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Landlord and Tenant-Abolition of Basic Premise of Landlord Tort Immunity-Landlord's Duty to Tenant Governed Solely by Negligence Principles

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Landlord and Tenant—ABOLITION OF BASIC PREMISE OF LANDLORD TORT IMMUNITY—LANDLORD'S DUTY TO TENANT GOVERNED SOLELY BY NEGLIGENCE PRINCIPLES

Sargent v. Ross, 308 A.2d 528 (N.H. 1973)

At common law the lease of land was treated as equivalent to a sale of the land for the term of the lease. The lessee acquired an estate in land and was, for the time he occupied the land, subject to virtually all the liabilities of the owner of a fee simple.[1] For this reason, the doctrine of caveat emptor applied to a lessee as well as to a vendee: the tenant, like a vendee, was required to inspect the land for himself and take it as he found it. The general rule was that there was no tort liability on the part of the landlord to the tenant or to others entering on the land for injuries resulting from conditions on the premises.[2]

Changing social conditions, however, including the shift from an agrarian to an urban-suburban society,[3] gradually caused the law to recognize a number of exceptions to the general rule of landlord nonliability. The landlord has been held liable in tort to a party injured on the leased premises where the party has been able to show that: (*1*) the landlord concealed from the tenant a dangerous condition in existence at the time the lease was entered into;[4]

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[1] 2 RESTATEMENT (SECOND) OF TORTS § 356, comment *a* (1965).

[2] W. PROSSER, TORTS § 63 (4th ed. 1971); 1 H. TIFFANY, REAL PROPERTY § 104 (3d ed. B. Jones 1939). For discussions of the historical development of the common law rules as to landlord and tenant, see Lesar, *Landlord and Tenant Reform,* 35 N.Y.U.L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future,* 38 FORDHAM L. REV. 225 (1969).

[3] In Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970), Judge Skelly Wright emphasized the changing patterns of American life as a basis for re-evaluation of the landlord-tenant relationship:

> The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. . . . When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

[4] 2 F. HARPER & F. JAMES, TORTS § 27.16 (1956); 2 R. POWELL, REAL PROPERTY ¶ 234[2] (rev. ed. P. Rohan 1971); W. PROSSER, *supra* note 2, § 63; 2 RESTATEMENT, *supra* note 1, § 358. *See generally* Harkrider, *Tort Liability of a Landlord,* 26 MICH. L. REV. 260, 383, 531 (1928); 35 IND. L.J. 361 (1960).

Typical cases involving the concealed defect exception are: Anderson v. Shuman, 257

(2) the premises were leased for the admission of the public;[5] (3) the injury occurred on a part of the premises retained in the lessor's control or provided for the common use of the tenants;[6] (4) the lessor violated a covenant to repair;[7] (5) a statute imposed on the lessor a duty to repair;[8] (6) the lessor negligently repaired the premises;[9] (7) the lessor rented premises having conditions dangerous to those outside the premises;[10] (8) the lease was for a short term.[11] However, despite the decreased harshness of the law pre-

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Cal. App. 2d 272, 64 Cal. Rptr. 662 (1967); Smith v. Green, 358 Mass. 76, 260 N.E.2d 656 (1970); Johnson v. O'Brien, 258 Minn. 502, 105 N.W.2d 244, 88 A.L.R.2d 577 (1960); Marston v. Andler, 80 N.H. 564, 122 A. 329 (1923).

[5] 2 F. HARPER & F. JAMES, *supra* note 4, § 27.16; W. PROSSER, *supra* note 2, § 63; 2 RESTATEMENT, *supra* note 1, § 359. Cases involving the public use exception include: Spain v. Kelland, 93 Ariz. 172, 379 P.2d 149 (1963) (tavern); Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580 (1952) (greasepit of service station); Junkerman v. Tilyou Realty Co., 213 N.Y. 404, 108 N.E. 190 (1915) (amusement park).

[6] 2 R. POWELL, *supra* note 4, ¶ 234[2]; W. PROSSER, *supra* note 2, § 63; 2 RESTATEMENT, *supra* note 1, §§ 360, 361. Cases dealing with the control or common use exception are: Kline v. 1500 Massachusetts Ave. Apts. Corp., 439 F.2d 477 (D.C. Cir. 1970) (common hallway); Gibson v. Hoppman, 108 Conn. 401, 143 A. 635 (1928) (common stairway); Sanford v. Belemyessi, 284 N.E.2d 588 (Mass. 1972) (rear porch of duplex); Wiggin v. Kent McCray of Dover, Inc., 109 N.H. 342, 252 A.2d 418 (1969) (automatic door of store); Dubreuil v. Dubreuil, 107 N.H. 519, 229 A.2d 338 (1967) (common driveway); Black v. Fiandaca, 98 N.H. 33, 93 A.2d 663 (1953) (attic); Flanders v. New Hampshire Sav. Bank, 90 N.H. 285, 7 A.2d 233 (1939) (back porch of duplex); Hunkins v. Amoskeag Mfg. Co., 86 N.H. 356, 169 A. 3 (1933) (roof); Gobrecht v. Beckwith, 82 N.H. 415, 135 A. 20 (1926) (common bathroom); Coleman v. Steinberg, 54 N.J. 58, 253 A.2d 167 (1969) (heating pipes); Bowman v. Goldsmith Bros., 63 Ohio L. Abs. 428, 109 N.E.2d 556, *appeal dismissed,* 158 Ohio St. 121, 107 N.E.2d 114 (1952) (stairway).

