Montgomery Ward & Co. v. New York Cent. R.R.*, 389 F.2d 556, 558 (2d Cir. 1968); *Trimble v. Spears*, 182 Kan. 406, 410, 320 P.2d 1029, 1032 (1958); *Lipsitz v. Schechter*, 377 Mich. 685, 689, 142 N.W.2d 1, 3 (1966); *Peterson v. Brune*, 273 S.W.2d 278, 283 (Mo. 1954); *Lopez v. Gukenback*,

There are a number of conditions precedent to a landlord's duty to maintain common areas in good repair. The basic inquiry is whether the landlord has retained control. This answer turns on the particular facts and circumstances surrounding a given case, with the inquiry focusing on whether the landlord *intended* to retain control.²⁸ Generally, a landlord is presumed to have retained control over common areas.²⁹ Conversely, when a tenant seeks to show that a landlord retained control over an area leased exclusively to the tenant, *e.g.*, the tenant's apartment, the presumption is reversed.³⁰ The mere right to inspect a tenant's apartment, unaccompanied by a contractual duty to repair, is generally insufficient to establish that the landlord retained control.³¹

Even if the landlord's control over an area is established, his duty may be limited by a number of exceptions. A landlord is not required to correct or warn of dangerous conditions that are natural and obvious, and he incurs no liability for injuries resulting therefrom.³²

391 Pa. 359, 365, 137 A.2d 771, 775 (1958). *See generally* HARPER & JAMES, *supra* note 15, § 27.17 noting that the duty owed by the landlord is a full, non-delegable duty of due care and that this duty is not satisfied by warning or making the danger obvious.

28. *Dinnan v. Jozwiakowski*, 156 Conn. 432, 434, 242 A.2d 747, 748 (1968); *Lipsitz v. Schechter*, 377 Mich. 685, 687, 142 N.W.2d 1, 2 (1966); *Lemm v. Gould*, 425 S.W.2d 190, 195 (Mo. 1968).

29. *Mackey v. Allen*, 396 S.W.2d 55, 59 (Ky. 1965).

30. *Kowinko v. Salecky*, 5 Conn. Cir. 657, 663, 260 A.2d 892, 897 (App. Div. 1969).

31. *Montgomery Ward & Co. v. New York Cent. R.R.*, 389 F.2d 556, 558 (2d Cir. 1968); *Blair v. Berlo Vending Corp.*, 287 A.2d 696, 697 (Del. Super. Ct. 1972); *Maxwell Bros. v. Deupree Co.*, 129 Ga. App. 254, 256-57, 199 S.E.2d 403, 405 (1973); *cf.* *Panaroni v. Johnson*, 158 Conn. 92, 98, 256 A.2d 246, 252 (1969); *Lemm v. Gould*, 425 S.W.2d 190, 195 (Mo. 1968).

32. *Compare* *Harkrider*, *supra* note 7, at 403 with *Sargent v. Ross*, 113 N.H. 388, , 308 A.2d 528, 532 (1973), and HARPER & JAMES, *supra* note 15, §§ 27.15-.17.

The "ice and snow" cases, for example, hold that a landlord is not liable for injuries resulting from natural accumulations of ice and snow in common areas. *See* *Klein v. United States*, 339 F.2d 512 (2d Cir. 1964); Comment, *Liability of Landlord and Tenant to Persons Injured on Premises*, *supra* note 15, at 362-63. Note, however, that liability may be imposed when accumulations are due to artificial conditions within the control of the landlord. *Id.* *But see* *Schofield v. Kinzell*, 29 Utah 2d 427, 430-31, 511 P.2d 149, 151 (1973) (duty to remove); HARPER & JAMES, *supra* note 15, § 27.17 (only a minority of states do not require removal).

Similarly, a landlord ordinarily is not held liable for injuries caused by darkness from failure to light common hallways and stairways. *Ullrich v. Kintzele*, 297 S.W.2d 602, 605-06 (Mo. Ct. App. 1957). *But see* note 53 *infra*. There are

A further limitation provides that if a tenant is injured while using a common area in a manner for which it is not reasonably intended, the landlord incurs no liability.³³ Traditional negligence doctrines may also assist landlords to escape liability to an injured tenant.³⁴ Courts will weigh evidence of the landlord's negligence³⁵ against such factors as the tenant's contributory negligence,³⁶ assumption of the risk,³⁷ proximate cause,³⁸ and foreseeability³⁹ in deciding the landlord's liability.

