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Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor

IMPLIED WARRANTY OF HABITABILITY IN LEASE OF FURNISHED PREMISES FOR SHORT TERM: EROSION OF CAVEAT EMPTOR

At common law, the rule of caveat emptor applied to a lease of real property.[1] Therefore, it was the tenant's duty to inspect the premises before leasing them to determine their safety and adaptibility to his needs.[2] With the rare exceptions of fraud, misrepresentation or express warranty, the landlord was not liable to a tenant who was injured by defects in the premises.[3] Under no circumstances was there an implied warranty in the lease of real property that the premises were suitable for occupancy.[4] Today, the great weight of authority, in the absence of statute, is in accord with the common law.[5] Simply stated, the majority rule is that there is no implied warranty of habitability in a leasehold estate, unless such a warranty can be inferred from the terms of the written lease.[6] The primary exception to the majority rule appears in the lease of furnished premises for a short term.

The earliest case involving this exception was the English decision of *Smith v. Marrable*,[7] decided in 1843. There, a tenant who had leased

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1 Walsh v. Schmidt, 206 Mass. 405, 92 N.E. 496 (1910); Fields v. Ogburn, 178 N.C. 407, 100 S.E. 583 (1919); Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889); Oliver v. Cashier, 192 Va. 540, 65 S.E.2d 571 (1951); Luedtke v. Phillips, 190 Va. 207, 56 S.E.2d 637 (1949); Powell v. Orphanage, 148 Va. 331, 138 S.E. 637 (1927); Charlow v. Blankenship, 80 W.Va. 200, 92 S.E. 318 (1917).

2 Turner v. Ragan, 229 S.W. 809 (Mo. 1921); Roberts v. Rogers, 129 Neb. 298, 261 N.W. 354 (1935); Duffy v. Hurtsfield, 180 N.C. 151, 104 S.E. 139 (1920); Franklin v. Brown, 118 N.Y. 110, 23 N.E. 858 (1889); Clifton v. Montague, 40 W.Va. 207, 21 S.E. 858 (1895).

3 Luedtke v. Phillips, 190 Va. 207, 211, 56 S.E.2d 80, 82 (1949).

4 Davidson v. Fischer, 11 Colo. 583, 19 P. 652 (1888); Boyer v. Commercial Bldg. Invest. Co., 110 Iowa 491, 81 N.W. 720 (1900); Young v. Povich, 121 Me. 141, 116 A. 26 (1922).

5 Valin v. Jewell, 88 Conn. 151, 90 A. 36 (1914); Luedtke v. Phillips, 190 Va. 207, 56 S.E.2d 80 (1949); Stewart v. Raleigh County Bank, 121 W.Va. 181, 2 S.E.2d 274 (1939). *See* Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1285 (1960); 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

6 Other exceptions include those cases where the lessee, restricted to a particular use, accepts the lease before the premises are completely constructed or altered. *See* Woolford v. Electric Appliances, Inc., 24 Cal. App.2d 385, 75 P.2d 112 (1938); J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. 1930); Hardman v. McNair, 61 Wash. 74, 111 P. 1059 (1910).

7 152 Eng. Rep. 693 (Ex. 1843).

a furnished house at a resort area was allowed to abandon the demised premises upon discovering that they were infested with vermin. In two later cases decided the same year, the holding in *Smith v. Marrable* was adopted, but it was criticized and strictly limited to a lease of furnished premises for a short term.[8] The significance of each of these early cases is that the tenant invoked the implied warranty concept as a defense to the landlord's action for rent. In effect, implied warranty was used as a type of constructive eviction to erode the caveat emptor rule.[8a] What these cases did not allow, however, was the complete abrogation of caveat emptor by permitting the tenant to recover for personal injuries.

Hacker v. Nitschke

In 1892, Massachusetts adopted the English exception in what was to be the first of a series of cases involving the application of implied warranty to leases of realty.[9] Some fifty years later in *Hacker v. Nitschke,*[10] the Massachusetts court extended the implied warranty concept to allow a tenant, who had leased a furnished beach cottage for four weeks, to recover when injured as a result of a defect in a bunk-bed ladder.[11] Even though the landlord had no knowledge of the concealed defect and had not been negligent in failing to discover its presence, he was held liable for the injuries to the tenant. The court based its decision on the breach of an implied agreement that the ladder, as part of the furnishings, was safe for use.

