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Liability of a Landlord for Negligently Making Repairs When Not Obligated to Do So

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effect as long as it remains peaceful and becomes unlawful as soon as it turns towards violence.[26]

The author does not condemn combinations which have as their objective interference with the free flow of labor, but he does feel that before such interference is allowed the equities of the parties should be carefully weighed, the sanctity of the contract on the one hand, and the social and economic advantages to be gained on the other.

PHILIP ADELMAN.

LIABILITY OF A LANDLORD FOR NEGLIGENTLY MAKING REPAIRS WHEN NOT OBLIGATED TO DO SO.

In a recent New York case [1] the Court of Appeals laid down a doctrine for determining the liability of a landlord for damage resulting from gratuitous repairs. The facts in that case, as related to this discussion, were briefly these: The plaintiff, a tenant in the premises of the defendant Chapman, had entered into a lease exempting the latter "from all liability to the former for any injury to person or property * * *, whether the said damage or injury shall be caused by or be due to the negligence of the landlord, the landlord's agent, servant, employee or not." [2] Thereafter the roof began to leak and, at the request of the tenant, the landlord sent men down who repaired the roof and departed. They told the tenant that these repairs were not permanent, and would not prevent the roof from leaking. The roof leaked again and the landlord's agents again came to the premises, this time disclosing to the tenant the condition of the roof which permitted the leaking. They also made some temporary repairs, and again departed after repeating the statements they had made the first time. Upon an examination it was revealed that the same condition still existed after their departure. Thereafter, great quantities of water leaked in, which damaged the goods of the tenant, who thereupon brought this action. The Court of Appeals, in dismissing the plaintiff's complaint, predicated its decision on this formula:

The landlord in a gratuitous undertaking is liable for damage to the tenant if he misrepresents the nature and extent of the repairs

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[26] National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902) Typothetae v. Typographical Union No. 6, 132 App. Div. 921, 117 N. Y. Supp. 70 (1st Dept. 1909), *aff'd* without opinion, 196 N. Y. 571, 90 N. E. 1161 (1909); Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, *aff'd* without opinion, 144 App. Div. 939, 129 N. Y. Supp. 1111 (2nd Dept. 1911).

[1] Kirshenbaum v. General Outdoor Advertising Co., 258 N. Y. 489, 180 N. E. 245 (1932).

[2] *Id.* at 493.

and damage ensues, "or creates insecurity where formerly there was safety." [3]

In other words, a landlord's liability for gratuitous repairs is limited to two instances: when he misrepresents the efficacy of the repairs, by word or act; or creates a new danger. This rule is supported by judicial opinion and legal principle, and dispels the uncertainty concerning the negligence necessary to hold the landlord liable.

As to misrepresentation, or "negligence in word," [4] as it is sometimes called, there never seemed to be a doubt. This is justly so, for if the landlord asserts that he has repaired a certain condition, and it is safe, whereas a danger still exists which is now hidden or camouflaged, he should be liable.

The conflict, however, arises as to the second ruling. The case of *Thorn* v. *Deas* [5] was the first important judicial gesture in creating the distinction between nonfeasance and misfeasance in gratuitous undertaking. It was said, then, that although one is not liable for not acting under a contract without consideration, he "is responsible when he attempts to do it, and does it amiss." [6]

Wynne v. *Haight* [7] was the next landmark on this question. There the defendant, who was under no duty to repair, attempted to fix the ceiling in his tenant's apartment. Subsequently the ceiling fell, and the tenant sought to hold the landlord for liability for negligently making the repairs. The Court in holding for the defendant, distinguished between negligence as it is ordinarily used, and the negligence necessary to predicate liability on in this type of case, saying that to recover the plaintiff must show affirmative acts of negligence on the part of the landlord. The landlord's liability accrues if his act is the real, direct cause of the accident, and merely showing inefficient or incomplete repairs is insufficient.

Tiffany, in writing on this proposition, distinctly affirmed that ruling, citing *Wynne* v. *Haight* in support of his statement.[8] Professor Bohlen, an authority on the law of torts, indorses this view.[9]

There is a consistent line of cases following *Wynne* v. *Haight*, which conclusively laid down the same rule. In *Salveta* v. *Farley*,[10] the Court cited the *Wynne* case, quoting the following words from it: "his negligent act must be the real cause of the injury, and it is

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[3] *Id.* at 496.

