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Is a Landlord in Montana Answerable in Tort for Breach of Covenant to Repair the Leased Premises?

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The only way that such a release can free the tortfeasor from his duty to contribute is to include a provision to the effect that the other tortfeasors shall be released from the injured person's pro rata share of the common liability.[54]

(7) Another optional section of the act enables one or more of several tortfeasors sued by the injured person to add as third-party defendants any fellow joint tortfeasors whom they believe to have been also responsible for the tort. In this way the interests of justice may be promoted by obviating the necessity of a separate action for contribution.[55]

As can be easily seen, a legislative adoption of these provisions of the Uniform Act would establish a system whereby the respective liabilities of the tortfeasors could be equitably and conveniently determined, and the distribution of loss would be governed by the respective degrees of fault.[56]

Robert Brooke.

IS A LANDLORD IN MONTANA ANSWERABLE IN TORT FOR BREACH OF COVENANT TO REPAIR THE LEASED PREMISES?

In this paper we shall deal with the question of a landlord who contracts with his tenant to repair defects in the leased premises and fails to do so. Injury results to the tenant proximately caused by such defect not being remedied by the landlord as he had agreed. Can the tenant recover in a tort action,

[54]Sec. 5 (ann.)

[55]Sec. 7 (the procedural aspect of this section is modeled as closely as possible after the new FEDERAL RULES OF CIVIL PROCEDURE, 28 U. S. C. A., following 723c.

[56]It might be well to note a recent criticism directed towards this modern view of the law of contribution among joint tortfeasors. Mr. James, in 54 HARV. L. REV. 1170, advocates a program of socialization of loss by the simple theory of retaining the common law rule against contribution. His argument boils down to the premise that joint and several liability among tortfeasors, without contribution, gives the injured person a free hand in shifting the loss to that tortfeasor best able to bear it thus passing it on to society in general. This argument seems inconclusive due to the fact that it appears to be predicated on the rapid increase in joint tort liability in automobile accidents where if no contribution is allowed, the loss in the majority of cases would be borne by an insurance company, thus effecting a wider distribution of loss. In innumerable other tort actions, this result would not follow.

For an excellent defense of the law allowing contribution among joint tortfeasors, in answer to the theory broached by Mr. James, see Mr. Gregory's reply in 54 HARV. L. REV. 1170.

or must he be satisfied with an action on the contract and a contract measure of damages?

At common law, a rule similar to caveat emptor applied to leased realty. Courts looked at the transaction as a sale of an interest in the land, title to which vested in the lessee immediately upon the execution of the lease. He was entitled to the exclusive and peaceable enjoyment thereof during the term. The prospective tenant could inspect as fully as could the landlord, and consequently he took for better or for worse. Since the landlord was under no duty to repair defects existing prior to the lease, a fortiori, he was under no duty to repair dilapidations which occurred during the tenancy, even though called to his attention by the tenant.[1]

To this general rule that the landlord owes no duty to the tenant to make the premises safe, the courts early developed a number of exceptions.[2] One was that the landlord would be liable for any concealed or hidden dangers he knew to exist, but which the tenant could not discover. A second was where the premises leased were to be used for a public purpose, and here again the landlord was liable to members of the public injured by defects in the premises.[3] The landlord was also held liable for injuries occurring in common passages where the landlord and not the tenant retained control. A fourth exception was where the landlord in fact purported to have repaired the defect but in fact aggravated it, to the tenant's injury. A fifth exception involves landlords covenant to repair and failure to do so. It is with this exception alone that we are concerned.

At common law this exception was not recognized. If the landlord covenanted to repair and injuries resulted from his failure to do so, the damages recoverable for the breach were limited to the difference between the rental value of the premises with repairs, and their rental value without. Damages resulting from an injury to a tenant's person or property were too remote to be recovered in an action on the covenant. Nor could damages to a third party or his property be recovered because the covenant to repair was not made for his benefit.[4] Clearly recovery was limited strictly to a contract, not a tort, measure of damages.

