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Landlord-Tenant Law: Landlord Held Negligent for Criminal Assault by Third Party Intruder on Tenant

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Case Comment

Landlord-Tenant Law: Landlord Held Negligent for Criminal Assault by Third Party Intruder on Tenant

Plaintiff appellant was seriously injured when she was criminally assaulted and robbed in the common hallway of the apartment building in which she resided. When plaintiff signed her lease, defendant landlord had provided certain security provisions in the 585-unit apartment building, including a doorman, a twenty-four hour desk attendant and other safeguards. Thereafter the security precautions were reduced in spite of an increase in crimes committed against the tenants in the common areas of the building. The United States District Court held that the landlord owed no duty to take steps to protect tenants from the criminal acts of third parties. On appeal, the Court of Appeals for the District of Columbia Circuit reversed, one judge dissenting, *holding* that such a duty did in fact exist and had been violated. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, —F.2d — (D.C. Cir. 1970).

Kline combines three areas of the law which historically have been subject to a wide area of overlap: negligent torts, contract and landlord-tenant. At common law it was a general rule of negligence that without a special relationship between the parties, such as innkeeper-guest,[1] common carrier-passenger,[2] business proprietor-patron[3] or school district-pupil,[4] there was no duty[5] to protect another from criminal attack.[6] The existence of such relationships, however, could create such a duty. For ex-

1. *E.g.*, Fortney v. Hotel Rancroft, Inc., 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955); Gurren v. Casperson, 147 Wash. 257, 265 P. 472 (1928).

2. *E.g.*, Quigley v. Wilson Line of Mass., Inc., 338 Mass. 125, 154 N.E.2d 77 (1958); Sandler v. Hudson and Manhattan R.R., 8 N.J. Misc. 537, 151 A. 99 (1930), *aff'd*, 108 N.J.L. 203, 156 A. 459 (1931); Exton v. Central R.R., 62 N.J.L. 7, 42 A. 486 (1898), *aff'd*, 63 N.J.L. 356, 46 A. 1099 (1899).

3. Becker v. City of Newark, 72 N.J. Super. 355, 178 A.2d 364 (App. Div. 1962); Lee v. National League Baseball Club, 4 Wis. 2d 168, 89 N.W.2d 811 (1958).

4. McLeod v. Grant County Sch. Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953).

5. Defined as ". . . an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." W. PROSSER, LAW OF TORTS 331 (3d ed. 1964).

6. Toone v. Adams, 262 N.C. 403, 137 S.E.2d 132 (1964); Murray v. Osenton, 126 So. 2d 603 (Fla. 1961); Altepeter v. Virgil State Bank, 345 Ill. App. 585, 104 N.E.2d 334 (1952); Swinfin v. Lowry, 37 Minn. 345, 34 N.W. 22 (1887).

ample, an employer has been held to owe a duty to his employees to provide a place to work which will be reasonably free from the probability of criminal attack by a third party,[7] although the mere happening of a criminal attack on an employee does not alone constitute a breach of the employer's duty to provide a safe place to work.[8] The employer is also obligated to warn the employee of latent dangers of the work, one of which may be attack by third parties.[9] In a similar manner, liability is imposed on one who establishes a business place open to the public[10] or one who assumes custody of another.[11] On one who voluntarily undertakes to protect the plaintiff, regardless of the parties' relationship, the law imposes a duty to protect.[12] One of the theories that give rise to the duty is the doctrine of reliance, whereby the defendant, by his promise, has induced the plaintiff to forego self-protective measures; thus because of his misleading undertaking, defendant should be responsible for the consequences.[13] Without some such special relationship or circumstances, however, no common law duty exists to protect another person from criminal assaults.

In refusing to impose liability courts have not limited themselves solely to examination of the relationship of the parties,

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7. The leading case in this area is Lillie v. Thompson, 332 U.S. 459 (1947). *See also* Atlantic Coast Line R.R. v. Godard, 211 Ga. 373, 86 S.E.2d 311 (1955).

