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Harold Horowitz

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The instant case,³⁵ in promulgating the principle that damages may be recovered for fright and its effects if there is a physical impact concurrent with the fright, has taken a progressive and a logical step in the direction of modifying the doctrine of the *Mitchell* case. The effect of the decision in actions which may arise in the future will always be limited by a determination of whether the injuries are the immediate and evident result of the defendant's lack of care. It would be even a more reasonable and a more just rule if, regardless of physical injuries or physical impact, fright and shock were treated as links in the chain of causation between the wrongful act and the injury.³⁶

PHILIP V. MANNING, JR.

LIABILITY OF LANDLORD IN TORT FOR INJURIES SUFFERED ON
LEASED PREMISES—PROPOSED STATUTORY CHANGE.

It has been remarked that under present rules of law a tenant has two rights: first, to sign the lease, and second, to pay the rent. This banter is more caustic than witty, and in a sense portrays the notorious situation of unbalance existing in the law of Landlord and Tenant. The heritage of ancient conditions is a law of real property which, in modern urban life, creates situations which are patently unfair to the lessee. Slowly and gradually are the more glaring inequities being eradicated.¹ It is only a matter of seventy years

³⁵ *Supra* note 8.

³⁶ *Supra* note 5, Throckmorton, 34 HARV. L. REV., p. 268, "The first reason" (namely, p. 265, that fright caused by negligence is not itself a cause of action none of its consequences can give a cause of action) "assigned for denying recovery for nervous shock resulting from fright may therefore be dismissed with the statement that while it is true no recovery may be had for mere fright for want of a physical injury yet physical injury resulting from a wrongful act is actionable, whether the injury be to the nerves or to some other part of the body and regardless of whether the link in the chain of causation between the wrongful act and the injury to the nerves is physical impact or fright. The essential thing is the existence of the link in the chain of causation, not the character of that link."

¹ In *Franklin v. Brown*, 118 N. Y. 110, 113, 23 N. E. 126 (1889), Vann, *J.*, speaking for the court said: "It is not open to discussion in this state that a lease, of real property only, contains no implied covenant of this character and that in the absence of an express covenant, unless there has been fraud, deceit or wrong-doing on the part of the landlord, the tenant is without remedy even if the demised premises are unfit for occupation." (Citing *Witty v. Matthews*, 52 N. Y. 512, and *Jaffe v. Harteau*, 56 N. Y. 398.) Twenty-four years later, in *Streep v. Simpson*, 80 Misc. 666, 141 N. Y. Supp. 863 (1913), the court, aware of the pronounced change in living conditions, relaxed the rigor of the above rule and said: "*Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof.* An intolerable condition which the defendant neither causes nor can remedy, seems to me, warrants the application of the doctrine of constructive eviction." (Italics ours.)

since a tenant is excused from paying rent for a house which has been destroyed by fire.² Although both landlord and tenant were equally blameless and equally impotent to prevent or check the disaster, the law exacted toll from the tenant and made him pay for the use of that which was non-existent.³ This article is concerned with calling attention to a similar piece of apparent injustice ingrained in the common law; to a doctrine which wreaks a hardship on the tenant, and immunizes the landlord from a liability which should attach to the results of his own misdoing.

Under the existing common-law rule, the landlord has no duty to keep leased premises in repair.⁴ Such an obligation can arise only by contract between the parties.⁵ The absence of duty precludes responsibility in tort: ⁶ breach of covenant to repair involves purely a breach of contract.⁷ Damages, then, are those which can be said to have been within the contemplation of the parties when making the contract,⁸ and decisions have been legion to the effect that a covenant to repair will *not* be interpreted to mean that the landlord has assumed to indemnify the lessee for consequential losses arising out of his failure to fulfill his promise.⁹

In a recent decision of the Court of Appeals, *Cullings v. Goetz*,^{9a} this holding is reiterated. In that case the plaintiff, having been injured by a falling garage door, joined the lessee of the garage and the lessor of the premises, in a negligence action. The lessor had covenanted to keep the premises in repair, and had been notified of the existent defective condition. It was held that since the lessor had renounced control to another, the tenant in possession had assumed such responsibility as exclusive occupation entails. From him alone might an injured party seek redress. The lessor had made a purely private contractual arrangement with his lessee to repair: that was the measure of his duty; the cost of making the repairs,

² Laws of 1860, c. 345; now N. Y. REAL PROP. L. §227; *Syndham v. Jackson*, 54 N. Y. 450 (1873).

³ *Graves v. Berdan*, 26 N. Y. 498, 501, 502 (1863).

⁴ *Golob v. Pasinsky*, 178 N. Y. 458, 70 N. E. 973 (1904).

⁵ *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193 (1889).

⁶ Of course, there is a duty to disclose known hidden defects. *Caesar v. Karutz*, 60 N. Y. 229 (1875); *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837 (1892).

⁷ *Schick v. Fleischauer*, 26 App. Div. 210, 49 N. Y. Supp. 962 (1st Dept. 1898).

