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Implied Warranty of Habitability and Security in Residential Leases: *Trentacost v. Brussel*

A large minority of jurisdictions now recognize an implied warranty of habitability in residential leases.[1] With one notable exception,[2] however, courts have rejected the view that the lease agreement imposes a duty upon the landlord to protect his te-

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1. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). *But cf.* Blackwell v. Del Bosco, 191 Colo. 344, 558 P.2d 563 (1977) (the court sustained the use of caveat emptor). For a detailed listing, see Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37, 37 n.1 (1978). In addition, the American Law Institute has adopted the implied warranty of habitability as an alternative tenant remedy. RESTATEMENT (SECOND) OF PROPERTY, Landlord and Tenant §§ 5.4, 5.5 (1977).

2. Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970). In *Kline* the court found the landlord liable for a tenant's injuries that resulted from a criminal assault committed in a common hallway. The evidence showed that although substantial security precautions existed when the tenant signed the lease, they had deteriorated markedly in the seven years preceding her attack. A few commentators have interpreted *Kline* as extending the implied warranty to include a warranty of security. *See, e.g.*, 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 234[2], at 367 (P. Rohan ed. 1977); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Security in Residential Urban Leases*, 56 CORNELL L. REV. 489, 503-04 (1971). However, courts in subsequent cases have been reluctant to extend the decision beyond its facts and have ruled that the landlord is obligated to maintain only those precautions in effect at the beginning of the lease term. *See* Bernstein v. District of Colum. Bd. of Zoning Adjustment, 376 A.2d 816 (D.C. 1977); Dietz v. Miles Holding Corp., 277 A.2d 108 (D.C. 1971); Williams v. William J. Davis, Inc., 275 A.2d 231 (D.C. 1971).

California lower courts have flirted in dicta with the concept of an implied warranty of security. In Secretary of Hous. and Urban Dev. v. Layfield, 88 Cal. App. 3d Supp. 28, 152 Cal. Rptr. 342 (App. Dep't Super. Ct. 1978), a landlord brought an unlawful detainer action against a tenant who defended on the ground that the landlord had breached an implied warranty of habitability failing to provide adequate security. Noting *Kline*, the court said:

> A landlord's duty to provide security measures to protect tenants against crime because of his control of the areas of common use in an apartment complex can be part of the implied warranty of habitability . . . and certainly can become a part of the duty owed to tenants by express terms of a lease.

Id. at 30, 152 Cal. Rptr. at 343 (footnote omitted).

In Duarte v. State, 84 Cal. App. 3d 717, 148 Cal. Rptr. 804 (1978), a wrongful death action arising from a murder in a state college dormitory, the court held that the state had a contractual duty to *protect* student residents from criminal attack. However, a rehearing was later granted and the judgment was vacated. 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979). The final opinion made no mention of an implied warranty, and the California Supreme Court ordered that the earlier opinion not be officially published.

nants from criminal assault.[3] In *Trentacost v. Brussel*,[4] the Supreme Court of New Jersey departed from the traditional view by holding that an implied warranty of habitability imposes a duty on landlords to protect tenants from foreseeable criminal activity on leased premises.

Florence Trentacost was assaulted and seriously injured in the common hallway of the apartment complex where she had resided for over ten years. The building consisted of eight dwelling units that were located over street-level stores with access from front and rear doors to the common hallway. A padlock secured the rear entrance, but there was no lock on the front door that was apparently used by both Mrs. Trenacost and her assailant.[5] Mrs. Trentacost brought an action for personal injuries against her landlord, Dr. Nathan T. Brussel, alleging that he had been negligent in maintaining "the safety of the common areas of access and egress to [the] building."[6]

The evidence introduced at trial indicated that considerable criminal activity, consisting primarily of burglaries, street muggings, and other civil disturbances, had taken place in the vicinity of the apartment complex in the three years preceding the assault.[7] At the close of the presentation of evidence, the judge granted plaintiff's motion to strike the contributory negligence defense. The jury subsequently awarded the plaintiff $3,000. When defendant refused to consent to an additur of $15,000, the court granted plaintiff's motion for a new trial on the issue of damages. The second jury awarded plaintiff $25,000 and defendant appealed.