8. *E.g.*, Murray v. Osenton, 126 So. 2d 603 (Fla. 1961); Lencioni v. Long, 139 Mont. 135, 361 P.2d 455 (1961); McMillin v. Barton-Robison Convoy Co., 182 Okla. 553, 78 P.2d 789 (1938).

9. *E.g.*, McCalman v. Illinois C. R.R., 215 F. 465 (6th Cir. 1914); Baxter v. Roberts, 44 Cal. 187 (1872).

10. *E.g.*, Quinn v. Smith Co., 57 F.2d 784 (5th Cir. 1932) (owner of swimming pool held to owe patrons a duty of due care for protection from unprovoked assaults); Nance v. Ball, 134 So. 2d 35 (Fla. 1961) (bowling alley operator had duty to reasonably guard patrons from assaults by others); Winn v. Holmes, 143 Cal. App. 2d 501, 299 P.2d 994 (1956) (restaurant owner negligent in refusing to prevent one customer from assaulting another); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913 (1901) (operator of a public amusement park liable for assault on customer); Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N.W. 54 (1899) (railway depot liable for attack on passenger by employee of a tenant of the depot).

11. *E.g.*, Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962); McLeod v. Grant County Sch. Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953); RESTATEMENT (SECOND) OF TORTS § 320 (1965).

12. *E.g.*, Kansas, O. & G. R.R. v. Pike, 264 S.W. 593 (Tex. Civ. App. 1924); Hansen v. Dodwell Dock & Warehouse Co., 100 Wash. 46, 170 P. 346 (1918).

13. *E.g.*, Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 196, 186 S.W. 87, 89 (1916).

often considering "convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer"[14] and the availability and cost of insurance. The factors which have generally prevented recovery in such cases are variously given labels such as fairness, forseeability, proximate cause and the defense of intervening cause, though they are not distinctly separable concepts. The fairness criteria, for example, which have been cited by courts[15] are at best synonymous with the amorphous concept of "public policy" which stresses the equity of the decision and the complex factor analysis which goes into the consideration of proximate cause.

The forseeability factor is involved in questions both of duty and proximate cause[16] in the case of negligence, or the comprehension of the parties under contract theory. It may be exceedingly difficult for the plaintiff to show that the defendant knew or should have known that his actions could reasonably lead to a criminal attack.[17] Lack of forseeability underlies many instances of inability to recover damages since a criminal act by a third person is usually held to be not forseeable as a matter of law.[18] Forseeability is relevant in a negligence suit as it relates to the issues of proximate and intervening cause. By definition, the defendant cannot be held liable if his actions were not the proximate cause of the plaintiff's injury, but beyond this point, courts cease to agree. If the court holds that criminal acts of third parties are unforseeable as a matter of law, defendant's actions cannot be the proximate cause of the injury.[19] Other cases take a subjective approach to forseeability of acts by third parties, holding that where injury is in fact forseeable to the defendant, his actions constitute a nonsuperseded proximate cause

14. W. PROSSER, LAW OF TORTS 334 (3d ed. 1964). *See also* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928) & 29 COLUM. L. REV. 255 (1929).

15. Goldberg v. Housing Authority, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962).

16. Firman v. Sacia, 7 App. Div. 2d 579, 184 N.Y.S.2d 945 (1959) held that the outcome would be the same regardless of whether forseeability was considered to be a measure of duty or proximate cause.

17. *E.g.*, Watson v. Kentucky & Ind. Bridge & R.R. Co., 137 Ky. 619, 126 S.W. 146 (1910).

18. *E.g.*, Sitarek v. Montgomery, 32 Wash. 2d 794, 203 P.2d 1062 (1949); Fulfer v. Sherry's Liquor Stores, 149 P.2d 734 (Cal. 1944); Weigand v. Chicago R.I. & P. R.R., 121 Kan. 610, 249 P. 615 (1926).

