THE LANDLORD'S LIABILITY TO HIS TENANTS FOR INJURIES CRIMINALLY INFLECTED BY THIRD PERSONS

by

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I. INTRODUCTION

U N T I L A P P R O X I M A T E L Y F I F T E E N Y E A R S A G O a landlord was never held civilly liable to his tenants for injuries inflicted by the criminal acts of third persons, regardless of the deficiency of the security measures provided by the landlord.¹ The landlord was protected from tenant lawsuits by three factors: The historical concept of a lease, certain tort theories of a legalistic nature, and some policy concerns having significant influence upon the courts. In recent years the courts have begun holding landlords liable in some circumstances for criminally-induced injuries sustained by their tenants. The following discussion will examine the reasons for the landlord's former immunity from suits by victimized tenants and the kinds of situations in which he may now be found liable.

II. THE HISTORICAL VIEW OF A LEASE

In the past a lease was regarded basically as a conveyance of the premises for a specified period.² Being viewed as a grantee (although for a limited period), the tenant was expected to be fully responsible for the maintenance of the rented property, and this responsibility extended to the provision of measures necessary to ensure his self-protection.³ Since most tenants were farmers leasing rural land containing humble improvements,⁴ it did not seem onerous to place upon the tenant responsibility for the maintenance and security of his property. As the years passed and the agrarian tenant was gradually supplanted by the urban apartment dweller, the courts began imposing some limited maintenance responsibilities on the landlord, such as an obligation to keep the common areas in repair.⁵ However, it was not until 1970, when the United States Court of Appeals for the District of Columbia held that a lease of residential premises included

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²Recent Development, Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity, 33 VAND. L. REV. 1493, 1495-1496 (1980).
an implied warranty of habitability, that the concept of a lease as a conveyance began to significantly erode.

III. LEGALISTIC TORT THEORIES MILITATING AGAINST LANDLORD LIABILITY

A. Nonliability for Nonfeasance

When a tenant is assaulted or robbed by a criminal the landlord is guilty, at worst, of nonfeasance, and the law has generally been unwilling to impose tort liability for nonfeasance in the absence of some special relationship existing between the nonfeasor and the victim. This principle is recognized by the Restatement (Second) of Torts, which provides: "[T]here is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless: . . . (b) a special relation exists between the actor and the other which gives to the other a right to protection." The existence of such a "special relation," creating an affirmative duty to protect, has been recognized where the parties stand in the position of common carrier/passenger, innkeeper/guest, and business invitor/invitee, but the courts have generally been unwilling to extend these categories to embrace the landlord/tenant relationship.

Cases illustrating the courts' reluctance to impose tort liability on a landlord for nonfeasance are Cross v. Chicago Housing Authority and Totten v. Moore Oakland Residential Housing Inc. The former case was a negligence-grounded personal injury action brought by a tenant against C.H.A. and others after the tenant was attacked by unknown assailants while on C.H.A. premises. Although the Illinois Court of Appeals reversed the lower court's dismissal of the suit against C.H.A. (for unrelated reasons), the First District Appellate Court of Illinois declared:

[T]he allegations of the plaintiffs' complaint in the instant case do not establish an affirmative act on the part of the defendant CHA which created a specific risk where none would have otherwise existed . . . Moreover, plaintiffs have not alleged a special relationship between the

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8Comment, supra note 1, at 277.
9RESTATEMENT (SECOND) OF TORTS § 315 (1965). A more general expression of the law's reluctance to recognize liability for nonfeasance is found at § 314: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965).
10RESTATEMENT (SECOND) OF TORTS § 314A (1965).
11Recent Development, supra note 2, at 1503.
defendant CHA and the plaintiffs which would impose upon the defendant a duty to control the conduct of third persons to such a degree as to prevent them from causing the plaintiff physical harm. Plaintiffs' complaint therefore fails to allege facts establishing such a common law duty.¹⁴

In Totten a guest of a tenant was shot by strangers while in the laundry room of defendant’s apartment complex. In the resulting personal injury suit, plaintiff-guest alleged that defendant was negligent in failing to provide adequate security guard service. The First District California Court of Appeal affirmed a judgment dismissing the action, stating:

As a basic principle, in the absence of a special relationship or circumstance, a private person has no duty to protect another from a criminal attack by a third person . . . .

. . . [T]he instant case discloses that the injury to Caroline [plaintiff] was inflicted by two men who happened to enter the apartment house without any legal relationship to either the victim or the landlord . . .

