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the person harmed requires that the defendant shall pay for the loss. "It can scarcely be said that there is less of a moral point of view involved in the rule that one who innocently causes harm should make it good."⁴⁹ Furthermore, there is a broader sense in which fault means nothing more than harm inflicted by an innocent defendant who could not help his actions.⁵⁰ It would appear that the interest of society as a whole would be better served by imposing liability upon the unconscious driver just as we do with the insane. The moral aspects are the same; the situation is the same; only the labels are different. The renunciation of the conventional fault doctrine in the unconscious motorist situation is not the abandonment of an ideal, "It is but a new recognition of a human limitation."⁵¹

CHRISTOPHER NARDI

Tort Liability of a Landlord Out of Possession and Control

The liability of a landowner for injuries to person and property occasioned by the defective condition of the premises is largely dependent upon whether the landowner is in control of the land. With the widespread use of leases in business and residential transactions, it becomes important to determine under what circumstances a landlord who is out of possession may be held liable. It has been stated that "Liability in tort is an incident to occupation or control,"¹ but "control" has different meanings depending upon who is the plaintiff. Accordingly, this note will consider the landlord's liability to tenants, trespassers, licensees, invitees, and strangers, i.e. persons who are not on the premises at the time of injury.

If any general rule may be formulated, it is that the landlord is not liable for defects arising after the lease, but that he may be liable if the defect arose prior to the time of leasing. This dividing line between liability and non-liability is not limited to the original lease — a landlord may be liable if a defect existed at the time the lease was renewed.² It should also be noted that ownership of the land is immaterial because a tenant out of possession and control is classified as a landlord out of possession and control.³

⁴⁹ *Id.* at 318.

⁵⁰ See Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918); cf. Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241 (1916-17).

⁵¹ Isaacs, *supra* note 50.

COMMON PROBLEMS

Regardless of the status of the plaintiff, there are three problems which are common to the cases: the "common hallway," the negligent making of repairs by the landlord and the statutory cause of action. Ohio has long adhered to the rule that the landlord will be liable for defects which exist on a portion of the premises that is used in common by several tenants, the rationale being that the landlord is the only person with overall authority to control this common area.⁴ But while this is well-established, courts have frequently had difficulty determining whether the rule was applicable.

In a case involving a tenant who leased the entire premises, the lease agreement provided that the window sash should be part of the outside of the building; this provision was sufficient to establish the liability of the landlord to a person who was injured by the falling window sash as he walked past the building.⁵ If several tenants had occupied the building and there had been no lease provision, it seems that the Ohio Supreme Court would have considered the outside of the building as being used in common by all the tenants. However, a subsequent appellate case took a different stand with respect to a grating which was attached to the outside of the tenant's window.⁶ The dissenting judge recognized that the Supreme Court case was not controlling because the lease was silent as to whether the grating should be considered as part of the outside or the inside of the tenant's rooms. He argued that the face of a building should not be divided into individual areas, the liability for each area hinging upon which tenant is in control of the interior. Certainly, the outside walls, as well as the roof, of a building which is leased to several tenants should be considered as being used in common by all the tenants.⁷

A porch running across the rear of the dwelling has also been cause for variance of opinion. Despite the absence of a dividing railing,

¹ Cardozo, in *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931). This statement was approved in *Berkowitz v. Winston*, 128 Ohio St. 611, 193 N.E. 343 (1934).

² Annot., 49 A.L.R. 1418 (1927). *Coward v. Fleming*, 89 Ohio App. 485, 102 N.E.2d 850 (1951) (Dicta).

³ *Youngstown v. Peters*, 60 Ohio App. 247, 20 N.E.2d 538 (1937).

⁴ *Davies v. Kelley*, 112 Ohio St. 122, 146 N.E. 888 (1925).

⁵ *Friedl v. Lackman*, 136 Ohio St. 110, 23 N.E.2d 950 (1939).

⁶ *Rotte v. Meierjohan*, 78 Ohio App. 387, 70 N.E.2d 684 (1946).

⁷ In *Prendergast v. Ginsburg*, 119 Ohio St. 360, 164 N.E. 345 (1928), the roof of the building was held to be used in common by tenants, each of whom leased part of the premises.

such a porch has been held not to be used in common,⁸ although a case with similar facts reached an opposite conclusion.⁹ When a tenant was injured on the portion of an outside stairway which led only to her apartment, the court of appeals, over a strong dissent, held that the stairway lost its common character when the tenant passed the landing adjacent to the apartment of the first floor tenant.¹⁰ If this were an interior stairway with a door at the bottom of the stairs, the majority opinion would be clearly correct. But it is more in accord with the public's thought process to regard open stairways, whether outside or inside, as a unified whole which is used in common, not as a network of private passageways. The Ohio Supreme Court dismissed the landlord in a case which involved a stairway leading only to the tenant's premises,¹¹ but it has not been confronted with the problem of a common stairway which allegedly loses its common character when only one tenant's doorway remains ahead of the person using the stairs. However, an appellate court, faced with a problem concerning a side hallway which led only to one tenant's premises, treated the question of the landlord's liability just as if the injury had occurred in the main hallway.¹² Many of the imponderables in these "common hallway" cases could be avoided by a clause in the lease which specified the limits of the leased premises; in the past, the delineation has generally been left to the courts.