19. *E.g.*, Crandall v. Consolidated T., T., and Elec. Co., 14 Ariz. 322, 328, 127 P. 994, 997 (1912); Watson v. Kentucky & Ind. Bridge & R.R. Co., 137 Ky. 619, 633-44, 126 S.W. 146, 151-53 (1910).

of that injury.[20] A detailed discussion of proximate cause is beyond the scope of this Comment.[21]

In finding a duty of protection in terms of landlord-tenant law, and a breach of the applicable standard of care, the *Kline* court admitted that as a general rule there was no duty to protect another from the criminal acts of a third party. The court found nevertheless that such a rule falters when applied to modern urban conditions in multi-unit dwellings where the landlord had notice of repeated criminal acts which were likely to continue and had the exclusive power to take preventative action[22] at least in the common areas. The court imposed a duty on the landlord both to maintain and repair the premises and to take protective measures guarding "the entire premises and the areas peculiarly under the landlord's control against the perpetration of criminal acts . . . ."[23]

The court relies in part on *Whetzel v. Jess Fisher Management Co.*,[24] where a tenant sued for damages accruing when injured by a falling ceiling on the premises. The court there held that the enactment of the Housing Regulations[25] altered the common law rule that a landlord had no duty to repair the premises and that a tenant had a cause of action sounding in tort against the landlord for his failure to discharge his duty of repair. This doctrine was reaffirmed in *Kanelos v. Kettler*,[26] where the tenant's injury was attributable to the deteriorated condition of a door sill. By the time *Levine v. Katz*[27] was decided, the principle had solidified:

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20. *E.g.*, Lillie v. Thompson, 332 U.S. 459, 462 (1947); Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962); Winn v. Holmes, 143 Cal. App. 2d 501, 504-05, 299 P.2d 994, 996 (1956).

21. *See* Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937); Feezer & Favour, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940). Other factors to be considered are economics (Stevenson v. Kansas City, 187 Kan. 705, 711, 360 P.2d 1, 6 (1961)); ability or inability of defendant to comply with the duty imposed (Mastad v. Swedish Brethren, 83 Minn. 40, 43, 85 N.W. 913, 914 (1901)), and ability or inability of the plaintiff to protect himself (Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 144, 18 Cal. Rptr. 892, 894 (1962)). The tort aspects of liability of one for the criminal attacks of another are exceedingly complex. *See generally* Annot., 10 A.L.R.3d 619 (1966).

22. — F.2d at —.

23. *Id.* at —.

24. 282 F.2d 943 (D.C. Cir. 1960).

25. Housing Regulations of the District of Columbia §§ 2101, 2104, 2301, 2401 & 2501 (1956).

26. 406 F.2d 951 (D.C. Cir. 1968).

27. 407 F.2d 303 (D.C. Cir. 1968).

> It has long been well settled in this jurisdiction that, where a landlord leases separate portions of property to different tenants and reserves under his own control the halls, stairs, or other parts of the property for use in common by all tenants, he has a duty to all those on the premises of legal right to use ordinary care and diligence to maintain the retained parts in a reasonably safe condition.[28]

Obviously these cases are distinguishable from *Kline*. They all deal with some sort of physical defects on the premises; yet the logic behind them seems applicable, especially in the light of cases like *Kendall v. Gore Properties, Inc.*[29] and *Ramsay v. Morrissette*[30] which held that the duty extended to cases of physical intrusion by third parties.

Kendall held that a landlord was negligent in having hired, without investigation, a painter who, when given access to the tenant's apartment, proceeded to strangle the tenant. The court held:

> [I]f he [the landlord] knows, or in the exercise of ordinary care ought to know, of a possibly dangerous situation and fails to take such steps as an ordinarily prudent person, in view of existing circumstances, would have exercised to avoid injury to his tenant, he may be liable.[31]

In *Ramsay* a tenant was assaulted by an intruder who forced his way into her apartment. The tenant alleged that the landlord was negligent in failing to replace the full-time resident manager, failing to apprise police of the situation, failing to install locks on the front door and failing to prevent intruders and strangers from sleeping in the halls. The court held that these allegations were sufficient to preclude summary judgment for the landlord and relying on *Kendall*, stated:

> The traditional duty of reasonable care under all the circumstances would, of course, apply to those parts of the building used in common by all tenants where it can be shown that the landlord was aware of a dangerous situation and took no action either to remedy the situation or to warn the tenants of the danger.[32]

A synthesis of the repair cases and the intruder cases affords the *Kline* court an adequate basis for holding that as to tort law, "[t]he rationale of the general rule exonerating a third party from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses."[33]

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28. *Id.* at 304.
29. 236 F.2d 673 (D.C. Cir. 1956).
30. — D.C. Ct. App. —, 252 A.2d 509 (1969).
31. 236 F.2d 673, 680 (D.C. Cir. 1956).
32. — D.C. Ct. App. —, 252 A.2d 509, 512 (1969).
33. — F.2d at —.