Moreover, we are deeply convinced the appellant’s claim must be rejected for the additional reason that the creation of a new duty in the present situation would run counter to elementary justice and would be patently unfair.¹⁵

B. The Presence of an Intervening, Independent Agency

Since one element of proximate cause is “causation in fact,”¹⁶ the courts have traditionally accepted the argument that the existence of an intervening criminal act precludes the landlord’s behavior, even if negligent, from being deemed the proximate cause of the tenant’s injury.¹⁷ There is at least a rational basis for this position. Prosser observes: “As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.”¹⁸ The principle that an intervening criminal act committed by Y should, as a general rule, insulate Z from tort liability is articulated as follows by the Restatement of Torts:

The act of a third person in committing an intentional tort or crime

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¹⁴74 Ill. App. 3d at 927, 393 N.W.3d at 585 (citations omitted).
¹⁵63 Cal. App. 3d at 546, 134 Cal. Rptr. at 32-35. Accord, Whalen v. Lang, 71 Ill. App. 3d 83, 389 N.E.2d 10 (1979). Whalen, a tenant in a commercial building, was attacked by a trespasser while in the building’s parking lot. Whalen filed a personal injury action against the lessor, alleging that the latter had failed to exercise reasonable care to ensure the safety of the tenants. The Third District Court of Appeals of Illinois affirmed a dismissal of the suit, stating:

In order to state a cause of action in the instant case, Whalen must allege a special relationship between himself and the Langs [lessor] which created a duty to insure the safety of the tenants . . . or an affirmative negligent act of the Langs or their agents which caused the loss . . . Also, we find no allegation of an affirmative negligent act on the part of the Langs or their agents. 71 Ill. App. at 86, 389 N.E.2d at 12.
¹⁸W. PROSSER, supra note 16, at 236-237.
is a superceding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.\(^\text{19}\)

Among the cases in which the superceding-cause theory has been applied to excuse a landlord from liability are *Tirado v. Lubarski*\(^\text{20}\) and *Scott v. Watson*.\(^\text{21}\) In the former case, Tirado sued his landlord for personal injuries and loss of property sustained when three unknown men broke into Tirado’s apartment during the night. Tirado asserted that defendant was negligent in failing (after being notified of the defect) to repair a lock on the front door of plaintiff’s apartment. The Bronx County Civil Court directed a verdict for defendant, stating:

To be actionable the negligence complained of must not only involve the breach of some legal duty which the defendant owes to the plaintiff, but it must also proximately result in the injury claimed by the plaintiff. In the eyes of the law, the proximate cause of an occurrence is that which is a natural and continual sequence of the wrongful act complained of ‘unbroken by any new cause . . . and without which that event would not have occurred’.\(^\text{22}\)

In *Scott v. Watson* the daughter of a tenant who was fatally shot while in the landlord’s underground parking garage instituted a wrongful death action against the landlord, contending that the security measures were deficient in the apartment complex’s common areas. Defendant had the case removed to the U.S. District Court for the District of Maryland, and the latter court certified several questions of substantive law to the Court of Appeals of Maryland. After responding to one of the certified questions by ruling that Maryland law imposes no special duty upon a landlord to protect his tenants against criminal acts committed by third parties on the landlord’s premises\(^\text{23}\) the Court of Appeals of Maryland added:

Finding a duty and its breach is not conclusive of actionable negligence. Proximate (legal) causation is also a vital element of negligence, especially in relating to potential superceding cause of third party criminal activity to a breach of duty by the landlord . . . .

\(^{19}\)Restatement (Second) of Torts § 448 (1965).


\(^{22}\)49 Misc. 2d at 544, 268 N.Y.S.2d at 56. The concluding phrase was a quotation from Laidlaw v. Sage, 158 N.Y. 73, 99, 52 N.E. 679, 688 (1899) (quoting T. Sherman & A. Redfield, A Treatise on the Law of Negligence § 26 (1888)).

\(^{23}\)278 Md. at 166, 359 A.2d at 552 (1976).
superceding cause of the injury, and thus find no landlord liability.

A breach of duty by the defendant would result in his liability in the third party criminal context only if the breach enhanced the likelihood of the particular criminal activity which occurred.\(^\text{24}\)

Inasmuch as the law's requirement of a showing of proximate cause is actually based on the policy consideration that some reasonable limits must be imposed on a person's legal accountability,\(^\text{23}\) it appears justifiable to rule against liability where the infraction of the landlord was in fact remote from the criminal act that injured the plaintiff. A more difficult question is presented where the causal link is more direct and where the injury suffered by plaintiff was more predictable.

C. The Absence of Foreseeability

Since people are expected to obey the law,\(^\text{26}\) tenant-plaintiffs have lost a number of cases on the rationale that the criminal actions of another person are not foreseeable by the landlord.\(^\text{27}\) Because foreseeability is, under the prevailing view, an element of proximate cause,\(^\text{28}\) the courts must address the issue whenever the tenant's injury is allegedly ascribable to the landlord's negligence.