[1]Bohlen, *Landlord and Tenant*, 35 HARV. L. REV. 633.
[2]Prosser on Torts (1st ed. 1941) sec. 81, p. 648.
[3]*Junkermann* v. *Tilyou Realty Co.* (1915) 213 N. Y. 404, 408, 108 N. E. 190, L. R. A. 1915F 700.
[4]Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260; 1 *Tiffany*, Landlord and Tenant p. 589.

The majority of American jurisdictions still hold that the tenant's action for landlord's breach of covenant to repair is ex contractu not ex delicto. The lessor's liability for non performance is said by the Maine court[5] to be no greater than that of a carpenter or other person contracting to repair.

> ". . . if the lessor contracts to repair the premises in the possession and under the control of his tenant, his liability is no greater or different than would be the liability of a third person, e.g. carpenter or other mechanic who contracts to make such repairs. . . . . "

A leading case in establishing this view was *Schick* v. *Fleischauer*.[6] Here the landlord had been notified of a defective ceiling and had agreed to repair, but he failed to do so and it fell on the tenant, causing the injuries complained of. The court held that a mere contract by the landlord to repair did not subject him to liability for negligence for personal injuries resulting to the tenant from the failure to perform the contract.

> "Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence."

New York has recently reiterated this view[7] which has also been taken by the Michigan court[8] which said,

> ". . . The tenant cannot maintain an action of tort for a breach of the contract duty of the owner to keep the house in repair, there being no contract, and if there were, tort would not lie. . . . The tenant's right to recover damages in tort can only be based on Pub. Acts 1917, No. 167, #71, requiring the owner to keep the premises in repair, which duty is ultra contractual."

A recent Pennsylvania case[9] in an action for trespass for injuries to the wife of a tenant caused by the collapse of a stairway, where judgment for defendant was affirmed, followed this view. The court held:

> ". . . an agreement to repair does not impose on the landlord liability in tort at the suit of the tenant or other

[5]Jacobson et al v. Leventhal, (1930) 128 Me. 424; 148 A. 281; 68 A. L. R. 1192.
[6](1898) 26 App. Div. 210; 49 N. Y. S. 962.
[7]Cullings v. Goetz et al. (1931) 241 N. Y. S. 109, 111.
[8]Annis v. Britton (1925) 233 Mich. 291, 105 N. W. 128.
[9]Harris et ux. v. Lewistown Trust Co. et al. (1937) 326 Pa. 145; 191 A. 34.

> on the land in the right of the tenant, since liability in tort should follow the legal incident of occupation and control, and occupation and control are not reserved by an agreement of the landlord to repair."

The court goes on to recognize that a minority of the jurisdictions take the opposite view and hold that a promise to repair is a reservation of control over the premises. The Pennsylvania court expresses its disagreement with the Barron case, which appears below.

Vermont also accepts this rule in a late case[10] and the court says,

> ". . . We accept the rule as stated by Cardozo, C.J., in the Cullings case that '. . . occupation and control are not reserved through an agreement that the landlord will repair.' "

In direct opposition to the common law view limiting recovery to a contract measure of damages is that of the Restatement of Torts shown in Sections 357[11] and 378.[12] A variety of ingenious theories has been advanced in support of this liability by courts adopting the minority view. The most popular one is that under an agreement to repair, the lessor retains the privilege to enter and supervise the property and so is in "control" of the premises, and subject to the same duties as the occupier. This seems to be the theory the Minnesota court proceeded under in the leading case of *Barron* v. *Liedloff*.[13] This was an action for damages for injury to a subtenant caused by a board in the porch giving way, after the landlord (defendant) had agreed to repair it.

> ". . . where he agrees to repair and keep in repair the leased premises, his right to enter and have possession of

[10]Soulia v. Noyes et al. (1940) ....Vt....., 16 A. 2nd 173.

[11]Restatement, Torts, Sec. 357.

A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if

a. the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and
b. the disrepair creates an unreasonable risk to persons upon the land which performance of lessor's agreement would have prevented.

[12]Restatement, Torts, Sec. 378.

A lessor of land who, as such, contracts with his lessee to keep premises in repair, is subject to liability for bodily harm to others outside the land caused by a condition of disrepair which involves an unreasonable risk to them which the lessor's performance of his contract would have made reasonably safe.