The *Hacker* decision was unique because it allowed the tenant to use the implied warranty of habitability concept as an affirmative weapon

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[8] Sutton v. Temple, 152 Eng. Rep. 1108 (Ex. 1843); Hart v. Windsor, 152 Eng. Rep. 1114 (Ex. 1843). It was approved and followed in 1877 by Wilson v. Finch Hutton, L.R. 2 Ex. 336 (1877). The latter case may be distinguished on its facts, however.

[8a] Buckner v. Azulai, 59 Cal. Rptr. 806, 221 Cal. App. 2d 1013 (1967).

[9] Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). The adoption of the implied warranty theory where furnished premises are leased for a short period has been justified on three grounds:

A. The parties contemplate immediate occupation without the necessity of alteration;

B. A furnished dwelling is difficult to inspect before renting;

C. The exception, in line with modern business practices, is just and equitable. Harkrider, *Tort Liability of a Landlord,* 26 MICH. L. REV. 260, 281-82 (1928).

[10] 310 Mass. 754, 39 N.E. 2d 644 (1942).

[11] Screws holding clamps by which the ladder was attached to the upper bunk became loose. While the tenant was climbing the ladder, the screws pulled out causing the clamps to become detached. The tenant was injured when the ladder fell.

against the landlord.[12] The rationale behind the court's decision was that the tenant, in leasing furnished premises for a short term, had no time to inspect.[13] The Massachusetts court stated that since the leasehold was to be let furnished under a short term lease, the parties contemplated that the dwelling would be ready for immediate occupancy without any necessity of alteration. Under these circumstances, the tenant would rely on the landlord to see that the premises were in a habitable condition at the commencement of his tenancy. As such, no inspection would be necessary, nor in fact contemplated. The ultimate effect of *Hacker v. Nitschke* was to relieve a tenant of his common law duty to inspect furnished premises leased for a short term.

Prior to the *Hacker* decision the Massachusetts court had been attacked for its abrogation of the common law duty of inspection.[14] The essence of the attack was that there was no more difficulty in inspecting furnished than unfurnished premises,[15] and that to justify an implied warranty of habitability on the grounds that no inspection by the tenant was contemplated, was somewhat artificial.[16] Further attacks on the language used in the *Hacker* decision followed.[17] No one was sure, exactly, for how long a "short term" lease ran. When faced with this problem of terminology, the Maine court adopted the phrase "for a temporary purpose" rather than "short term." [18]

Through judicial interpretation, the holding in *Hacker* was gradually defined by the Massachusetts court. Subsequent cases limited the rule to defects existing at the time the premises were let,[19] provided the

12 Prior to this case, the implied warranty doctrine was successfully used by the tenant only as a shield against an action by the landlord for rent.

13 Hacker v. Nitschke, 310 Mass. 754, 39 N.E. 2d 644 (1942).

14 Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260, 282 (1928); Note, 37 HARV. L. REV. 896, 898 (1942).

15 Davis v. George, 67 N.H. 393, 396, 39 A. 979, 981 (1892); Harkrider, *supra* note 14, at 282.

16 Harkrider, *supra* note 14, at 282.

17 Note, 37 HARV. L. REV. 896, 898 (1942); 90 U. PA. L. REV. 859 (1942).

18 Young v. Povich, 121 Me. 141, 143, 116 A. 26, 27 (1922). The court stated that "for a temporary purpose," being a more elastic phrase, would admit testimony not only as to the length of the leasehold estate, but also as to other circumstances surrounding the lease agreement, such as the purposes for which the premises were let. *See* Horton v. Marston, 352 Mass. 322, 225 N.E. 2d 311 (1967) where the Massachusetts court held that a lease of a furnished cottage for nine months was not so long as to place the risk of concealed defects on the lessee.

19 Legere v. Asselta, 342 Mass. 178, 172 N.E. 2d 685 (1961); Bowman v. Realty Operators Corp., 336 Mass. 395, 145 N.E. 2d 833 (1957); Bolieau v. Traiser, 253 Mass. 346, 148 N.E. 809 (1925).

premises were fully furnished.[20] The Massachusetts court then extended the warranty to cover structural defects in the premises.[21] The end result of all of these decisions was to expand the scope of recovery, while confining the factual setting giving rise to recovery.