Illustrative cases holding for the landlord on the ground that the tenant's victimization by a criminal was not foreseeable are *Martin v. Usher*\(^\text{29}\) and *Levin v. Eleto Realty Corp.*\(^\text{30}\)

In the first case, Martin brought suit against her landlord for injuries incurred when an intruder entered her apartment and robbed and shot her. Martin asserted that defendant was negligent in failing to maintain and repair locks

\(^{24}\)278 Md. at 171, 173, 359 A.2d at 555, 556. Accord, *DeFoe v. W. & J. Sloan*, 99 A.2d 639 (D.C. 1953). Tenants sued their landlord for smoke and soot damage caused by a fire started by a trespasser. Plaintiffs alleged that defendant was negligent in allowing trash to accumulate in an unlocked hall closet, which was the site of the fire, and leaving the outside entrance to the building unlocked. Affirming a judgment for defendant, the Municipal Court of Appeals for the District of Columbia stated:

> But in addition to negligence... plaintiffs must show that the legal or proximate cause of their injury was the acts or omissions complained of...

> [T]he proximate cause of the injury complained of was not necessarily the... condition of the closet or hallways, but was the 'unlawful act of individual moral agencies', over which defendant had no control, with which it was not in collusion, and for whose acts it was not responsible. 99 A.2d at 640. The court quoted, where indicated, from *Applebaum v. Kidwell*, 12 F.2d 846, 847 (1926).

\(^{25}\)"Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." W. Prosser, *supra* note 16, at 237.

\(^{26}\)In the ordinary case [the actor] must reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is particularly true where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law.

Restatement (Second) of Torts § 302 B, comment d (1965).


on the doors of the common areas and in failing to repair lights in the hallways. The First District Appellate Court of Illinois affirmed a dismissal of Martin's complaint, stating "The question of whether or not a legal duty exists is one of law and requires that the occurrence be reasonably foreseeable, more than a mere possibility of occurrence."

In Eleto, Levin sued his landlord for the value of property lost when his apartment was burglarized. Levin contended that defendant was negligent in failing to provide his apartment door with a new lock and moldings. The lower court held for plaintiff, but the Appellate Term of the Supreme Court reversed and dismissed the case, declaring, "The evidence does not establish that the loss in the manner testified to could have been reasonably anticipated so as to impose further duty to repair the condition complained of."

Although a landlord obviously cannot be expected to foresee a specific crime, there are circumstances in which he can reasonably be expected to anticipate the probability — and even the nature — of some crime occurring on the premises. For example, if the rental property is located in a high-crime section of the community, if there have been robberies or assaults within the premises in the past, and if the landlord's security measures are minimal, it would seem highly probable that such crimes will take place on the premises in the future. Several recent cases have recognized this reality, and the Restatement (Second) of Torts has acknowledged it as follows: "An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of . . . a third person which is intended to cause harm, even though such conduct is criminal."

IV. POLICY CONCERNS INCONSISTENT WITH LANDLORD LIABILITY

A. The Inherent Vagueness of a Security Responsibility

To extend the landlord's responsibility to encompass the provision of security for his tenants is to impose on him an obligation that is intrinsically too vague and general to provide him with a guideline for appropriate action.

Among the cases that have found merit in this argument are

115 Ill. App. 3d at 410, 371 N.E.2d at 70.

160 Misc. at 141, 289 N.Y.S. at 668. Accord, Czech v. Aspen Industrial Center, 145 N.J. Super. 597, 368 A.2d 938 (1976). Czech, who was employed by a tenant of defendant's factory building, was mugged by an unknown assailant as she ascended the stairs leading to her place of work. Czech instituted a personal injury action against lessor-Aspen, asserting that Aspen had failed to take adequate security measures. Affirming a judgment for defendant, the Appellate Division of the Superior Court of New Jersey stated: "There is nothing in the present case to support the conclusion that the kind of criminal attack to which plaintiff was subjected was a reasonably foreseeable risk in this factory setting against which additional security measures should have been taken by the landlord." Id. at 600, 368 A.2d at 939.


"RESTATEMENT (SECOND) OF TORTS § 302B (1965)."
Hollywood Boulevard Venture v. Superior Court and Smith v. Chicago Housing Authority. In the former case, plaintiff sued her landlord for personal injuries incurred when an intruder broke into her apartment at 4:30 a.m. and raped her. Plaintiff alleged that defendant was negligent in failing to replace a burned out light which had been illuminating the outside of her apartment. Holding that the lower court should have sustained defendant’s demurrer to the complaint, the Second District California Court of Appeals said:

No one really knows why people commit crime, hence no one really knows what is ‘adequate’ deterrence in any given situation . . . .

It would be intolerable and grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were ‘inadequate,’ especially in light of the fact that the decision would always be rendered in a case where the security had in fact proved to be inadequate.

Smith was a wrongful death action in which decedent’s administrator asserted that C.H.A.’s negligent failure to provide sufficient security contributed to decedent’s fatal shooting (by persons unknown) as he entered the apartment building in which he lived. The First District Appellate Court of Illinois affirmed a dismissal of the complaint, stating: “Requiring an owner to repair and maintain the property imposes a reasonable and essential social duty . . . . To impose liability in the case before us would unjustly place upon defendant as a property owner a legal duty which is impossible of performance.”