[7] 2 F. HARPER & F. JAMES, *supra* note 4, § 27.16; 2 R. POWELL, *supra* note 4, ¶ 234[2]; W. PROSSER, *supra* note 2, § 63; 2 RESTATEMENT, *supra* note 1, § 357; Bohlen, *Landlord and Tenant,* 35 HARV. L. REV. 633 (1922). Violations of the covenant to repair have been dealt with in numerous cases. *See, e.g.,* Williams v. Davis, 188 Kan. 385, 362 P.2d 641 (1961); Sanford v. Belemyessi, 284 N.E.2d 588 (Mass. 1972); Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968); Rampone v. Wanskuck Buildings, Inc., 102 R.I. 30, 227 A.2d 586 (1967).

[8] 2 R. POWELL, *supra* note 4, ¶ 234[2].

[9] 2 F. HARPER & F. JAMES, *supra* note 4, § 27.16; 2 R. POWELL, *supra* note 4, ¶ 234[2]; W. PROSSER, *supra* note 2, § 63; 2 RESTATEMENT, *supra* note 1, § 362; 1 H. TIFFANY, *supra* note 2, § 105. Examples of cases involving the negligent repair exception are: Janofsky v. Garland, 42 Cal. 2d 655, 109 P.2d 750 (1941); Oglesby v. Rutledge, 67 Ga. App. 656, 21 S.E.2d 497 (1942); Rowan v. Amoskeag Mfg. Co., 79 N.H. 409, 109 A. 561 (1920); Marks v. Nambil Realty Co., 245 N.Y. 256, 157 N.E. 129 (1927).

[10] W. PROSSER, *supra* note 2, § 63. *See, e.g.,* Kelly v. Laclede Real Estate & Inv. Co., 348 Mo. 407, 155 S.W.2d 90 (1941) (lessor liable to passerby injured by falling piece of building wall if injury resulted from permanent condition of building existing at time building was leased).

[11] This exception is often recognized where the leased premises are furnished. Cases in this category sometimes contain language vaguely suggesting that recovery may be based on an implied warranty of habitability.

Presson v. Mountain States Properties, Inc., 18 Ariz. App. 176, 501 P.2d 17 (1972), involved injury to a tenant caused by a defective hot water heater. The court spoke in terms

duced by recognition of these exceptions to the general rule of immunity, it still remained a prerequisite for the injured party to fit his case within one of these exceptions in order for the court even to consider the negligence of the landlord.[12]

In *Sargent v. Ross*,[13] the Supreme Court of New Hampshire, faced with "[t]he anomaly of the general rule of landlord tort immunity and the inflexibility of the standard exceptions,"[14] eliminated the requirement that the injured party fit his case within one of the traditionally recognized exceptions to landlord immunity:

> [W]e today discard the rule of "caveat lessee" and the doctrine of landlord nonliability in tort to which it gave birth. . . . Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm.[15]

I

BACKGROUND AND RATIONALE OF *Sargent*

Four-year-old Anna Sargent fell to her death from an outdoor stairway of a residential building owned by the defendant-landlady,

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of the implied warranty of habitability as being suggestive of judicial trends in landlord-tenant law. It held that, in the case of a short-term residential lease, the landlord owes the tenant a duty of care to maintain the premises free from unreasonably dangerous conditions, that the landlord has a duty to repair such conditions, and that failure to repair is indicative of negligence. However, since the tenant first discovered the dangerous condition three days after taking possession of the premises, the case could have fit within the exception for situations in which a concealed defect was in existence at the beginning of the term. *See* note 4 and accompanying text *supra*.

California recognizes in the short-term lease of furnished premises an implied warranty that the furniture is fit for use, violation of which can make the landlord liable to the tenant in tort. Charleville v. Metropolitan Trust Co., 136 Cal. App. 349, 29 P.2d 241 (1934).

In Horton v. Marston, 352 Mass. 322, 225 N.E.2d 311 (1967), the tenant was injured by the explosion of a gas stove a short time before her nine-month lease expired. The court held that a nine-month lease was not of such length as to place the risk of concealed defects on the tenant. The landlord impliedly covenanted that the cottage and its furnishings were suitable for their intended use. *Horton* was based on an earlier tort case, involving an extremely short lease, where recovery was said to be based on an implied warranty of habitability. Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942). There is some confusion in these two opinions as to whether the recovery is based on implied warranty or on the failure to reveal concealed defects. The practical result in Massachusetts seems to be that where a tenant is injured by a defect in the premises during a short-term lease a presumption arises that the defect existed and was concealed by the landlord at the beginning of the term.

For further discussion of the implied warranty of habitability as it relates to tenant tort recovery, see note 43 *infra*.

[12] "Unless a case fits into some one of the . . . categories . . . , the lessor has no responsibility to compensate the lessee for losses caused to the lessee by the condition of the leased premises." 2 R. POWELL, *supra* note 4, ¶ 234[2][f].

[13] 308 A.2d 528 (N.H. 1973).

[14] *Id.* at 532.