Noting that the case was one of first impression, the intermediate appellate court[8] ruled in favor of plaintiff by relying exclusively on negligence concepts, especially the "enhanced risk"

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3. *E.g.*, Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973); Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76 (1975); Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962); New York City Hous. Auth. v. Medlin, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (Civ. Ct. 1968), *aff'd*, 64 Misc. 2d 857, 316 N.Y.S.2d 149 (App. Term 1968); Annot., 43 A.L.R.3d 331, 335 (1972).

4. 412 A.2d 436 (N.J. 1980).

5. *Id.* at 438.

6. Trentacost v. Brussel, 164 N.J. Super. 9, 12, 395 A.2d 540, 542 (1978).

7. 412 A.2d at 438. Plaintiff claimed that two months prior to the attack she had told the defendant of an attempt to break into the cellar of the building. Defendant, however, denied ever having discussed with plaintiff the possibility of placing a lock on the front door. *Id.* at 437.

8. 164 N.J. Super. 9, 395 A.2d 540 (1978).

doctrine of *Braitman v. Overlook Terrace Corp.*[9] The court concluded that there was sufficient evidence to support a jury finding that the defendant's negligent conduct had created a probability, and not merely a possibility, that harm or injury might occur to plaintiff.[10]

On appeal the New Jersey Supreme Court explicitly created a new basis for landlord liability. In a four-to-three decision,[11] the court characterized Dr. Brussel's failure to place a lock on the outside door of the apartment complex as "exemplifying a callous disregard for the residents' safety in violation of ordinary standards of care"[12] and held that sufficient evidence existed to make the plaintiff's injuries a foreseeable result of such negligence.[13] The court also decided to "clarify the scope of a landlord's duty to his tenant" and to "reconsider the general principle that the mere relationship of landlord and tenant imposes no duty on the landlord to safeguard the tenant from crime."[14]

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9. 68 N.J. 368, 346 A.2d 76 (1975). The tenant in *Braitman* rented an apartment in a large, high-rise building that was equipped with only a slip lock. The trial court concluded that the defendant's negligence in failing to provide adequate locks was the proximate cause of the theft that resulted in plaintiff's loss. The appellate court affirmed, holding that defendant's negligence "unreasonably enhanced the risk or hazard of a break-in or robbery." 132 N.J. Super. 51, 52, 332 A.2d 212, 214 (App. Div. 1974). The New Jersey Supreme Court also affirmed and suggested that a statutory duty may have existed as well. 68 N.J. at 383, 346 A.2d at 84.

In *Trentacost* the appellate court found no statutory duty but noted that *Braitman* alluded to a statutory duty only as an "additional source" for the landlord's liability. 164 N.J. Super. at 14, 395 A.2d at 543. The "enhanced risk" concept was apparently first developed in New Jersey in Zinck v. Whelan, 120 N.J. Super. 432, 294 A.2d 727 (App. Div. 1972), where the injured plaintiff was allowed to recover damages from the owner of a stolen automobile who had left the keys in the ignition.

10. 164 N.J. Super. at 14, 395 A.2d at 544. The court cited McCappin v. Park Capital Corp., 42 N.J. Super. 169, 126 A.2d 51 (App. Div. 1956) as support for the foreseeability test. *See also* Flexmir, Inc. v. Lindeman & Co., 4 N.J. 509, 73 A.2d 243 (1950).

11. Although the court unanimously affirmed the Appellate Division's decision in favor of Mrs. Trentacost, one justice refused to join in the portion of the opinion extending the implied warranty to include security precautions. 412 A.2d at 445 (Pollock, J., concurring in part). Two other justices filed a concurring opinion criticizing the extension. *Id.* at 445 (Schreiber, J., concurring in the result; Clifford, J., concurring in the result and dissenting in part).

12. *Id.* at 441.

13. *Id.*

14. *Id.* (citing Braitman v. Overlook Terrace Corp., 68 N.J. at 387, 346 A.2d at 87). As justification for this broad examination, the court quoted one of its own opinions:

> [T]here is no constitutional mandate that a court may not go beyond what is necessary to decide a case at hand. . . . [T]he Court may express doubts upon existing doctrines, thereby inviting litigation, or may itself raise an issue it thinks should be resolved in the public interest, or may deliberately decide issues which need not be decided when it believes that course is warranted.