In establishing the landlord's duty the *Kline* court analogized from the duty required of an innkeeper to exercise reasonable care to protect the guest from assaults of third parties,[34] the theory of liability being that

> since the ability of one of the parties to provide for his own protection has been limited, in some way, by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated.[35]

The analogy of the court to the innkeeper's duty to protect his patrons, although dictum, seems to reflect the overall movement in the law away from the old conceptualization of the lease which was treated as a conveyance of an interest in realty, toward viewing it as an ongoing contractual relationship. The dissent attacks the majority's innkeeper analogy on the grounds that the innkeeper is liable only "if, by the exercise of reasonable care, the proprietor could have discovered that such acts were being done or about to be done, and could have protected against the injury by controlling the conduct of the other patron."[36] There appear to be cases going either way on this point[37] but such criticism seems moot since the standard espoused by the dissent appears to be substantially the same as that adopted by the majority. Although it has been reported that "[t]he modern apartment dweller more closely resembles a guest in an inn than he resembles an agrarian tenant"[38] there may be some danger in wholeheartedly adopting the innkeeper analogy. In addition to the greater breadth of liability of an innkeeper, courts have held him to the standard of a high degree of care to secure the safety of his guests.[39] One opinion stated that "[o]ne entering a hotel 'is entitled to expect that far greater preparations to secure his safety will be made than one entering a private building' . . . ."[40]

34. *E.g.*, Fortney v. Hotel Rancroft, Inc., 5 Ill. App. 2d 327, 125 N.E. 2d 544 (1955); Gurren v. Casperon, 147 Wash. 257, 265 P. 472 (1928) (liability for personal injury on the premises); Hancock v. Rand, 94 N.Y. 1 (1883) (liability for lost and stolen goods); Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303 (1850).

35. — F.2d at —.

36. *Id.* at —.

37. *See* Annot. A.L.R.2d 628 (1960). The prevailing view appears to be that reasonable care is required.

38. J. LEVI, P. HALBUTZEL, L. ROSENBERG & S. WHITE, MODERN RESIDENTIAL LANDLORD-TENANT CODE 6, 7 (Tent. draft 1969).

39. Fortney v. Hotel Rancroft, Inc., 5 Ill. App. 2d 327, 331, 125 N.E. 2d 544, 546 (1955); Wilson v. Iberville Amusement Co., Inc., 181 So. 817, 818 (1938).

40. Schubart v. Hotel Astor, Inc., 168 Misc. 431, 435, 5 N.Y.S.2d 203,

The danger is that the landlord would be made an insurer of his tenant's safety, consequently causing higher rental costs, an outcome which the majority expressly disavows.

One of the factors given special consideration in deciding the outcome of *Kline* was whether or not the commission of the crime was forseeable. Relying on the record to establish that the tenants were being subjected to an increasing number of crimes in the hallway of the building, the court found that the landlord had both constructive and actual notice of the pattern of crime. The court distinguished such cases as *Goldberg v. Housing Authority*,[41] which held that the landlord had no duty to protect his tenants. *Goldberg* dealt with a provision of actual police protection, and was based on a statutory interpretation that a private person had no statutory right to employ a police force, this being a function of government. As the majority in *Kline* points out, the *Goldberg* court appears to equate "possible" with "probable" crime and thereby declined to allow that a criminal act could be "forseeable." *Goldberg* was countered in New York by *Bass v. City of New York*,[42] a case in which the controlling statute allowed the housing unit, at its discretion, to provide and maintain a uniformed police force. Under these circumstances when a young girl was raped and killed, it was held that the proprietor had a *duty* to provide adequate protection to secure tenants against molestation. The only difference between the two fact situations was the statutory policing authority alloted the respective proprietors under the laws of New York and New Jersey.