A major problem left unanswered by the Massachusetts court is whether the tenant's contributory negligence is a bar to his recovery. It is to be remembered that the liability of the landlord at common law was based on his negligence, either in his failure to disclose latent defects which were known to him or in misrepresenting the condition of the premises.[22] Therefore, contributory negligence on the part of the tenant was always a bar to recovery.[23] Clearly, however, the common law courts did not contemplate the situation involving an implied warranty of habitability in a short term lease of furnished premises. Whether the tenant's contributory negligence would be a defense for the landlord today in an action for breach of implied warranty of habitability, would depend on the nature of the warranty action. In the majority of jurisdictions which consider breach of warranty as a contract action, contributory negligence would not be a bar.[24] This, in effect, has the undesired result of making the landlord absolutely liable for the tenant's injuries.

A number of reasons have been raised for not imposing absolute liability on the landlord. For instance, the landlord could carefully

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20 Bolieau v. Traiser, 253 Mass. 346, 348, 148 N.E. 809, 810 (1925). Consider the difficulties that may arise with respect to determining when premises are only partially furnished.

21 Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E. 2d 418 (1946). The case, in dictum, suggests that the warranty protection would extend to cover members of the tenant's household.

22 *See* cases cited notes 1 and 2 *supra*.

23 A few cases went so far as to hold that the tenant's contributory negligence was a defense for the landlord even where the landlord was guilty of fraud in concealing defects. *See* Nelson v. Myers, 94 Cal. App. 66, 270 P. 719 (1928).

24 The slight weight of authority today in the field of products liability is that contributory negligence is not a defense to a warranty action. *See* Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633 (1957); Brockett v. Harrell Bros. Inc., 206 Va. 457, 143 S.E.2d 897 (1965). *Contra,* Pepsi-Cola Bottling Co. v. Superior Burner Service Co., 427 P.2d 833 (Alaska 1967); Ettin v. Ava Truck Leasing, Inc., 100 N.J. Super. 515, 242 A.2d 663 (1968); Procter & Gamble Manufacturing Co. v. Langley, 422 S.W.2d 773 (Texas 1967). *See also* FRUMER & FRIEDMAN, 1 PRODUCTS LIABILITY § 16.01[3]; HURSH, 1 AMERICAN LAW OF PRODUCTS LIABILITY, § 3.9; RESTATEMENT (SECOND) OF TORTS 402A, comment n (1965). *Cf.* Hart v. Coleman, 192 Ala. 477, 68 So. 315 (1915) (plea of contributory negligence by the landlord was "entirely inept" as a defense to a count ex contractu for the landlord's breach of his contract to repair).

inspect the premises and still find himself liable to a careless tenant. Another reason for not imposing absolute liability on the landlord is the unique relationship between landlord and tenant, which has its historical roots in the common law.[25] Although the incidents of possession borne by the tenant are, for the most part, no longer viable, something unique in the character of real estate militates against holding the landlord to the same standard as a vendor of personal property. Since a leasehold of furnished premises contains personalty as well as realty, however, why should the landlord not be held to the same standard as a *lessor* of personal property?

The Bailment Theory

It has been suggested that the lease of furnished premises for short periods, especially in resort areas, might be considered as having a dual aspect—that is, it is both a lease of realty and a contract of bailment of the furnishings.[26] The common law caveat emptor rule would still be applicable to the structural premises, but an implied warranty of fitness for use would apply to the furnishings.[27] Clearly, the owner of a chattel who lets it out for hire has a duty to see that the chattel is reasonably safe for its intended use.[28] There is nothing in the law of landlord and tenant to militate against this view, and cases such as *Hacker v. Nitschke* could be decided on a similar rationale without the necessity of creating an uncertain exception to the common law rule.

More than likely, it is the apparent simplicity of the bailment theory which has prevented courts from adopting it. On its face the theory is not limited to furnishings leased with the dwelling, and, therefore, could extend to personal property other than furnishings owned by the

[25] Halliday v. Greene, 244 Cal. App. 2d 482; 53 Cal. Rptr. 267, 270-71 (1966). *See* Harkrider, *supra* note 14, at 260-63.