Judicial application of the control doctrine has not been uniform. Courts have varied their approach when determining how strictly the concept should be interpreted. The result has been a wide range of decisions reflecting varying views of equity. By manipulating the facts of a given case, courts have used the control concept to achieve what in their view was the appropriate result.⁴⁰

two exceptions: if the common passageways or stairways are inherently dangerous, or if the landlord has voluntarily assumed the duty of lighting, he is bound to follow through with reasonable care. *Tremblay v. Donnelly*, 103 N.H. 498, 500-01, 175 A.2d 391, 393 (1961). See also *HARPER & JAMES*, *supra* note 15, § 27.17; *Annot.*, 25 A.L.R.2d 496 (1952).

33. *Trimble v. Spears*, 182 Kan. 406, 413-15, 320 P.2d 1029, 1035-37 (1958); *Landay v. Cohn*, 220 Md. 24, 28, 150 A.2d 739, 741 (1959); *Wagman v. Boccheciampe*, 206 Va. 412, 416, 143 S.E.2d 907, 909 (1965); *Landlord & Tenant*, *supra* note 2, at 764. Cf. text at note 24 *supra*. But see *Freeman v. Mazzer*, 150 Cal. App. 2d 61, 63, 309 P.2d 510, 511 (Dist. Ct. App. 1957), which held that the intended use defense does not apply to small children.

34. *Trimble v. Spears*, 182 Kan. 406, 412, 320 P.2d 1029, 1034-35 (1958).

35. *Id.*

36. *Id.*; *Sabin v. C & L Dev. Corp.*, 141 So. 2d 482, 486 (La. Ct. App. 1962); *Landlord & Tenant*, *supra* note 2, at 778.

37. *Landlord & Tenant*, *supra* note 2, at 778.

38. *Trimble v. Spears*, 182 Kan. 406, 412, 320 P.2d 1029, 1034-35 (1958); *Landlord & Tenant*, *supra* note 2, at 765.

39. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 478 (D.C. Cir. 1970); *Sabin v. C & L Dev. Corp.*, 141 So. 2d 482, 486 (La. Ct. App. 1962); see, e.g., *Martin v. Reis*, 344 Mass. 32, 37, 181 N.E.2d 580, 584 (1962). See also note 33 *supra*; *Landlord's Duty*, *supra* note 13.

40. E.g., *Torre v. De Renzo*, 143 Conn. 302, 122 A.2d 25 (1956); *Pratt v. Scott Enterprises, Inc.*, 421 Pa. 46, 218 A.2d 795 (1966). In both cases plaintiff fell through the floor of premises occupied solely by the tenant, into the basement, which had remained in the control of the landlord. *Torre* denied recovery on the ground that the weak floor represented a defect entirely within the tenant's control. *Pratt*, on the other hand, allowed recovery on the theory that it was not the tenant's floor that was defective but rather the landlord's basement ceiling. For a discussion of the common service system cases (*i.e.* the utilities systems, such as heating, electrical, water, gas, etc.) see *Gladden v. Walker & Dunlop*,

Holdings favorable to the landlord have been reached through a strictly mechanical application of the control doctrine.⁴¹ This approach draws artificial lines regardless of the actual uses to which an area is put by the tenants.⁴² Judicial manipulation of facts on the landlord's behalf has also occurred in connection with the other exceptions to non-liability.⁴³ Such judicial manipulation has encouraged some unusual attempts by counsel to insulate the landlord from liability by perverting the control doctrine.⁴⁴

On the other hand, courts holding in favor of the tenant have also demonstrated great judicial imagination. Like their pro-landlord counterparts, some of these courts have resorted to manipulation of

Inc., 168 F.2d 321 (D.C. Cir. 1948); *Coleman v. Steinberg*, 54 N.J. 58, 253 A.2d 167 (1969); *Green v. Kahn*, 391 S.W.2d 269 (Mo. 1965); *Thompson v. Paseo Manor South, Inc.*, 331 S.W.2d 1 (Mo. Ct. App. 1959), all holding that such common service systems are deemed to have been retained within the landlord's control. *Contra*, *Yuppa v. Whittaker*, 88 R.I. 214, 145 A.2d 255 (1958) (recovery denied on the ground that the particular instrumentality of the harm—a radiator—was exclusively within the tenant's control). It is worth noting that the facts of the *Yuppa* case are identical to those of *Thompson*.