The record in *Kline* indicates that at trial the defendant conceded his notice of offenses committed in the building. The dissent attempts to show that the notice was insufficient because there was only one assault and robbery, and 19 thefts rather than 20 assaults and robberies, which is felt to be "an insufficient base to support a finding that *assaults* and robberies are a 'predictable risk' from which the landlord would have 'every reason to expect like crimes to happen again.' "[43] It has been held, however, that as the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less.[44] To say that "[a]ssaults of this character are not pre-

207, *aff'd*, 255 App. Div. 1012, 8 N.Y.S.2d 567 (1938), *aff'd*, 281 N.Y. 597, 22 N.E.2d 167 (1939).

41. 38 N.J. 578, 186 A.2d 291 (1962).

42. 61 Misc. 2d 465, 305 N.Y.S.2d 801 (1969).

43. — F.2d at — & n.2.

44. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

dictable from clandestine thefts,"[45] when one considers the potential gravity of the presence of intruders on the premises, is insensitive and unrealistic.

The *Kline* court based the landlord's duty on three factors. The first is the economic reality of the situation, that is, that the landlord is the only one in a position to take the necessary protective measures required. They indicate their disagreement with *Goldberg* by noting that the landlord is in a better position than the police to provide the necessary protective measures. The court relies heavily upon *Kendall v. Gore Properties*,[46] a case where the landlord's employee strangled to death a tenant, for the proposition that

> the landlord does not become a guarantor of the safety of his tenant. But, if he knows, or in the exercise of ordinary care ought to know, of a possibly dangerous situation and fails to take such steps as an ordinarily prudent person, in view of existing circumstances, would have exercised to avoid injury to his tenant, he may be liable.[47]

Second, building on *Levine*,[48] *Kendall*[49] and *Javins v. First National Realty Co.*,[50] the court alternatively held that the duty arises out of an implied contract that the landlord will provide those protective measures reasonably within his capability. Since the tenant continued to pay the same rent, and even though after the first year's lease expired the tenant went to a month to month tenancy, she was entitled at least to the protection which existed at the beginning of the term.[51] Third, the court cited the innkeeper-guest relationship as being closely analogous to that of the modern urban tenant and his landlord with respect to the tort duties of the landlord.

After establishing the existence of a duty owed to the tenant, the court turned to the question of the standard of care to be used. They establish a standard of care reasonable under all the circumstances, but then go on to obfuscate the standard by equivocally holding:

> [T]he applicable standard of care in providing protection for the tenant is that standard which this landlord himself was employing in October 1959 when the appellant became a resi-

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45. — F.2d at —.
46. 236 F.2d 673 (D.C. Cir. 1956).
47. *Id.* at 680. *See also* Ramsay v. Morissette, — D.C. Ct. App. —, 252 A.2d 509 (1969).
48. 407 F.2d 303 (D.C. Cir. 1968).
49. 236 F.2d 673 (D.C. Cir. 1956).
50. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 39 U.S.L.W. 3227 (1970).
51. This aspect of the argument seems less than sound as today's rents continue to rise steeply.

> dent on the premises . . . . The tenant was led to expect that she could rely upon this degree of protection.[52]

The court recognizes that appellant's attempts to introduce the standard of protection commonly provided in apartment buildings of the same character and class as appellant's had been wrongfully frustrated by the trial judge and opposing counsel. The court indicated that the obligation to use this standard is the same whether the duty is grounded in tort or contract,[53] but failed to realize that they had stated two distinct standards. It was an implied obligation of the lease contract as well as a reasonable standard in conjunction with the protection commonly provided in apartment buildings of that character.