B. The Double Taxation of Landlords

The economic burden of providing protection against the acts of criminals should be borne by the entire community, not by landlords, who constitute merely one segment of the community and already pay taxes for police protection.

Probably the best expression of this argument is found in Goldberg v. Housing Authority of Newark. Plaintiff, a milkman, was attacked and robbed by two strangers while making a delivery to a tenant. The attack occurred in an elevator used by the tenants, their guests, and business invitees. Plaintiff’s action against the Authority was based on the contention that the latter was

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172 Cal. App. 3d at 905, 172 Cal. Rptr. at 530.
116 Ill. App. 3d at 971, 344 N.E.2d at 540. Accord, Goldberg v. Hous. Auth., 38 N.J. 578, 186 A.2d 291, 297 (1962) and Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973). Trice was a wrongful death suit filed by a tenant whose minor son was killed by a thrown television set while in a common areaway outside his apartment. Plaintiff averred that defendant negligently failed to exercise due care in the operation, maintenance, and design of the building’s common areas. The First District Court of Appeals of Illinois affirmed a dismissal of plaintiff’s complaint, observing that “[A] duty to protect tenants from injuries caused by criminally reckless acts of third persons would be vague in that landlords would have no standard by which to determine which criminally reckless acts would come within this duty.” 14 Ill. App. 3d at 101, 302 N.E.2d at 210.
negligent in failing to provide private police protection within the project. The lower courts held for plaintiff, but the Supreme Court of New Jersey reversed, stating:

"The proper approach is to state, if there by any doubt upon the subject, the duty of the constituted police forces to move wherever they need to go, not only to detect crime but also to prevent it . . . .

. . . . The burden should be on the whole community . . .

But the duty to provide police protection is and should remain the duty of government and not of the owner of a housing project."

A related consideration is that the expense of providing a guard service and other security measures will generally be the greatest for the owners of rental properties in or near slum areas, since these tend to be the high-crime zones. To the extent that these owners (who often operate at the margin of profitability) pass the expense on to their tenants, the greatest economic burden will fall on those least able to pay.

C. Deference to Legislative Discretion

Since imposing on landlords a responsibility for tenant protection could have a significant impact on the cost and availability of rental housing, it would be more appropriate to let such a major legal development await legislative action.

Among the cases reflecting this position are Trice v. Chicago Housing Authority* and Hall v. Fraknoi.* In Trice the First District Appellate Court of Illinois affirmed a dismissal of plaintiff's wrongful death complaint against C.H.A., stating:

It has been suggested by plaintiff in this case that the duty recognized and imposed on a lessor by reason of an implied warranty of habitability . . . is available to plaintiff as the common law duty upon which to predicate her case . . . .

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The panel opinion is an excellent argument for a high degree of security in apartments and many of its contentions have considerable weight to them, but in my opinion they overstate the security that can reasonably be afforded. The hysteria of apartment dwellers in an inner city plagued with crime is understandable but . . . they cannot expect the landlord to furnish the equivalent of police protection that is not available from the duly constituted government in the locality. 439 F.2d at 492.

*Comment, supra note 1, at 300.

*Id. at 296-297.


*14 Ill. App. 3d 97, 302 N.E.2d 207. See supra note 38.

... But where the expanded warranty is sought to be used ... in an action for money damages for wrongful death, I think that the economic and social consequences to our society and to tenants themselves, which would be involved in the judicial imposition of such an enlarged duty, are so incalculable as to make any such action appropriate solely for the legislature.  

*Hall* began as a landlord's action for unpaid rent. The tenant counterclaimed for damages, alleging that as a result of landlord-Hall's negligence in failing to provide a front door lock and a buzzer system, he and his wife were, on separate occasions, robbed in the common areaways of their apartment building. The Civil Court of The City of New York granted Hall's motion for summary judgment, declaring:

[T]he imposition of a police function upon landlords as an implication of the landlord-tenant relationship would appear to be so much a matter of policy, including the problem of the incidence of cost, that it would seem to be more appropriate to consider and determine it legislatively rather than judicially.

... Since I believe that policy in the fact situation presented here should be determined legislatively, it is my opinion that the first and second counterclaims should be dismissed.

A weakness in the leave-it-to-the-legislature position is that the courts have often recognized a cause of action in situations where none previously existed.  

In *Rivera v. State* the New York County Court of Claims, rejecting the argument that a cause of action for wrongful birth should await statutory authorization, observed that “[T]he fundamental principles of tort law were created by courts, not legislatures. Where legislatures have entered the field, it has frequently been in reponse to the unwillingness of the judiciary to respond to changing times or to depart from *stare decisis*.”