41. *Cf.* text at note 3 *supra*.

42. *See, e.g.*, *Bowman v. Goldsmith Bros. Co.*, 63 Ohio L. Abs. 428, 109 N.E.2d 556 (Ct. App. 1952). *Bowman* denied recovery holding that when the first flight of a two-flight stairway served both the first and second floor tenants it was a common stairway but that the second flight of the same stairway was exclusively in the control of the second story tenant. *Cf.* text at note 57 *infra*. *See also* *Finn v. Peters*, 340 Mass. 622, 165 N.E.2d 896 (1960) (recovery denied to a tenant injured when a porch railing gave way, for even though the porch was serviced by a common stairway, the porch itself was not "reasonably incident" to the common throughway); *Foster v. Laba*, 402 S.W.2d 619 (Mo. Ct. App. 1966) (different landlords, each owning separate halves of a building, were said to give each of two tenants sharing the same floor exclusive possession of a half-interest in what would otherwise have been a common porch, thus precluding a finding that a given landlord had retained control).

43. *See, e.g.*, *Coates v. Dewoskin*, 379 S.W.2d 146 (Mo. Ct. App. 1964), in which a hole in an apartment bedroom ceiling had merely been covered over with wallpaper prior to plaintiff's tenancy. When the remaining plaster fell on plaintiff, the court refused to recognize this as within the concealed latent defect exception, reasoning that holes do not fall and that it could not say for a fact that the missing plaster so weakened the rest of the ceiling as to be a cause—*i.e.* no defect existed to be concealed. *Id.* at 148-49.

44. *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941) (plaintiff did not retain exclusive control of the hallways just because he was the sole tenant in the building); *Weidner v. Schottenstein*, 111 Ohio App. 376, 169 N.E.2d 304 (1960) (merely because plaintiff was injured when she stepped on the lid of a garbage can assigned exclusively to a fellow tenant did not mean that she had temporarily left the area retained by the landlord for common use).

facts to reach the result they find most equitable.⁴⁵ An additional tactic employed by some courts is to estop the landlord from denying control when, by his silence or conduct, he is deemed to have acquiesced in the common use of an area.⁴⁶

A growing minority of progressive and enlightened courts, aware of the landlord's superior bargaining power and the increasing dependence of the modern tenant upon the landlord for complex and costly services that are beyond the tenant's power to provide, have taken more direct action on behalf of the tenant, avoiding the subterfuges and manipulations of other courts.⁴⁷ These courts have not hesitated to re-evaluate common law rules governing the landlord-tenant relationship when the underlying rationales are no longer appropriate.⁴⁸ The majority of tenants are no longer self-sufficient farmers primarily interested in the land,⁴⁹ but urbanites whose major concerns are proper dwelling maintenance and provision of necessary services by the landlord.⁵⁰ The modern tenant is faced with repairs that require more skill and financial outlay than those contemplated when land-

45. See, e.g., *Fantacone v. McQueen*, 196 Cal. App. 2d 477, 16 Cal. Rptr. 630 (Dist. Ct. App. 1961); *Pratt v. Scott Enterprises, Inc.*, 421 Pa. 46, 218 A.2d 795 (1966) (discussed in note 40 *supra*).

46. See, e.g., *Sonne v. Booker*, 310 S.W.2d 526 (Ky. 1957); *Rowe v. Ayer & Williams, Inc.*, 86 N.H. 127, 164 A. 761 (1933). In both cases the landlord was deemed to have acquiesced to the use of a fire escape as a common passageway by his failure to object. *But see Swingler v. Robinson*, 321 S.W.2d 29 (Mo. Ct. App. 1959).

47. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Kline v. Burns*, 111 N.H. 87, 91-92, 276 A.2d 248, 251 (1971). Much of the landlord's leverage comes from the housing shortage created by the rapid urbanization of this country, especially since World War II. See *Lessor's Duty to Repair*, *supra* note 7, at 671.

48. See, e.g., *Clarke v. O'Connor*, 435 F.2d 104, 111 (D.C. Cir. 1970); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Mounsey v. Ellard*, Mass., 297 N.E.2d 43, 51 (1973); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250-51 (1971); *Foisy v. Wyman*, 83 Wash. 2d 22, 27, 515 P.2d 160, 164 (1973); *cf. McCutcheon v. United Homes Corp.*, 79 Wash. 2d 443, 449-50, 486 P.2d 1093, 1097 (1971). See *generally Lessor's Duty to Repair*, *supra* note 7, at 671.