⁸ *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. Ex. 179, 18 Jur. 358, 26 Eng. L. & Eq. 398 (1854).

⁹ *Murrell v. Crawford*, 102 Kan. 118, 169 Pac. 561 (1918); *O'Neil v. Brown*, 158 Ky. 113, 164 S. W. 315 (1914); *Korach v. Loeffel*, 168 Mo. App. 261, 173 S. W. 707 (1913); *Spellman v. Bannigan*, 36 N. Y. 174 (1885); *Sanders v. Smith*, 5 Misc. 1, 25 N. Y. Supp. 125 (1893); *Schiff v. Pottlitzer*, 51 Misc. 611, 101 N. Y. Supp. 249 (1906).

^{9a} 256 N. Y. 287, 176 N. E. 397 (1931).

the measure of his obligation.¹⁰ If the tenant himself could not maintain a suit *ex delicto* for injuries sustained, it is clear that no greater right would inure to members of his family¹¹ or to his invitee.¹²

There is no doubt that this case is well decided according to a host of past adjudications.¹³ And yet, although this ruling is supported by most text-writers¹⁴ and by good legal reasoning, the court seems to sense an injustice. Wedged in between the terse, objective, rigid statements of the law, one detects a flicker of sympathy for the tenant and the injured suitor. Says Cardozo, *J.*, "Countless tenants, suing for personal injuries and proving nothing more than the breach of an agreement, have been dismissed without a remedy. * * * Countless visitors of tenants and members of a tenant's family have encountered a like fate." There is an apprehension of victimization. Despite the facile flow and apparent logic of his legal dialectic, the impression¹⁵ lingers that the eminent chief judge is subjectively apologizing in the words of Alderson, *J.*, the English jurist, who once wrote, "My duty is plain. It is to expound the law, and not to make the law; to decide on it as I find it, not as I may wish it to be."¹⁶

Where there have been a series of decisions by the supreme court of a state, the rule of *stare decisis* may usually be regarded as impregnable, the holding to be altered only by legislative act.¹⁷ Such a statute was passed by our legislature to change the common law liability of a landlord to an apartment house tenant.¹⁸ Liability in tort was imposed,¹⁹ with the salutary result that landlords, fearful of being held financially accountable for resultant injuries, have become actually anxious to do that which they contracted to do. It is urged

¹⁰ *Schiff v. Pottlitzer*, 51 Misc. 611, 101 N. Y. Supp. 249 (1906). Nor can a tenant get compensation from the landlord for damages paid to a third party. *Kushes v. Ginsberg*, 188 N. Y. 630, 81 N. E. 1168 (1907).

¹¹ *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855 (2d Dept. 1902).

¹² *Elefante v. Pizitz*, 182 App. Div. 819, 169 N. Y. Supp. 910 (1st Dept. 1918).

¹³ *Walker v. Swayzee*, 3 Abb. Pr. 136 (N. Y. 1856); *Flynn v. Hatton*, 43 How. Pr. 333 (N. Y. 1872); *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987 (1892); *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763 (1898); *Golob v. Pasinsky*, 178 N. Y. 458, 70 N. E. 973 (1904); *Kushes v. Ginsberg*, 188 N. Y. 630, *aff'g*, 99 App. Div. 417, 81 N. E. 1168 (1907).

¹⁴ POLLOCK, *TORTS* (13th ed. 1929) p. 532; SALMOND, *TORTS* (7th ed. 1928) p. 477; WALSH, *REAL PROPERTY* (2d ed. 1927) §177, pp. 296, 297, 298.

¹⁵ Cardozo, *J.*, for the court: "The doctrine, *wise or unwise* in its origin, has worked itself by common acquiescence into the tissue of our law. It is too deeply imbedded to be superseded or ignored." (Italics ours.)

¹⁶ See *Miller v. Salomons*, 7 Ex. 475, 541 (1852).

¹⁷ *Harrow v. Meyers*, 29 Ind. 470 (1868).

¹⁸ TENEMENT HOUSE LAW, c. 61 of Con. Laws, §2, subd. 1; §102.

¹⁹ In *Altz v. Lieberson*, 233 N. Y. 16, 134 N. E. 703 (1922), another reason is adduced in support of the statutory change. Said the court: "The legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone." This argument applies with like force to the case of an indigent lessee of store property.

that this statutory liability be extended to include all property, business as well as residential, leased under a covenant to repair.

The rule contended for obtains in many jurisdictions,²⁰ wherein the courts hold that the lessor impliedly reserves that measure of control which gives him the right to re-enter to effectuate his agreement.²¹ It is further argued that even if the rule of *Hadley v. Baxendale*²² is rigidly applied, "the nature of the covenant is such as naturally to create a reasonable anticipation that the neglect to perform it will probably be the cause of personal injuries being inflicted on the tenant";²³ and moreover, that the covenant to repair is in many instances the controlling factor in inducing a tenant to sign a lease.²⁴ But by far the salient point of the minority argument is that it is only fair that restitution be made by him, who after receiving notice of a condition of disrepair, promises to attend to the matter, and then by constant dilly-dallying causes his tenant, in reliance on his promise, to put off making the repairs himself.²⁵ The admission by such a lessor that he causelessly delayed doing that which concededly was his solemn obligation, irrefutably lays the blame for an injury to his inexcusable procrastination.