[26] Wilson v. Hatton, 2 Ex. 336 (1887) (opinion of Pollock, B); Sutton v. Temple, 152 Eng. Rep. 1108, 1112 (1843) (opinion of Lord Abinger, C.B.); Harkrider, *supra* note 14, at 283-85.

[27] Harkrider, *supra* note 14, at 283. It has been suggested that where a landlord rents a house warranting the safety and sufficiency of its ceiling, there is imposed on him a duty to maintain it in that condition, and a failure to perform this duty can fix the landlord's negligence which caused the injury. It is significant, however, that the court would not allow the tenant's child, who was injured when the ceiling fell, to maintain an action on the warranty. Moore v. Steljes, 69 F. 518 (2nd Cir. 1895).

[28] *See* Albina Engine & Machine Works, Inc. v. Abel, 305 F. 2d 77 (10th Cir. 1962); Ettin v. Ava Truck Leasing, Inc., 100 N.J. Super. 515, 242 A.2d 663 (1968); Cintrone v. Hertz Truck Rental & Leasing Serv., 45 N.J. 434, 212 A.2d 769 (1965); Lackey v. Perry, 366 S.W. 2d 91 (Tex. Civ. App. 1963).

landlord and left on the premises. Another major criticism of the bailment theory is in its distinction between personalty and realty, which can only raise all the potential problems inherent in the law of fixtures. Furthermore, if the theory were extended to fixtures, the next step would be to allow recovery for defects in the structural premises. As a result, the courts treat the presence of furnishings only as evidence tending to show that the premises were leased for immediate habitation.

Innkeeper-Guest

To date Massachusetts is the only state which clearly allows a tenant to recover on the basis of a breach of an implied warranty of habitability for injuries resulting from defects in furnished premises leased for a short period.[29] In a few states, statutes impose a duty on the landlord to put the premises in a tenantable condition.[30] These statutes, generally in the area of low income housing, recognize that the landlord is not only in a superior bargaining position, but is also in a better position to protect against hazards in the premises.[31] Apart from statutes, those jurisdictions which allow the tenant to recover have done so with modifications of the "implied warranty of furnished premises" rule. In 1931, the District Court of Appeals of California followed Massachusetts with respect to defects in furnishings.[32] Later cases in California, however, rejected the application of an implied warranty to all furnishings, holding that such a broad application would make a lessor of furnished premises a virtual insurer of his tenant.[33]

The California courts modified the implied warranty theory by re-

[29] Horton v. Marston, 352 Mass. 322, 225 N.E. 2d 311 (1967); Legere v. Asselta, 342 Mass. 178, 172 N.E. 2d 685 (1961); Bowman v. Realty Operators Corp., 336 Mass. 399, 145 N.E. 2d 833 (1957); Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E. 2d 418 (1946). Rhode Island rejected the exception, at least to the extent that it permits recovery in tort. Zatloff v. Winkleman, 90 R.I. 403, 158 A. 2d 874 (1960) (The plaintiff-tenant brought his action in tort and not in contract).

[30] For a discussion and listing of statutes see Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1284-87 (1960); Note, 35 IND. L.J. 361, 370-371 (1960).

[31] See Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 523-528 (1966).

[32] Fisher v. Pennington, 116 Cal. App. 248, 2 P. 2d 518 (1931) (Query as to whether this was not in fact a "fixture"). The court held that the landlord of a furnished apartment impliedly warrants the safety of the premises and the furnishing to the same extent as does an innkeeper.