Viewing the modern apartment as "a variety of goods and services"[15] and noting that the warranty of habitability extended to "all facilities vital to the use of the premises for residential purposes,"[16] the court reasoned:

> Among the "facilities vital to the use of the premises" are the provisions for the tenant's security. . . . [W]ithout a minimum of security, their well-being is as precarious as if they had no heat or sanitation. . . . Under modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from the risk of criminal intrusion.[17]

A concurring justice noted that the question presented to the court was a narrow one—whether the landlord had a duty to provide a lock for the door that opened into the common access area—and argued that traditional tort theory could provide an affirmative answer.[18] He pointed out that since New Jersey statutes require residential buildings to be equipped with "heavy duty lock sets,"[19] noncompliance with the statutes provides an injured party with grounds to bring a common-law negligence action.[20]

Another justice, dissenting in part, expressly disagreed "with the notion that liability can be imposed on the defendant landlord on the theory of implied warranty of habitability."[21] While sharing the court's concern for "the harsh realities of

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412 A.2d at 441 (quoting Busik v. Levine, 63 N.J. 351, 363-64, 307 A.2d 571, 578 (1973), *appeal dismissed*, 414 U.S. 1106 (1973)).

15. 412 A.2d at 442.

16. *Id.* at 443 (quoting Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970)).

17. 412 A.2d at 443.

18. *Id.* at 445-46 (Schreiber, J., concurring).

19. 412 A.2d at 446 (Schreiber, J., concurring). The regulation cited by Justice Schreiber provided in pertinent part:

> Security Requirements—Multiple dwellings: Building entrance doors and other exterior exit doors shall be equipped with heavy duty lock sets. Latch sets shall have stop-work in the inside cylinder controlled by a master key only. Outside cylinders of main entrance door locks shall be operated by the tenant's key, which shall not be keyed to also open the tenant's apartment entrance door. Main entrance door locks shall be kept in the locked position and shall be freely openable from the inside at all times. Other exterior exit doors shall be locked to prevent entry and shall be freely openable from the inside at all times.

N.J. Admin. Code 5:10-605.3(f)(2) (current version at N.J. Admin. Code 5:10-19.6(c)(2)(i) (Supp. 1979)).

20. The justice cited Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958), as support for this view.

21. 412 A.2d at 446 (Clifford, J., dissenting in part).

modern life,"[22] he maintained that the "novel application of the implied warranty to the baleful conditions reflected in those realities [was] unwarranted and ill-advised."[23] He further argued that the majority's decision "predicate[d] what amount[ed] to *absolute liability* solely upon the relationship between the landlord and tenant and upon loose notions of foreseeability."[24]

While it may be logical to argue that an implied warranty of habitability will motivate landlords to repair physical defects in leased premises, it is illogical to suggest that extension of that duty to include security will protect tenants from sudden criminal acts of third persons. The duties imposed by the implied warranty may only aggravate the poor economic condition of many tenants and may worsen the shortage of available urban housing. Moreover, the product liability concept of a warranty should not be applied to hold landlords strictly liable for the intentional acts of third parties. A better solution would be for legislatures to determine minimum security standards for multiple dwellings. This approach would preserve the defenses of contributory negligence and assumption of risk that are eliminated when the warranty theory is applied. Such an approach would also better inform tenants and landlords of their legal rights and duties.

It is clear that an apartment without electricity or running water may be considered uninhabitable. Furthermore, the failure to maintain wiring or plumbing may constitute a breach of an implied warranty of habitability. It is not clear, however, whether intercom systems, security guards, closed-circuit television monitors or any combination thereof are sufficient to meet the apparent *Trentacost* duty. New Jersey landlords are being obliged by the court to guard against the intentional acts of unknown third parties, not disease or cold. The duty of a landlord to repair a broken stair or a leaky pipe is altogether distinct from a duty to protect against sudden intentional acts of persons who commit theft, injury or murder. Although accidental injuries may occur if the landlord fails to take some physical precau-

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22. *Id.*

23. *Id.* (citing Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d at 76 (1975)).