V. **Circumstances Recognized As Justifying Landlord Liability**

Most of the cases in which landlords have been held liable for injuries criminally inflicted by third persons fall into five situational categories:

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*14 Ill. App. 3d at 102-03. 302 N.E.2d at 211 (Hayes, J., concurring).*


*Some recent cases illustrating this phenomenon are: Dorsey v. State Farm Mut. Auto. Ins. Co., 9 Ohio St. 3d 27 (1984), where the Supreme Court of Ohio held that the doctrine of parental immunity no longer bars a negligence action against the estate of a deceased parent; Brown v. Brown, 381 Mass. 231, 409 N.E.2d 717 (1980), where the Massachusetts Supreme Judicial Court ruled that the doctrine of interspousal tort immunity was not, contrary to precedent, a barrier to a negligence-grounded personal injury suit by a wife against her husband; and Shroades v. Rental Homes Inc., 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981), where the Supreme Court of Ohio decided that a tenant could maintain a negligence suit against her landlord, who had failed, after receiving due notice, to repair the tenant's private stairs.*

*94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978).*

*Id. at 161, 404 N.Y.S.2d at 953.*
A. Where the Landlord Himself Created a Crime-Conducive Condition on the Premises

Illustrative cases are Samson v. Saginaw Professional Building and Phillips v. Chicago Housing Authority. In the former case S.P.B., which rented office space to attorneys, insurance companies, and other commercial tenants, leased a suite on the fourth floor to the Sagmaw Valley Consultation Center, a psychiatric clinic created by the state to provide outpatient care for released mental patients. Mrs. Samson, a secretary to an attorney who rented offices on the fifth floor, was attacked in the elevator by a patient of the clinic. Mrs. Samson, who was stabbed several times, sued S.P.B., asserting that the latter was negligent because it: (a) leased office space to a tenant whose daily operations presented a threat to the building's other tenants; and (b) took no special precautions to isolate the tenant in question from S.P.B.'s other tenants. The Michigan Supreme Court affirmed a judgment for plaintiff, stating: "The magnitude of the risk, that of a criminally insane person running amok within an office building filled with tenants and invitees was substantial to say the least.... Judge Levin, in an addendum, added: "An ordinarily prudent person might have rented to the state only office space on the first floor so that mental patients would have no need to use the elevator, stairwells, or other common areas of the building. He might have placed a guard on the elevators to protect the people lawfully using them. It was his duty, not the tenant's, to remedy this potentially dangerous situation."

Phillips was a wrongful death action brought against C.H.A. by a tenant whose minor daughter was abducted by persons unknown, taken to a vacant floor of her apartment building, raped, and thrown out a window to her death. Plaintiff alleged that C.H.A. was negligent in that it had recently closed and purported to seal off certain floors in plaintiff's building where numerous crimes had been committed, including the floor to which plaintiff's daughter was taken. However, the keys to the supposedly sealed off floors were left in a place that was widely known and readily accessible to the general public; elevators going to the closed floors remained available; and tenants in plaintiff's building were not warned by C.H.A. that the closed floors were in fact unsecured. Reversing a dismissal by the Circuit Court of Cook County, the First District Court of Illinois said:

[T]he landlord may be liable if it attempts to safeguard the premises but does so negligently... or if by his acts he creates a hazard which did not previously exist....

...[I]t appears that here the dangerous condition was created by

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393 Mich. 393, 224 N.W.2d 843 (1975).
393 Mich. at 408, 224 N.W.2d at 849.
393 Mich. at 410, 224 N.W.2d at 851.
the Housing Authority. The Housing Authority, having chosen to close off the floors, had a duty to do so in a manner that would not increase the danger to the residents of the building.\(^5\)

Finding landlord liability in situations of this kind seems easily defensible. At the very least the landlord should owe his tenants an obligation to refrain from behavior that affirmatively lessens the security from criminal activity.

**B. Where Both Parties Understood That a Portion of the Tenant's Rent Was Being Allocated to the Cost of Providing Security**

This circumstance, which gives rise to an express or implied contract,\(^6\) was held to create tort liability in *Holley v. Mt. Zion Terrace Apartments, Inc.*\(^5\) and in *Sherman v. Concourse Realty Corporation.*\(^6\) *Holly* was a wrongful death suit instituted on behalf of the estate of a tenant who was raped and murdered in her apartment. Since the killer apparently gained access into decedent's apartment through a window which fronted onto a common outside walkway, the basis of plaintiff's suit against the landlord was the latter's alleged negligence in securing the common areas. The Dade County Circuit Court granted a summary judgment for defendant, but the Third District Florida Court of Appeals reversed and remanded, stating: "The showing that part of Ms. Bryant's rent may have been expressly for security creates a genuine issue concerning the landlord's contractual responsibility to provide that protection."\(^5\)

In *Sherman* a tenant sued his landlord for personal injuries inflicted during a robbery in the lobby of plaintiff's apartment building. Plaintiff asserted that defendant was negligent in allowing the lock to the lobby door (through which the unidentified assailant had evidently entered) to remain defective for a week prior to the robbery. This rendered inoperative the building's security buzzer system. The lower court dismissed the complaint, but the Second Department Appellate Division reversed and granted a new trial, declaring: "It was stipulated that this tenant's rent was increased to pay for this protection... For a monetary consideration, i.e., increased rent, the landlord assumed a limited duty of protection by the installation of the bell and buzzer system which was permitted to fall into disrepair."\(^6\)