The standard enunciated is sufficiently indefinite to raise a question of its exact scope. "Reasonable care under the circumstances" is the classic tort standard of care and the court indicates it will vary with the facts of individual cases. Whether the landlord's obligation was grounded in tort or in contract based on the lease is inconsequential. This appears to be a conceptually untenable position unless the court meant that the standard holds only for this particular set of facts. If the duty sounds in contract, the underlying obligation is implied from the lease and the initial standard which the tenant was led to rely upon is the measure of that duty; while if it sounds in tort the standard commonly provided in apartments of this class and character in the community should be applied. As the dissent points out, if the contract standard is used, the tenant theoretically has no recourse since after the first year's tenancy the lease ran on a month to month basis, a new contract being created each period. This would seem to imply that the standard would change to conform with the condition of the premises at the beginning of each month. Appellant was able to observe the changes which occurred in the premises over a period of time. Her recovery under this rule would seem to be limited to the standard in existence at the beginning of the month in which the assault occurred since by continuing to pay rent she arguably ratified the diminished security.

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52. — F.2d at —.

53. *Id.* at —. More often than not, it is to the advantage of the plaintiff to invoke the tort remedy since it will allow a greater measure of recovery. Contract law normally allows damages for breach only to the extent of those within the contemplation of the defendant at the making of the agreement. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Reps. 145 (1854). In tort, the only limitation of damages is that of proximate causation.

The tort standard—the protection provided in apartment buildings of the same character and class as appellant's—also raises some perplexing questions. It implies that a slum tenant is entitled to no better protection than that provided in the slum area, which usually means none at all. This aids least those who need aid most. Indigent tenants[54] are unable to move to a place which provides better security. Moreover, under varying circumstances either of the standards, tort or contract, may be higher than the other. For example, if a landlord's building provided little or no protection at the inception of a lease term, and other buildings of like character did provide adequate protective measures, under a reliance standard a tenant would be entitled to less protection than under an industry custom standard. Is a tenant to be entitled only to the lesser standard if there is a choice? The court fails to anticipate this possibility and consequently fails to suggest a solution. It is possible that the lack of an unambiguous standard would force the landlord either to adopt the highest standard of care, and in effect become an insurer of the safety of his tenants (an outcome which the majority explicitly rejects), or attempt to contract out of liability through a lease provision, an attempt which is arguably prohibited by the *Javins* decision.[55]

Having found the duty and establishing the standard of care, the court determined that the landlord had failed to discharge his duty. They found the risk to have been predictable, the landlord to have had notice of that risk and the means of avoiding it. The court was quick to emphasize that the ruling did not make the landlord an insurer of the safety of his tenants, or force him to provide protection commonly provided by municipal police. He was only to do what was reasonably within his power and capacity to do under the circumstances. Before reversing and remanding to the district court for the determination of damages, the court held that the landlord was justified in passing on the

54. THE U.S. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 15 (1969), reports that urban blacks make up the vast majority of persons arrested for murder, rape, assault and robbery, and that the victims in most cases are also blacks. Roughly 66 percent of the homicides and assaults, and 60 percent of the rapes are black against black.

55. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 39 U.S.L.W. 3227 (1970). It has been held that a lease clause is invalid if it would insulate landlords "from the consequences of violations of their duties to the public under both the common law and the District of Columbia Building Code . . . ." Tenants Council v. DeFranceaux, 305 F. Supp. 560, 563 (D.D.C. 1969).

costs of installment of protective devices to the tenant. A further difficulty, raised by the dissent, is that the court may have been mistaken in deciding that the standard had been violated here as a matter of law. After laying down new rules of law, the court should have remanded to the trial court for further proceedings, applying the new rule to the evidence in the case. Apparently findings of fact were not made at the trial level since the district court had ruled that the landlord had no duty as a matter of law. The District of Columbia Court of Appeals applied its newly announced duty to a record substantially devoid of evidentiary materials.

Neither the majority nor the dissent address the question of whether the tenant could have been found to be contributorily negligent or whether she might have assumed the risk in issue. In discussing the District of Columbia Housing Regulations, *Whetzel v. Jess Fisher Management Co.*[56] held that the Regulations create "a duty of care which the appellant [tenant] owes to herself. Breach of this duty is likewise at least evidence of contributory negligence."[57] Consequently, "recovery would be barred if . . . the tenant unreasonably exposed herself to danger by failing to vacate the premises . . . ."[58] The *Whetzel* court reiterates that knowledge of the defect is a circumstance relevant to the determination of contributory negligence.