The second common problem is that of the landlord who, while out of possession and control, makes repairs in a negligent manner. The Restatement of Torts takes the position that the landlord will be liable if he attempts to make repairs or if his negligent workmanship renders the premises more dangerous.¹³ Thus it would seem that if there is an element of reliance, the landlord will be liable even if the premises are not in a worse condition than they were before he attempted to repair. There have been no Ohio cases directly on this point, but it has been held that the plaintiff is not justified in relying on a promise of the landlord that he will repair the defect.¹⁴ Ohio cases have followed the

⁸ *Kline v. Rider*, 48 Ohio L.Abs. 1, 73 N.E.2d 378 (Ct. App. 1947).

⁹ *Reynolds v. Cherrington*, 45 Ohio L.Abs. 564, 68 N.E.2d 136 (Ct. App. 1943).

¹⁰ *Bowman v. Goldsmith Bros. Co.* 63 Ohio L.Abs. 428, 109 N.E.2d 556 (Ct. App. 1952).

¹¹ *Pitts v. Cincinnati Metropolitan Housing Authority*, 160 Ohio St. 129, 113 N.E.2d 869 (1953).

¹² *Roberts v. Fulton*, 24 Ohio C.C.R. (n.s.) 233 (1916).

¹³ RESTATEMENT, TORTS § 362 (1934).

¹⁴ *Minneker v. Gardiner*, 47 Ohio App. 203, 191 N.E. 793 (1933); *Himelreich v. Sams*, 16 Ohio L. Abs. 27 (Ct. App. 1933); *Ewing v. Webb*, 13 Ohio L.Abs. 162 (Ct. App. 1932); *Ward v. Dan Cohen Realty Co.*, 30 Ohio Op. 469 (C.P. 1945); *Schradski v. Butler*, 22 Ohio Dec. 701 (C.P. 1911); *Marlow v. Shiffman*, 9 Ohio

view of the Restatement that if the landlord has made the premises more dangerous,¹⁵ he will be held liable despite the fact that his act of making repairs was purely gratuitous.¹⁶

One Ohio court of appeals case raised the question of how extensive the repair work must be.¹⁷ The landlord had made some repairs to a rear porch two months before the plaintiff was injured, and this was sufficient misfeasance to hold the landlord liable. However, the dissenting judge pointed out that the landlord had repaired another part of the porch, not the part which caused the plaintiff's injury. Such a holding could certainly be justified on a "reliance" theory if the landlord repaired one floorboard and left its neighboring floorboard in a defective condition. On the other hand it would be difficult to say that a landlord who repaired a floorboard on a porch would be liable to a tenant who was injured by a defective railing. Yet the holding of this appellate case might be said to justify imposing such liability.

The third common area of discussion is that of the statutorily-created cause of action. Any of the common law rules regulating the landlord's liability may be changed by statute,¹⁸ but Ohio courts are not quick to imply a change in the common law rules.¹⁹ The greatest difficulty has been experienced with statutes or ordinances which provide that, "The owner or operator shall, etc." Several lower court cases have held that such wording imposes statutory liability on the landlord out of possession and control,²⁰ but the Supreme Court has adopted the better view

N.P.(n.s.) 533 (C.P. 1909), *aff'd.* 18 Ohio L.Rep. 209 (1911). *Contra*, Union Trust Co. v. Johnson, 42 Ohio App. 301, 182 N.E. 137 (1931).

¹⁵ Chapman v. Park Lane Villa Co., 62 Ohio L.Abs. 1, 105 N.E.2d 659 (Ct. App. 1951); Verplanck v. Morgan, 55 Ohio L.Abs. 574, 90 N.E.2d 872 (Ct. App. 1948); Ballato v. Industrians Savings and Loan Co. 64 Ohio App. 339, 28 N.E.2d 789 (1940); Marshall v. Pewter, 21 Ohio L.Abs. 511 (Ct. App. 1936); Honnemeyer v. Fischer, 27 Ohio C.C.R. 8, 17 Ohio C.C. Dec. 8 (1905).

¹⁶ Chapman v. Park Lane Villa Co., 62 Ohio L.Abs. 1, 105 N.E.2d 659 (Ct. App. 1951); Verplanck v. Morgan, 55 Ohio L.Abs. 574, 90 N.E.2d 872 (Ct. App. 1948).