An Illinois court,²⁶ justifying the old common-law rule, points out that in the event that the lessor violates his covenant to repair, the lessee has recourse to four separate remedies. The tenant may: "(1)—Abandon the premises if they become untenable by reason of want of repair; (2)—make the repairs himself and deduct the cost from the rent; (3)—occupy the premises without repair, and recoup his damages in an action for rent; (4)—sue for damages for breach of the covenant to repair, and the damage recoverable in this last instance is usually the difference between the value of the premises in repair and the value out of repair." Close analysis will expose the gross inadequacy of *all* of these remedies. Let us take the case

²⁰ *Collison v. Curtner*, 141 Ark. 122, 216 S. W. 1059 (1919); *Monahan v. National Realty Co.*, 4 Ga. App. 680, 62 S. E. 127 (1908); *Robinson v. Heil*, 128 Md. 645, 98 Atl. 195 (1916); *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289 (1905); *Merchant's Cotton Press & Storage Co. v. Miller*, 135 Tenn. 187, 186 S. W. 87 (1916); *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092 (1913); *Lowe v. O'Brien*, 77 Wash. 677, 138 Pac. 295 (1914); *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N. W. 489 (1914).

²¹ LAW OF TORTS RESTATEMENT (AM. L. INST. 1925) §227.

²² 26 Eng. L. & Eq. Rep. 398 (1854). "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from said breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of a breach of it."

²³ *Mesher v. Osborne*, *supra* note 20; SHEARMAN and REDFIELD, NEGLIGENCE (6th ed. 1913) §708a, p. 1860.

²⁴ See *Patten v. Bartlett*, 111 Me. 409, 89 Atl. 375 (1914).

²⁵ *Merchant's Cotton Press & Storage Co. v. Miller*, 135 Tenn. 187, 186 S. W. 87 (1916).

²⁶ *Cromwell v. Allen*, 151 Ill. App. 404, 408 (1909).

of a small retailer who leases a store at an agreed rental of \$100 a month. The landlord covenants to keep the premises in repair. The tenant moves in: fixtures, stock, and name. He soon discovers that a certain section of the flooring is insufficiently supported. The lessor is notified, assures the tenant he will take care of the matter, but consistently delays to do the work. The necessary repairs will cost \$500. Consider the tenant's plight: If he is put to making the repairs himself, he may seriously deplete his working capital. If he does *not* make the repairs, he submits himself to the hazard of incurring a ruinous liability, through someone being injured. If the tenant moves out, he sustains an irreparable loss due to consequent depreciation of fixtures, cost of moving, loss of goodwill, etc. At best, if the tenant can afford the expenditure, makes the repairs, and refuses to pay rent for the next few months, his depletion of capital to do that which the landlord contracted to do is tantamount to an extortion of rent for five months in advance. In a case like this, a statement setting forth the multiplicity of available remedies is almost facetious.

Proper protection can only be afforded the tenant by passing a statute to the effect that a lessor of real property will be held liable in tort at the suit of an injured party, lawfully on the premises, after the lapse of a reasonable time after he (the lessor) has been duly notified of a condition deserving of repair. Likewise, the fastening of liability on the more financially responsible landlord would insure a greater measure of protection to the public. An uncollectible judgment against an impecunious retailer is meagre balm for pain, mental suffering, and the costs of hospitalization.

The overwhelming number of former decisions in other jurisdictions²⁷ has not deterred forward-looking courts, uncommitted to any traditional policy, from veering from the established rule.²⁸ The law on this matter is in a state of transition,²⁹ and the minority opinion, steadily gaining ground, has won no less an adherent than the American Law Institute.³⁰ The progressive viewpoint of this eminent group must carry weight with all liberal-thinking students of jurisprudence.

HAROLD HOROWITZ.

²⁷ *Smith v. Halluck*, 210 Ala. 529, 98 So. 781 (1924); *Grazer v. Flanagan*, 35 Calif. App. 724, 170 Pac. 1076 (1917); *Willis v. Snyder*, 190 Ia. 248, 180 N. W. 290 (1920); *Murrell v. Crawford*, 102 Kan. 118, 169 Pac. 561 (1917); *Brady v. Klein*, 133 Mich. 422, 95 N. W. 422 (1903); *Kohnle v. Paxton*, 268 Mo. 463, 188 S. W. 155 (1916); *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220 (1917); *Jordan v. Miller*, 179 N. C. 73 (1919); *Schradski v. Butler*, 22 Ohio Dec. 701 (1911); *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630 (1904).

²⁸ For collected authorities see 8 A. L. R. 766; 16 R. C. L. 1059.

²⁹ *Supra* note 23.

³⁰ *Supra* note 21, p. 194. "A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land in the right of the 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 the performance of the lessor's agreement would have prevented."