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\(^5\) *91 Ill. App. 3d at 547-49, 414 N.E.2d at 1136-37. See also Vernes v. American Dist. Tel. Co., 312 Minn. 33, 251 N.W.2d 101, 105 (1977).*

\(^6\) "'If the agreement or mutual assent is manifested in words, oral or written, the contract is said to be 'express.' On the other hand, where the mutual undertaking of the parties is inferred from their conduct alone, without spoken or written words, the contract is said to be 'implied in fact.'" L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 5 (2d ed. 1965).

\(^5\) *382 So.2d 98 (Fla. Dist. Ct. App. 1980).*

\(^6\) *A.D.2d 134, 365 N.Y.S.2d 239 (1975).*

\(^10\) *382 So.2d at 100. The court also attached significance to the fact that defendant had formerly provided armed guard service, because that seemed to indicate that defendant realized the common areas were dangerous. Id.*

No hardship is apparent in compelling a landlord to bear the consequences of his failure to honor the terms of an express or implied contract to provide security. Clearly the double-taxation argument has no force where the landlord received additional rent money to provide security.

C. Where the Landlord Failed to Provide the Security Required by State or Municipal Law

Among the cases finding liability where the criminal gained entrance as a result of the landlord’s noncompliance with building regulations are Smith v. ABC Realty Company and Braitman v. Overlook Terrace Corp. Smith was a personal injury action brought by a tenant who was raped by an unknown intruder who entered her apartment through a broken window. Plaintiff contended that landlord-ABC, was negligent in knowingly permitting the window, which faced upon a fire escape, to remain broken for two weeks prior to the crime. In a nonjury trial the Civil Court of the City of New York gave judgment for plaintiff, observing: “Section 78 of the Multiple Dwelling law required the defendant to keep this building ‘and every part thereof’ in good repair. This window was such a part . . . The defendant had notice of the defect in sufficient time to make the repair, and its failure to do so was negligent.”

In Braitman, a tenant sued for losses sustained when his apartment was burglarized eight days after defendant-landlord’s unexplained failure to repair a defective deadbolt lock on the door of plaintiff’s apartment. The Supreme Court of New Jersey affirmed a judgment for plaintiff, stating:

The New Jersey Hotel and Multiple Dwelling Law . . . was enacted by the Legislature in order to assure “decent standard and safe units of dwelling space” for the residents of this State . . . Since the statute unquestionably applies to defendant’s apartment complex . . . defendant’s failure to supply plaintiff with a working “deadbolt or additional latch bolt” is a violation of a penal statute . . . Since the Braitmans are unquestionably among the class for whose benefit the instant regulations were promulgated, and defendant’s failure to comply with the regulation was the efficient cause of their loss . . . plaintiffs would have been entirely justified in invoking the Multiple Dwelling Law . . . as evidence of defendant’s negligence.
At least three arguments can be advanced in support of tort liability where the landlord has failed to provide legally required security:

(a) There is nothing vague about the standard of care which the landlord must satisfy here. He must simply provide the lighting, locks, etc. that the law demands.

(b) The significance of another person's intervening criminal act would seem to be diminished in cases where the defendant-landlord has himself violated the law. A provision of the Restatement (Second) of Torts appears relevant to this kind of situation: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent . . . or criminal does not prevent the actor from being liable for harm caused thereby."

(c) The state and municipal laws which mandate that the landlord provide specific security measures apply, for the most part, to the common areas. Since the landlord has long been held responsible for the physical safety of the common areas, it does not constitute a major departure from the status quo to impose upon him some responsibility for their safety from crime as well.

D. Where the Landlord Failed to Maintain a Specific Security Measure That He Provided at the Beginning of the Tenancy

The failure to continue an originally-provided security service was the principal basis of liability in Kline v. 1500 Massachusetts Avenue Apartment Corp. and Ramsay v. Morrissette. In the former case Kline sought compensation from her landlord for losses and injuries sustained when she was robbed and assaulted in the common hallway of her apartment house. Contending that defendant was negligent in its provision of security, Kline alleged the following: At the beginning of her lease a doorman was on duty at the main entrance twenty-four hours a day, at least one employee constantly manned a desk in the lobby (from which all persons using the elevators could be observed), and a door leading to the parking garage was guarded at all times. By the night of her assault all of these protections had been discontinued or radically curtailed. Although the facts were not disputed, the lower court held for defendant, ruling that as a matter of law there was no duty upon a landlord to take steps to protect tenants from criminal acts committed by third parties. The United States Court of Appeals for the District of Columbia reversed, stating:

failed . . . to incur heavy expenses to augment tenant security . . . . All that was required was for the defendants to restore the night time illumination required by law . . . . Surely this was not too heavy a burden to impose." 73 A.D. at 191, 427 N.Y.S. at 107.