¹⁷ Johnson v. Dumech, 52 Ohio L.Abs. 161, 82 N.E.2d 297 (Ct. App. 1948). See also, Kline v. Rider, 48 Ohio L.Abs. 1, 73 N.E.2d 378 (Ct. App. 1947) where the court casually made the distinction without comment.

¹⁸ Stackhouse v. Close, 83 Ohio St. 339, 94 N.E. 746 (1911); Branham v. Fordyce, 103 Ohio App. 379, 145 N.E.2d 471 (1957).

¹⁹ In *Tair v. Rock Inv. Co.*, 139 Ohio St. 629, 41 N.E.2d 867 (1942), an ordinance provided, "Every tenement house . . . shall be maintained . . . in good repair. . . ." The court said that this did not change the common law rule of non-liability. A statute imposing liability upon "any owner of any factory," was held not to be applicable to the owner of the building in the case of *Lee v. Smith*, 42 Ohio St. 458 (1884). See also, *Stanforth v. Smith*, 79 Ohio App. 158, 71 N.E.2d 738 (1946).

²⁰ *Bevan v. Century Realty Co.*, 64 Ohio App. 58, 27 N.E.2d 777 (1940), *dism'd*, 136 Ohio St. 549, 27 N.E.2d 148 (1940); *Doster v. Munn*, 57 Ohio App. 157, 12 N.E.2d 781 (1937); *Wilson v. Saalfeld*, 45 Ohio App. 484, 187 N.E. 323 (1933).

that such language is too ambiguous to imply a legislative intent to abolish well-established rules of non-liability.²¹ At least, it is clear that contributory negligence is a defense and that the plaintiff is estopped if he knew of the defect, even if he did not know that it was a violation of a statute or ordinance.²²

LIABILITY TO TENANTS

The general rule is that the landlord is not liable to his tenant for injuries to the tenant's person or property. In an earlier Supreme Court case the court said, "If the owner does not agree with the lessee to put the property in good repair or to keep it in good repair the lessee cannot recover from the owner damages for an injury sustained by the lessee due to the defective condition of the property."²³ However, later Supreme Court cases established that the landlord would not be liable for a defect which occurred during the lease, even if he covenanted to keep the premises in repair.²⁴ Since liability in tort is predicated upon control, these later holdings appear to be the better rule. The Supreme Court has defined "control of the premises" as, ". . . the power and the right to admit people . . . and to exclude people. . . ;"²⁵ so it is obvious that the fact that the landlord has covenanted to repair does not place him in "control" of the premises.²⁶ Most Ohio cases have followed this rationale and have held that the landlord is not liable, regardless of whether the defect arose before or after the lease.²⁷

²¹ Kauffman v. First-Central Trust Co., 151 Ohio St. 298, 85 N.E.2d 796 (1949).

²² Branham v. Fordyce, 103 Ohio App. 379 (1957); Stanforth v. Smith, 79 Ohio App. 158, 71 N.E.2d 739 (1946); French v. Huston, 7 Ohio L.Abs. 55 (Ct. App. 1928); Hall v. Myers, 49 Ohio L.Abs. 345, 77 N.E.2d 81 (Munic. 1947). *Contra*, Euphrat v. Kingsley, 5 Ohio L.Abs. 748 (Ct. App. 1927).

²³ Goodall v. Deters, 121 Ohio St. 432, 169 N.E. 443 (1929).

²⁴ Cooper v. Roose, 151 Ohio St. 316, 85 N.E.2d 545 (1949); Berkowitz v. Winston, 128 Ohio St. 611, 193 N.E. 343 (1934).

²⁵ Cooper v. Roose, 151 Ohio St. 316, 85 N.E.2d 545 (1949).

²⁶ But see the definition of "control" in cases involving strangers, footnote 67, *infra*.

²⁷ Cooper v. Roose, 151 Ohio St. 316, 85 N.E.2d 545 (1949); Berkowitz v. Winston, 128 Ohio St. 611, 193 N.E. 343 (1934); Branham v. Fordyce, 103 Ohio App. 379 (1957); Vecchiarelli v. Buchsieb, 62 Ohio L.Abs. 207, 107 N.E.2d 154 (Ct. App. 1950); Kline v. Rider, 48 Ohio L.Abs. 1, 73 N.E.2d 378 (Ct. App. 1947); Neff v. Keepers, 58 Ohio App. 159, 16 N.E.2d 276 (1937); Himelreich v. Sams, 16 Ohio L.Abs. 27 (Ct. App. 1933); Krug v. Link 8 Ohio L.Abs. 652 (Ct. App. 1930); Poland v. Wuest, 36 Ohio App. 204, 172 N.E. 836 (1930); Pinchefskey v. Goldstone, 34 Ohio App. 306, 170 N.E. 657 (1929); Hollingsworth v. Mueller, 3 Ohio L.Abs. 119 (Ct. App. 1924); Roberts v. Fulton, 24 Ohio C.C.R. (n.s.) 233 (1916); Mitchell v. Greiwe, 25 Ohio Dec. 670 (Super. 1913); Devanney v. Joering, 13 Ohio Dec. 230 (Super. 1902); Ward v. Dan Cohen Realty Co., 30 Ohio Op. 469 (C.P. 1945); Herman v. Albers, 13 Ohio N.P. (n.s.) 98 (C.P. 1912); Marlow v. Shiffman, 9 Ohio N.P. (n.s.) 533 (C.P. 1909), *aff'd*, 18 Ohio L.Rep. 209 (1911); Hall v. Myers, 49 Ohio L.Abs. 345, 77 N.E.2d 81 (Munic. 1947).