Kanelos v. Kettler[59] dealt with the assumption of risk in the present context. The court, citing the *Restatement (Second) of Torts*[60] states that "[r]isks . . . are assumed . . . because the claimant, with knowledge of the risk and full appreciation of its dangers, is willing to accept and gamble on it."[61] The key is whether the action is voluntary—it is not voluntary where the defendant's tortious conduct has forced plaintiff to choose between courses of conduct which leave him no reasonable alternative to taking his chances. If plaintiff has to choose between evils, his exercise of choice cannot be held against him.[62] The doctrine of assumption of risk is barred "where the plaintiff . . . is compelled to accept the risk in order to exercise or protect a right of privilege, of which the defendant has no privilege to de-

56. 282 F.2d 943 (D.C. Cir. 1960).
57. *Id.* at 950.
58. *Id.*
59. 406 F.2d 951 (D.C. Cir. 1968).
60. § 496 E, comment a (1965).
61. 406 F.2d 951, 955 (D.C. Cir. 1968).
62. RESTATEMENT (SECOND) OF TORTS, § 496 E, comment c (1965).

prive him."[63] It is ultimately held that the responsibilities placed upon landlords by the Housing Regulations should not be nullified by the mere circumstance that the tenant remains in possession.[64] This would seem to indicate that failure to move, without other circumstances, would be inadequate evidence of assumption of risk.

The conduct of the tenant apparently was not put in issue in *Kline*, which accounts for the silence of the court in regard to contributory negligence or assumption of risk. Tenant was aware of the crimes being committed on the premises. The record indicates that she had discussed the problem with the landlord's agent, and police reports periodically showed that the crimes were an almost daily occurrence.[65] The inevitable question is whether it would be reasonable to require tenant to move from the premises. As stated in one concurring opinion: "[O]ne's acceptance of a risk of harm created by another's nonperformance of duty does not represent a free choice where there is no feasible alternative save to sacrifice an interest which the duty exists ultimately to subserve."[66] It seems likely that had the issue been raised, the court would have found that failure to move was not unreasonable under the circumstances, and that to find an assumption of risk would in this case have defeated the affirmative responsibilities placed on the landlord.

Kline could have been decided handily on the basis of existing tort law in the District of Columbia. What makes the case so unusual is that the court chose to blend tort theory with landlord-tenant law, using an implied warranty of habitability in the lease to buttress the imposition of a duty on the landlord. Landlord-tenant law has consistently been structured by the historical view which treated a lease as a conveyance of land free from implied covenants and warranties, subject to certain narrowly defined exceptions. Certain recent cases have indicated a liberalization of the common-law doctrines, emphasizing a preference for treating the apartment dweller's lease as a contract subject to express and implied warranties which may be inferred from the municipal housing codes.[67]

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63. Kanelos v. Kettler, 406 F.2d 951, 955 (D.C. Cir. 1968).
64. *Id.* at 956.
65. — F.2d at — n.4.
66. Hewitt v. Safeway Stores, Inc., 404 F.2d 1247, 1255 (D.C. Cir. 1968) (concurring opinion).
67. For a concise discussion of the historical development in this area *see* Comment, 39 CIN. L. REV. 600 (1970); Comment, 55 MINN. L. REV. 354 (1970).

In the District of Columbia this "revolution" resulted in *Javins v. First National Realty Corp.*[68] which stressed the necessity of considering a lease as a contractual relationship rather than a conveyance of land, and which recognized the existence of an implied warranty of habitability creating a duty on the landlord to maintain and repair the premises. From *Javins*,[69] *Levine*[70] and *Kendall*,[71] the court extracts the rule that there is an implied covenant in the contract between landlord and tenant which places on the landlord a continuing obligation to provide those protective measures which are reasonably within his capacity.