[15] *Id.* at 534.

who resided on the first floor of the building. The stairway led to a second-floor apartment, which was leased to the landlady's son and her daughter-in-law, a regular babysitter for the child. Anna's mother, as administratrix of the deceased child's estate, brought suit against the daughter-in-law on a theory of negligent supervision of the child, and against the landlady for negligent construction and maintenance of the stairway.[16] At trial, the jury found that the daughter-in-law had not been negligent, but returned a verdict against the defendant-landlady. The evidence indicated two possible causes of the fall. First, the stairway, which had been added to the building approximately eight years before the accident, was dangerously steep, and second, the railing was insufficient to prevent the child from falling over the side.[17] On the defendant-landlady's seasonable exceptions, all questions of law were reserved and transferred to the Supreme Court.[18]

Chief Justice Kenison, speaking for the court, observed that at trial the plaintiff had attempted to place the facts of her case within one of the two possibly applicable exceptions to the general rule of landlord immunity recognized in New Hampshire:[19] (*1*) the control or common use exception;[20] and (2) the negligent repair exception.[21] The court recognized that it could uphold the verdict below by straining the control or common use exception to include a stairway used only by the defendant's tenant to reach the second-floor apartment[22] or by broadening the negligent repair

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[16] *Id.* at 529-30.

[17] *Id.* at 530.

[18] *Id.* at 529-30.

[19] *Id.* at 530. It is unclear from the opinion whether the plaintiff relied upon just one, or both, of the two possible theories.

[20] *See, e.g.*, Black v. Fiandaca, 98 N.H. 33, 92 A.2d 663 (1953); Flanders v. New Hampshire Sav. Bank, 90 N.H. 285, 7 A.2d 233 (1939). *See also* note 6 *supra.*

[21] *See, e.g.*, Rowan v. Amoskeag Mfg. Co., 79 N.H. 409, 109 A. 561 (1920). *See also* note 9 *supra.*

[22] 308 A.2d at 532. *See also* note 6 *supra.* In analogous situations, when a court is faced with a plaintiff who it feels should recover but who does not fit within one of the exceptions, adherence to the old landlord immunity rule requires strained interpretations and can produce almost ludicrous results. For example, Coleman v. Steinberg, 54 N.J. 58, 253 A.2d 167 (1969), involved a duplex served by a single furnace in the cellar. One of the tenant's radiators was fed by a bare "up-pipe" coming through the floor. The year-old son of the tenant was severely burned when he came into contact with the pipe, which was not insulated and which had no protective device to prevent contact with it. On appeal the court remanded for a new trial on the issue of the landlord's negligence, holding that the plaintiff had sustained the burden of fitting his case within the control or common use exception. The court held that the "up-pipe" *within the plaintiff's apartment* was part of the duplex's heating system as a whole. Since the heating system was for the benefit and common use of all the tenants, possession and control remained in the landlord, who had a duty to maintain common facilities in a reasonably safe condition.

exception to include negligent construction of an improvement which had taken place eight years before the accident.[23] Instead, however, the court, on its own motion, chose to do away with the basic premise of landlord nonliability[24] and concentrated on the question of whether or not the landlord had been negligent.

The court expressed four reasons for turning away from the firmly established precedents found in New Hampshire case law. First, it pointed to the difficulty of fitting the facts of the case at bar into one of the traditional exceptions to landlord immunity, and the tendency of the rigid inclusion requirements to becloud the basic issue of responsibility for the injury suffered.[25] In *Sargent* the jury had found the defendant-landlady guilty of negligence in the original construction of the stairway or in permitting the stairway to remain in a dangerous condition.[26] As a proximate result of this negligence a four-year-old child fell to her death. Yet strict adherence to the control exception would have resulted in denial of recovery to the plaintiff. According to traditional analysis, the tenant could have argued convincingly that he was powerless to remedy the dangerous condition because he neither owned the house nor had any authority to repair defects; the landlady could have argued successfully that the stairway, leading only to the single second-floor apartment, was not within her control.[27] The trial in such cases bogs down in conflicting evidence as to which party had control of the area where the injury occurred, whether the landlord had knowledge of a latent defect at the time of the leasing, whether oral assurances constituted a covenant to repair, and other similar issues. Ignored is what should be the central question: upon whom is it most reasonable to place the risk of injury in a given case?[28]

Second, the court argued that the traditional control or common use rule "actually discourages a landlord from remedying a dangerous condition since his repairs may be evidence of his control."[29] A landlord, already disinclined to make repairs because of the expense involved, would be reinforced in his reluctance by

[23] 308 A.2d at 533. *See also* note 9 *supra.*

[24] The court declared that "now is the time for the landlord's limited tort immunity to be relegated to the history hooks where it more properly belongs." 308 A.2d at 533.

[25] *Id.* at 532-33.

[26] It cannot be determined from the opinion upon which of the possible alternative grounds for finding negligence the jury based its decision. *Id.* at 530.

[27] *Id.* at 532.

[28] *Id.* "The emphasis on control and other exceptions to the rule of nonliability, both at trial and on appeal, unduly complicated the jury's task and diverted effort and attention from the central issue of the unreasonableness of the risk." *Id.* at 533.

[29] *Id.* at 532.

the prospect of increased exposure to tort liability. Such discouragement of repair contravenes the logical position that the landlord, who retains possession of the building after departure of the tenant and is therefore best able to make repairs, should bear the burden of assuring safe living conditions in rental housing. The *Sargent* court, in abandoning landlord immunity, adopted the view that it is more practicable to expect the landlord to remedy dangerous conditions, particularly where a substantial alteration is required.[30] Elimination of immunity and imposition of "the ordinary negligence standard should help insure that a landlord will take whatever precautions are reasonably necessary under the circumstances to reduce the likelihood of injuries from defects in his property."[31]

Third, the court found that the retention of landlord tort immunity would be incompatible with the judicial trend toward abrogation of the traditional immunities of certain groups from tort liability.[32] Earlier New Hampshire decisions had eliminated the tort immunities of spouses,[33] the sovereign,[34] parents,[35] charitable organizations,[36] and real estate vendors.[37] Stressing the trend toward modernization of tort law, the court alluded to numerous recent cases questioning the traditional invitee-licensee-trespasser distinction, with their emphasis on the *conduct* of the parties rather than on the *status* of the injured party.[38] In view of the modern trend to eliminate the tort immunity of certain classes and to avoid artificial classifications and distinctions, the *Sargent* court saw no reason for continuing the privileged position of the landlord.