An exception to the rule of nonliability has been made with respect to defects existing at the time of the lease if the evidence established that the landlord was guilty of actual or constructive fraud. Ohio has had only one case involving actual fraud — the landlord represented that there was a candy factory on the adjoining premises, whereas the jury found that he knew that it was really a torpedo factory.²⁸ The court had no difficulty in holding the landlord liable.

With respect to constructive fraud, the Restatement of Torts takes the position that,

A lessor of land, who conceals or fails to disclose to his lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land, is subject to liability . . . if (a) the lessee does not know of the condition or the risk involved therein, and (b) the lessor knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk.²⁹

Unfortunately, the Ohio cases fail to come to such a clear conclusion. The only Supreme Court case is an early one, and its holding is that the landlord will be liable if he has knowledge of defects in the premises which are not discoverable by the tenant upon practicable examination.³⁰ Such rule is in keeping with the view of the Restatement, but the lower courts have not followed it universally. Most of the Ohio lower court cases hold that the landlord will be liable only if he has actual knowledge of the defect³¹ and the tenant does not have reason to know of it.³² But a few cases have held that the landlord will be liable if he ought to have known of the defect³³ and the tenant did not have actual knowledge of it.³⁴

Three cases have formulated an exception to the rule of nonliability for defects arising after the lease. The Cuyahoga County Court of Appeals, in handling two cases of low-income tenants who rented the

²⁸ *Brudno v. Miller*, 22 Ohio C.C.R. (n.s.) 471 (1907).

²⁹ RESTATEMENT, TORTS § 358 (1934).

³⁰ *Shinkle, Wilson and Kreis Co. v. Birney*, 68 Ohio St. 328, 67 N.E. 715 (1903).

³¹ *Marshman v. Stanley*, 68 Ohio L.Abs. 417, 122 N.E.2d 482 (Ct. App. 1952); *Bradner v. Kelly*, 8 Ohio L.Abs. 69 (Ct. App. 1929); *Mitchell v. Greiwe*, 25 Ohio Dec. 670 (Super. 1913); *Herman v. Albers*, 13 Ohio N.P. (n.s.) 98 (C.P. 1912); *Jones v. Roberts*, 1 Ohio Dec. 572 (C.P. 1894).

³² *Hoffhines v. Breen*, 27 Ohio L.Abs. 290 (Ct. App. 1938); *Bradner v. Kelly*, 8 Ohio L.Abs. 69 (Ct. App. 1929); *Herman v. Albers*, 13 Ohio N.P. (n.s.) 98 (C.P. 1912).

³³ *Hoffhines v. Breen*, 27 Ohio L.Abs. 290 (Ct. App. 1938); *Krug v. Link*, 8 Ohio L.Abs. 652 (Ct. App. 1930); *Pinchfsky v. Goldstone*, 34 Ohio App. 306, 170 N.E. 657 (1929).

³⁴ *Stanforth v. Smith*, 79 Ohio App. 158, 71 N.E.2d 739 (1946); *French v. Huston*, 7 Ohio L.Abs. 55 (Ct. App. 1928); *Jones v. Roberts*, 1 Ohio Dec. 572 (C.P. 1894).

premises from month-to-month, allowed the tenants to recover tort damages for breach of the landlord's promise to repair the premises.³⁵ A common pleas decision distinguished between personal injuries and property damage, recovery being allowed for the latter on the theory that property damages were within the contemplation of the parties.³⁶ No other Ohio cases have adopted these exceptions.

LIABILITY TO TRESPASSERS AND LICENCEES

The Restatement of Torts makes no provision for a landlord's liability to trespassers, the trespasser being left to seek his remedy against the person in possession and control of the premises. In Ohio's only trespasser case, the court held the landlord liable on a strained extension of the agency theory.³⁷ The landlord had told the tenant to keep boys from breaking down the fences, and the tenant shot one of the boys.