There is no doubt that apartment dwellers are in need of greater protection in their buildings.[72] The question is whether tort law sufficies to provide this protection or whether it is necessary to resort to implied warranties. Such a warranty was said in *Javins*[73] to be implied by operation of law into leases of urban dwelling units covered by the District of Columbia Housing Regulations. By the signing of the lease, the landlord was held to have undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law. Contract principles were to govern the landlord's failure to meet his duties and the tenant's obligation to pay rent was conditioned on the landlord's performance. It was also held in *Javins*[74] that the parties could not contract out of liability by the introduction of an exculpatory clause. It should be noted that the Housing Regulations are silent on the landlord's duty to protect.[75] Con-

68. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 39 U.S.L.W. 3227 (1970).
69. *Id.*
70. 407 F.2d 303 (D.C. Cir. 1968).
71. 236 F.2d 673 (D.C. Cir. 1956).
72. The National Commission on the Causes and Prevention of Violence report, *supra* note 54, indicates that violent crime is particularly rampant in the major cities. More than half of the reported crimes come from 26 cities each with populations in excess of 500,000. A special police department crime analysis study in New York City found that about two-thirds of the robberies reported occur inside buildings, most frequently in the hallways, lobbies, and elevators of apartment houses, necessitating new patrol tactics such as block sweeps, in which a police team suddenly moves into an especially dangerous block and searches the public places—roofs, hallways, elevators, lobbies and cellars—of all apartment houses. N.Y. Times, Dec. 24, 1969, at 1, Col. 8.
73. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 39 U.S.L.W. 3227 (1970).
74. *Id.* at 1081-82.
75. Section 2304 reads, "No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, *safe*, and sanitary condition, in repair and free from rodents and vermin" (emphasis added). Section 2501 reads

ceivably the language of section 2501 of the Housing Code[76] requiring that premises be healthy and *safe* could be construed to address the protection of the tenant, but it is more likely that the draftsmen of the Regulations intended it to refer to physical shortcomings in the buildings. On the other hand, a lack of protective devices may be considered a physical defect, and indeed, the *Kline* court cites the language of *Javins* to the effect that tenants 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.[77]

It is therefore an open question whether the Regulations extend to require protective devices. Should tort remedies prove unavailable, the tenant is forced to rely on a forced interpretation of the Regulations. If the Housing Regulations are meant to require provision of security, they should clearly so state to obviate the necessity of judicial manipulation of ambiguous language. There are further consequences of such ambiguity. The court, for example, recalled that *Javins* prevents the landlord from exculpating himself from liability in the lease. This is clearly correct in the *Javins* situation which clearly falls within the ambit of the Regulations, but it seems questionable whether the landlord should also be prohibited from contracting out of liability for failure to provide protective devices, which are not clearly within the scope of the Housing Regulations.

What the court appears to be doing is creating judicially, what is in effect welfare legislation. Superficially, the landlord alone is in the position to take the necessary protective steps required. It is probably correct that as between the landlord and the police the landlord is better able to protect his tenants in his building; but it is also correct that a legislative remedy—more police and higher welfare rent allowances payments—would serve to shift some of this heavy burden from the landlord. It may be, in fact, a severe burden. On the basis of *Javins*, not only can plaintiff Kline refuse to pay a portion of her rent,

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"Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and *safe*" (emphasis added).

76. Housing Regulations of the District of Columbia § 2501 (1956).

77. — F.2d at —.

but the remaining 584 occupants can likewise withhold rent payments. This offers the landlord two choices. He can refuse to add the devices, go out of business, and force his tenants to relocate in substantially identical slum tenements, if openings can be found. Or he can install the devices and pass the expense along to the tenants, absent some form of rent control, who are least able to afford the additional expense.[78] The other side of the coin is the added expense of insuring apartments, and the financial and human cost of assaults and robberies. The court's remedies seem to be stopgap at best, and the alternative appears to be legislative action to provide more efficient and extensive crime control and prevention. This equitably spreads the burden over the whole community rather than just the landlord and tenant, because it is the community at large, and not merely the landlords and tenants, which is the ultimate beneficiary.

78. Assume that under slum conditions a tenant pays $60.00 per month for an apartment in a hundred unit tenement. To provide one day guard and one night guard would cost approximately $10,000 per year per guard, or $20,000. This would result in a cost of $200.00 more per year per unit or $15.00 to $20.00 per month. Electrical devices have a comparable cost basis. This burden can be spread over a much wider area, the community, by better and more extensive law enforcement.