[13](1905) 95 Minn. 474, 475; 104 N. W. 289.

> the premises for that purpose is necessarily implied and his duties and liabilities are in some respects similar to those of owner and occupant. And if his negligence in making or failing to make the repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully on the premises who are not guilty of contributory negligence on their part."

This view is carried to the extreme in the case of *Keiper* v. *Anderson et al*,[14] where recovery was allowed in an action for the death of plaintiff's husband, a janitor, due to tuberculosis. The alleged cause was defendant landlord's failure to keep premises heated, as he had covenanted to do.[15] But it seems obvious that the control in such cases is a mere fiction since the landlord has no power to exclude anyone or to direct the use of the land.

A second theory, and it would seem a better one, is that the lessor by his promise has induced the tenant to forego making repairs himself, and by such misleading undertaking has made himself responsible for the consequences that proximately result. He is distinguished from other contractors by the peculiar probability that the tenant will rely on him. In short, it is the doctrine of reliance. This view has been taken by the Tennessee court.[16] Whatever the theory, the cases seem to represent a rather ill-defined feeling that the responsibility which has been voluntarily retained by the landlord should not be shifted to the tenant.

The question then arises as to the position of the Montana court. Our legislature early adopted two sections of the California code verbatim which have an important bearing on the problem.

> R. C. M. (1935) 7741 Lessor to Make Dwelling House Fit for its Purpose.
>
> Lessor of building intended for the occupation of human beings, must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable, except such as are mentioned in Section 7734.
>
> R. C. M. (1935) 7742 When Lessee May Make Repairs, Etc.

[14](1916) 138 Minn. 392; 165 N. W. 237; LRA 1918C 299.
[15]Good v. Von Henert, 114 Minn. 393; 131 N. W. 466. Ames v. Brandvold, (1912) 119 Minn. 521, 138 N. W. 787. Deegan v. Heilman Brewery Co. (1915) 129 Minn. 496, 152 N. W. 877.
[16]Merchants Cotton Press and Storage Co. v. Miller (1916) 135 Tenn. 187; 186 S. W. 87.

> If, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expense of such repairs from the rent, or lessee can vacate the premises in which case he shall be discharged from further payment of rent, or performance of other conditions.[17]

As there were already a number of cases decided in California in reference to these sections when Montana adopted them, it is assumed our legislature intended to adopt the construction given by those cases. In one of the first of these,[18] the California court held that the only statutory consequences of a breach of lessor's obligation were that lessee could either vacate or repair it himself. In a later case[19] the same court again held that the obligation imposed by the first section

> ". . . should be and is, limited to the extent of the privilege conferred on the tenant by section 1942 (R. C. M. (1935) 7742) and the only consequences of the breach of the landlord's obligation is that the tenant may either vacate or expend a month's rent on repairs."

In the recent (1918) and more conclusive case of *Granzer* v. *Flanagan*[20] the tenant brought suit for injuries caused his child by a gas explosion. The tenant and the landlord's agent, in inspecting the house, had noted a gas pipe uncapped. The agent had promised to repair but had failed to do so. The court held for the defendant, and that the statute provided the remedy, and that the tenant could treat the landlord's failure to repair as a breach of the lease and vacate or make repairs himself.

With these cases in mind, let us see what our court has done. Even before the statutes in question were adopted, the court held that the lease of a house is no implied warranty that the property is fitted for the use for which it is let, or for any purpose, or that it will remain in a tenantable condition.[21] The court early (1904) limited the application of the sections strictly to dwelling houses[22] and in the case of *Bush, Executrix* v. *Baker*[23] decided that the tenant, after making repairs amounting

[17]California Civil Code, (1920) Sections 1941, 1942.
[18](1888) Seeber v. Blanc, 76 Cal. 173, 18 P. 260.
[19](1899) Gately v. Campbell, 124 Cal. 250; 57 P. 567.
[20]35 Cal. App. 724; 170 P. 1076.
[21](1898) York v. Stewart et al. 21 Mont. 515; 55 P. 29.
[22]Landt et al v. Schneider, 31 Mont. 15; 77P. 307.
[23](1915) 51 Mont. 326; 152 P. 750.