[4] Glanzer v. Shephard, 233 N. Y. 236, 135 N. E. 275 (1922); International Products Co. v. Erie R. Co., 244 N. Y. 331, 155 N. E. 662 (1927).

[5] 4 Johns. 84 (N. Y. 1809).

[6] *Id.* at 96.

[7] 27 App. Div. 7, 50 N. Y. Supp. 187 (1st Dept. 1898).

[8] TIFFANY, LANDLORD AND TENANT (1910) §87, subd. f. 3: "If the repairs made by the landlord are merely insufficient, that is, if the pre-existing defects and dangers still exist, in spite of the landlord's action in setting about their repair, he should not, it seems, be liable by reason of such action."

[9] BOHLEN, STUDIES IN THE LAW OF TORTS, p. 206.

[10] 123 N. Y. Supp. 230 (App. T. 1st Dept. 1910).

for that alone that he is liable." [11] The same theory was followed in *Lipshitz* v. *Rapaport*.[12]

Another important and much-cited case on the same proposition followed. In *Marston* v. *Frisbie*,[13] where the insufficient repairs of a loose step were involved, the Court, presenting the theory on which the landlord could be held, said: "having volunteered to repair, he was negligent with respect to the repairs he attempted to make, and increased the danger, and that the damages were the direct results of his acts." [14]

Schatzky v. *Harber* affirmed the same ruling in even stronger language, the Court there stating: "the fact that he volunteered to make the temporary repair did not impose upon him the obligation of making it reasonably safe, for being under no duty to repair he should not be held liable merely for having attempted to repair if the floor was not rendered more unsafe by what he did, or the plaintiff was not misled thereby." [15]

This strong statement was affirmed and cited with approval in *Botwin* v. *Rothkopf* [16] and in *Jarchin* v. *Rubin* [17] where the facts showed an attempted repair, and the same condition continuing to exist.

Thus the judicial trend of thought, as indicated by these cases, seemed definitely to be towards imposing liability on the landlord only for his active, direct negligence. It had to be proved that he created the danger, or magnified the existent condition before he was held liable. Merely commencing repairs and failing to complete them, or entering to make repairs, and leaving the premises in no worse condition, was no basis for a tort liability.

However, in the case of *Marks* v. *Nambil*,[18] Judge Cardozo, writing for the Court, expressly attempted to overrule the holding of the *Wynne* case, and the *Marston* case, as before stated. In the *Marston* case, where the landlord had told the tenant that the repairs would "last forever," [19] the Court rightly held the landlord liable for subsequent damage. It was not necessary for the decision that any reference at all be made to the theory advanced in the *Wynne* case, and those following it, for a clear-cut case of misrepresentation existed. The landlord had expressly told the tenant, in as many words, that the repairs were complete, and the danger removed. The Court seemed to base its opinion on that, or, at least, increasing the danger, for it stated: "the inference is permissible that the presence of the prop cloaked the defect, dulled the call to vigilance, and so

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[11] *Ibid.*
[12] 133 N. Y. Supp. 385 (App. T. 1st Dept. 1912).
[13] 168 App. Div. 666, 154 N. Y. Supp. 367 (1st Dept. 1915).
[14] *Id.* at 370.
[15] Shatzky v. Harber, 164 N. Y. Supp. 610, 611 (App. T. 1st Dept. 1917).
[16] 217 N. Y. Supp. 192 (App. T. 2d Dept. 1926).
[17] 218 N. Y. Supp. 269 (App. T. 2d Dept. 1926).
[18] 245 N. Y. 256, 157 N. E. 129 (1927).
[19] *Id.* at 258.

aggravated the danger." [20] In the face of this, the statement of Judge Cardozo, in the same case, "that it is sufficient if what was wrong continues to be wrong" seems to be merely dicta and should be treated as such.