[33] Stowe v. Fritzie Hotels, Inc., 44 Cal. App. 2d 416, 282 P. 2d 890 (1955); Hunter v. Freeman, 105 Cal. App. 2d 129, 233 P. 2d 65, 67 (1951); Forrester v. Hoover Hotel & Investment Co., 87 Cal. App. 2d 226, 196 P. 2d 825 (1948).

sorting to the logic of innkeeper-guest law rather than to that of landlord-tenant.[34] Unlike a landlord, the innkeeper has an affirmative duty to maintain the premises in a reasonably safe condition, and to insure that the furnishings will be safe if used in an ordinary and reasonable manner.[35] The innkeeper's liability is predicated on negligence, and he is relieved of liability when the tenant's negligence contributes to his injury.[36] In view of the degree of control that a lessor retains over furnished permises rented for short periods, his identity is more closely associated with the innkeeper than with the common law landlord.[37] Similarly, a tenant under a short term lease of furnished premises may be compared to a guest, who has only the right to use the premises, subject to the landlord's control and right of access to them. Clearly, the typical lease of a furnished beach cottage more closely parallels the renting of a hotel room than an unfurnished apartment.[38]

Conclusion

Unquestionably, there is a need to revise the law of landlord and tenant where furnished premises are leased for short periods. Since no

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[34] Stowe v. Fritzie Hotels, Inc., 44 Cal. App. 2d 416, 282 P. 2d 890 (1955); Forrester v. Hoover Hotel & Investment Co., 87 Cal. App. 2d 226, 196 P. 2d 825 (1948).

[35] Stowe v. Fritzie Hotels, Inc., 44 Cal. App. 2d 416, 282 P. 2d 890, 892 (1955); Lynch v. Sprague, Inc., 95 N.H. 485, 66 A. 2d 697 (1949); Crosswhite v. Shelby Operating Corp., 182 Va. 713, 716, 30 S.E. 2d 673, 674 (1944); Kirby v. Moehlman, 182 Va. 876, 884, 30 S.E. 2d 548, 551 (1944). *See* VA. CODE ANN. § 35-10 (Repl. Vol. 1953). If the relationship is that of an owner of a hotel and a guest, the rule is that, although the proprietor is not absolutely liable for injuries suffered, he owes a duty, at all times, to maintain the premises in a reasonably safe condition. Stowe v. Fritzie, *supra* 282 P. 2d 892.

[36] Bazure v. Richman, 169 Cal. App. 2d 218, 336 P. 2d 1014 (1959); Baxton v. Deloatch, 84 So. 2d 721 (Fla. 1956); Daulton v. Williams, 81 Cal. App. 2d 70, 183 P. 2d 325 (1947); Griggs v. Cook, 106 Cal. App. 551, 289 P. 693 (1930); Nelson v. Myers, 94 Cal. App. 66, 270 P. 719 (1928).

[37] A "tenant" has exclusive legal possession of the premises and is responsible for their care and condition; on the other hand, a "guest" has only the right to use the premises, subject to the landlord's retention of control and right to access to them. Stowe v. Fritzie Hotels, Inc., 44 Cal. App. 2d 416, 282 P.2d 890, 893 (1955). In Lynch v. Sprague, Inc., 95 N.H. 485, 66 A.2d 697 (1949), a guest in a hotel was injured when a ladder leading to the upper bunk of a bunk-bed slipped from the bed as she descended. The court held the defendant (hotel) negligent in maintaining the ladder without securing it to the bunk-bed in an adequate manner. Compare this result with that reached in Hacker v. Nitschke, 310 Mass. 754, 39 N.E. 2d 644 (1942).

[38] *Compare* Fisher v. Pennington, 116 Cal. App. 248, 2 P.2d 518 (1931) *with* Stowe v. Fritzie Hotels, Inc., 44 Cal. App. 2d 416, 282 P.2d 890 (1955) and Chase v. Bard, 55 Wash.2d 58, 346 P.2d 315 (1960).

inspection of the premises is contemplated in a typical short term lease of furnished premises, the tenant should not be shackled with the harsh implications of the antiquated caveat emptor rule. But neither should the landlord be made an absolute insurer of the tenant's safety, particularly where he has exercised due care to see that the premises are in a reasonably safe condition. Finding a proper balance between these two extremes is made more difficult in view of the undesirable results achieved by *Hacker v. Nitschke* and the artificial simplicity of the bailment theory.

It is to be recommended that in a lease of furnished premises for a short term, particularly with respect to resort lodgings where there is a frequent change of tenants within a short period, the landlord should be required to inspect the premises before leasing them. The lessor's duty in this situation would be to use reasonable care to see that the premises are safe for use when the tenant takes possession. Only in this manner can an effective compromise between absolute liability and caveat emptor be reached.

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