24. 412 A.2d at 446-47 (emphasis added). Citing *Kline* as support for his view, the justice argued that the duty "should not be grounded simply on a special relationship between the parties, but rather should arise from the particular circumstances of the case, including foreseeability." *Id.*

tion, intentional injuries may occur despite the installation and maintenance of security measures.[25] It is possible that a landlord's use of more sophisticated protection methods will only lead to a criminal's use of more sophisticated methods to circumvent the security devices.[26] Nevertheless, the only guideline the *Trentacost* court offers is that landlords must furnish "reasonable safeguards."[27]

The duty imposed by the court is unclear. If the basis for the landlord's duty was contractual, then the underlying obligation was implied in the lease, and the standard that Mrs. Trentacost relied upon for over ten years was the measure of the duty.[28] However, if the alleged liability was grounded in negligence, then the reasonable person or community standard test would define the duty.[29] Unfortunately, in resorting to a warranty theory the *Trentacost* court did nothing to clarify the duty it was placing on landlords.

A more logical and equitable approach to the problem than imposition of a warranty theory is for legislatures to define minimum standards of security for multiple dwellings. The *Trentacost* court cited violations of the state multiple dwelling code as evidence of defendant's negligence[30] and noted that it was "entirely appropriate to consider the landlord's statutory

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25. *See* 1971 L. & Soc. Ord. 612, 625.

26. *Id.*

27. 412 A.2d at 443. In *Kline* the court employed a community standard test to determine whether "reasonable care under the circumstances" had been observed: "[The] standard of protection may be taken as that commonly provided in apartments of this character and type in this community, and this is a reasonable standard of care on which to judge the conduct of the landlord here." 439 F.2d at 486. Presumably a landlord who is sued in an action for negligence could escape liability by showing his security precautions to be equivalent to those of surrounding buildings. In slum areas, such precautions could well be nonexistent.

In *Trentacost* the court implied that the *crime level* in the surrounding area was an important factor to consider. 412 A.2d at 441. *Trentacost* is further distinguished from *Kline* in that *Kline* relied heavily on evidence documenting the occurrence of prior crimes within the apartment building. Aside from the single attempted break-in alluded to by plaintiff, there was no other evidence of crimes having been committed within the *Trentacost* apartment building.

28. Although the facts do not reveal the terms of Mrs. Trentacost's lease, it is arguable that she had ratified the level of security by continuing to pay rent when the defects were well-known to her. *See also* Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d at 492 (MacKinnon, J., dissenting).

29. For a similar criticism of the *Kline* decision, see Note, *Landlord-Tenant Law: Landlord Held Negligent for Criminal Assault by Third Party Intruder on Tenant*, 55 Minn. L. Rev. 1097, 1105 (1971).

30. 412 A.2d at 444-45.

and administrative responsibilities to his tenants."[31] However, the court held that this was only an "alternative ground"[32] for defendant's liability; both concurring justices, on the other hand, found it the only appropriate basis.[33]

In contrast to the vague standard of "reasonable safeguards" set forth in the instant case, a definitive statutory scheme would provide a more precise standard for judges and juries to use when determining the scope of the landlord's duty. The legislature "by reason of its organization and investigating processes is generally in a better position to establish such tests than [is] the judiciary."[34] Moreover, the legislature would undoubtedly consider the economic implications of such standards and perhaps would appropriate assistance to low-income areas or offer tax abatements to the affected properties. Most importantly, under statutory law the chances are greater that tenants would be more aware of their specific rights and that landlords would have notice of their specific duties.

An additional benefit of the statutory approach is that the defenses of contributory negligence and assumption of risk would remain available; proximate cause, however, would still have to be shown.[35] Although each state is free to adopt its own standard of statutory scrutiny, the majority of states[36] now hold that an unexcused violation of a statutory duty is conclusive on the issue of negligence and "jurors have not dispensing power by which to relax it."[37]

The court inaccurately assumes that landlords can afford additional security precautions because of their ability to

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31. *Id.* at 444.

32. *Id.*

33. *Id.* at 445-47. (Schrieber & Clifford, JJ., concurring).

34. Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201 (1959).

35. W. PROSSER, THE LAW OF TORTS § 36, at 201 (4th ed. 1971).

36. *Id.* at 200.

37. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920) (Cardozo, J.). Ironically, violation of a statutory duty in New Jersey is not conclusive on the issue of negligence. Braitman v. Overlook Terrace Corp., 68 N.J. 368, 385, 346 A.2d 76, 85 (1975). In the landlord/tenant context, the Supreme Court of New Jersey referred to the Tenement House Act and said:

> Our statute does not expressly authorize a suit by one injured by reason of a landlord's violation and hence does not create a statutory cause of action as that term is understood. Rather, in harmony with our usual approach to statutes of this kind, the act is deemed to establish a standard of conduct, and to permit the intended beneficiaries to rely upon a negligent failure to meet that standard in a common law action for negligence.

Michaels v. Bookchester, Inc., 26 N.J. 379, 386, 140 A.2d 199, 203 (1958).

"spread the cost of [maintaining property] over an extended period of time among all residents enjoying its benefits."[38] Although it may be true that a landlord is the "superior risk bearer" in the lessor-lessee relationship, the landlord's ability to pay for security expenses seldom exceeds his tenant's rental payments. To conclude otherwise is to assume that most landlords enjoy healthy profit margins. Strong evidence, however, refutes the assumption that urban landlords reap large profits. A 1968 survey of New York City's landlords[39] indicated that approximately 73% had incomes of $10,000 or less[40] and concluded that "the limited availability of resources for capital improvement is evident."[41] Another study[42] revealed that among the landlords surveyed, 43% owned only one apartment building,[43] 45% were either blue-collar or retired,[44] and 36% resided on the rental property,[45] presumably exposing themselves to the same dangers as their tenants. The imposition of vague security duties on landlords, in addition to increasing maintenance costs, would assuredly accelerate insurance premiums and legal expenses. If such costs rendered apartment buildings unprofitable, landlords would be forced to sell or even abandon rental properties. The abandonment or conversion of rental properties to other uses would further exacerbate the rental housing shortage lamented by the court.[46]

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38. 412 A.2d at 442. The *Kline* opinion, cited by the *Trentacost* majority, noted that the landlord "is entirely justified in passing on the cost of increased protective measures to his tenants." 439 F.2d at 488. However, further expansion of the landlord's duties may exacerbate the "chronic desperate need for rental housing," *id.* at 442, which in turn has led to an "inequality of bargaining power between landlord and tenant." Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

39. G. STERNLIEB, THE URBAN HOUSING DILEMMA (1972).

40. *Id.* at 467.

41. *Id.*

42. G. STERNLIEB, THE TENEMENT LANDLORD (1969). The information for this survey was gathered in Newark, New Jersey, not far from the apartment complex in the instant case. *See generally* G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED (1973).

43. G. STERNLIEB, THE TENEMENT LANDLORD 122 (1969).

44. *Id.* at 130.

45. *Id.* at 131, 134. The court ignores the landlord's self-interest in securing his property. Moreover, it is logical that this interest is highest among those who reside in the building themselves.

46. *See, e.g.*, Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975). Some studies indicate that the imposition of an implied warranty of habitability has had little effect on the availability of rental housing. *See, e.g.*, Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37 (1978); Note, *The Great* Green *Hope: The Implied Warranty of Habit-*

After partially justifying the economic impact of its decision by referring to the ability of the lessor to "spread his costs,"[47] the court lauded local government bodies that "have adopted rent control ordinances to prevent unregulated economic forces from depriving citizens of decent shelter."[48] Such logic demonstrates the court's limited understanding of the financial burden its decision places upon landlords and tenants. The persons least able to bear the added security costs will be those who suffer the most, since statistics reveal that crime is highest in the poorest neighborhoods.[49]

The added expenses incidental to the *Trentacost* duty, far from improving the average tenant's condition, may actually contribute to the reduction of urban housing.[50] Although the court deplores the fact that modern landlord/tenant relatonships are often "contracts of adhesion,"[51] it removes contractual freedom by imposing implied warranties that increase tenant costs. Tenants may well prefer "non-secure" housing they can afford to "secure" housing that they cannot afford.[52]

The policy questions raised when plaintiff-tenants offensively use the implied warranty must also be examined.[53] One of

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ability in Practice, 28 STAN. L. REV. 729 (1976). However, these surveys cannot show the real impact of extending the warranty to include *security* precautions, since California does not recognize such a warranty. Moreover, the surveys were conducted the year following recognition by California of the warranty of habitability when few tenants were aware of the ruling. In addition the economic impact of the implied warranty on the housing market—specifically the potential for disinvestment—cannot be shown in the short term.