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[30] *Id.*

[31] *Id.* at 535. *See* 62 HARV. L. REV. 669 (1949). The author advocates imposing on the landlord the duty to repair because

> the lessor would fall within the general proposition underlying many areas of tort law that he who owns or is in a position to control or is responsible for things or persons has the duty to prevent their harming others. And the large body of negligence principles which have developed in other fields would bound this duty.

Id. at 678.

[32] 308 A.2d at 533.

[33] Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915).

[34] Hurley v. Town of Hudson, 112 N.H. 365, 296 A.2d 905 (1972).

[35] Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).

[36] Welch v. Frisbie Memorial Hosp., 90 N.H. 337, 9 A.2d 761 (1939).

[37] Derby v. Public Serv. Co., 100 N.H. 53, 119 A.2d 335 (1955).

[38] 308 A.2d at 534-35. *See, e.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1971). *See also* 121 U. PA. L. REV. 387 (1972); 25 VAND. L. REV. 623 (1972).

Fourth, the court found no remaining social justification for landlord immunity, which had developed during the period when, as a practical matter, the lessee exercised virtually complete control over the land.[39] Viewing the immunity doctrine as inextricably tied to the values of a predominantly agrarian past, the court saw the abrogation of landlord immunity as a logical extension of related recent developments in landlord-tenant law.[40] In 1971, the court, in *Kline v. Burns,*[41] had recognized an implied warranty of habitability in the lease of rental housing for the following reasons: (*1*) the legislature, in establishing housing codes, has recognized the need for a dwelling to be habitable at the beginning, and throughout the term, of the lease; (*2*) the landlord is more likely to have better knowledge of the condition of the premises than the tenant, in part because housing code violations are usually reported to the landlord; (*3*) the landlord retains ownership of the premises and should bear the cost of repairs necessary to make them habitable; and (*4*) the landlord is in a better bargaining position than the tenant. The *Sargent* court recognized that the same factors supporting an implied warranty of habitability also favored the elimination of landlord immunity and thus supported the exposure of the landlord to liability for negligence without forcing the plaintiff to fit his case within one of the exceptions.[42] The implied warranty of habitability supplied the tenant's need for habitable living conditions, but provided no protection from tort injuries caused by defects in or on the premises.[43] The court saw no reason for not broadening the

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[39] 2 RESTATEMENT, *supra* note 1, § 356, comment *a.*

[40] 308 A.2d at 533-34.

[41] 111 N.H. 87, 276 A.2d 248 (1971). For further discussion of implied warranty of habitability as related to tortious injury to tenants, see note 43 *infra.*

[42] 308 A.2d at 533-34. The archaic attitude underlying landlord immunity is well expressed in Miller v. Hooper, 119 Me. 527, 529, 112 A. 256, 257 (1921):

> An owner may build a tenement house with stairways which because of steepness or for other obvious structural reasons are inconvenient or even unsafe. The tenant cannot exact any change. If such stairways need to be repaired or rebuilt, the owner is not required to make them safer or more convenient.

[43] The traditional rule that there is no implied warranty in the lease of rental housing is expressed in Clarke v. Sharpe, 76 N.H. 446, 83 A. 1090 (1912), and Towne v. Thompson, 68 N.H. 317, 44 A. 492 (1895). Warranties were first recognized in short-term leases of furnished premises. *E.g.,* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (implied warranty of habitability and fitness in lease of furnished house for two periods of three and six months; breach of warranty because rats present in dwelling); Horton v. Marston, 352 Mass. 322, 225 N.E.2d 311 (1967). The landmark implied warranty case, Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), involved a nine-month lease of a furnished house and could have been fit within the exception for short-term leases of furnished premises. *See* note 11 *supra.*

The number of jurisdictions with judicially created implied warranties in long-term leases is rapidly increasing. *E.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.),

protection of the tenant, stating that the elimination of landlord

cert. denied, 400 U.S 925 (1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973). These cases follow reasoning similar to that found in Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971). *See* note 41 and accompanying text *supra.*

See also Quinn & Phillips, *supra* note 2; Skillern, *Implied Warranties in Leases: The Need for Change,* 44 DENVER L. REV. 387 (1967); Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem,* 22 CAS. W. RES. L. REV. 739 (1971); Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor,* 3 U. RICH. L. REV. 322 (1969); Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability,* 16 VILL. L. REV. 710 (1971); 56 CORNELL L. REV. 489 (1971); 21 DRAKE L. REV. 300 (1972); 40 FORDHAM L. REV. 123 (1971).

Two model acts also embody an implied warranty of habitability: ABA MODEL RESIDENTIAL LANDLORD-TENANT CODE §§ 2-203 to -206 (Tent. Draft 1969); NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104 (Final Draft 1972).

The common denominator of the above-cited cases, articles, notes, and model acts is their failure to discuss the problem of a landlord's tort liability. They emphasize the need to provide remedies for substandard housing (*see, e.g.,* Quinn & Phillips, *supra* note 2); tort recovery by the tenant is almost wholly ignored. The implied warranty of habitability does not provide a basis for a tort action in the same way that implied warranties do in sales situations. *E.g.,* Crotty v. Sbartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960). This fact is implicit in the *Sargent* court's position that its rationale is a logical *extension* of *Kline* (*see* note 41 and accompanying text *supra*), and in the infrequent discussion of tortious injuries to tenants in other implied warranty cases.