The Restatement attempts to place the licensee in the same position as an invitee and hold the landlord liable for defects existing at the time of the lease or arising later if the landlord has covenanted to keep the premises in repair.³⁸ The Ohio Supreme Court laid down a different rule than the Restatement in the only case in which an Ohio court has been called upon to decide the landlord's liability to licensees of the tenant. The court held that the landlord out of possession and control will be liable to licensees only if the landlord knows of a dangerous condition existing at the time of the lease and knows that the licensee might reasonably be expected to encounter such danger in the exercise of his license.³⁹ The plaintiff in this case had been invited to the defendant's fairgrounds, but it seems that he acquired the status of a licensee when he wandered into a portion of the fairgrounds from which invitees were excluded.

LIABILITY TO INVITEES

Under the broad heading of invitees are found cases dealing with business invitees, social guests, employees of the tenant, and members of the tenant's family. The Restatement of Torts takes the position that the landlord will be liable to invitees for defects existing at the time of

³⁵ Union Trust Co. v. Johnson, 42 Ohio App. 301, 182 N.E. 137 (1931); Rutsky v. Santa Lucia, 34 Ohio App. 317, 170 N.E. 599 (1929).

³⁶ Ward v. Dan Cohen Realty Co. 30 Ohio Op. 469 (C.P. 1945). *Contra*, Shinkle, Wilson and Kreis Co. v. Birney, 68 Ohio St. 328, 67 N.E. 715 (1903).

³⁷ Hanslip v. Hammer, 40 Ohio App. 178, 178 N.E. 19 (1931).

³⁸ RESTATEMENT, TORTS § 357 (1934).

³⁹ Stark County Agricultural Society v. Brenner, 122 Ohio St. 560, 172 N.E. 659 (1930).

the lease or for defects arising later if the landlord has covenanted to keep the premises in repair.⁴⁰ The Ohio courts have taken a contrary stand in at least the latter situation; they have held that the landlord is not liable for a defect arising after the making of the lease, despite the fact that he has contracted to keep the premises in repair.⁴¹ Four cases might be said to be in conflict with the preceding rule because, while the landlord was held not to be liable, the courts indicated that they might have found liability if there had been covenants by the landlord to keep the premises in repair.⁴²

A recent appellate case is troublesome because the court does not indicate the status of the plaintiff.⁴³ If the plaintiff was a stranger, the correct rule was used,⁴⁴ but if the plaintiff was an invitee, the holding is to the effect that the landlord's agreement to keep an air compressor in repair is sufficient evidence to find that he had control of the compressor. While this later interpretation finds support in the Restatement,⁴⁵ it is novel to Ohio law.

Clearly, the landlord will be liable to the tenant's invitees for defects existing at the time of the lease if he has been guilty of actual or constructive fraud. Ohio's only two cases involving invitees have stated that the landlord must have actual knowledge of the defect to be held liable,⁴⁶ otherwise the rules of the "tenant" cases⁴⁷ are probably applicable.

⁴⁰ RESTATEMENT, TORTS § 357 (1934).

⁴¹ *Pitts v. Cincinnati Metropolitan Housing Authority*, 160 Ohio St. 129, 113 N.E.2d 869 (1953); *Brown v. Cleveland Baseball Co.*, 158 Ohio St. 1, 106 N.E.2d 632 (1952); *Sinton v. Butler*, 40 Ohio St. 158 (1883); *Burdick v. Cheadle*, 26 Ohio St. 393 (1875); *Trinity Universal Insurance Co. v. Pure Oil Co.*, 73 Ohio L.Abs. 114, 136 N.E.2d 279 (Ct. App. 1955); *Chupek v. Akron*, 89 Ohio App. 266, 101 N.E.2d 245 (1951); *Bevan v. Century Realty Co.*, 64 Ohio App. 58, 27 N.E.2d 777 (1940); *Ford v. Eisenberger*, 29 Ohio L.Abs. 277 (Ct. App. 1939); *Land v. Brotherhood*, 21 Ohio L.Abs. 462 (Ct. App. 1936); *Minneker v. Gardiner*, 47 Ohio App. 203, 191 N.E. 793 (1933); *Ewing v. Webb*, 13 Ohio L.Abs. 162 (Ct. App. 1932); *Kasunic v. Euclid East Seventeenth Street Co.*, 32 Ohio L.Rep. 261 (Ct. App. 1929); *Ward v. Dan Cohen Realty Co.*, 30 Ohio Op. 469 (C.P. 1945); *Schradski v. Butler*, 22 Ohio Dec. 701 (C.P. 1911).

⁴² *Kauffman v. First Central Trust Co.*, 151 Ohio St. 298, 85 N.E.2d 796 (1949); *Shindelbeck v. Moon*, 32 Ohio St. 264 (1877); *Flynn v. Wiltshire*, 19 Ohio C.C.R. (n.s.) 433 (1912); *McNeal v. Emery's Sons*, 8 Ohio Dec. Reprint 513 (Dist. 1882).