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

50. *Id.*; *Lemle v. Breeden*, 51 Hawaii 426, 430, 462 P.2d 470, 473 (1969); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250-51 (1971); *Landlord's Duty*, *supra* note 13, at 1156.

lord-tenant law was developing.⁵¹ In addition, the modern tenant's vastly greater mobility discourages substantial investments of time and money in the leasehold.⁵²

Growing awareness of modern landlord-tenant problems has led some courts to expand the landlord's duties and obligations to his tenant.⁵³ Among the boldest extensions of the landlord's duty is a recent line of cases holding that a landlord has a duty to protect his tenants from foreseeable criminal assaults in common areas.⁵⁴ The reasoning in these cases illustrates the growing judicial awareness of the realities of modern urban apartment living.

It should be noted, however, that many of these recent developments in the law have been effectuated by courts operating within

51. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078-79 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250-51 (1971); *Lessor's Duty to Repair*, supra note 7, at 671. See also note 13 supra.

52. See note 51 supra.

53. See, e.g., *Gallagher v. Saint Raymond's Roman Catholic Church*, 21 N.Y.2d 554, 236 N.E.2d 632, 289 N.Y.S.2d 401 (1968), in which the court held that the common law rule of no duty to light the common areas was an anachronism not in accord with the technology or mores of modern society and therefore abolished the exception. *Id.* at 558, 236 N.E.2d at 634, 289 N.Y.S.2d at 403. Similarly, the court in *McCutcheon v. United Homes Corp.*, 79 Wash. 2d 443, 486 P.2d 1093 (1971), held that exculpatory clauses in leases were contrary to public policy and would not be enforced. *Id.* at 450, 486 P.2d at 1097. Still more recently, some courts have begun to recognize that the lesser duty of care owed by a landlord to a licensee, as opposed to an invitee, is an archaic distinction based on a rationale that is no longer justifiable in light of the hazards of everyday urban living. See, e.g., *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972); *Mounsey v. Ellard*, Mass., 297 N.E.2d 43, 51 (1973). See also *Clarke v. O'Connor*, 435 F.2d 104 (D.C. Cir. 1970), in which the court refused to consider the control issue as dispositive, observing that it was anachronistic when applied in the modern urban apartment context. Note, however, that the court did not do away with the control doctrine, as did the court in *Sargent*, but merely found it inappropriate because of the unusual tenancy involved. In *Clarke* the landlord allowed a group of working women to share an apartment under an arrangement that allowed any one of them to move out whenever she wished, as long as she found a replacement. The court reasoned that such a fluctuating situation never permitted a given group of tenants to retain control or to allocate responsibility efficiently (*cf.* text at note 22 supra), hence the landlord was deemed to have retained control. 435 F.2d at 112.

54. See, e.g., *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Johnston v. Harris*, 387 Mich. 569, 198 N.W.2d 409 (1972). See also *Landlord's Duty*, supra note 13; Comment, *Protection of Tenants: The Extent of the Landlord's Duty*, 1971 L. & Soc. ORDER 612; 7 URBAN L. ANN. 347 (1974).

the traditional confines of landlord-tenant law. The scope of the landlord's duty is often still limited by the extent of his control.⁵⁵ It is in this respect that *Sargent* represents a clean break from the past. Unlike former decisions, *Sargent* does not extend the landlord's tort liability merely by expanding the exceptions to the general rule of non-liability.⁵⁶ Instead, *Sargent* marks the first time that a court has imposed directly upon the landlord the same responsibilities and liabilities to which other individuals are subject.

In reaching its result, the court reasoned that "[a] proper rule of law would not preclude recovery in such a case by a person foreseeably injured by a dangerous hazard solely because the stairs serviced one apartment instead of two."⁵⁷ The opinion noted that such a mechanical determination of duty and liability may have been justifiable in medieval England, but that such a system finds no supportable rationale for its continued existence today.⁵⁸ Rather