One student note does discuss the possible effects of implied warranty on the tort liability of landlords. 56 CORNELL L. REV. 489 (1971). The author suggests that many courts base the finding of an implied warranty of habitability in the legislative mandate provided by housing codes. Since the housing codes are found to impose a duty on landlords, the violation of a housing code regulation should be evidence of negligence per se, subjecting the landlord to liability in tort. The author also suggests that the concept of negligence may not even be pertinent—if a housing code violation is seen as a defect in a product, then strict liability may result. *Id.* at 499.

Only if some jurisdiction having an implied warranty of habitability should hold that violation of the implied warranty produces strict liability would an injured tenant want to bring his claim under an implied warranty theory, while perhaps alleging negligence as an alternative basis for recovery. In a jurisdiction which has recognized an implied warranty, but is not willing to use it to impose on landlords strict liability in tort, a tenant unable to place his claim within one of the exceptions to landlord immunity might want to base his action on an implied warranty theory. A court permitting such a claim would in effect be recognizing yet another exception to landlord immunity, involving the same problems accompanying the exceptions swept away by *Sargent.*

There are several logical reasons why, absent strict liability for violation of implied warranty, it would be wiser to follow a *Sargent* negligence approach than to carve out yet another exception to landlord immunity—this time based on implied warranty. Courts in various jurisdictions have produced widely varying definitions of what constitutes a breach of the implied warranty. In Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (1970), it was held that to be actionable a breach of the implied warranty must be so substantial as to amount to a constructive eviction. In Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), the court stated that the implied warranty of habitability is

nonliability follows "naturally and inexorably"[44] from the decision to recognize an implied warranty of habitability in rental housing. Thus, in the court's view, the responsibility of the landlord extends beyond providing habitable living conditions: he is required to maintain the premises in the manner in which they would be maintained by a reasonable man wanting to prevent injury to his tenants and their visitors.

Applying the standard of "reasonable care,"[45] the court concluded that there was sufficient evidence for the jury to have found that the defendant had negligently designed or constructed the stairway or that she had negligently failed to remedy the dangerous condition or warn the child of the danger.[46] Since contributory negligence was not an issue because of the age of the deceased,[47] the court sustained the verdict of the jury and entered judgment thereon.

II

THE FUTURE OF THE *Sargent* DOCTRINE

As the New Hampshire court pointed out, the abandonment of landlord immunity is a logical step to be taken in conjunction with the finding of an implied warranty of habitability in the lease of rental housing.[48] It is likely, therefore, that a negligence ap-

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fulfilled by substantial compliance with the housing code. It is not difficult to imagine fact situations under which such definitions of the implied warranty would be of little use to the tenant attempting to recover for tortious injury.

If the implied warranty of habitability is defined by the provisions of the housing code, as it is in a number of jurisdictions (*e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)), a tenant injured by a defect in the premises could conceivably be denied recovery if the dangerous condition causing the injury happened to be one not covered by the housing code. Such an approach would produce many of the same problems tenants encounter in attempting to fit their cases within the traditional exceptions to landlord immunity. That is, a concern for ritualistic categorization would predominate, rather than the issue of whether in a given case the landlord should bear responsibility for a particular injury.

Finally, the basing of tenant recovery on negligence law rather than on implied warranty permits the courts to draw upon the large, established body of negligence principles in determining liability. 62 HARV. L. REV. 669, 678 (1949).

[44] 308 A.2d at 533.

[45] *See* note 15 and accompanying text *supra*.

[46] 308 A.2d at 531.

[47] *Id.* at 532. The court relied on Dorais v. Paquin, 304 A.2d 369 (N.H. 1973), which held that the normal standard of care required of children for their own protection is that which is reasonable to expect of children of like age, intelligence, and experience under similar circumstances.

[48] 308 A.2d at 533.

proach similar to that of *Sargent* will eventually be adopted in other jurisdictions.[49] However, the impact of a simple negligence approach in landlord-tenant litigation remains to be gauged.

Under a negligence approach the tenant must still allege and prove that the landlord failed to exercise reasonable care under all the circumstances.[50] And precise formulation of the landlord's

[49] In a case decided after *Sargent*, a California court of appeals employed a *Sargent*-like analysis. In discussing the weight to be given the landlord's control over the premises in determining his tort liability, the court in Brennan v. Cockrell Inv., Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973), stated:

> Possession and degree of control over the premises are significant factors to be weighed in determining whether or not the landlord failed to meet the statutory standard of care. Indeed, these considerations go to the very essence of the negligence issue. But . . . [t]hat a landlord must act toward his tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of such injury, the burden of reducing or avoiding the risk, and his degree of control over the risk-creating defect, seems a sound proposition and one that expresses well the principles of justice and reasonableness upon which the law of torts is based. It is no part of fairness and rationality to transform possession and control from mere factors bearing on negligence into barriers to consideration of that issue.

Id. at 800-01, 111 Cal. Rptr. at 125. The court mentioned *Sargent* as indicative of the trend in other jurisdictions toward applying ordinary rules of negligence to tort cases involving owners and occupiers of land. *Id.* at 801, 111 Cal. Rptr. at 126. It based its holding, however, on an extension of the rationale of Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), which rejected the traditional licensee-invitee distinction and applied ordinary negligence principles to a case involving injury to a social guest.