⁴³ *Taylor v. Standard Oil Co.*, 71 Ohio L.Abs. 75, 130 N.E.2d 391 (Ct. App. 1954). *Gaug v. Monroeville Oil Co.*, 35403, has been certified to the supreme court by the Huron County Court of Appeals as being in conflict with the *Taylor* case.

⁴⁴ See footnote 67, *infra*.

⁴⁵ RESTATEMENT, TORTS § 357 (1934).

⁴⁶ *Dyer v. Robinson*, 110 Fed. 99 (S.D. Ohio 1899); *Bradner v. Kelly*, 8 Ohio L.Abs. 69 (Ct. App. 1929).

⁴⁷ See footnotes 30-34, *supra*.

In the absence of fraud, the cases are in conflict as to the landlord's liability for defects existing at the time of the lease. The leading Ohio case in this area is *Burdick v. Cheadle*.⁴⁸ The landlord was in the process of constructing shelving for a storeroom when he leased the premises to a tenant, the construction being completed after the lease was made. Thus, the defect may have arisen before or after the lease.⁴⁹ The court held that it was immaterial when the shelving became defective because the landlord would not be liable in either case.

The holding of the *Burdick* case was beclouded two years later by dicta in the case of *Shindelbeck v. Moon*.⁵⁰ Faced with a defect which arose after the lease, the Supreme Court enunciated the rule that a landlord out of possession and control, who can't even enter to make repairs without the tenant's consent, is not liable unless the defect arose before the lease. This dicta has been followed in two appellate cases,⁵¹ and it is the basis for two Supreme Court cases wherein the landlord reserved the right to direct and supervise the making of repairs.⁵² This line of cases does not appear to be the better view, and their holdings have not been followed by the great majority of Ohio cases, the rule of the *Burdick* case being adopted instead.⁵³ Unlike the stranger who has an independent status, the invitee can only claim *through* the person who invited him to the premises. If the tenant has no cause of action against the landlord, neither should the invitee of the tenant.

Many states have given the invitee an independent status, and thus permitted him to sue the landlord, if the premises were leased to the tenant so that he might invite large numbers of the public to the premises. This "public use" doctrine was enunciated in the New York

⁴⁸ 26 Ohio St. 393 (1875).

⁴⁹ Although the opinion clearly indicates that the court is not sure just when the defect arose, the syllabus states that the defect arose after the lease was made.

⁵⁰ 32 Ohio St. 264 (1877).

⁵¹ *R.K.O. Midwest Corp. v. Berling*, 51 Ohio App. 85, 199 N.E. 604 (1935); *Flynn v. Wiltshire*, 19 Ohio C.C.R. (n.s.) 433 (1912). *Edwards v. Rissler*, 5 Ohio C.C.R. (n.s.) 44 (1902) really involved a part of the premises used in common, but the court stated as an alternate ground of decision that the landlord would be liable for a defect inherent in the original construction.

⁵² In *Stackhouse v. Close*, 83 Ohio St. 339, 94 N.E. 746 (1911), the alternate ground of decision was violation of a statute. The court did adopt the rule in *Witherspoon v. Haft*, 157 Ohio St. 474, 106 N.E.2d 296 (1952), but it seems better to justify holding the landlord liable on the ground that the tenant had been in possession too short a time to discover the defect.

⁵³ *Schwalbach v. Shinkle*, *Wilson & Kreis Co.*, 97 Fed. 483 (S.D. Ohio 1899); *Ripple v. Mahoning National Bank*, 143 Ohio St. 614, 56 N.E.2d 289 (1944); *Berkowitz v. Winston*, 128 Ohio St. 611, 193 N.E. 343 (1934); *Marqua v. Martin*, 109 Ohio St. 56, 141 N.E. 654 (1923); *Lee v. Smith*, 42 Ohio St. 458 (1884); *Sinton v. Butler*, 40 Ohio St. 158 (1883); *Vecchiarelli v. Buchsieb*, 62 Ohio L.Abs.

case of *Swords v. Edgar* when the court stated that the intestate's use of the pier was under a claim of right because the pier was in actuality an extension of the public highway.⁵⁴ Subsequent cases have applied the rule to amusement parks,⁵⁵ theaters,⁵⁶ sporting events,⁵⁷ and similar places where the public congregates in large numbers. This view has also been adopted by the Restatement of Torts.⁵⁸ The Ohio courts have not yet ruled on this "public use" doctrine, although the opportunity has been presented.⁵⁹ Since such semi-public places are, for all intents and purposes, like the public sidewalk adjoining leased premises, it is submitted that the "public use" doctrine should be adopted by the Ohio courts. The invitee thus takes on the independent status of a stranger and should be governed by the same rules of liability.