to one month's rent, could subsequently repair dilapidations occurring in a following month, even though both expenditures exceeded the amount of one month's rent. It was further held however, that the tenant had no redress for damages to person or property consequent on the landlord's failure to repair. In the case of *Dier* v. *Mueller*[24] the lessee notified lessor that the porch had fallen into disrepair, and he promised to remedy the defect but failed to do so. A month later the injury complained of resulted but the court held no right of action for personal injury existed and that the demurrer was properly sustained. Our court relied on the California case of *Van Every* v. *Ogy*[25] and said,

> "... whether the construction is right or not, it is presumably adopted with the sections themselves and it constitutes a right of property, and the courts of this state are without authority to alter it."

Another jurisdiction whose decisions should be very persuasive with our court is Oklahoma. It has statutory provisions almost identical to ours.[26] In an action for personal injuries caused by gas escaping from an uncapped pipe[27] the court found the demurrer properly sustained. The court couldn't agree with plaintiff's contention that it was defendant's duty to make the house "fit for human occupation" before being occupied by her. Rather it held the tenants remedy confined to the statute, and beyond it she could not recover damages. In other words, the obligation of the landlord in the one section was limited to the extent of the privilege conferred on the tenant in the other section.

In a similar case for an action by the tenant for the death of an infant son caused by falling down a cystern, the Oklahoma court held[28]

> "... In absence of fraud and concealment of the lessor as to some defect known to him and unknown to the lessee, the rule of caveat emptor applies, and the lessee takes the premises ... in whatever condition they may be in, thus assuming all risk of personal injury from defects therein."

[24](1917) 53 Mont. 288; 163 P. 466.
[25](1881) 59 Cal. 563.
[26]Oklahoma Compiled Statutes (1931) Sections 10926, 10927.
[27]Lavery v. Brigance et al. (1925) 122 Okla. 31, 242 P. 239, 93 A. L. R. 782.
[28]Godbey v. Barton et al (1939) 184 Okla. 237, 87 P. 2nd 261; Young v. Beattie, (1935) 172 Okla. 250, 45 P. 2nd 470; (1937) Alfe v. N. Y. Life Ins. Co. et al., 180 Okla. 87, 67 P. 2nd 947.

No attempt has here been made to decide between the majority or New York rule and the minority or Minnesota rule, as a matter of policy and reason. The query is raised however, whether the Montana court would be free, if the case ever arises, to adopt the Restatement view. R. C. M. (1935) 7741 does not precisely cover the situation of a covenant to repair. If it is held to apply to that situation, would it also limit recovery in the case of common passageways, a dangerous concealed defect, or the other exceptions to the general rule mentioned at the first of this article? While this may still be an open question, it is submitted that, even irrespective of the more widely accepted majority view, in the light of the California and Oklahoma cases under statutes identical or similar to ours our court could not consistently adopt the Restatement view. In this state the code offers the tenant relief from the harsh common law rule, and this relief is apparently exclusive. If a change is desired, it would seem to be for the legislature, not the judiciary, to bring it about.

Orville Gray.

VOLUNTARY ASSUMPTION OF DUTY; CIVIL LIABILITY OF ADJACENT PROPERTY OWNER FOR CONDITION OF SIDEWALK. STEWART v. STANDARD PUBLISHING CO.[1]

This was a case in which the plaintiff sought to recover damages for personal injuries suffered by her in a fall on a sidewalk adjacent to defendant's place of business as a result of the accumulation of ice and snow thereon. The sidewalk had been constructed by defendant and had been maintained by defendant since its construction. The sidewalk was defective in that the stones had become uneven so that water could collect and freeze. The ice was covered with a light fall of snow. Defendant had been in the practice of cleaning the sidewalk of ice and snow and employed janitors for this purpose. This was ordinarily done about 7:30 in the morning, but on the morning of the accident was not done until 10:00, the accident occurring about 8:30 in the morning. The Montana Supreme Court, affirming the District Court, held that plaintiff should recover because the defendant had constructed the sidewalk, had assumed the duty of maintenance thereof, and had undertaken the duty of removing the accumulation of

[1](1936) 102 Mont. 43, 55 P. (2d) 694.