47. 412 A.2d at 442, 444.

48. *Id.* at 444.

49. "One of the most fully documented facts about crime is that the common serious crimes . . . happen most often in the slums of large cities." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 35 (1967); G. STERNLIEB & R. BURCHELL, *supra* note 42, at xx, 160.

50. G. STERNLIEB & R. BURCHELL, *supra* note 42, at xx.

51. 412 A.2d at 442.

52. If the "superior risk bearer" justification is taken to its logical limits, it may be argued that the best entity to bear the costs of criminal activity is the government. However, in contrast to the security duties imposed upon private landlords by the court, many governmental bodies are immune from liability for failure to provide adequate police protection. *E.g.*, CAL. GOV'T CODE § 845 (West). "Neither a public entity nor a public employee is liabile for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." *Id.*

53. While some jurisdictions have adopted the implied warranty in cases where the tenant brought an action against the landlord, *e.g.*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (tenant sought recovery of expenses from landlord for repairs); Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. N.Y. 1972) (tenant

the benefits to New Jersey tenants under *Trentacost* is that they may now bring actions to compel landlords to install security devices *prior* to injury or theft.[54] To the extent that *Trentacost* benefits tenants who are willing to bear the additional rent necessary to obtain more secure dwellings, the decision serves a just purpose, whether used offensively in seeking specific performance or defensively in a wrongful detainer action.

However, a more significant implication of the expanded duty is the use of a warranty theory to overcome the traditional tort requirement that a defendant either have knowledge that a defect exists or have a special relationship with the plaintiff.[55] Although the *Trentacost* court ignored the "special relationship" issue, it explicitly declared that a landlord need not have notice of an unsafe or defective condition in order to be held liable.[56] The court held that liability can be found where a landlord does "not take measures which [are] in fact reasonable for maintaining a habitable residence."[57] By applying the warranty principle, the court actually imposed *strict liability* on the land-

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sought termination of lease), the warranty is most often invoked as a defense to a landlord's action for rent. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). The Restatement (Second) of Property, Landlord and Tenant § 5.4, provides remedies that include rent abatement, repair and deduct, rent withholding and limited consequential damages.

54. Prior to *Trentacost* the warranty was not recognized in tort for personal injuries that were intentionally inflicted. Contract damages are designed primarily to protect the expectation interest of the promisee, thereby providing him with the benefit of his bargain as intended by the parties. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147-49 (1970). Contract damages are prospective; they are designed to place the aggrieved party in the same position he would have been in had the breach not occurred. In contrast, tort damages are compensatory, awarded to place the injured party in the position he occupied *before* the occurrence of the tort. W. PROSSER, *supra* note 35, § 95, at 634.

55. At common law no individual was under a duty to protect another from criminal attack absent some "special relationship" between the parties. These relationships included landowner/invitee, common carrier/passenger, innkeeper/guest, employer/employee, jailer/ prisoner, hospital/patient, school/pupil, and in some areas, parent/child. W. PROSSER, *supra* note 35, §§ 56, 124. The Restatement (Second) of Torts includes most of these categories, but notes, "[t]he duty in each case is only one to exercise reasonable care under the circumstances. The defendant . . . is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate . . . ." RESTATEMENT (SECOND) OF TORTS § 314A, Comment e (1965). The *Trentacost* court could simply have extended the innkeeper/guest relationship by analogy to include landlord/tenant, as was suggested in *Kline*. 439 F.2d at 482-83.

56. 412 A.2d at 443.