Some courts have formulated an "extended public use" rule which renders the landlord liable to invitees of the tenant even if *small* numbers of the public are to be admitted to the premises.⁶⁰ While the

207, 107 N.E.2d 154 (Ct. App. 1950); *Bevan v. Century Realty Co.*, 64 Ohio App. 58, 27 N.E.2d 777 (1940); *Carr v. Fox*, 32 Ohio L.Abs. 103, 31 N.E.2d 713 (Ct. App. 1940); *Harrison v. Struich*, 19 Ohio L.Abs. 374 (Ct. App. 1935); *Minneker v. Gardiner*, 47 Ohio App. 203, 191 N.E. 793 (1933); *Wilson v. Saalfeld*, 45 Ohio App. 484, 187 N.E. 323 (1933); *Mouliet v. Anderson*, 13 Ohio C.C.R. (n.s.) 404 (1907). *Ziegler v. Rice*, 14 Ohio L.Abs. 570 (Ct. App. 1933) also reached this result, but it was reversed in 128 Ohio St. 239, 190 N.E. 560 (1934) because the Supreme Court found that a "common hallway" situation existed.

⁵⁴ 59 N.Y. 28, 32 (1874).

⁵⁵ *Albert v. State*, 66 Md. 325, 7 Atl. 697 (1886); *Martin v. Asbury Park*, 111 N.J.L. 364, 168 Atl. 612 (1933); *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N.Y. 310, 66 N.E. 968 (1903); *Joyce v. Martin*, 15 R.I. 558, 10 Atl. 620 (1887); *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599 (1919).

⁵⁶ *Lang v. Stadium Purchasing Corp.*, 216 App. Div. 558, 215 N.Y. Supp. 502 (1926).

⁵⁷ *Folkman v. Lauer*, 244 Pa. 605, 91 Atl. 218 (1914).

⁵⁸ RESTATEMENT, TORTS § 359 (1934).

⁵⁹ In *Brown v. Cleveland Baseball Co.*, 158 Ohio St. 1, 106 N.E.2d 632 (1952), stands collapsed at a football game; the landlord was held liable because he had really not surrendered control to the tenant. With similar facts in *Witherspoon v. Haft*, 157 Ohio St. 474, 106 N.E.2d 296 (1952), the court chose to base liability on the fact that the landlord supervised and controlled the erection of the bleachers. The landlord has also been held liable on the theory that the tenant was in possession an insufficient time to discover and repair the defects, e.g., a one or a two day lease. *DiRenzo v. Cavalier*, 165 Ohio St. 386, 135 N.E.2d 394 (1956); *Carr v. Fox*, 32 Ohio L.Abs. 103, 31 N.E.2d 713 (Ct. App. 1940).

⁶⁰ *Gilligan v. Blakesley*, 93 Colo. 370, 26 P.2d 808 (1933) (doctor's office); *Webel v. Yale University*, 125 Conn. 515, 7 A.2d 215 (1939) (beauty shop); *Stenberg v. Willcox*, 96 Tenn. 163, 33 S.W. 917 (1896) (boarding house). But other courts have repudiated such an extension and refused to hold the landlord liable; *Warner v. Fry*, 360 Mo. 496, 228 S.W.2d 729 (1950) (neighborhood tavern); *Clark v. Chase Hotel Co.*, 230 Mo. App. 739, 74 S.W.2d 498 (1934) (turkish bath); *Marx v. Standard Oil Co.*, 6 N.J.Super. 39, 69 A.2d 748 (1949) (gas station); *Hayden*

"public use" rule itself may be justified on grounds of public policy, the extension of it literally destroys the well-established and logical rules discussed earlier in this section. No Ohio courts have adopted this extended theory.

LIABILITY TO STRANGERS

When the injured party is not on the premises at the time of his injury, the courts understandably apply a stricter standard of liability. The usual case involves a pedestrian on the public sidewalk who is injured by a falling object or trips over a defect in the sidewalk. Though the landlord is out of possession and control, he will be liable if a nuisance existed on the premises at the time of the lease, whether he knew of the nuisance or not.⁶¹ However, if the plaintiff fails to prove that the defect constituted a nuisance or that it existed at the time of the lease, a verdict must be directed for the landlord.⁶² The statement has been made that the landlord might also be liable if a nuisance were certain to arise from the normal use of the premises or if the landlord knew the tenant would negligently create a nuisance,⁶³ and one appellate case seems to have used this theory to hold the landlord liable.⁶⁴

The leading case on the subject of defects arising during the lease is that of *Appel v. Muller*,⁶⁵ the court reasoned that the landlord has a basic duty to keep the premises safe for strangers, and when he covenants with the tenant to keep the premises in repair, he retains sufficient power to perform that duty. Ohio indicated at an early date that it would follow such a rule when, in dicta, the Supreme Court stated that a covenant to repair would be a sufficient retention of control to render the landlord liable to strangers.⁶⁶ The precise facts have been before the

v. Second Nat. Bank, 331 Pa. 29, 199 Atl. 218 (1938) (public garage); *Gentry v. Taylor*, 182 Tenn. 223, 185 S.W.2d 521 (1945) (restaurant in amusement park).