[50] The tenant may be aided in proving negligence by the existence of a housing code in his jurisdiction. Some jurisdictions treat housing code violations by a landlord as negligence per se. *See, e.g.*, Morningstar v. Strick, 326 Mich. 541, 40 N.W.2d 719 (1950) (plaintiff infant severely burned by steam emitting from radiator; violation of state housing law, requiring that heating and plumbing equipment in every dwelling be kept in good repair by the owner, held negligence per se); McLain v. Haley, 53 N.M. 327, 207 P.2d 1013 (1949) (tenant injured in fall from outside stairway having no railing, in violation of housing code; failure to comply with housing code held negligence per se); Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922) (tenant injured by falling ceiling; statute imposing duty on landlord to keep tenement house in good repair included duty to repair individual apartments); Annot., 17 A.L.R.2d 704 (1951).

Some jurisdictions, however, treat housing code violations as merely "some evidence" of negligence. *See, e.g.*, Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960) (tenant injured when bedroom ceiling fell on her; violation of housing regulations "some evidence" of negligence); Ellis v. Caprice, 96 N.J. Super. 539, 233 A.2d 654, *certification denied*, 50 N.J. 409, 235 A.2d 901 (1967) (six tenants died in tenement fire; dictum that statute requiring fireproofing of airshafts for protection of tenants may be considered some evidence of negligence if breach caused injury).

Other jurisdictions treat housing code violations as irrelevant to the question of negligence. *See, e.g.*, Chambers v. Lowe, 117 Conn. 624, 169 A. 912 (1933) (tenaut injured by plaster falling from bedroom ceiling; statute imposing on landlord duty to keep building in good repair did not include duty to repair individual apartments within building); Stapleton v. Cohen, 353 Mass. 53, 228 N.E.2d 64 (1967) (violation of municipal building code requiring lighting of common hallways not considered evidence of negligence); Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950) (tenant injured by collapsing bed; landlord not liable for personal injury to tenant although statute required landlord to keep

duty may not be possible. The *Sargent* court, however, outlined a framework for the division of responsibility for keeping rented premises safe. The court noted that it would be unfair to hold a landlord liable for an accident caused by the tenant's faulty care of the premises,[51] but it also noted that "ordinarily the landlord is best able to remedy dangerous conditions, particularly where a substantial alteration is required."[52] It is the lessor's ownership and control which impose upon him the duty to prevent harm to others.[53] In order to discharge the burden "[a] landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk."[54]

Although under *Sargent* the plaintiff retains the burden of proving negligence, he is relieved of the often more difficult burden of squeezing his case within one of the narrow exceptions to landlord immunity. The outcome in a *Sargent*-type case will no longer hinge on such hairsplitting concerns and peripheral issues as whether the area where the injury occurred was under the control of the landlord or was provided for the common use of all tenants.[55] The New Hampshire court emphasized that

> [t]he questions of control, hidden defects and common or public use, which formerly had to be established as a prerequisite to

premises fit for occupation and to make repairs on notice, because statutory remedies allowing tenant to make repairs at landlord's expense considered exclusive); Alfe v. New York Life Ins. Co., 180 Okla. 87, 67 P.2d 947 (1937) (tenant injured when defective gas heating system exploded; violation of housing code no evidence of negligence; housing code remedies permitting tenant either to vacate or to make repairs at landlord's expense considered exclusive).

[51] 308 A.2d at 531.

[52] *Id.* at 532.

[53] *Id.* at 534.

[54] *Id.*

[55] In Black v. Fiandaca, 98 N.H. 33, 93 A.2d 663 (1953), the plaintiff was a guest in a second-floor apartment. The plaintiff went to the attic above the apartment and was injured when he fell through the floor, which consisted of boards laid across the joists, with open spaces between them. After a trial without jury, the court found that the defendant landlord was not negligent. The Supreme Court of New Hampsbire reversed, holding that the decisive question was whether the defendant was in control of the attic. If the tenants used the attic pursuant to oral permission from the landlord, the defendant had a duty to remedy or give warning of hidden defects. If the tenants used the attic as an appurtenance to the leased apartment for common use, the defendant had a duty to discover defects and make them safe. If the tenants exclusively controlled the attic, then the landlord's sole duty was not to deceive the tenants as to dangers of which the defendant knew and the tenants did not. A new trial was granted because the trial court had made no finding on the crucial issue of control, which governed the standard for the defendant's conduct; whether the defendant was negligent would depend upon the standard applied. *Accord,* Flanders v. New Hampshire Sav. Bank, 90 N.H. 285, 7 A.2d 233 (1939).

> 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.[56]

The *Sargent* negligence approach should thus have its greatest impact in cases where formerly the plaintiff, despite a meritorious claim, was unable to fit his case within one of the exceptions to landlord immunity. *Sargent* undoubtedly will enable more plaintiffs to go to the jury on the issue of negligence, particularly in cases which, under the old law, would demand proof of control or concealed defect.[57] In this area, *Sargent* will help to prevent unjust results. For example, in the Massachusetts case of *Sanford v. Belemyessi*,[58] the plaintiff was denied recovery because of failure to prove that a porch was under the landlord's control, although the court assumed that the evidence was such as to make the landlord liable for negligence had control by the landlord been established. Through inflexible application of the control test, a landlord who had been found negligent was granted immunity from tort liability—even though he had previously known of the defect causing the injury and had agreed to repair it.[59]

An important question raised, but not answered, by *Sargent* is whether its salutary effects can be defeated by landlords using the defenses of contributory negligence or assumption of risk. The New Hampshire court was able to avoid this question because of the age of the injured party.[60] Furthermore, the doctrine of assumption of risk has been found not to apply in New Hampshire landlord-tenant cases.[61] However, if the injured party in *Sargent*

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[56] 308 A.2d at 534.