*RESTATEMENT (SECOND) OF TORTS § 449 (1965).

*New York's regulations, which are illustrative, are discussed in Comment, The Landlord's Duty in New York to Protect His Tenant Against Criminal Intrusions, 45 ALB. L. REV. 988, 1012-1027 (1981).

*Recent Development, supra note 2, at 1497-1498.


We therefore hold in this case that the applicable standard of care in providing protection for the tenant is that standard which this landlord himself was employing . . . when appellant became a resident on the premises at 1500 Massachusetts Avenue. The tenant was led to expect that she could rely upon this degree of protection.\textsuperscript{70}

\textit{Ramsey} was an action against a landlord for injuries incurred when the tenant-plaintiff was assaulted in her apartment by an unknown intruder. Plaintiff asserted that defendant was negligent because \textit{inter alia}, he failed to replace the full-time resident manager who had inhabited the building when she began her tenancy but had died shortly thereafter. The lower court granted a summary judgment for defendant, but the District of Columbia Court of Appeals reversed and remanded, speaking as follows:

Appellant testified . . . that she leased an apartment from appellee after a reassuring conversation with the resident manager that he was there in the building to take care of any problems . . . .

. . . . It is appellant's contention that in the circumstances of this case a jury could reasonably find that her injuries were the proximate result of the landlord's negligence in (1) not replacing the full-time resident manager who died . . . We by no means suggest that there is a \textit{general} duty on the landlord to provide full-time managers . . . .\textsuperscript{71}

An objection to predicking liability on the landlord's failure to maintain protective measures that were in operation at the commencement of the lease is that such a rule would seem to discourage landlords from ever providing any more security than is required by law. However, the following arguments can be offered on behalf of the rule:

(a) It appears to be simply an application of the well-established common law principle that one who has voluntarily undertaken to provide a service must do so competently.\textsuperscript{72}

(b) The disincentive effects of the rule will probably in most instances be constrained by the forces of the marketplace. Assuming that apartment complexes X, Y, and Z are facilities of comparable quality in the

\textsuperscript{70}439 F.2d at 486. The court also rested its decision on two additional theories of liability that are not generally accepted: That a landlord occupies the same "special relationship" to his tenant that an innkeeper does to his guests; and that the implied warranty of habitability recognized in Javins v. First Nat. Realty Corp., 428 F.2d 1017 (D.C. Cir. 1970), includes "an obligation on the landlord to provide those protective measures which are within his reasonable capacity." 439 F.2d at 485.

\textsuperscript{71}252 A.2d at 510, 512. In Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976), discussed supra at text accompanying notes 23 & 24, the Court of Appeals of Maryland said: "We think it clear that even if no duty existed to employ the particular level of security measures provided by the defendants, improper performance of such a voluntary act could, in particular circumstances, constitute a breach of duty." 278 Md. at 171, 359 A.2d at 555.

\textsuperscript{72}"It is commonly held that one who gratuitously undertakes to render aid to another assumes a duty to act with reasonable care, a duty which once assumed may not be abandoned at will." E. KIONKA, supra note 28, at 110; \textit{See also} \textit{Restatement (Second) of Torts} § 323 (1965).
same general urban neighborhood, if X and Y offer a security buzzer system, then (in the absence of a local apartment shortage) Z will generally have to provide comparable security to successfully compete.

(c) In those instances in which the tenant reasonably believed that the security measures existing at the beginning of his lease would be continued, a contract would appear to result if he relied upon this belief, since detrimental reliance can serve as a substitute for consideration.73

E. Where the Court Interpreted the Implied Warranty of Habitability (Imposed By Law in a Lease of Residential Premises) As Including an Obligation to Provide the Tenant With Protection Against Crime

Among the handful of cases basing landlord liability on this theory are Trentecost v. Brussel75 and Brownstein v. Edison.76 Trentecost was a personal injury action filed against a landlord by a tenant who was assaulted and robbed by an unknown attacker in the common hallway of her apartment building. Plaintiff contended that defendant was negligent in failing to install a lock on the front door of the eight-unit building. Although the jury found for plaintiff and the Appellate Division affirmed, this judgment was grounded solely upon the theory that defendant was negligent.77 The Supreme Court of New Jersey affirmed but rested defendant's liability largely upon his failure to comply with an implied warranty of habitability. The court declared:

In Braitman we considered, but declined to resolve, whether the implied, warranty 'is flexible enough to encompass appropriate security devices . . . . We now conclude that it is and therefore hold that the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises . . . . Examining the facts of this case, we find that defendant breached his implied warranty by failing to secure in any way the front entrance to the building.78

Brownstein was a wrongful death suit instituted by the widow of a tenant who was robbed and killed in the lobby of defendant's apartment building. Plaintiff, who alleged that defendant was negligent in failing to repair broken locks on the front entranceway, petitioned the court for leave to amend her complaint by adding a cause of action for breaching New York's statutory im-