57. *Id.*

lord for injuries inflicted by a criminal intruder.[58]

Moreover, a showing of proximate cause is no longer required under *Trentacost*. Prosser notes that under a warranty theory, "[t]he issue is *not* one of causation . . . but of whether the defendant was under any duty to protect the plaintiff against the intervening cause. Once that question is answered in the affirmative, nothing whatever remains to be said."[59] In addition, the warranty theory does not require the plaintiff to show foreseeability. Since courts may interpret a breach of warranty to be negligence *per se*,[60] the ultimate effect of the *Trentacost* decision is to make the landlord the actual insurer of the tenant's safety.

Finally, the court's application of products liability concepts to impose liability on landlords for the criminal acts of others is both ill-founded and ill-advised.[61] The landlord is not engaged in the mass production of a product to be placed in the stream of commerce with exposure to large numbers of consumers. His "product" is often in use long before he purchases it. He is wholly unlike the manufacturer or builder who has the ability to reasonably assure that a product leaves his hands in a safe condition. Although the implied warranty of habitability might serve

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58. "Whether it be tort or contract, a breach of warranty gives rise to *strict liability*, which does not depend upon any knowledge of defects on the part of the seller, or any negligence." W. PROSSER, *supra* note 35, § 95, at 636 (emphasis added) (footnotes omitted).

59. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 401 (1950) (emphasis added). *Contra*, Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976). "Finding a duty and its breach is not conclusive of actionable negligence. Proximate (legal) causation is also a vital element of negligence, especially in relating the potential superseding cause of third party criminal activity to a breach of duty by the landlord." 278 Md. at 171, 359 A.2d at 555.

60. This is precisely the case in New Jersey:

> [I]t has been said over and over again that this warranty—if that is the name for it—is not the old sales warranty, it is not the warranty covered by the Uniform Sales Act or the Uniform Commercial Code. It is not a warranty of the seller to the buyer at all, but it is something separate and distinct which sounds in tort exclusively, and not at all in contract; which exists apart from any contract between the parties; and which makes for strict liability in tort.

Rosenau v. City of New Brunswick, 51 N.J. 130, 141, 238 A.2d 169, 174-75 (1968) (quoting Prosser, *Spectacular Change: Products Liability in General*, 36 CLEV. B.A.J. 149, 167-68 (1965)).

61. The court warned of the inherent weaknesses in such an analogy in Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (App. Div. 1973), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973). As noted earlier, the average landlord's ability to spread the risk of liability among numerous "consumers" is limited. The *Dwyer* opinion was clearly overruled *sub silentio* in *Trentacost*.

as a positive incentive to create more habitable units, it should not be applied to an intentional act committed by a third party. Even under the strict liability theory, a manufacturer should not be held liable when a third party's *criminal misuse* of his product injures another.[62]

The warranty approach imposes strict liability on landlords and eliminates traditional tort concepts that allow a defendant to show that his conduct was reasonable under the circumstances. It removes from the trier of fact the right to evaluate all of the facts, including the plaintiff's knowledge of any defects.[63] The ends of justices are better served when the test to determine landlord liability considers (1) whether the landlord, as a reasonably prudent person, realized or should have realized that his acts or omissions involved an unreasonable risk of criminal harm to his tenants,[64] or (2) whether he has complied with the statutory security requirements governing leased residential property.

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62. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). Under the strict liability theory, a manufacturer will not be held liable where the injury results from "abnormal handling" of the product. *Id.* Although § 402A does not explicitly address the criminal misuse issue, it would be highly illogical to assume that a section proscribing liability for "abnormal handling" implies that a manufacturer may be found liable where the product is criminally misused.

63. In Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960), the court held that the District of Columbia Housing Regulations created "a duty of care which the appellant [tenant] owes to herself." *Id.* at 950. "[R]ecovery would be barred if . . . the tenant unreasonably exposed herself to danger by failing to vacate the premises . . . ." *Id.* The court emphasized that a tenant's knowledge of a defect is relevant to the determination of contributory negligence. Although the Restatement disallows contributory negligence as a defense, it does allow an assumption of risk defense: "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." RESTATEMENT (SECOND) OF TORTS, § 402A, Comment n (1965). The language of this section highlights the inapplicability of products liability law to the landlord/tenant relationship. Furthermore, even if the application were proper, the *Trentacost* court acts counter to the Restatement position by denying the assumption of risk defense.

64. *See* RESTATEMENT (SECOND) OF TORTS, § 302B (1965).