This stand becomes even stronger when the case of *H. R. Moch Co., Inc.* v. *Rensselaer Water Co.*[21] is read. In that case there was an agreement between the city of Rensselaer and the defendant, whereby the defendant agreed to furnish water to the city for fire hydrants and other purposes. A fire arose and plaintiff's warehouse was damaged, which he claims could have been prevented if a sufficient amount of pressure for drawing water had existed in the fire hydrant. Judge Cardozo, writing the opinion for the Court, in discussing the question of negligence, said: "what we are dealing with at this time, is a mere negligent omission, unaccompanied by malice or other aggravating elements. The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong." [22]

It is well to note that the defendant furnished some water; thus the liability, if any, for negligence would be for not proceeding to complete what had already been started. This is in conflict with the statement in the *Marks* case and seems to recognize it as merely dicta, and therefore ignores it. The cases thus seem to be reconciled on that basis.

The rule as expressed in the *Kirshenbaum* case can be reconciled on the principles of the law of negligence. Negligence has been defined as the breach of a legal duty, proximately resulting in damage. That is, damage in order to be compensable must have resulted from the dangerous condition as a proximate cause.[23]

The proximate cause of an accident is the cause without which the accident could not have occurred.[24] It is the efficient cause, the one that necessarily set the other causes in motion.[25]

Examining the rule we can see that it comes squarely within this theory of proximate cause. It cannot be said that the proximate cause of an accident resulting after gratuitous repairs, is the failure to completely repair. The condition which caused the accident was that which existed before the landlord even put his hand to the repairs; and would have caused the damage, as it did, even if the landlord had not entered. Having entered, it would be anomalous to say that the scope of proximate cause would be enlarged to include an omission to complete that which he was under no duty to perform. Where he has commenced repairs and enhanced the danger, it can readily be seen that his act is the proximate cause of any damage which results.

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[20] *Id.* at 259.
[21] 247 N. Y. 160, 159 N. E. 896 (1928).
[22] *Id.* at 169.
[23] Hall v. N. Y. Telephone Co., 214 N. Y. 49, 108 N. E. 182 (1915); Babcock v. Fitzpatrick, 221 App. Div. 225, 225 N. Y. Supp. 30 (3rd Dept. 1927).
[24] WORDS AND PHRASES, p. 5762.
[25] ANDERSON, LAW DICTIONARY.

His has been the last act which increased the danger and he is responsible for any injury resulting therefrom. This does not rest on the theory of a duty to complete, but on the obligation not to create a danger which had heretofore not existed.

A fortiori the argument becomes the stronger if in repairing he creates a danger in some part of the premises distinct from the one he is repairing. Thus his liability is for active, creative acts of negligence and not merely for passive omission to completely remove defects.

To summarize, the rule that a landlord who gratuitously repairs premises is liable for damage only if he has misrepresented the condition of the repairs, or has created a new danger, or enlarged an old, seems amply supported by judicial opinion and legal principle [26] and is a just and fair one.

IRVING L. WHARTON.

ADMINISTRATIVE LAW AND THE SEPARATION OF POWERS.

That the law is a living organism capable of adaptation to the ever-increasing complexities of the modern social and political system is well illustrated in the development of that branch of jurisprudence that is termed administrative law.

Administrative tribunals are public officers and commissions which in addition to their primary executive or delegated legislative power, have incidental judicial power, that is, power to hear and determine causes. Administrative law embraces the principles applied by the courts in reviewing the determinations of these tribunals.

Fundamental in administrative law is the principle that the jurisdiction of an administrative tribunal not being at issue or having been established, an appellate court will not interfere with the action of that tribunal unless it is arbitrary, unreasonable or capricious. If the administrative tribunal has jurisdiction, and has a reason for its determination, the appellate court will look no further; it will not substitute its judgment for that of the tribunal.[1] "Power to make the

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[26] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TORTS §232: "A lessor of land, who by purporting to make repairs thereon while the land is in the possession of his lessee or by the negligent manner in which he has made such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use, is subject to liability for bodily harm caused thereby to the lessee and others upon the land in the right of the lessee."

[1] Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. 548 (1888); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1903); U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905); Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155 (1909); People *ex rel.* New York & Queens Gas Co. v. McCall, 245 U. S. 345, 38 Sup. Ct. 122, *aff'g*, 219 N. Y. 84, 113 N. E. 795 (1916); People *ex rel.* Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891); Matter of Ormsby v. Bell, 218 N. Y. 212, 112 N. E. 747 (1916); People *ex rel.* Board of Education v. Graves, 243 N. Y. 204, 153 N. E. 49 (1926).