55. See, e.g., text at note 54 *supra*.

56. The only other comparable innovation occurred in those cases holding that a landlord is under an implied warranty to furnish a dwelling fit for human habitation. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). A breach of such an implied warranty of habitability would generally give rise to an action in contract rather than in tort. It should be noted that a warranty action does not require a personal injury, only that the object of the contract—the leasehold—does not accord with commonly accepted standards of fitness and livability. In this respect, the type of injuries for which the action would lie may well be different and more varied than those recoverable under a tort theory. New Jersey, for example, allows recovery for economic injury stemming from defective products (including housing) under a theory of strict liability in tort as well as contractual warranty. See *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). In California, on the other hand, recovery for economic losses because of defective products is restricted to contractual warranty theories, expressly rejecting strict liability in tort as a theory of recovery when commercial losses are concerned. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). Likewise, the remedies available in a warranty action may be of a different scope and nature (e.g., rent reduction or the cost of repairing and making fit). See *Kline v. Burns*, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971). See also PROSSER, *supra* note 15, at 408-09, 640.

57. 113 N.H. at, 308 A.2d at 531.

58. *Id.* at, 308 A.2d at 533, 534-35. See also *Mounsey v. Ellard*, Mass.,, 297 N.E.2d 43, 51 (1973); text at note 3 *supra*; text at notes 47-52 *supra*.

than engraft yet another artificial exception onto the rule of landlord liability, the court preferred to discard the old rationale in favor of a more realistic approach.⁵⁹ Such a change, the court noted, would not require the landlord to make any difficult adjustments since he would merely be governed by traditional negligence standards already applicable to him when acting as an individual.⁶⁰ The court observed that henceforth the court will not ask "who had control" but whether due care was exercised by all parties.⁶¹ In conclusion, the court stated:

The questions of control, hidden defects and common or public use, which formerly had to be established as a prerequisite to even considering the negligence of a landlord, will now be relevant only inasmuch as they bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm.⁶²

It might be argued that *Sargent's* practical effect will not be as great as its radical implications portend. Unless the tenant willingly relinquishes his privacy to allow landlord inspections at will,⁶³ it may be unreasonable to subject the landlord to liability,⁶⁴ a result much the same as under the control doctrine. Nevertheless, *Sargent* will lead to a different outcome in at least two situations in which the landlord previously would have been insulated from liability: when he had actual notice of the defect but did not attempt to repair;⁶⁵ and when the landlord could readily inspect and repair

59. 113 N.H. at, 308 A.2d at 533. See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) (noting the disadvantages of piecemeal reform).

60. 113 N.H. at, 308 A.2d at 534.

61. *Id.* at, 308 A.2d at 535.

62. *Id.* at, 308 A.2d at 534.

63. *Cf.* text at note 10 *supra*.

64. *Cf. Lessor's Duty to Repair, supra* note 7, at 676. See also 51C C.J.S. *Landlord & Tenant* § 371, at 978 (1968), which states: "Where a landlord is obligated to make repairs during the term, actual or constructive notice of the need for repair is necessary to put him in default on his obligation, unless he . . . has actual knowledge, or reasonable opportunity to acquire knowledge, of the defect." (Emphasis added.)

65. *E.g.*, *Green v. Del-Camp Inv., Inc.*, 193 Cal. App. 2d 479, 14 Cal. Rptr. 420 (Dist. Ct. App. 1961); *Coates v. Dewoskin*, 379 S.W.2d 146 (Mo. Ct. App. 1964); *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958).

an area that, although technically within the tenant's control, was not within the realm of his personal privacy.⁶⁶

Whether *Sargent* will be a landmark case in the law of landlord tort liability remains to be seen. It is unknown how the *Sargent* rationale will be received by other jurisdictions.⁶⁷ Although courts that have previously demonstrated their awareness of urban realities⁶⁸ will probably approve of *Sargent*, those in larger, more urbanized states may still hesitate to follow it because of the economic implications. Nevertheless, there is little doubt that *Sargent* represents an unequivocal break with the common law past.

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66. Such was the factual situation in *Sargent*. See, e.g., *Harris v. Ellis Realty, Inc.*, 350 Mass. 520, 215 N.E.2d 797 (1966); *Fitzpatrick v. Ford*, 372 S.W.2d 844 (Mo. 1963); *Flournoy v. Kuhn*, 378 S.W.2d 264 (Mo. Ct. App. 1964); cases cited note 42 *supra*.

67. A preliminary indication may be found in a recent California intermediate appellate decision that endorsed *Sargent* and the trend towards applying ordinary rules of negligence to the law of real property. *Brennan v. Cockrell Invs. Inc.*, 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (Ct. App. 1973).

68. See cases cited notes 47-51 *supra*.