⁶¹ *Little Miami R.R. v. Hambleton*, 40 Ohio St. 496 (1884); *Coward v. Fleming*, 89 Ohio App. 485, 102 N.E.2d 850 (1951); *Dodson v. New England Trust Co.*, 78 Ohio App. 503, 71 N.E.2d 503 (1946); *Scherman v. Allard*, 19 Ohio App. 374 (1923); *Debar v. Walsh*, 11 Ohio App. 75 (1919); *Williams v. Macready & Co.*, 7 Ohio Dec. Reprint 381 (Dist. 1877); *McIlvaine v. Wood*, 12 Ohio Dec. Reprint 384 (Gen. Term 1856). Eldredge, *Landlord's Tort Liability*, 84 U. PA. L. REV. 467 (1936); 37 KY. L.J. 322 (1948-49); 7 N.Y.U. INTRA. L. REV. 131 (1951-52).

⁶² *Prendergast v. Ginsburg*, 119 Ohio St. 360, 164 N.E. 345 (1928); *Hess v. Devou*, 112 Ohio St. 1, 146 N.E. 311 (1925); *Smith v. Miller*, 11 Ohio C.C.R. (n.s.) 577 (1909).

⁶³ *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N.E. 286 (1903).

⁶⁴ In *Mayer v. Brudno*, 16 Ohio C.C.R. (n.s.) 102 (1909), the tenant used the premises for a torpedo factory.

⁶⁵ 262 N.Y. 278, 186 N.E. 785 (1933).

⁶⁶ *Burdick v. Cheadle*, 26 Ohio St. 393 (1875).

Ohio courts only twice,⁶⁷ but the cases have clearly established that, unlike the meaning of "control" in the tenant and invitee situations,⁶⁸ "control" is now *equated* with a covenant to repair. On the other hand, when the landlord has not covenanted to keep the premises in repair, Ohio courts refuse to hold him liable for defects occurring after the lease.⁶⁹

CONCLUSION

The landlord will be liable to his tenant only if he is guilty of actual or constructive fraud in concealing a defect which existed at the time of the lease. In all other cases involving tenants, the better rule is that the landlord is not liable, despite the fact that he has covenanted to repair. The same rule is generally used in invitee situations, although there have been strong cross-currents. Since the invitee can only claim through the tenant, it would appear better to say that he has no better right against the landlord than the tenant would have. A worth-while exception has been carved out of the rule of nonliability if the premises are leased for the admission of large numbers of the public, but the attempt of some courts to extend this doctrine to places where small numbers of the public are admitted seems erroneous. If the plaintiff is a stranger, the landlord will be liable for a nuisance which existed on the premises at the time of the lease, and if he has covenanted to repair, he will also be liable for a defect which arose during the lease.

Regardless of the status of the plaintiff, the landlord may be liable if the injury takes place on a portion of the premises which is used in common by two or more tenants. The age-old distinction between non-feasance and misfeasance still exists in the cases, so the landlord who gratuitously makes repairs in a negligent manner will render himself liable to whomever is injured by his faulty workmanship. Cutting across all these rules of liability and nonliability is the power of the legislature to create new liabilities or eradicate old ones.

A landlord cannot very well escape liability for defects existing at the time of the lease. But he can minimize the possibility of being found liable for a defect arising during the lease if he does not covenant to

⁶⁷ Friedl v. Lackman, 136 Ohio St. 110, 23 N.E.2d 950 (1939); Williams v. Macready & Co., 7 Ohio Dec. Reprint 381 (Dist. 1877).

⁶⁸ See footnotes 25 and 41, *supra*.

⁶⁹ Prendergast v. Ginsburg, 119 Ohio St. 360, 164 N.E. 345 (1928); Hess v. Devou, 112 Ohio St. 1, 146 N.E. 311 (1925); Langabaugh v. Anderson, 68 Ohio St. 131, 67 N.E. 286 (1903); Youngstown v. Peters, 60 Ohio App. 247, 20 N.E.2d 538 (1937); Poland v. Wuest, 36 Ohio App. 204, 172 N.E. 836 (1930); Amazon Lodge v. Krempin, 5 Ohio L.Abs. 7 (Ct. App. 1926); Smith v. Miller 11 Ohio C.C.R. (n.s.) 577 (1909).