73L. Simpson, supra note 56, at 112. In Kline, 439 F.2d 477 the court said: "The appellant tenant was entitled to performance by the landlord measured by this [beginning-of-lease] standard of protection whether the landlord's obligation be viewed as grounded in contract or in tort." 439 F.2d at 486.
74See supra, note 7.
77Defendant's failure to put a lock on the building's entrance door violated New Jersey law (see 82 N.J. at 231, 412 A.2d at 444-445), and plaintiff testified that she had complained about the absence of such a lock, thereby providing defendant with notice. 412 A.2d at 439.
7882 N.J. at 227-28, 412 A.2d at 443.
plied warranty of habitability. Rejecting defendant’s argument that the state's statutory warranty does not encompass protection against criminal acts, the Kings County Supreme Court granted plaintiff's motion to amend her complaint, stating:

[W]here as here, defendants have assumed a duty to provide some degree of protection to the tenants by installation of front door locks... then to that extent building security is an essential service affecting habitability and thus coming within the scope of the statute...

Can anyone dispute that in New York City today... apartment house dwellers are acutely aware of and concerned about building security?...

Accordingly, the court finds that the plaintiff's proposed amendment states a cognizable cause of action for breach of the warranty of habitability. ...

Although most jurisdictions now recognize an implied warranty of habitability in a lease of residential property, to date only a small number of courts have construed the warranty to embrace a duty to provide security against crime. For the following reasons it is hoped that additional courts will not so interpret the warranty:

First, under this theory a landlord can be held liable for a tenant's criminally-inflicted injury or loss without a showing that the landlord had received any notice of the security deficiency that made the crime possible. If this does not make the landlord an insurer of his tenant's safety, it seemingly comes close to doing so. Second, assuming that the theory requires a showing that the landlord was at fault, it imposes a standard of care that is excessively vague. In Trentacost, the court observed that it was "entirely appropriate... to consider" the fact that defendant was in violation of New Jersey's statutory multiple dwelling regulations at the time of the criminal assault, but the court did not

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"Section 235-b of New York's Real Property Law states:
In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health, or safety.


"103 Misc. 2d at 318-19, 425 N.Y.S.2d at 775-776. Accord, Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (Kan. 1980) and Kline, 141 App. D.C. 370, 439 F.2d 477. In the latter case (discussed supra, in the text accompanying note 70), the United States Court of Appeals for the District of Columbia declared: "Secondly... there is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity." 439 F.2d at 485.

"Haines, supra note 7.

"Id. at 355.

"Since the landlord's implied undertaking to provide adequate security exists independently of his knowledge of any risks, there is no need to prove notice of such a defective and unsafe condition to establish the landlord's contractual duty." Trentacost v. Brussel, 82 N.J. 214, 228, 412 A.2d 436, 443 (1980).

"82 N.J. at 230, 412 A.2d at 444.
condition defendant's liability on this statutory violation. Third, since recognition of such an expansive basis of liability would represent a major change in landlord-tenant law, this would seem to be an instance where the courts should await action by the legislature. Admittedly, undue judicial deference to the legislature has been criticized. However, it would appear that the legislature, whose members are always elected, is the more appropriate forum for the adoption of significant legal changes that could impact on the cost and availability of housing, which is a fundamental human need.

VI. SUMMARY AND CONCLUSION

Prior to the 1970's a landlord was not held civilly liable to his tenants for injuries caused by the criminal acts of third persons, regardless of the inadequacy of the security measures provided by the landlord. The landlord's immunity from tenant lawsuits was ascribable to such factors: the original concept of a lease as a conveyance; reluctance to penalize a landlord for nonfeasance; judicial unwillingness to treat security deficiencies as the proximate cause of a tenant's criminally-induced injuries; concern that imposing a security obligation on landlords would be unfair, either because of the difficulty of defining with clarity a standard of care for landlords to follow or because of the fact that landlords, who already pay taxes to support police, would be burdened with additional crime-prevention expenses; and the belief that the imposition of any security responsibility was best left to the discretion of the legislature.

In recent years the courts have begun holding landlords liable in some situations for criminally-inflicted injuries sustained by their tenants. Most of these decisions can be explained on either a landlord-misfeasance or breach-of-contract analysis. Into the former category fall those cases in which the landlord created a crime-conducive condition on the premises or violated a law related to security measures. In the latter category are cases in which it was mutually understood that a part of the tenant's rent was being allocated to the provision of security or where the landlord failed to maintain a particular protective measure that he was providing at the beginning of the term. A few courts have adopted the theory that the implied warranty of habitability imposes a security obligation upon landlords, but this position is subject to serious criticism and does not seem likely to gain wide acceptance. It appears probable that litigation in this whole area will increase unless our society is able to devise means of reducing violent crime in our major cities.

See supra text accompanying notes 48-50.