[57] *See* notes 4 & 6 *supra*.

[58] 284 N.E.2d 588 (Mass. 1972). The plaintiff was injured in a fall on the rear porch of a duplex. It was held that control by the landlord was not established by the evidence, because the porch provided access only to the plaintiff's apartment. The fact that the defect in the porch had been brought to the attention of the landlord, who had agreed to repair it, did not furnish a basis for liability in tort, because of the traditional distinction between misfeasance and nonfeasance. Despite the jury's having found for the plaintiff, the court overruled the plaintiff's exceptions to the trial judge's setting aside of the jury verdicts.

[59] A similar result was reached on similar facts by an Ohio appellate court in Bowman v. Goldsmith Bros., 63 Ohio L. Abs. 428, 109 N.E.2d 556, *appeal dismissed*, 158 Ohio St. 121, 107 N.E.2d 114 (1952) (stairway providing access to tenant's apartment only). *See* Masterson v. Atherton, 149 Conn. 302, 179 A.2d 592 (1962); Kowinko v. Salecky, 5 Conn. Cir. 657, 260 A.2d 892 (1969); Anderson v. Hamilton Gardens, Inc., 4 Conn. Cir. 255, 229 A.2d 705, *certification denied*, 154 Conn. 719, 222 A.2d 809 (1966); Hannon v. Schwartz, 304 Mass. 468, 23 N.E.2d 1022 (1939); Cobb v. Rutland Sav. Bank, 113 Vt. 117, 29 A.2d 705 (1943).

[60] *See* note 47 and accompanying text *supra*.

[61] Ayers v. Gordon, 94 N.H. 30, 45 A.2d 656 (1946); Papakalos v. Shaka, 91 N.H. 265,

had been an adult, the landlord could have argued that the defect in the stairway was obvious, and that by using the stairway with knowledge of the danger the plaintiff was contributorily negligent or had assumed the risk as a matter of law. At least one court has accepted such an argument. In *Roberts v. Burkette,*[62] an eighty-five-year-old woman who slipped and fell on the stairs in a building where she had been a tenant for two or three years was found by a Florida court to be contributorily negligent as a matter of law.

Most courts, however, tend to distinguish situations in which the tenant has an obvious alternative to using the dangerous portion of the premises from situations in which no such alternative exists. Where no alternative exists the courts will not find contributory negligence or assumption of risk as a matter of law. In *Manes v. Hines & McNair Hotels, Inc.,*[63] the plaintiff was injured when she slipped on a six inch by eighteen inch wet spot in a nine foot wide hallway. The Supreme Court of Tennessee found that because she was well aware of the wet spot and could easily have avoided it, she was contributorily negligent as a matter of law. Other courts have reached similar results where the defective portion of the premises was one which the tenant could easily have avoided or was not one which the tenant absolutely needed to use.[64]

The majority of courts, however, hold that where the injury occurs in some portion of the leased premises which the tenant

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18 A.2d 377 (1941). The rationale behind these cases is that a tenant should not be found to have assumed the risk by using some portion of the premises the use of which cannot be avoided. *See* notes 65-70 and accompanying text *infra.*

[62] 245 So. 2d 134 (Fla. App.), *cert. denied,* 248 So. 2d 170 (Fla. 1971). The outcome may have resulted from an erroneous extension of the principle expressed in Joskowitz v. Holtman, 134 So. 2d 265 (Fla. App. 1961) (*see* note 64 *infra*). That case announced the principle that if the tenant has a reasonable alternative to using a dangerous portion of the premises, he must use the alternative or be held contributorily negligent as a matter of law.

[63] 184 Tenn. 210, 197 S.W.2d 889 (1946).

[64] *See, e.g.,* Joskowitz v. Holtman, 134 So. 2d 265 (Fla. App. 1961) (tenant tripped over overlapping carpet runner in hall; condition in existence over a year); Hicks v. Board of Supervisors of La. State U. & A. & M. College, 189 So. 2d 90 (La. App.), *writ refused,* 249 La. 730, 190 So. 2d 239 (1966) (no liability to plaintiff partially crippled by polio who fell in drainage ditch between student housing units at state university in circumstances where safer, well-lighted route available); Good v. Jones, 184 Neb. 454, 168 N.W.2d 520 (1969) (no recovery against landlord for injury resulting from fall over concrete slab in front of apartment building where defect minor and readily apparent, accident occurred during daylight, and plaintiff aware of defect); Harris v. Nachamson Dep't Stores Co., 247 N.C. 195, 100 S.E.2d 323 (1957) (recovery for fall down muddy, slippery stairway denied where plaintiff knew of alternate stairway which was dry); Lisk v. Dickey, 1 Wash. App. 112, 459 P.2d 810 (1969) (recovery denied where plaintiff knew of alternative to using icy sidewalk).

cannot avoid using, the issue of contributory negligence is for the fact-finder.[65] For example, in *Kanelos v. Kettler,*[66] the plaintiff was injured when her slipper caught in a deteriorated bathroom door sill, causing her to fall. The trial judge directed a verdict for the defendant-landlord on the ground that the plaintiff had assumed the risk. The District of Columbia Court of Appeals reversed, and ordered a new trial on the issues of the plaintiff's contributory negligence and the negligence of the landlord. The same result was reached in *McKenzie v. Egge,*[67] where the plaintiff had notified the landlord of a defect in the back porch of a second-floor apartment and was subsequently injured when the porch collapsed. The trial court directed a verdict for the landlord. The Court of Appeals of Maryland reversed, holding that it was unreasonable to expect the plaintiff to forego all use of the porch, which was a necessary adjunct to use of the apartment, and that the question of contributory negligence therefore should have been submitted to the jury. These cases suggest that where there is no reasonable alternative to avoiding the danger the tenant runs little risk of being found contributorily negligent as a matter of law and he will almost certainly be permitted to reach the jury.

The *Restatement (Second) of Torts* also provides support for the proposition that a tenant is not contributorily negligent as a matter of law if he is exercising a right or privilege in connection with his lease of living quarters. The *Restatement* would permit the landlord the defense of contributory negligence under such circumstances only if the tenant acts unreasonably.[68]

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[65] Kanelos v. Kettler, 406 F.2d 951 (D.C. Cir. 1968) (deteriorated bathroom door sill); Finch v. Willmott, 107 Cal. App. 662, 290 P. 660 (1930) (dilapidated stairs providing only access to second-floor apartment); Conroy v. Briley, 191 So. 2d 601 (Fla. App. 1966), *cert. denied,* 201 So. 2d 231 (Fla. 1967) (stairway lacking handrail providing only access to second-floor apartment); Murray v. Patton, 118 So. 2d 704 (La. App. 1960) (stairway providing sole access to apartment); Sachs v. Pleasant, 253 Md. 40, 251 A.2d 858 (1969) (broken toilet seat); McKenzie v. Egge, 207 Md. 1, 113 A.2d 95 (1955) (collapsing porch); Braimaster v. Wolf, 320 Mass. 620, 70 N.E.2d 697 (1947) (stairway providing only access to boiler heating tenant's room); Schwab v. Allou Corp., 177 Neb. 342, 128 N.W.2d 835 (1964) (ice accumulation on sole entranceway to building); Rush v. Commercial Realty Co., 7 N.J. Misc. 337, 145 A. 476 (1929) (defective privy); Conway v. Sciano, 27 Misc. 2d 970, 211 N.Y.S.2d 275 (Sup. Ct. 1961) (defective step between dining room and kitchen); Beck v. Dutra, 129 Vt. 615, 285 A.2d 732 (1971) (defective stairway providing sole access to tenant's apartment); Jorgensen v. Massart, 61 Wash. 2d 491, 378 P.2d 941 (1963) (flooded kitchen floor); Hape v. Rath, 492 P.2d 974 (Wyo. 1972) (ice accumulation on sole entranceway to building).

[66] 406 F.2d 951 (D.C. Cir. 1968).

[67] 207 Md. 1, 113 A.2d 95 (1955).

[68] § 473. Danger Encountered in Exercise of Right or Privilege.

Whether the defense of assumption of risk should be available to a landlord in a tort suit by a tenant is highly questionable.[69] The tenant cannot be said to have voluntarily assumed the risk when he uses some part of the premises which is absolutely necessary or unavoidable, yet possibly dangerous because of the landlord's negligence. For that reason, courts in several jurisdictions have concluded that the defense of assumption of risk is inapplicable in landlord-tenant cases.[70]

It is apparent that in most jurisdictions the more favorable conditions for tort suits against landlords provided by adoption of the *Sargent* rule would not be defeated by the defenses of contributory negligence or assumption of risk. The tenant would be found to be contributorily negligent or to have assumed the risk as a matter of law only if there existed an obvious alternative to use of the portion of the premises causing the injury. It would not be contributory negligence or assumption of the risk as a matter of law if the tenant were injured while using a portion of the premises necessary to his enjoyment of them.

CONCLUSION

Sargent is a significant and logically sound advance in the law of landlord and tenant. It represents an important step in the current movement "to revise and modernize the law of landlord and tenant to serve more realistically the needs of an urban society."[71] The abandonment of landlord immunity embodied in *Sargent* is a useful complement to the rapidly expanding law of

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> If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably.

2 RESTATEMENT, *supra* note 1, § 473.

[69] In Massachusetts the defense of assumption of risk is a question for the jury. Braimaster v. Wolf, 320 Mass. 620, 70 N.E.2d 697 (1947).

[70] *See, e.g.,* Kanelos v. Kettler, 406 F.2d 951 (D.C. Cir. 1968); Ayers v. Gordon, 94 N.H. 30, 45 A.2d 656 (1946); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); Rush v. Commercial Realty Co., 7 N.J. Misc. 337, 145 A. 476 (1929); Beck v. Dutra, 129 Vt. 615, 285 A.2d 732 (1971).

> The District of Columbia Court of Appeals expressed its reasoning as follows: Appellant's evidence was of a caliber sufficient to require submission for the jury's determination of the issue whether [the landlord's] duty had been dishonored. If it was, appellee cannot now avoid liability by the suggestion that appellant was at liberty to avert the danger by moving out. She could not, in the face of appellee's affirmative duty to exert care, be held to have voluntarily assumed the risk of injury posed by his negligence.

Kanelos v. Kettler, 406 F.2d 951, 956 (D.C. Cir. 1968).

[71] ABA MODEL RESIDENTIAL LANDLORD-TENANT CODE § 1-103(3) (Tent. Draft 1969).

implied warranties of habitability in rental housing.[72] The combined force of these two legal advances will greatly improve the position of the tenant and enable the law more appropriately to respond to the conditions of modern urban society.

Frank H. Andorka

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[72] *See* note 43 *supra*.